No. 19-819

IN THE

Supreme Court of the United States

ALFRED PROCOPIO, JR., PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

JOHN B. WELLS
Counsel of Record

769 Robert Blvd.
Suite 201D
Slidell, LA 70458
johnlawesq@msn.com
985-641-1855

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 350-9073

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INTRODUCTION

The government's Brief in Opposition dodges many of the issues raised in the Petition, preferring to concentrate on three questionable points. They rely extensively, to their detriment, on Judge Lourie's concurrence in *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019), a claim that the panel decision in *Haas v., Peake*, 525 F.3d 1168 (Fed. Cir. 2008) *reh'g denied*, *Haas v. Peake*, 544 F.3d 1306 (Fed. Cir. 2008) provided the VA "substantial" justification and their assertion that the pro-veterans canon of construction does not apply to EAJA because it is not specifically a veterans benefits statute. The three legs of this triad are mired in quicksand and do not support the government's position.

In reaching their flawed conclusions, the Secretary fails to address the basic principles of statutory construction. Nor do they discuss the difficulties inherent in the veterans benefits system that keep veterans such as Al Procopio from obtaining compensation for their government incurred injuries and disabilities. In doing so they ignore the Congressional intent that veterans should enjoy a paternal and friendly system to streamline compensation. Although the Secretary summarily dismisses the pro-veteran canon, they provide no support for their view that it does not apply to EAJA requests in veterans' benefits cases.

The government first argues that precedent "alone is sufficient for [an EAJA fees] motion to fail." *Owen* v. *United States*, 861 F.2d 1273, 1274 (1988) (per curiam). (Brief in Opposition at 12). They then change positions and concede that the totality of circumstances must be considered to determine whether

governmental reliance is reasonable. (Brief in Opposition at 18). They are wrong on both counts.

Accordingly, this court should grant *certiorari* to clarify the important questions raised herein.

STATEMENT OF THE CASE

The parties generally agree on the facts and procedural history of this case. Differences will be discussed below.

ARGUMENT

I. The Government's Reliance on Judge Lourie's concurrence in *Procopio v. Wilkie*, Strengthens the Need for *Certiorari*.

The Secretary has embraced Judge Lourie's concurrence in *Procopio* for the proposition that the statute was ambiguous and that this somehow substantially justified the government's position. Brief in Opposition at 6, 10 and 16. The fatal flaw in the government's argument is that Judge Lourie found that the VA's own regulation, 38 C.F.R. § 3.307(a)(6)(iii), unambiguously granted the presumption to those veterans who served in "waters offshore." *Procopio*, 913 F.3d at 1381 (Lourie, J. Concurring). Judge Lourie went on to find that this VA 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." *Procopio* at 1382.

Judge :Lourie's concurrence becomes even more important because the waters adjacent to the nation extends past the territorial sea. *Procopio* at 1379.

When read with Judge Lourie's concurrence, it is obvious that the regulation, as well as the statute, encompassed Mr. Procopio's position.

This court should grant *certiorari* to resolve any questions concerning the breadth of the presumption of exposure.

II. 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.

By claiming that this case would require reversal of *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988), the Secretary impliedly invokes the specter of *stare decisis* without doing so explicitly. There is no need to overrule *Pierce*. What the Court can and should do is to ensure that the reasonableness standard addresses cases where the government position was clear error. In other words, as Judge O'Malley pointed out, the word "substantially" must do some work in defining precisely how justified the government's position must be. Appendix 4a. Such a clarification is consistent with *Pierce* and the dictates of Congress.

The instant case is especially important because it allows the Court to fill gaps left by *Pierce*. Additionally, it answers the question of whether the court should consider the reasonableness of the government's action in the narrow lane upon which the

case was decided or to make the decision based on the totality of the circumstances. While the Secretary embraces the latter concept in his brief, Brief in Opposition at 18, he abandons it at the beginning of his analysis when he urges this Court to consider only the reasonableness of the VA's definition of the term Republic of Vietnam. As discussed further below, the VA's actions were patently unreasonable in the context of the totality of circumstances. This Court should grant *certiorari* to ensure that the reasonableness of the Secretary's position is tested against that standard. More important, this case gives the Court an opportunity to adopt that totality standard in the context of attorneys fees in veterans cases.

Assuming *arguendo* that the substantially justified position should only be decided upon a single dispositive issue, the Secretary's position still fails. He claims that the failure to Specifically include the term territorial-waters[1] in the statute supports their position. This is ludicrous and flies in the face of statutory construction principles. As this Court has stated:

> [A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804) (Marshall, C.J.).

Hartford Fire Ins. Co. v. California, 509 U.S. 764, 81415 (1993). This *Charming Betsy* canon has been a venerated canon of construction for over two centuries. Congress must be presumed to have understood the

[1] The correct term is territorial sea not territorial waters.

provisions of the Senate ratified Convention on the Territorial Sea and Contiguous Zone, [1958] 15 U.S.T. 1607, T.I.A.S. No. 5639 (hereinafter 1958 Treaty).

It is the Secretary, not Mr. Procopio, who was unreasonable in his interpretation of the statute. Congress should not be required to define every word of a statute when treaties exist that fulfill that requirements. This is especially true when as here, this Court has recognized the boundary setting provisions of the 1958 Convention on the Territorial Sea. *See, United States v. California*, 381 U.S. 139, 165 (1965) and *United States v. Louisiana*, 394 U.S. 11 (1968).

The canons of statutory construction must be used by agencies in determining their policies. A failure to properly apply them, such as here, is patently unreasonable and cannot be considered in any way as substantially justified. The opportunity to apply these canons to EAJA in veterans benefit cases strongly supports granting *certiorari* in the instant case.

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 Secretary attacks the use of the pro-veteran canon of construction in the EAJA context. Rather than discuss the issue of whether a liberal construction would favor the veteran, they similarly dismiss its application. Relying upon *Parrott v. Shulkin*, 851 F.3d 1242, 1251 (Fed. Cir. 2017), the Secretary argues that the pro-veteran does not apply since EAJA is not a veterans' benefit statute but one of general applicability. The government reliance upon this dicta is misplaced.

The issue in *Parrott* was not one of applicability of the canon but whether the canon could be used to determine which consumer price index should be used. *Id.* at 1251. The question herein is not whether there was an attempt to use the canon to gain a windfall, but rather whether the Secretary's position is reasonable. The use of the canon in determining reasonableness and by implication whether it was substantially justified is most appropriate.

Additionally, the use of canons of construction have undergone significant review by this Court since *Parrott* was decided. *See*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) and *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). In both *Kisor* and *Epic Systems*, this Court has required the use of canons of construction at the initial phase of statutory review.

Congress has repeatedly dictated that the veterans' system should be non-adversarial and veteran friendly, The applicability of the pro-veterans canon to all aspects of the program not only makes sense but is in keeping with the intent of Congress. The fact that the applicability of the canon is a question of first impression before this Court, strengthens the argument for *certiorari*. The Court should now grant *certiorari* to determine whether these canons should apply to EAJA in the veterans' benefits context.

III. 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.

Using the VA's reasonable standard merely strengthens the case for certiorari. Although the Secretary claims that his actions were reasonable, his actions cannot meet even that standard. He states that " the central question in the merits proceedings concerned the proper understanding of service "in the Republic of Vietnam" for purposes of the Agent Orange Act's presumption of service connection and benefits eligibility. Brief in Opposition at 10. While that was the basis upon which the court made their decision, it does not adequately describe the reasonableness of the Secretary's actions in the Blue Water Navy matter.

Information demonstrating Agent Orange infiltration into the bays, harbors and territorial sea of Vietnam was before the VA and the Court below. *See*, D. S. Pavlov et. al, *Present-Day State of Coral Reefs of Nha Trang Bay (Southern Vietnam) and Possible Reasons for the Disturbance of Habitats of Scleractinian Coral*; Eric Wolaski and Nguyen Huu Nhan entitled *Oceanography of the Mekong River Estuary;* Chen, S*ignature of the Mekong River Plume in the Western South China Sea Revealed by Radium Isotopes*. VA ignored this evidence and just simply denied the benefits for Mr. Procopio and others. This can hardly be termed the actions fo a reasonable person. Granting *certiorari* in this case will allow the

Court to clarify what is reasonable in the "substantially justified" context.

Although the Secretary discounts *Gray v. McDonald* 27 Vet.App. 313 (2015), they did so at their peril. *Gray* was the canary in the coal mind that signaled to the Secretary that his "boots on the ground" policy was defective. *Gray* noted that the issue in *Haas* involved an area miles distant from Da Nang Harbor, the body of water where Mr. Gray's ship was anchored. *Gray*, 27 Vet. App. at 321. While Mr. Procopio's case extended past the harbors, it was still short of the Vietnam Service Medal demarcation line reviewed in *Haas*. Notably, this was the original standard used by the VA to award benefits under the Agent Orange Act. *Haas v. Peake*, 525 F.3d 1168, 1196 (Fed. Cir. 2008), overruled by *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019).

More importantly, *Gray* vacated the existing VA "boots on the ground" policy remanding with orders to "reevaluate its definition of inland waterways—particularly as it applies to Da Nang Harbor—and exercise its fair and considered judgment to define inland waterways in a manner consistent with the regulation's emphasis on the probability of exposure." *Gray*, 27 Vet. App. at, 326–27. This the VA did not do.

The parties conceded that the Vietnamese rivers were contaminated. *Gray* gives rise to the question of where the inland rivers end. The vast array of evidence, provided to the Secretary, conclusively proved that ships within the territorial sea were exposed. As explained in the Petition, the mixture of the discharge plume of various rivers, as well as the rainwater runoff especially during the Monsoon season with tidal surges from the salt water South China Sea. This brackish water extended for miles past the

landmass. It was undisputed that the dioxin would be ingested into the evaporation distillation system, which enhanced rather than removed the dioxin from the distilled potable water. *See*, National Research Centre for Environmental Toxicology and the Queensland Health Services (hereinafter NRCET) entitled the *Examination of The Potential Exposure of" Royal Australian Navy (RAN) Personnel to Polychlorinated Dihenzodioxins And Polychl/orinated Dibenzojimms Via Drinking Water*, (2002).

Thus the Secretary was sufficiently on notice that his litigation position was unsound and irrational.

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.

The Secretary most wistfully claims that the refusal of the *Haas* court to involve the pro-veteran's canon of construction supports their belief that their litigation position was substantially justified. That argument fails the reasonableness test as well as the facetiousness test. A fair reading of the decision in *Haas* reveals that the Court clearly rejected the canon, not beause of its applicability, but because they felt it was not properly raised in the court below.

The *Haas* court's holding on the matter of the pro-veterans's canon reads as follows:

> In his petition for rehearing, Mr. Haas argues that any ambiguity in the meaning of section 1116 should have been resolved in his favor under the canon of statutory interpretation that ambiguity in a veterans benefits statute should

> be resolved in favor of the veteran. *Brown v. Gardner*, 513 U.S. 115, 117–18, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994). Because Mr. Haas failed to raise that argument in his brief on appeal, despite the Veterans Court's ruling that the statute was ambiguous and despite otherwise extensive briefing on the issue of statutory interpretation, the argument has been waived. *Pentax v. Robison*, 135 F.3d 760, 762 (Fed.Cir.1998)

Haas v. Peake, 544 F.3d 1306, 1308 (Fed. Cir. 2008). In light of *Henderson ex rel. Henderson v. Shinseki*, 561 U.S. 428, 441, 131 S.Ct. 1197, 1206 (2011) which reaffirmed the pro-veteran canon of construction, the VA was on notice that the canon was viable and dispositive. Any doubt as to the weakness of the position should have been resolved when this Court issued *Epic Systems*, *supra*., which required that canons of construction be used at step one of any *Chevron* analysis. *Epic Systems*, *supra.* at 1630.

It is unfathomable that in light of *Henderson* and *Epic Systems*, any reasonable person could believe that *Haas* would survive a challenge based on statutory interpretation. The cases sent a strong message that *Haas*' refusal to apply the pro-veterans canon was clear error. Rather than reassuring the Secretary that *Haas* remained good law, the actions of this Court, especially in light of *Gray,* should have sounded the alarm that *Haas* was no longer good law. The Secretary's failure to react to that warning is not a basis to find that there conduct was substantially justified.

Granting *certiorari* will allow this Court to explore the general applicability of canons to the underlying issues in EAJA cases, and more importantly

the specific consideration of the pro-veteran's canon in determining whether the government's position on the underlying issues was reasonable and/or substantially justified.

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

As discussed *supr*a., both the underlying science and the evolving tenets of administrative law underscored the error of the VA's arbitrary position.

The government blatantly asserts that "The Federal Circuit's rejection of petitioner's request for attorney's fees in this case does not conflict with those decisions." Brief in Opposition at 20. Actually the government is incorrect.

The analysis in the opening brief discussed the actions taken by other Circuits on the issue of whether the government position was substantially justified. The decisions cited are examples of a more liberal reading of the "substantially justified" standard and articulated exceptions to the *Owen* decision cited by the government *supra*. Other Circuits have noted that the existence of controlling precedent is not an automatic path to claiming substantial justification.

Nor can it be said, as the government seems to imply, that the circumstances of the cited cases are not applicable to the instant case. The opposite is true.

In *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C. Cir.2004), cited in the opening brief, the Court found that the government's position was wholly unsupported by the "text of the applicable regulations." The government also tries to distinguish *Halverson v.*

Slater, 206 F.3d 1205, 1212 (D.C.Cir.2000) which held that the government's position was not substantially justified where it was contrary to "the easily ascertainable plain meaning of" a statute). They also misconstrue the holding of *Marcus v. Shalala*, 17 F.3d 1033, 1038 (7th Cir.1994) when there is no substantial justification when the government's position was not substantially justified where it was "manifestly contrary to the statute."

In trying to distinguish these case, the government conspicuously ignores the holding of the *Procopio* court that the VA's position was untenable and that the *Haas* court went astray. *Procopio*, 913 at 1380. In her concurrence, Judge O'Malley noted that *Haas* was "plainly wrong." Appendix 6a. This clear error falls within the scope of the exceptions articulated in *Halverson*, *Role Models* and *Marcus*.

The *Haas* decision does not bolster the argument that the Secretary's position was substantially justified. It detracts from it. The government cannot claim that he was substantially justified to rely on precedent that was clearly erroneous. In other Circuits, the government's argument would have been rejected. Accordingly, this Court should grant *certiorari* to resolve the conflict.

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