No. 22-605

IN THE

Supreme Court of the United States

MILITARY-VETERANS ADVOCACY INC., PETITIONER

v.

SECRETARY OF VETERANS AFFAIRS

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I. Whether the Federal Circuit's Decision Warrants Certiorari When the "Airspace" Rule was upheld despite its conflict with the ." Convention on International Civil Aviation, T.I.A.S. No. 1591, arts. 1-2 (Dec. 7, 1944) (Chicago Convention).

Whether a Proper Construction of the BWN Act Warrants Certiorari when the Federal Circuit's decision and the VA's BWN Rule conflicts with the plain statutory language and departs from the plain meaning of the Agent Orange Act and the Federal Circuit's Own decision in *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (*en banc*).

Whether the Secretary conducted a flawed interpretation of the Agent Orange Act contrary to its own established precedent and in contravention of the pro-veteran/pro-claimant canon of construction

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed on the cover.

RULE 29.6

Military-Veterans Advocacy Inc. is a registered 501(c)(3) non-profit that is incorporated in the state of Louisiana.

STATEMENT OF RELATED CASES

None.

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The opinion of the Secretary of Veterans Affairs is unreported. The March 22, 2023 opinion of the United States Court of Appeals for the Federal Circuit is reported at *Mil.-Veterans Advoc. Inc. v. Sec'y of Veterans Affs.*, 63 F.4th 835 (Fed. Cir. 2023). The July 5, 2023 denial of the petition for rehearing *en banc* from the Federal Circuit is unpublished.

JURISDICTION

The judgement of the United States Court of Appeals for the Federal Circuit was entered on March 22, 2023. A timely petition for rehearing *en banc* was denied on July 5, 2023.. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State

claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

38 U.S.C. §502

An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provisions of chapter 72 of this title, the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.

38 U.S.C. §7292(c)

The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

38 U.S.C. §501(a)

> The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including--
> (1) regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws.
> (2) the forms of application by claimants under such laws.
> (3) the methods of making investigations and medical examinations; and
> (4) the manner and form of adjudications and awards.

38 U.S.C. §553(e)

> petition for the issuance, amendment, or repeal of a rule.

38 U.S.C. §1116(c)

> For purposes of establishing service connection for a disability or death resulting from exposure to a herbicide agent, including a presumption of service-connection under this section, a veteran who performed covered service, shall be presumed to have been exposed during such service to an herbicide agent containing dioxin or 2,4-dichlorophenoxyacetic acid, and may be presumed to have been exposed during such service to any other chemical compound in an

herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

5 U.S.C. §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(B) contrary to constitutional right, power, privilege, or immunity.

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

(D) without observance of procedure required by law.

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those

parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Blue Water Navy Vietnam Veterans Act, Pub.L. No. 116-23, 113 Stat. 966 (2019)

An Act To amend title 38, United States Code, to clarify presumptions relating to the exposure of certain veterans who served in the vicinity of the Republic of Vietnam, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Blue Water Navy Vietnam Veterans Act of 2019".

SEC. 2. CLARIFICATION OF PRESUMPTIONS OF EXPOSURE FOR VETERANS WHO SERVED IN VICINITY OF REPUBLIC OF VIETNAM.

(a) IN GENERAL.—Chapter 11 of title 38, United States Code, is amended by inserting after section 1116 the following new section:

1116A. Presumptions of service connection for veterans who served offshore of the Republic of Vietnam

"(a) SERVICE CONNECTION.—For the purposes of section 1110 of this title, and subject to section 1113 of this title, a disease covered by section 1116 of this title becoming manifest as specified in that section in a veteran who, during active military, naval, or air service, served offshore of the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, 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.

"(b) EXPOSURE.—A veteran who, during active military, naval, or air service, served offshore of the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

"(c) EFFECTIVE DATE OF AWARD.—(1) Except as provided by paragraph (2), the effective date of an award under this section shall be determined in accordance with section 5110 of this title.

"(2)(A) Notwithstanding subsection (g) of section 5110 of this title, the Secretary shall determine the effective date of an award based on a claim under this section for an individual described in subparagraph (B) by treating the date on which the individual filed the prior claim specified in clause (i) of such subparagraph as the date on which the individual filed the claim so awarded under this section.

"(B) An individual described in this subparagraph is a veteran, or a survivor of a veteran, who meets the following criteria:

"(i) The veteran or survivor submitted a claim for disability compensation on or after September 25, 1985, and before January 1, 2020, for a disease covered by this section, and the claim was denied by reason of the claim not

establishing that the disease was incurred or aggravated by the service of the veteran.

"(ii) The veteran or survivor submits a claim for disability compensation on or after January 1, 2020, for the same condition covered by the prior claim under clause (i), and the claim is approved pursuant to this section.

"(d) DETERMINATION OF OFFSHORE.—Notwithstanding any other provision of law, for purposes of this section, the Secretary shall treat a location as being offshore of Vietnam if the location is not more than 12 nautical miles seaward of a line commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia and intersecting the following points:

"**Points Geographic Names**
Latitude North
Longitude East

At Hon Nhan Island, Tho Chu Archipelago Kien Giang Province 9°15.0 103°27.0
At Hon Da Island southeast of Hon Khoai Island Minh Hai Province 8°22.8 104°52.4
At Tai Lon Islet, Con Dao Islet in Con Dao-Vung Toa Special Sector 8°37.8 106°37.5
At Bong Lai Islet, Con Dao Islet 8°38.9 106°40.3
At Bay Canh Islet, Con Dao Islet 8°39.7 106°42.1
At Hon Hai Islet (Phu Qui group of islands) Thuan Hai Province 9°58.0 109°5.0
At Hon Doi Islet, Thuan Hai Province 12°39.0 109°28.0

At Dai Lanh point, Phu Khanh Province 12°53.8 109°27.2
At Ong Can Islet, Phu Khanh Province 13°54.0 109°21.0
At Ly Son Islet, Nghia Binh Province 15°23.1 109° 9.0
At Con Co Island, Binh Tri Thien Province 17°10.0 107°20.6
"(e) HERBICIDE AGENT.—In this section, the term 'herbicide agent' has the meaning given that term in section 1116(a)(3) of this title.".
(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 1116 the following new item:
"1116A. Presumptions of service connection for veterans who served offshore of the Republic of Vietnam.".
IMPLEMENTATION.—
(1) GUIDANCE.—Notwithstanding section 501 of such title, the Secretary of Veterans Affairs may issue guidance to implement section 1116A of title 38, United States Code, as added by subsection (a), before prescribing new regulations under such section.
(2) UPDATES.—(A) Not later than 120 days after the date of the enactment of this Act, the Secretary shall submit a report to the Committees on Veterans' Affairs of the House of Representatives and the Senate regarding the plans of the Secretary—
(i) to conduct outreach under subsection (d); and
(ii) to respond to inquiries from veterans regarding claims for disability compensation

under section 1116A of title 38, United States Code, as added by subsection (a) of this section.
(B) On a quarterly basis during the period beginning on the date of the enactment of this Act and ending on the date on which regulations are prescribed to carry out such section 1116A, the Secretary shall submit to the Committees on Veterans' Affairs of the House of Representatives and the Senate updates on the status of such regulations.
(3) PENDING CASES.—
(A) AUTHORITY TO STAY.—The Secretary may stay a claim described in subparagraph (B) until the date on which the Secretary commences the implementation of such section 1116A.
(B) CLAIMS DESCRIBED.—A claim described in this subparagraph is a claim for disability compensation—
(i) relating to the service and diseases covered by such section 1116A; and
(ii) that is pending at the Veterans Benefits Administration or the Board of Veterans' Appeals on or after the date of the enactment of this Act and before the date on which the Secretary commences the implementation of such section 1116A.
(d) OUTREACH.—
(1) REQUIREMENT.—The Secretary of Veterans Affairs shall conduct outreach to inform veterans described in paragraph (2) of the ability to submit a claim for disability compensation under section 1116A of title 38, United States Code, as added by subsection (a). Such outreach shall include the following:

(A) The Secretary shall publish on the website of the Department a notice that a veterans described in paragraph (2) may submit or resubmit a claim for disability compensation under such section 1116A.
(B) The Secretary shall notify in writing the veteran service organization community of the ability of veterans described in paragraph (2) to submit or resubmit claims for disability compensation under such section 1116A.
(2) VETERAN DESCRIBED.—A veteran described in this paragraph is a veteran who, during active military, naval, or air service, served offshore of the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.
(e) REPORTS.—Not later than January 1, 2021, and annually thereafter for 2 years, the Secretary of Veterans Affairs shall submit to the Committees on Veterans' Affairs of the House of Representatives and the Senate a report regarding claims for disability compensation under section 1116A of title 38, United States Code, as added by subsection (a). Each report shall include, with respect to the calendar year preceding the report, disaggregated by the regional offices of the Department of Veterans Affairs, the following:
(1) The number of claims filed under such section.
(2) The number of such claims granted.
(3) The number of such claims denied.
(f) HEALTH CARE.—Section 1710(e)(4) of title 38, United States Code, is amended by inserting "(including offshore of such Republic as

described in section 1116A(d) of this title)" after "served on active duty in the Republic of Vietnam".

(g) EFFECTIVE DATE.—The amendments made by this section shall take effect on January 1, 2020.

STATEMENT

After covering 90,000 Navy veterans for agent orange benefits, the court below left an additional 55,000 adrift. The Court's decision improperly eliminates a statutory presumption of service connection for Blue Water Navy veterans who served within certain waters off Vietnam. Certiorari is necessary to bring the panel's ruling in line with the Agent Orange Act and the Federal Circuit's en banc decision in *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019).

Additionally, the Court below ignores international law that provided, countries have full sovereignty over the airspace above their territory. See Convention on International Civil Aviation, T.I.A.S. No. 1591 (Dec. 7, 1944) (Chicago Convention). The Chicago Convention, which the United States ratified in 1946, states: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." Id., art. 1.

During the Vietnam War, millions of Americans served in the U.S. military across Southeast Asia, including on bases in Vietnam and Thailand, in air operations over the Vietnamese mainland and surrounding seas, and in the waters offshore of Vietnam. After the war, many veterans returned home with nascent cancers and other diseases linked to

exposure to herbicides such as Agent Orange, a defoliant used to clear vegetation during the war.

When their illnesses manifested—years or decades later—it was often difficult to prove that they resulted from their wartime service.

Recognizing this obstacle, Congress passed the Agent Orange Act in 1991. The Act provides that veterans suffering from certain diseases associated with herbicide exposure need not prove that their diseases are linked to their service. Instead, "military, naval, or air service." Veterans may rely on a presumption that their diseases are service connected so long as they "served in the Republic of Vietnam" during the thirteen years of the War (from 1962 to 1975). 38 U.S.C. § 1116(a) (2021).

Despite this broad language, for many years the Department of Veterans Affairs denied a presumption of service connection to Blue Water Navy veterans who served on ships in the offshore waters of Vietnam. The agency instead applied a misconceived "foot-on-land" or "boots-on-the ground" policy, which afforded the presumption only to veterans who served on the landmass or inland waterways of the Republic of Vietnam. In 2019, the Federal Circuit corrected the VA's misinterpretation of the Agent Orange Act and held that the "Republic of Vietnam" unambiguously includes its "territorial sea." *Procopio v. Wilkie*, 913 F.3d 1371, 1376 (Fed. Cir. 2019). As a result, "those who served in the 12 nautical mile territorial sea of the 'Republic of Vietnam' are entitled to § 1116's presumption" of service connection. Id. at 1380-81.

Following the Procopio decision, Congress passed the Blue Water Navy Vietnam Veterans Act of 2019, Pub. L. No. 116-23, 133 Stat. 966 ("BWN Act"). Although Congress passed the BWN Act to codify

Procopio's protections and expand the presumption of service connection to veterans who served in the offshore waters of Vietnam, VA instead issued a new rule that effectively limits the presumption to fewer geographic areas (and fewer veterans) than those covered by the Agent Orange Act.

Military-Veterans Advocacy, Inc. ("MVA") challenged VA's new rule in a petition for review, arguing that the rule conflicts with statute, international law, and this Court's rulings. Nevertheless, the Court below upheld the new rule, despite its erroneous interpretation of the Agent Orange Act and its divergence from Procopio. The Federal Circuit agreed with the government's reading of the BWN Act—that Congress intended the geographic points listed in § 1116A to provide an exclusive definition, overriding any other statute that might afford a presumption of service connection for veterans who served in the offshore waters of Vietnam. Certiorari is warranted to correct the Federal Circuit's flawed statutory interpretation, which eliminates a presumption of service connection for Blue Water Navy veterans who served within certain territorial waters of Vietnam. This is contrary to the plain language of the Agent Orange Act, the clear intent of Congress, and their decision in *Procopio*.

REASONS FOR GRANTING THE PETITION

I. The Federal Circuit's Decision Warrants Certiorari When the "Airspace" Rule was upheld despite its Conflict with the ." Convention on International Civil Aviation, T.I.A.S. No. 1591, arts. 1-2 (Dec. 7, 1944) (Chicago Convention).

The Airspace Rule, which precludes the presumption of exposure for the airspace over Vietnam, is inconsistent with the plain text of the governing statute and the Court bellow's ruling in *Procopio.* App 32[a]p 11 of Petition for review] The Agent Orange Act requires VA to grant a presumption of service connection to all veterans, including those in the air service, who served "in the Republic of Vietnam." As the Court below explained in *Procopio*, Congress intended that statutory phrase to include at least the land and sea over which the Republic of Vietnam held sovereignty. But the same logic applies to airspace. Under the Convention on International Civil Aviation, every country holds sovereignty over the airspace over both its land and its territorial sea. This Court has recognized this Convention as controll9ng authority. *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 9–10, 106 S. Ct. 2369, 2374, 91 L. Ed. 2d 1 (1986). Yet the Airspace Rule is inconsistent with the plain text of this treaty, the governing statute and this Court's jurisprudence.

As an initial matter, the Airspace Rule contradicts the plain text of the governing statute, 38 U.S.C. § 1116. Under *Chevron, U.S.A., Inc.v. Natural Resources Defense Council, Inc.*, courts use a two-step framework for "review[ing] an agency's construction of

the statute which it administers." 467 U.S. 837, 842 (1984); *see, e.g., Procopio*, 913 F.3d at 1375, *Epic Systems Corp. v. Lewis*, 584 U.S. ___ (2018)

"First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Determining whether Congress has directly spoken involves "employing traditional tools of statutory construction"—including the text, legislative history, and canons of interpretation—to determine "congressional intent." *Id.* at 843 n.9.

Chevron's second step comes into play only if, after employing these traditional tools of statutory construction, the court is "unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

Here, there is no room for the VA's Airspace Rule because the statute is clear. The statute grants a presumption of service connection to "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(f). The statute does not limit the presumption to veterans who served only on Vietnamese land or water. Rather, it extends the presumption to all veterans who served in the "active military, naval, or *air* service ... *in the Republic of Vietnam*." *Id.* (emphasis added). By its plain language, the presumption applies to veterans who served in the "air" in the Republic of Vietnam during the relevant time period. And under clear principles of international and U.S. law, this includes the airspace above the Republic of Vietnam.

Under international law, countries have full sovereignty over the airspace above their territory. *See* Convention on International Civil Aviation, T.I.A.S. No. 1591 (Dec. 7, 1944) (Chicago Convention). The Chicago Convention, which the United States ratified in 1946, states: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." *Id.*, art. 1.

"[T]he principle of airspace sovereignty ... is today an unquestioned principle of international law." *National Sovereignty of Outer Space*, 74 Harv. L. Rev. 1154, 1163-64 (1961). The United States likewise exercises absolute sovereignty over its own airspace. *See* 49 U.S.C. § 40103(a)(1) ("The United States Government has exclusive sovereignty of airspace of the United States.").

Indeed, in *Procopio*, the Court below explained that the Agent Orange Act must be interpreted consistent with international law. The Court held that, under the plain text of 38 U.S.C. § 1116(a), veterans who served in the territorial sea of the Republic of Vietnam are entitled to the service-connection presumption if they meet the section's other requirements. *Procopio*, 913 F.3d at 1380-81. The Court explained: "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." *Id.* at 1375. And because "international law unambiguously confirms" that the "Republic of Vietnam" includes its territorial sea, the Court concluded that Congress's intent was clear.
Id. "International law uniformly confirms that the 'Republic of Vietnam,' like all sovereign nations, included its territorial sea." *Id.* Veterans "who served

in the territorial sea of the 'Republic of Vietnam' [are] entitled to § 1116's presumption." *Id.* at 1376.

The Chicago Convention explains that "[f]or the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State." T.I.A.S. No. 1591, art. 2. Accordingly, countries have full sovereignty over the airspace above their land areas and territorial waters. This convention clearly establishes that the "Republic of Vietnam" includes the airspace above its territory. Chicago Convention, T.I.A.S. No. 1591, art. 1. "This was true in 1955 when the 'Republic of Vietnam' was created. And this was true in 1991 when Congress adopted the Agent Orange Act." *Procopio*, 913 F.3d at 1375 (citation omitted). The intent of Congress is therefore clear from the text of § 1116—veterans who served in the airspace of the "Republic of Vietnam" are entitled to § 1116's presumption.

When, as here, a statute is clear on its face, there is no need to resort to legislative history. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end.

In addition, *Procopio* noted that the statute's express inclusion of "active military, naval, or air service ... in the Republic of Vietnam," § 1116(a)(1), "reinforc[ed] [its] conclusion that Congress was expressly extending the presumption to naval personnel who served in the territorial sea." *Id.* at 1376. So too for the veterans who served in the "air ... in the Republic of Vietnam." 38 U.S.C. § 1116(a)(1)(A).

Congress clearly intended to extend the presumption of service connection to air personnel who served in the "air ... in the Republic of Vietnam." The Court below, however, relied upon a statement by Mark Takano that the Blue Water Navy Act did not apply to the airspace over offshore waters. H.R. REP. NO. 116-58, at 11–12 (2019), *See* App16a (opinion at pg 9). Mr. Takano limited his statement to the area over the waters offshore and not the land mass. Takano went on to say that: "an aircraft that passed in the airspace above the offshore waters would not have drawn water from the sea and therefore is not considered present within the offshore waters for purposes of this legislation." *Id.*

The Takano statement only makes sense when it is limited to offshore waters. It makes no sense over land. Aircraft strike missions were over contaminated land. The bombs, missiles, rockets and cannon of the F-4, A-4, A-6 and A-7 aircraft flew low, sometimes at tree-top level, and sprayed dup geysers of contaminated dirt and debris which often adhered to the bottom of the aircraft. There is no indication in the legislative history that airspace rule was never intended to apply to flights over land.[1]

This Court should vindicate Congress's intent and invalidate the provision of the Airspace Rule that purports to deprive air personnel of that presumption.

Accordingly, *certiorari* is required to reconcile the intent of Congress and the Chicago Convention with the holding of the Court below.

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[1] B-52 aircraft that flew high level missions were based in Guam. Those aircrews are covered under 38 U.S.C. § 1116(d)(5).

II. A Proper Construction of the BWN Act Warrants Certiorari when the Federal Circuit's decision and the VA's BWN Rule conflicts with the plain statutory language and departs from the plain meaning of the Agent Orange Act and the Federal Circuit's Own decision in *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (*en banc*)

A. The BWN Rule conflicts with the plain statutory language.

Agent Orange Act grants a presumption of service connection to any veteran who, "during active military, naval, or air service, served in the Republic of Vietnam" during specified dates. 38 U.S.C. § 1116(a)(1)(B) (2021). It does not limit that presumption any further.

The plain language of the statute thus grants the presumption to all veterans in "active ... naval ... service ... in the Republic of Vietnam" during the relevant period, without restricting that presumption to veterans who served within the specific geographic points listed in § 1116A (or within any other geographic areas).

Instead, as the Court below observed in *Procopio*, the boundaries of "the Republic of Vietnam" are those laid down in a host of long-standing international laws, including the Geneva Agreements on the Cessation of Hostilities in Vietnam, art. 1, July 20, 1954, 935 U.N.T.S. 149, the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639 (Apr. 29, 1958), and the United

Nations Convention on the Law of the Sea, as well as the Restatement of Foreign Relations Law. *Procopio*, 913 F.3d at 1376. These authorities "confirm[] that, when the Agent Orange Act was passed in 1991, the 'Republic of Vietnam' included ... its 12 nautical mile territorial sea." *Id.* Thus, this Court concluded "that the intent of Congress is clear from the text of § 1116: [a veteran] who served in the territorial sea of the 'Republic of Vietnam' is entitled to § 1116's presumption." *Id.* In enacting the BWN Act, Congress expressed no intent to change this interpretation. On the contrary, it left § 1116's language unchanged and sought to preserve *Procopio*'s protections. *See* H.R. Rep. No. 116-58, at 11.

Yet the Federal Circuit's opinion eliminates the statutory presumption for veterans who fall within the gap between § 1116 and § 1116A. The distinction between § 1116 and § 1116A matters because each includes areas not covered by the other. Whereas § 1116 grants a presumption of service connection to veterans who served in "the Republic of Vietnam" (which includes its territorial sea), § 1116A expands the presumption to veterans who served "offshore of the Republic of Vietnam," and lists specific coordinates that "the Secretary shall treat ... as being offshore of Vietnam." Indeed, the coordinates listed in § 1116A range far off the coast of Vietnam in many places. As a result, § 1116A captures some 360 square nautical miles of sea that lie beyond Vietnam's territorial sea.

While encompassing areas *beyond* Vietnam's territorial sea would appear to cover Blue Water Navy veterans who served *in* Vietnam's territorial sea, the coordinates listed in § 1116A fail to capture the entire territorial sea of the Republic of Vietnam. For example, the island of Phu Quoc lies off the west coast of

Vietnam near its border with Cambodia and hosted a well-known prisoner of war camp during the Vietnam War. Although Phu Quoc was part of the sovereign territory of the Republic of Vietnam during all relevant times, the border outlined in § 1116A passes south of the island and thus excludes the 12-mile territorial sea that surrounds it. *Id.* The same holds true for the Paracel and Spratley islands archipelago, owned by the Republic of Vietnam, which lies seaward of the demarcation line delineated in § 1116A. Here the Federal Circuit merely ignored Phu Quoc saying that Congress had defined the field. App17a[opinion at 15] The Court below seemed to believe that the BWN Act had legislatively overruled *Procopio* although the House Report stated the intent was to codify *Procopio*. HR 116-58 at 11.

The differentiation between §1116 and § 1116A is confirmed by the first line in §2(a) of the BWN Act which states: "Chapter 11 of title 38, United States Code, is amended by inserting after section 1116 the following new section. . . " The BWN Act did not amend or modify existing law. It merely added a new section.

Of course, under the Agent Orange Act, any exclusion should not matter. As *Procopio* held, service in those waters is "service in the Republic of Vietnam" and therefore entitled to the presumption of service connection afforded by § 1116(a). And nothing in the BWN Act or in the VA's rule purports to limit that presumption. Indeed, VA's regulations implementing the Agent Orange Act extend the presumption of service connection not only to the territorial sea around Vietnam, but to the "waters offshore" the Vietnamese coast. *See Procopio*, 913 F.3d at 1381 (Lourie, J., concurring) (Under VA's regulation, "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.") (citing 38 C.F.R. § 3.307(a)(6)(iii)).

Nevertheless, contravening both the Agent Orange Act and VA's own regulations, the agency's BWN Rule limits the presumption of service connection to fewer Blue Water Navy veterans. Under the BWN Rule, VA's central processing teams may grant a presumption of service connection *only* when a veteran's naval service falls within the geographic area defined by § 1116A. They may not grant the presumption to veterans who served in any other offshore waters, even if their service was in Vietnam's territorial sea, such as the waters off of Phu Quoc, the Paracels and the Spratlys.

By restricting the presumption that Congress has authorized, the BWN Rule not only conflicts with the plain text of § 1116, but it also defies Congress's intent to expand coverage to Blue Water Navy veterans under the BWN Act. Congress explained the purpose of proposed legislation: "To ensure that VA construes this bill to extend the presumption to *all applicable BWN veterans who may have been exposed to herbicide agents*, the Committee intends that VA's definition of the Republic of Vietnam for this purpose be broad and comprehensive." H.R. Rep. No. 116-58, at 11 (emphasis added). And Congress emphasized that "[t]he bills intends to capture *all servicemembers* who were present between the shoreline and the farthermost reaches of the 12 nautical mile radius during the relevant timeframe." *Id.* (emphasis added).

B. The Federal Circuit's decision departs from the plain meaning of the Agent Orange Act.

The court below upheld the BWN Rule as consistent with the BWN Act. Without even trying to reconcile the BWN Rule with the Agent Orange Act, the court below adopted the government's cramped view of the BWN Act—that Congress intended the geographic points listed in § 1116A to be exclusive, even if other statutory provisions (such as § 1116) might afford a presumption of service connection for veterans who served in different offshore waters. Put simply, the Federal Circuit agreed that VA may deny a presumption of service connection to veterans who served in Vietnamese territorial waters that are not specifically described in the BWN Act. Although the Federal Circuit did not explain its reasoning, it presumably relied on the preamble to § 1116A(d), which states in full:

> Notwithstanding any other provision of law, for purposes of this section, the Secretary shall treat a location as being offshore of Vietnam if the location is not more than 12 nautical miles seaward of a line commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia and intersecting the following points: ...

But the plain meaning of § 1116A(d) is strictly expansive. By instructing the Secretary to treat certain geographic points as being offshore of Vietnam "[n]otwithstanding any other provision of law," Congress did not purport to override any other statute or regulation's definition of the word "offshore."

Indeed, § 1116A(d) does not even claim to *define* the term "offshore." Instead, it merely sets a minimum geographic boundary that the Secretary must "treat ... as being offshore of Vietnam." *Id.* Thus, on its face, § 1116A(d) recognizes that the phrase "offshore of Vietnam" might encompass additional areas beyond those expressly listed in subsection (d)—but it must include *at least* the listed areas.

Neither did Congress attempt to restrict, through § 1116A, any presumption of service connection available through another statute.

Indeed, § 1116A(d) expressly provides that Congress's list of geographic points is to be treated as "offshore of Vietnam" only "for purposes of this section"—namely, § 1116A itself. To the extent that any other statute or regulation uses the term "offshore," it may take on a different and perhaps broader meaning. Moreover, § 1116A, like § 1116, uses the term "Republic of Vietnam," which it does not define or limit in any way.

In short, consistent with both its plain language and its purpose, § 1116A does exactly one thing: ensure that the geographic area it delineates cannot be cut down by another statute or by a future VA regulation or rule interpreting some other portion of Title 38. Because nothing in § 1116A limits the scope and force of the Agent Orange Act, the BWN Rule improperly deprives a presumption of service connection to Blue Water Navy veterans who served in portions of Vietnam's territorial sea not included in § 1116A's description of "offshore."

Although the precise number of Blue Water Navy veterans excluded by the VA's BWN Rule is not known, it is likely significant. As of 2021, for example, VA had identified 60,492 Blue Water Navy veterans

who served in Vietnam's territorial waters, yet whose claims were denied under VA's prior policy. *See Nehmer v. U.S. Dep't of Veterans Affairs*, No. 86-cv-6160, Dkt. 495, at 3 (N.D. Cal. Sept. 17, 2021). This Court should grant review to correct the court bellow's flawed statutory interpretation.

Because the Federal Circuit's ruling concerning this important point of law creates confusion among the VA employees, veterans organizations and the veterans comm unity at large, this Court should grant *certiorari.*

III. The Secretary conducted a flawed interpretation of the Agent Orange Act contrary to its own established precedent and in contravention of the pro-veteran/pro-claimant canon of construction.

The issues presented in this case show that the Secretary impermissibly interpreted the Agent Orange Act to the detriment of disabled veterans. Before the enactment of the PACT Act, the Agent Orange Act stated, in the event of disability or death due to exposure to an herbicide agent containing dioxin or 2,4-dichlorophenoxyacetic acid, a veteran may be presumed to have been exposed during service "*to any other chemical compound in an herbicide agent*" so long as there is no affirmative evidence to the contrary. 38 U.S.C. §1116(c); 38 CFR §3.307(a)(6)(i) [emphasis added].[2] In interpreting the statute, it is abundantly clear that Congress intended to extend the

[2] Herbicide agent, as described by the statute meant a "chemical in an herbicide agent used in support of the United States and allied military operations in the Republic of Vietnam during the Vietnam Era."

presumption to those exposed to herbicides of any type so long as they were exposed to dioxin or 2,4-D used in support of operations in the Republic of Vietnam.

Here the text is unambiguous. If veterans who served this nation, supported US military operations in Vietnam, and were exposed to dioxin or 2,4-D, they are irrefutably entitled to a presumption of herbicide exposure. Indeed, the parties even agree that herbicides present in Guam and Johnston Island met the Act's textual criteria—i.e., they had the same chemical compositions as the rainbow herbicides like Agent Orange.

On three separate occasions, the Secretary has covered veterans outside of Vietnam. Namely, veterans who served near the Korean demilitarized zone, veterans associated with the C-123 aircraft, and veterans in Thailand who served on the perimeter of several Royal Thai Airfields. In denying MVA's rulemaking petition the Secretary claimed that granting the request would broaden the regulation beyond its intended function. He refused to consider an interpretation of the Act which would encompass anything but "the deliberate application of herbicides for a tactical military purpose on a broad scale." *Id.*

The Secretary's flawed interpretation of the Agent Orange Act runs contrary to the long-standing duty of the VA and Federal Courts to interpret statutes in the most veteran friendly manner. Here, the ambiguity arises over Congress' definition of "offshore" and its linguistic similarity to the regulation's use of the term "waters offshore." *See,* 38 C.F.R. § 3.307(a)(6)(iii)). The Secretary is obligated to interpret the Act in the most veteran friendly manner possible. *See e.g., Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Boone v. Lightner*,

319 U.S. 561 (1943); *Henderson v. Shinseki*, 562 U.S. 428 (2011).

In allocating jurisdiction among the federal courts, Congress has identified a select few areas of law where there is a pronounced need for national uniformity and clarity. Veterans' benefit appeals are one of those categories, and Congress granted the Federal Circuit exclusive jurisdiction over these appeals, as well as challenges to VA regulations. *See* Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988); 38 U.S.C. §§ 502, 7292(c). In assigning this exclusive jurisdiction, Congress was motivated by a "strong[] desir[e] to avoid the possible disruption of VA benefit administration which could arise from conflicting opinions in the same subject due to the availability of review in the 12 Federal Circuits or the 94 Federal Districts." H.R. Rep. No. 100-963, at 28.

The pro-veteran canon has been a fixture in our law for nearly 80 years. In *Boone v. Lightner*, the Court considered the Soldiers' and Sailors' Civil Relief Act of 1940, a federal law providing protections for active-duty servicemembers and explained that legislation conferring a benefit to veterans "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." 319 U.S. 561, 575 (1943).

Since its pronouncement in *Boone*, the Court has consistently applied the pro-veteran canon. For example, in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) the Court again explained that it must construe separate provisions of the Selective Training and Service Act of 1940 "as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions

permits." *Id.* Decades later, in *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980), the Court once again explained that statutes that confer benefits upon veterans are "to be liberally construed." *Id.* at 196. *See also, Henderson v. Shinseki*, 562 U.S. 428 (2011) (the pro-veteran cannon has been "long applied" and Congress could not have intended for the "harsh consequences" that would result from applying a jurisdictional bar").

This pro-veteran/pro-claimant canon requires that the Secretary and courts resolve any ambiguities in favor of the disabled veterans. Instead, the Secretary deliberately interpreted the Agent Orange Act and the BWN Act to the detriment of disabled veterans, causing permanent financial harm and decreased life expectancy to veterans who fought bravely for this country. While the Federal Circuit's application of the pro-veteran canon has long been inconsistent, especially when deciding whether to defer to an agency's interpretation of a statute, *see Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the long-established precedent of this Court counsels the application of the pro-veteran canon to an agency's statutory interpretation.

The finding of the Federal Circuit is in contravention of this Court's ruling in *Boone* and its progeny. Certiorari should be granted to clarify the application of the pro-veteran canon and the court below should utilize this venerated canon in their interpretation of Congressional intent

CONCLUSION

For the foregoing reasons and those stated in this Petition, Petitioner respectfully requests that the Court grant certiorari.

Respectfully submitted,
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