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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the government's position in this veterans'-benefits litigation was "substantially justified" within the meaning of the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A).

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals for Veterans Claims:

Procopio v. *McDonald*, No. 15-4082 (Nov. 18, 2016)

Procopio v. *Wilkie*, No. 15-4082 (July 9, 2019)

United States Court of Appeals (Federal Circuit):

Procopio v. *Wilkie*, No. 2017-1821 (Jan. 29, 2019)

Procopio v. *Wilkie*, No. 2017-1821 (Sept. 25, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulation:

Statutes and regulation—Continued: Page

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-8a) denying an award of attorney's fees is unreported. The opinion of the court of appeals (Pet. App. 9a-61a) addressing the merits of petitioner's claim for veterans' benefits is reported at 913 F.3d 1371.

JURISDICTION

The order of the court of appeals was entered on September 25, 2019. The petition for a writ of certiorari was filed on December 24, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a Navy veteran, sought disability benefits under the Agent Orange Act of 1991 (Agent Orange Act or Act), Pub. L. No. 102-4, 105 Stat. 11, based on his wartime service on the waters off the coast of Vietnam. Pet. App. 14a. The Department of Veterans Affairs

(VA) denied his claim, applying an interpretation of the Act that the Federal Circuit had previously upheld. *Ibid.*; see *Haas* v. *Peake*, 525 F.3d 1168 (Fed. Cir. 2008), cert. denied, 555 U.S. 1149 (2009). The en banc Federal Circuit overruled its prior decision and adopted a broader interpretation under which petitioner was eligible for benefits. Pet. App. 24a-25a. Petitioner then moved for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. The en banc court denied his request. Pet. App. 1a.

1. Under EAJA, a court in a "civil action * * * brought by or against the United States" may "award reasonable fees and expenses of attorneys" to a "prevailing party other than the United States" if the "position of the United States" was not "substantially justified" and no "special circumstances make an award unjust." 28 U.S.C. 2412(b) and (d)(1)(A). As relevant here, EAJA defines the term "position of the United States," 28 U.S.C. 2412(d)(1)(A), to mean "the position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based," 28 U.S.C. 2412(d)(2)(D). EAJA does not define the term "substantially justified." 28 U.S.C. 2412(d)(1)(A). This Court has held, however, that the term means "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988). A "position can be justified even though it is not correct, and * * * it can be substantially (*i.e.,* for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at 566 n.2. Thus, a prevailing party is not entitled to attorney's fees under EAJA "simply because

[the government] lost the case." *Scarborough* v. *Principi*, 541 U.S. 401, 415 (2004) (citation omitted).

2. Veterans who served our Nation in wartime are entitled to compensation for disabilities arising from their service. 38 U.S.C. 1110; see *Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011). A veteran applying for disability benefits usually must establish that his disability is "'service-connected,'" meaning that it was "incurred or aggravated" in the "line of duty." 38 U.S.C. 101(16); see 38 U.S.C. 5107(a). With respect to certain disabilities, however, Congress has determined that requiring proof of a connection to military service in each individual case would be overly burdensome. In those circumstances, Congress has instead directed that veterans who served in particular places at particular times and develop particular disabilities are presumptively entitled to benefits. See, *e.g.*, 38 U.S.C. 1112, 1116-1118.

Congress established such a presumption in the Agent Orange Act. 38 U.S.C. 1116. As relevant here, the Act provides that veterans who "served in the Republic of Vietnam" during the period when the United States used Agent Orange (January 9, 1962 to May 7, 1975), and who later develop specified diseases associated with exposure to that herbicide, are presumptively entitled to disability benefits. 38 U.S.C. 1116(a)(1)(A); see 38 U.S.C. 1116(f). A veteran who does not qualify for that presumption may nevertheless demonstrate an entitlement to benefits by showing that he was actually exposed to herbicides during service and that the exposure caused his disability. See 38 U.S.C. 101(16).

In 1993, VA issued regulations providing that service "in the Republic of Vietnam," for purposes of the Agent Orange Act, 38 U.S.C. 1116(a)(1)(A), "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). VA subsequently construed that regulation to require service either on the Republic of Vietnam's "landmass" or on its "inland waterways." Pet. App. 13a. VA's rationale for that interpretation was that "Agent Orange was sprayed only on land, and therefore the best proxy for exposure is whether a veteran was present within the land borders of the Republic of Vietnam." *Haas*, 525 F.3d at 1192.

In 2008, the Federal Circuit upheld VA's interpretation. See *Haas*, 525 F.3d at 1193. The court concluded that both the Agent Orange Act's reference to service "in the Republic of Vietnam," 38 U.S.C. 1116(a)(1), and VA's regulation interpreting that term were ambiguous, *Haas*, 525 F.3d at 1184, 1186. The court upheld VA's interpretation of the statute and regulation, finding that it was "reasonable" to "limit the presumptions of exposure and service connection to service members who had served, for some period at least, on land." *Id.* at 1193; see *ibid.* ("Drawing a line between service on land, where herbicides were used, and service at sea, where they were not, is prima facie reasonable.").

3. a. Petitioner served honorably in the United States Navy. Pet. App. 11a. From November 1964 to July 1967, he served aboard the U.S.S. *Intrepid*, an aircraft carrier that "was deployed in the waters offshore the landmass of the Republic of Vietnam." *Id.* at 14a; see *id.* at 15a (noting that petitioner "served in the territorial sea of the 'Republic of Vietnam' during the specified period"). In 2006 and 2007, petitioner filed claims for disability benefits for medical conditions covered by the Agent Orange Act. *Id.* at 14a.

As relevant here, petitioner contended that his service aboard the *Intrepid* created a presumption of service connection and entitlement to benefits under the Act. See Pet. App. 14a. VA denied his claim because he had not served on either the landmass or the inland waterways of the Republic of Vietnam and therefore did not qualify for the presumption under the interpretation of the Act upheld by the Federal Circuit in *Haas*. See *ibid.* Based on the same reasoning, the United States Court of Appeals for Veterans Claims (Veterans Court) affirmed VA's denial of petitioner's claim. *Ibid.*; see No. 15-4082, 2016 WL 6816244, at *5.

b. Petitioner appealed to the Federal Circuit, which sua sponte considered the case en banc and reversed. Pet. App. 14a. The majority held, contrary to its earlier decision in *Haas*, that Congress had "spoken directly to the question" and that, under a correct understanding of the Act, service "in the territorial sea of the" Republic of Vietnam constituted service "'in the Republic of Vietnam.'" *Id.* at 16a. The court stated that 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." *Ibid.*; see *id.* at 17a-18a (noting that, under international law, coastal nations' sovereignty over their territorial sea generally extends to a distance of 12 nautical miles off the coast). Because "[t]his uniform international law was the backdrop against which Congress adopted the Agent Orange Act," the court held that Congress's use of the formal term "Republic of Vietnam" was an "unambiguous[]" reference to both Vietnam's landmass and its territorial sea. *Id.* at 18a. Concluding that "the *Haas* court went astray when it found ambiguity in § 1116 based on 'competing methods of defining the

reaches of a sovereign nation,'" the court of appeals held that "*Haas* is overruled." *Id.* at 24a (citation omitted).

Judge Lourie concurred in the judgment. Pet. App. 30a-32a. He disagreed "with the majority that international law and sovereignty principles * * * render the phrase 'served in the Republic of Vietnam' in 38 U.S.C. § 1116 unambiguous." *Id.* at 30a (emphasis omitted). He explained that "[s]overeign 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." *Ibid.* In his view, petitioner was instead "plainly entitled" to a presumption of service connection based on VA's 1993 regulation. *Id.* at 32a.

Judge O'Malley issued a concurring opinion. Pet. App. 33a-43a. She agreed with the majority's interpretation and explained her view that "the pro-veteran canon of construction adds further support to the majority's conclusion." *Id.* at 33a.

Judge Chen, joined by Judge Dyk, dissented. Pet. App. 44a-61a. In his view, the Agent Orange Act "is ambiguous" as to the meaning of service "in the Republic of Vietnam," and "international law and sovereignty principles do not dictate that Congress unambiguously intended 'Republic of Vietnam' to include its territorial waters." *Id.* at 44a-45a. Judge Chen explained that "[n]o 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." *Id.* at 45a. He observed that, at the time Congress enacted the Agent Orange Act, dictionaries and maps defined or depicted countries "in terms of * * * land," rather than "land plus

the territorial sea." *Id.* at 49a; see *id.* at 58a-59a nn.2-3 (citing dictionaries and maps). He also noted that other statutes "expressly" state that "a country's territorial waters" are included in the statute's scope. *Id.* at 49a; see *id.* at 49a-50a, 60a n.4 (citing such statutes). He viewed those statutes as reflecting an "underlying assumption * * * that the use of the country name is not sufficient to include territorial or adjacent waters." *Id.* at 50a. Judge Chen also found the majority's reliance on implications from international law to be "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." *Id.* at 45a. And he emphasized that the majority had "repudiate[ed] a statutory interpretation from a 10-year old precedential opinion without any evidence of changed circumstances." *Id.* at 44a.

4. After the en banc court issued its decision, petitioner moved for an award of attorney's fees under EAJA. The government acknowledged that petitioner was a "prevailing party" under EAJA, but argued that VA's position had been "substantially justified." 28 U.S.C. 2412(d)(1)(A); see Gov't C.A. Br. 3-10. The government emphasized that it had based its position on the Federal Circuit's "binding, precedential" decision in *Haas*. Gov't C.A. Br. 4. The government also noted that the en banc Federal Circuit had previously held that reliance on such precedent "alone is sufficient for [an EAJA fees] motion to fail." *Ibid.* (quoting *Owen* v. *United States*, 861 F.2d 1273, 1274 (Fed. Cir. 1988) (en banc) (per curiam)). The en banc court denied petitioner's motion without issuing a written opinion. Pet. App. 1a-2a.

Judge O'Malley concurred in the denial of petitioner's motion for attorney's fees. Pet. App. 3a-8a. She acknowledged that "both Supreme Court and [Federal Circuit] precedent compel[led]" denial of the motion. *Id.* at 3a (footnote omitted); see *id.* at 7a n.1. In her view, however, 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." *Id.* at 4a. In particular, she disagreed with the interpretation of EAJA's "substantially justified" language that this Court had adopted in *Pierce*. *Ibid.* (citation omitted). Relying on Justice Brennan's separate opinion in *Pierce*, she explained that she would require that the government's position "be justified by a considerable amount or, at least, that it have a solid foundation in substance." *Id.* at 5a (citing *Pierce*, 487 U.S. at 578 (Brennan, J., concurring in part and concurring in the judgment)). In her view, the government had not satisfied that standard in this case, even though VA's position was consistent with the Federal Circuit's prior decision in *Haas*. *Id.* at 6a-8a & n.3.

5. On remand from the Federal Circuit, the Veterans Court vacated the prior decision denying petitioner's claim, and it remanded the case to VA. No. 15-4082, 2019 WL 2931940. In December 2019, VA awarded petitioner more than $107,000 in disability benefits.[1]

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[1] In June 2019, Congress enacted the Blue Water Navy Vietnam Veterans Act of 2019, Pub. L. No. 116-23, 133 Stat. 966. That statute codified the Federal Circuit's merits decision in this case by providing coordinates from which VA now calculates the 12 nautical miles that constitute qualifying service off the coast of Vietnam. § 2(a), 133 Stat. 967. In implementing the new statute, VA has reviewed

ARGUMENT

Petitioner contends (Pet. 7-15) that the en banc Federal Circuit erred in denying his motion for attorney's fees under EAJA. The court's decision is correct and does not conflict with any decision of this Court or another court of appeals. Petitioner appears to acknowledge (Pet. 7) that accepting his lead argument would require overruling this Court's longstanding construction of EAJA's "substantially justified" standard. 28 U.S.C. 2412(d)(1)(A); see *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988). Further review is not warranted.

1. The en banc court of appeals correctly denied petitioner's motion for attorney's fees under EAJA. EAJA does not authorize a fee award if "the court finds that the position of the United States was substantially justified." 28 U.S.C. 2412(d)(1)(A). This Court has construed the term "substantially justified" to mean "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce*, 487 U.S. at 564-565. As explained above, that standard does not require the government's position to be "correct" or to have resulted in a litigation victory. *Id.* at 566 n.2; see pp. 2-3, *supra*. Rather than mandating an award of attorney's fees to the "prevailing party" without qualification, 28 U.S.C. 2412(d)(1)(A), Congress declined to authorize an EAJA fee award "if a reasonable person could think [the government's position] correct,

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benefits determinations made for certain Navy veterans who served in the territorial sea off the coast of Vietnam. In reviewing its determination of petitioner's benefits, VA concluded that he was entitled to an additional $23,496. In early March 2020, VA informed petitioner that an additional payment in that amount will be made. VA also advised petitioner that it is prepared to schedule additional medical examinations to ensure that he is receiving all of the benefits to which he is entitled.

that is, if it has a reasonable basis in law and fact," *Pierce*, 487 U.S. at 566 n.2.

The government's position in this litigation readily satisfies that standard. 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. 38 U.S.C. 1116(a)(1)(A); see Pet. App. 15a-25a. The Act does not define the term "Republic of Vietnam." 38 U.S.C. 1116(a)(1)(A). And although the en banc court of appeals ultimately concluded that the Act's reference to the country name incorporated international-law principles of sovereignty, see Pet. App. 18a, that is not the only reasonable way to read the statutory reference, see *id.* at 30a (Lourie, J., concurring in the judgment) ("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."); *id.* at 44a-45a (Chen, J., dissenting) ("[I]nternational law and sovereignty principles do not dictate that Congress unambiguously intended 'Republic of Vietnam' to include its territorial waters.").

Indeed, the en banc court of appeals did not identify any prior decision or canon of construction indicating 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." Pet. App. 45a (Chen, J., dissenting). Other statutes include explicit territorial-waters references that would be superfluous under the default international-law definition that the en banc court applied here. See *id.* at 49a-50a, 60a n.4 (Chen, J., dissenting) (citing such statutes). And the en banc majority and dissenting judges agreed that, when

the Agent Orange Act was enacted, "generalist dictionaries and maps" typically described or depicted a country in terms of its landmass alone. *Id.* at 26a n.2 (majority opinion); see *id.* at 49a, 58a-59a nn.2-3 (Chen, J., dissenting). It therefore was "reasonable," *Pierce*, 487 U.S. at 565, for the government to rely on the ordinary understanding of the term "Republic of Vietnam," rather than on the specialized, international-law-based construction that the en banc court ultimately adopted, 38 U.S.C. 1116(a)(1)(A). The government's reliance on ordinary meaning was especially reasonable "in the context of a statute governing veterans' disability benefits, which in no way implicates a foreign country's sovereignty over territorial waters." Pet. App. 45a (Chen, J., dissenting).

The Federal Circuit's prior endorsement of VA's position strongly reinforces the conclusion that the agency acted reasonably in taking that position here. In *Haas* v. *Peake*, 525 F.3d 1168 (Fed. Cir. 2008), cert. denied, 555 U.S. 1149 (2009), the court held that it was "reasonable" for VA to "limit the [Agent Orange Act's] presumptions of exposure and service connection to service members who had served, for some period at least, on land." *Id.* at 1193. The *Haas* court explained that VA's construction reflected the fact that, in Vietnam during the relevant years, "herbicides were used" on land but not "at sea." *Ibid.* In this litigation, the government acted reasonably in relying on that binding, precedential decision. It was particularly reasonable for VA to rely on that precedent because the Federal Circuit has exclusive jurisdiction to review Veterans Court decisions, see 38 U.S.C. 7292, so as to facilitate uniform nationwide application of the veterans'-benefits laws. Indeed, the en banc Federal Circuit has held that reliance

on such precedent "alone is sufficient for [an EAJA fees] motion to fail." *Owen* v. *United States*, 861 F.2d 1273, 1274 (1988) (per curiam).

The en banc court's denial of petitioner's fee request was accordingly correct. Indeed, none of the judges who rejected the government's position in the underlying benefits litigation disputed that the government's position was "substantially justified" under this Court's construction of that term. 28 U.S.C. 2412(d)(1)(A); see Pet. App. 1a (indicating denial of petitioner's motion without noted dissent); *id.* at 3a (O'Malley, J., concurring) ("agree[ing]" that "both Supreme Court and [Federal Circuit] precedent compel" denial of petitioner's motion) (footnote omitted).

2. Petitioner's contrary arguments (Pet. 7-15) lack merit.

a. Petitioner contends (Pet. 7-9) that the Federal Circuit's interpretation of "substantially justified" does not comport with Congress's intent in enacting EAJA. 28 U.S.C. 2412(d)(1)(A). But the Federal Circuit did not construe the term "substantially justified" in the proceedings below. *Ibid.* The court instead issued a one-line summary decision stating only that petitioner's "motion is denied." Pet. App. 1a.

Petitioner appears to assume (Pet. 7) that the Federal Circuit denied his motion based on the interpretation of EAJA's "substantially justified" standard that this Court announced in *Pierce*. In petitioner's view (*ibid.*), that construction "seems to fly in the face of the plain meaning of the statute." Relying on Judge O'Malley's concurrence here and on Justice Brennan's separate opinion in *Pierce*, petitioner contends (Pet. 8-9) that EAJA's "substantially justified" standard requires something more than reasonableness.

Petitioner thus effectively urges this Court to overrule *Pierce*. Petitioner identifies no basis for taking that step, however, other than offering the same alternative construction of the statute that the *Pierce* Court considered and rejected. See 487 U.S. at 564-565, 566 n.2. Petitioner's implicit suggestion that the Court should revisit *Pierce* is particularly unavailing given the "enhanced force" this Court typically accords to decisions that "interpret[] a statute." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Petitioner does not suggest that *Pierce*'s "doctrinal underpinnings have * * * eroded over time" or that the Court's interpretation of EAJA has "proved unworkable." *Id.* at 2410-2411. There is consequently no reason to reconsider or depart from *Pierce*'s holding that the term "'substantially justified'" as used in EAJA means "justified to a degree that could satisfy a reasonable person." 487 U.S. at 565 (citation omitted).

b. Petitioner contends (Pet. 9-11) that the EAJA term "substantially justified" should be interpreted more restrictively (*i.e.*, as imposing a more demanding standard upon the government) in the veterans'-benefits context than in other government litigation. As petitioner observes (Pet. 9), this Court has stated that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011) (citation omitted). But EAJA "is not a veterans benefit statute"; it is a "statute of general applicability" that is not subject to a preferential standard for veterans. *Parrott* v. *Shulkin*, 851 F.3d 1242, 1251 (Fed. Cir. 2017) (holding that the pro-veteran canon does not apply to EAJA).

If Congress had intended that attorney's fees be more readily available to prevailing veterans than to

other persons who litigate against the government, it could have enacted a separate attorney's-fee provision specifically governing veterans'-benefits cases. Congress chose instead to allow prevailing veterans in such cases to seek fees under EAJA. Neither EAJA's text nor any accepted principle of construction suggests that the term "substantially justified" in Section 2412(d)(1)(A) can be given a different meaning in veterans'-benefits cases than in other government litigation. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005) (explaining that the "operative language" of a particular immigration provision "applies without differentiation to all three categories of aliens that are its subject," so that "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one"). This Court has applied EAJA to a veterans'-benefits case without suggesting that any different standard applies. See *Scarborough* v. *Principi*, 541 U.S. 401, 408-414 (2004); cf. *Shinseki* v. *Sanders*, 556 U.S. 396, 406 (2009) (holding that, in deciding an appeal in a veterans'-benefits case, a court should apply "the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases").

c. Petitioner contends (Pet. 11-15) that the government's position on his claim for veterans' benefits was not "substantially justified" because the en banc court concluded that Section 1116(a) unambiguously supports his understanding of service "in the Republic of Vietnam." 38 U.S.C. 1116(a). That argument places undue weight on the result of the litigation, rather than the reasonableness of the government's position. See *Pierce*, 487 U.S. at 565, 566 n.2. "Although the strength of the government's position in the litigation obviously plays an important role in a substantial justification

evaluation, the reasonableness inquiry 'may not be collapsed into [an] antecedent evaluation of the merits, for EAJA sets out a distinct legal standard.'" *Taucher* v. *Brown-Hruska*, 396 F.3d 1168, 1173 (D.C. Cir. 2005) (Roberts, J.) (citation omitted; brackets in original). Just as the government's position can be substantially justified even though "it lost the case," *Scarborough*, 541 U.S. at 415 (citation omitted), the government's position can be substantially justified even though a court concluded that the statutory language unambiguously favors the opposing party, see, *e.g.*, *Halverson* v. *Slater*, 206 F.3d 1205, 1211-1212 (D.C. Cir. 2000).

As petitioner observes (Pet. 15), the Federal Circuit analyzed this case under the two-step framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Pet. App. 15a. At step one of the *Chevron* inquiry, the court asks whether Congress has "directly spoken to the precise" statutory-interpretation "question at issue." 467 U.S. at 842. If "the statute is silent or ambiguous with respect to the specific issue," the court will uphold an agency's "reasonable" interpretation at step two of the inquiry. *Id.* at 843-844. The court below resolved this case at *Chevron* step one, concluding that Congress had "spoken directly to the question of whether [petitioner], who served in the territorial sea of the 'Republic of Vietnam,' 'served in the Republic of Vietnam.'" Pet. App. 16a; see *ibid.* (concluding that "'the Republic of Vietnam' * * * unambiguously * * * includes its territorial sea"). But neither this Court nor any other has indicated that resolution of a statutory-interpretation case against the government at *Chevron* step one—*i.e.*, a holding that a statute unambiguously supports the op-

posing party—precludes a determination that the government's position was substantially justified for purposes of EAJA. Cf. *id.* at 25a ("Because we decide that the statute is unambiguous, we need not decide whether the agency's interpretation is reasonable."); see also *id.* at 1a (denying petitioner's EAJA fees motion without dissent from any of the eight judges who held that the Agent Orange Act unambiguously supports his position).

Nor does any legal principle support equating an absence of ambiguity at step one of the *Chevron* analysis with a lack of reasonableness in the government's position for EAJA purposes. The Court in *Chevron* instructed courts to perform the step-one analysis "employing traditional tools of statutory construction." 467 U.S. at 843 n.9. Consistent with that directive, a court's ultimate determination that Congress has "directly spoken to" a particular question may be based on extensive analysis of the statutory text, history, structure, and purpose, among other interpretive sources. *Id.* at 842; see, *e.g.*, *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621-1630 (2018). Indeed, the court of appeals here engaged in a detailed analysis of international-law principles, pertinent regulations, related statutes, and judicial precedent, see Pet. App. 16a-25a, before concluding that "the statute is unambiguous," *id.* at 25a. Nothing in the court's analysis suggests that a contrary conclusion on that question—as reached by Judge Lourie's concurrence, the dissenting judges, the *Haas* panel, and the government—would necessarily lack "a reasonable basis in law and fact." *Pierce*, 487 U.S. at 566 n.2. Thus, while there may be contexts in which a lack of ambiguity about a particular legal source pre-

cludes reasonable conclusions to the contrary, the *Chevron* step one analysis is not one of them. See *Halverson*, 206 F.3d at 1211 ("*Chevron* step one cases have presented quite difficult issues and involved 'substantially justified' arguments on both sides."); see also, *e.g.*, *Saysana* v. *Gillen*, 614 F.3d 1, 6-7 (1st Cir. 2010) (denying EAJA fees motion even though the court rejected the government's argument that the statute was ambiguous); *Martini* v. *Federal Nat'l Mortg. Ass'n*, 178 F.3d 1336, 1340-1348 (D.C. Cir. 1999) (same), cert. dismissed, 528 U.S. 1147 (2000).

Analogies from other legal contexts underscore that the question of statutory ambiguity under *Chevron* is "distinct" from the question of substantial justification under EAJA. *Taucher*, 396 F.3d at 1173 (citation omitted). For example, a law-enforcement officer's conduct may violate the Fourth Amendment's prohibition on unreasonable searches and seizures, yet not "violate clearly established * * * constitutional rights of which a reasonable person would have known." *Wilson* v. *Layne*, 526 U.S. 603, 614 (1999) (citation omitted); see, *e.g.*, *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 741-742 (2011) ("The general proposition * * * that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established"—that is, whether a "'reasonable official would [have understood] that what he is doing violates that right.'") (citation omitted; brackets in original). Likewise, a search found unreasonable under the Fourth Amendment may be reasonable for EAJA purposes. See, *e.g.*, *United States* v. *$19,047.00 in U.S. Currency*, 95 F.3d 248, 251-252 (2d Cir. 1996). And "even a finding that an agency's ac-

tion was arbitrary and capricious doesn't preclude a decision that the action was substantially justified." *SecurityPoint Holdings, Inc.* v. *TSA*, 836 F.3d 32, 39 (D.C. Cir. 2016).

In short, "it is rare that a single factor will be dispositive of whether the government's position was substantially justified." *United States* v. *Hallmark Constr. Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000). Rather, "the substantial justification inquiry requires an analysis of the 'totality of the circumstances' surrounding the government's adoption of a particular position." *Patrick* v. *Shinseki*, 668 F.3d 1325, 1332 (Fed. Cir. 2011) (citation omitted). Thus, while a court's rejection of the government's position at step one of the *Chevron* analysis is a factor warranting consideration in the substantial-justification determination, it is not the only or the dispositive factor. Indeed, its probative value is limited, because the critical question under EAJA is "not what the law now is, but what the Government was substantially justified in believing it to have been." *Pierce*, 487 U.S. at 561; see, *e.g.*, *Gonzales* v. *Free Speech Coal.*, 408 F.3d 613, 620 (9th Cir. 2005) (reversing grant of EAJA fees motion because "the district court seemed to rely on hindsight, rather than an assessment of the reasonableness of the government's position *at the time of the litigation*").

Petitioner suggests (Pet. 12-13) that the court of appeals' decision in *Haas* put the government "on notice" that its position was not substantially justified. That argument is misconceived. In *Haas*, the Federal Circuit *upheld* the same interpretation of the Agent Orange Act that the government subsequently advanced in this litigation. See 525 F.3d at 1193. *Haas* thus strongly supports, rather than undermines, the reasonableness of

the government's position here. See pp. 11-12, *supra*; see also *Taucher*, 396 F.3d at 1177 ("In the absence of controlling Supreme Court case law, the available circuit precedent becomes more significant in considering substantial justification under EAJA."); *Owen*, 861 F.2d at 1275 (concluding that "the position of the government was substantially justified when it was taken, based on precedents then standing"). The *Haas* court's failure to "apply the pro-veterans canon" (Pet. 13) in upholding the government's interpretation likewise does not suggest that "VA should have reviewed [its] litigating position." To the contrary, the Federal "Circuit's decision not to invoke that canon in *Haas* reinforces the conclusion that the government in this case was "substantially justified in believing" that its interpretation was correct. *Pierce*, 487 U.S. at 561. At a minimum, the presence of binding circuit precedent in *Haas* makes this case a poor vehicle to consider broader questions about when a government position can be reasonable for EAJA purposes even though a court rejects it at step one of the *Chevron* analysis.[2]

3. Petitioner briefly suggests (Pet. 14) that other courts of appeals "have taken a more liberal approach" to EAJA by "holding that the government's position is not substantially justified if the statutory interpretation

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[2] Petitioner suggests (Pet. 11-12) that the government should have known that its position was incorrect after the Veterans Court's decision in *Gray* v. *McDonald*, 27 Vet. App. 313 (2015). But the court in *Gray* did not address the VA interpretation at issue in this case. Rather, it rejected a distinct VA interpretation that certain Vietnamese bays and harbors were "inland waterways." *Id.* at 324. Indeed, the Veterans Court in *Gray* specifically declined to "reexamine the validity of" the VA interpretation that was upheld in *Haas* and that is at issue here. *Id.* at 320.

is contrary to the plain language of the statue." As explained above, however, no court has adopted such a rule. See pp. 14-19, *supra*.

Petitioner relies (Pet. 14), for example, on the D.C. Circuit's decision in *Halverson*, *supra*. But the court in *Halverson* explained that its no-substantial-justification determination was *not* based "solely on the fact that the merits panel resolved this case on *Chevron* step one grounds." 206 F.3d at 1211. Rather, the court observed that, "[w]hile this *Chevron* case turned out to be quite easy, other *Chevron* step one cases have presented quite difficult issues and involved 'substantially justified' arguments on both sides." *Ibid.* The other decisions that petitioner cites similarly involved case-specific determinations. See *Role Models Am., Inc.* v. *Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004) (holding that the agency's position was not substantially justified because the pertinent regulations "were so clear and the Secretary's failure to comply with them so obvious that his actions could not 'appear correct to a reasonable person'") (citation omitted); *Marcus* v. *Shalala*, 17 F.3d 1033, 1038 (7th Cir. 1994) (concluding that the government's position was not substantially justified based on decisions of this Court and of six other circuits rejecting the government's position). The Federal Circuit's rejection of petitioner's request for attorney's fees in this case does not conflict with those decisions.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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