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No. 08-525

In the Supreme Court of the United States

JONATHAN L. HAAS, PETITIONER

v.

JAMES B. PEAKE, 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

In general, a veteran who seeks disability benefits must establish that his disability resulted from his military service. Under the Agent Orange Act of 1991, Pub. L. No. 102-4, § 2, 103 Stat. 11-12 (now codified at 38 U.S.C. 1116(a)), when veterans who "served in the Republic of Vietnam" between 1962 and 1975 develop certain diseases that have been linked to herbicide exposure, those diseases are presumed to be service connected. The question presented is as follows:

Whether the court of appeals correctly deferred to the Department of Veterans Affairs' interpretation of the term "serv[ice] in the Republic of Vietnam," which excludes veterans who served on ships off the coast of Vietnam but never set foot on the land mass of Vietnam.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 525 F.3d 1169. The supplemental opinion of the court of appeals on denial of rehearing (Pet. App. 63a-70a) is reported at 544 F.3d 1306. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 71a-113a) is reported at 20 Vet. App. 257. The decision of the Board of Veterans' Appeals (Pet. App. 114a-126a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2008. A petition for rehearing was denied on October 9, 2008 (Pet. App. 136a-137a). The petition for a writ of certiorari was filed on October 17, 2008. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the Agent Orange Act of 1991, Pub. L. No. 102-4, 103 Stat. 11, Congress established a framework for compensating veterans for illnesses that may have been caused by Agent Orange, a herbicide used for defoliation during the Vietnam War. Pet. App. 2a. In order to receive compensation for an illness related to military service, a veteran generally must establish that the disability is service connected, meaning that it was "incurred or aggravated * * * in [the] line of duty in the active military, naval, or air service." 38 U.S.C. 101(16). Determining service connectedness had long proven difficult with respect to diseases that may have been caused by Agent Orange, both because of the uncertain effects of Agent Orange on human health and because it is not possible to determine precisely who was exposed to Agent Orange in Vietnam. See, *e.g.*, S. Rep. No. 439, 100th Cong., 2d Sess. 65 (1988); 50 Fed. Reg. 34,454-34,455 (1995); see also Pet. App. 2a, 11a-15a.

The Agent Orange Act establishes a presumption of service connectedness for certain veterans who developed certain diseases that may have been caused by exposure to Agent Orange. The listed diseases include non-Hodgkin's lymphoma, certain soft-tissue sarcomas, chloracne, Hodgkin's disease, porphyria cutanea tarda, certain respiratory cancers, multiple myeloma, and (as relevant here) diabetes mellitus (type 2 diabetes). 38 U.S.C. 1116(a)(2). If a veteran who "served in the Republic of Vietnam" between January 9, 1962, and May 7, 1975, develops one of those diseases, the disease ordinarily "will be considered to have been incurred or aggravated by such service." 38 U.S.C. 1116(a)(1)(A). If

a veteran does not qualify for the presumption of service connectedness, he may demonstrate his entitlement to benefits by proving that he actually was exposed to Agent Orange and that Agent Orange caused his disability. See Pet. App. 56a; see also 38 U.S.C. 101(16).

b. The Secretary of the Department of Veterans Affairs (Secretary) has promulgated regulations to implement the Agent Orange Act. As relevant here, the Secretary has defined the term "served in the Republic of Vietnam" to include "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). The Secretary has long interpreted that regulation to require that a veteran who served on a ship offshore must have set foot on the land mass of Vietnam to have "served in the Republic of Vietnam." See 66 Fed. Reg. 23,166 (2001); 62 Fed. Reg. 51,274-51,275 (1997); Op. Gen. Counsel Dep't Vet. Aff. Precedent No. 27-97 (July 23, 1997); Op. Gen. Counsel Dep't Vet. Aff. Precedent No. 7-93 (Aug. 12, 1993). The Secretary has explained that requirement as follows:

> Because herbicides were not applied in waters off the shore of Vietnam, limiting the scope of the term service in the Republic of Vietnam to persons whose service involved duty or visitation in the Republic of Vietnam limits the focus of the presumption of exposure to persons who may have been in areas where herbicides could have been encountered.

62 Fed. Reg. at 51,274.

In 2004, as part of a comprehensive overhaul of Department of Veterans Affairs (VA) regulations, the Secretary published a proposed rule that confirms that a person who served on a ship off the coast of Vietnam

but never set foot on the Vietnamese land mass had not "served in the Republic of Vietnam" for purposes of the statutory presumption. 69 Fed. Reg. 44,614-44,615 (2004). The Secretary explained that he was "not aware of any valid scientific evidence showing that individuals who served in the waters offshore of the Republic of Vietnam * * * were subject to the same risk of herbicide exposure as those who served within the geographic land boundaries of the Republic of Vietnam." *Id.* at 44,620. The Secretary therefore proposed amending the regulation to "make it clear that veterans who served in waters offshore but did not enter Vietnam, either on its land mass or in its inland waterways[,] cannot benefit from this presumption." *Ibid.* The revised regulation would read: "For purposes of this section, 'Service in the Republic of Vietnam' does not include service in the waters offshore or service in other locations, but does include any service in which the veteran had duty in or visited in the Republic of Vietnam." *Ibid.* (proposing to amend 38 C.F.R. 3.307(a)(6)(iii) and renumber it 38 C.F.R. 5.262).

Earlier this year, the Secretary initiated a rulemaking proceeding to make explicit the requirement that a veteran must have set foot on the land mass of Vietnam to benefit from the statutory presumption. The amended regulation would define "service in the Republic of Vietnam" to include "service on land, or on an inland waterway, in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975." 73 Fed. Reg. 20,571 (2008). The Secretary explained that the statute's requirement of "serv[ice] in the Republic of Vietnam" "is most reasonably interpreted to refer to service within the land borders of the Republic of Vietnam," because "herbicides were commonly

deployed in foliated land areas and would have been released seldom, if at all, over the open waters off the coast of Vietnam." *Id.* at 20,568. The Secretary further observed that "the purpose of the presumption of exposure [is] to provide a remedy for persons who may have been exposed to herbicides because they were stationed in areas where herbicides were used." *Id.* at 20,568-20,569. Both the 2004 and 2008 rulemaking proposals are still pending.

2. Petitioner is a veteran of the Vietnam War. From August 1967 to April 1969, he served in the United States Navy aboard the U.S.S. *Mount Katmai*, an ammunition supply ship that operated in the Pacific Ocean off the coast of Vietnam. It is undisputed that petitioner's ship never moored in a Vietnamese port and that he never set foot on shore. Pet. App. 5a.

In August 2001, petitioner applied to the VA for disability compensation for type 2 diabetes, peripheral neuropathy, and loss of eyesight. Pet. App. 4a. Although petitioner has a family history of diabetes, he contended that his conditions were caused by exposure to the herbicides contained in Agent Orange during his military service. *Id.* at 4a, 74a. He argued that he is entitled to a presumption of service connectedness based upon his service "in the Republic of Vietnam." 38 U.S.C. 1116(a)(1)(A); 38 C.F.R. 3.307(a)(6)(iii); see Pet. App. 5a.[1]

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[1] In the alternative, petitioner contended that he actually was exposed to herbicides that were sprayed over land but drifted out over the ocean. That claim is not before this Court. See Pet. App. 56a. To the extent that petitioner now contends that he has evidence to establish actual exposure, he may bring that evidence to the attention of the VA. See *id.* at 133a-134a; pp. 18-19 & note 4, *infra*.

A regional office of the VA denied petitioner's claim. Pet. App. 127a-135a. Citing the statute and the VA's regulations, the regional office concluded that petitioner had not served "in the Republic of Vietnam" for purposes of the statutory presumption of service connectedness because he had served "in the waters offshore" and had never set foot on Vietnamese land. *Id.* at 130a-131a. The regional office explained that, "since application of herbicides would not have occurred in waters off the shore of Vietnam," the VA's interpretation reasonably "focus[es] the coverage of the regulations on persons who may have been in areas where herbicides could have been encountered." *Id.* at 132a.

3. The Board of Veterans' Appeals affirmed the denial of petitioner's claim. Pet. App. 114a-126a. It concluded that, under the agency's consistent interpretation of its own regulations, service on a naval vessel off the shore of Vietnam does not constitute "service in the Republic of Vietnam" for purposes of the statutory presumption. *Id.* at 119a-121a. It explained that the VA's understanding of the presumption's scope reflected the fact that "[herbicide] agents, which destroyed vegetation, were not used at sea." *Id.* at 120a.

4. The Court of Appeals for Veterans Claims reversed. Pet. App. 71a-113a. It agreed with the Secretary that the term "served in the Republic of Vietnam," as it appears in 38 U.S.C. 1116(a)(1)(A), could reasonably be construed either to encompass or to exclude service in waters off the Vietnamese coast. Pet. App. 80a-84a. The court then determined that the VA's regulatory definition of the term "service in the Republic of Vietnam," 38 C.F.R. 3.307(a)(6)(iii), is similarly "ambiguous regarding whether service on the land in Vietnam

is required for the presumption to apply." Pet. App. 92a.

Although the court recognized that the VA's interpretation of its own regulation is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation," Pet. App. 94a (internal quotation marks omitted), it refused to defer to the VA's interpretation of the agency rule, *id.* at 95a-105a. The court stated that the VA's current interpretation of the regulation is inconsistent with prior agency views. *Id.* at 95a-98a. The court also found that interpretation to be unreasonable because, in the court's view, "veterans serving on vessels in close proximity to land would have the same risk of exposure to the herbicide Agent Orange as veterans serving on adjacent land." *Id.* at 100a.[2]

5. The court of appeals reversed. Pet. App. 1a-62a. As an initial matter, it rejected petitioner's argument that the term "served in the Republic of Vietnam" unambiguously includes service in the Pacific Ocean off the coast of Vietnam. *Id.* at 27a-32a. Rather, after analyzing the statutory and regulatory history, *id.* at 10a-27a, the court of appeals determined that the statute is ambiguous in that regard, *id.* at 27a-32a. The court observed that a nation's boundaries may be defined in a variety of different ways, some of which include offshore waters and others of which do not. *Id.* at 28a. The court found that "[n]either the language of the statute nor its legislative history indicates that Congress intended to

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[2] The court also determined that the VA's modification of an internal guidance manual to reflect its regulation was invalid because it was not preceded by notice-and-comment rulemaking, and that the revised manual could not be retroactively applied to petitioner. Pet. App. 105a-111a. The court of appeals rejected those claims, *id.* at 51a-55a, and they are not before this Court.

designate one of the competing methods of defining the reaches of a sovereign nation." *Id.* at 29a.

The court of appeals next determined that the regulation—which speaks of "duty or visitation in the Republic of Vietnam," 38 C.F.R. 3.307(a)(6)(iii)—is also ambiguous, although the court stated that the government's reading is "probably the most natural reading of the language." Pet. App. 32a-33a. Under those circumstances, the court observed, the "agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." *Id.* at 33a (quoting *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2346 (2007)).

Applying that deferential standard of review, the court upheld the Secretary's interpretation of the VA rule. The court observed that "the agency's position has been consistent for more than a decade, and there is 'no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter.'" Pet. App. 41a (quoting *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997)). The court further explained that, because "Agent Orange was sprayed only on land," *id.* at 46a, "it was not arbitrary for the agency to limit the presumptions of exposure and service connection to servicemembers who had served, for some period at least, on land," *id.* at 48a. 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.").

Judge Fogel dissented. Pet. App. 56a-62a. He would have held that the VA's interpretation of its own regulation was "inconsistent with the intent of the statute," *id.* at 56a, and was not based on a sufficiently "careful scientific assessment" of the risks posed by Agent Orange, *id.* at 61a.

6. The court of appeals denied petitioner's petition for rehearing. Pet. App. 136a-137a. In a supplemental opinion issued on denial of rehearing, *id.* at 63a-70a, the court again rejected petitioner's argument that the statutory text was plain, citing various other "statutory references to presence 'in' a country" that "have been understood not to include presence in the airspace or the territorial waters." *Id.* at 69a-70a.

The court of appeals also rejected petitioner's argument, raised for the first time in his petition for rehearing, that the Secretary's reasonable interpretation of the statute must yield to the canon that statutory ambiguities should be resolved in favor of veterans. Pet. App. 67a-69a. The court explained that the canon does not require it to disregard the agency's otherwise reasonable construction of the statute. *Id.* at 67a-68a. In any event, the court noted, "this case would present a practical difficulty in determining what it means for an interpretation to be 'pro-claimant,'" because the Secretary "has already interpreted the statute in a pro-claimant manner by applying it to any veteran who set foot on land, even if for only a very short period of time." *Id.* at 68a. Under those circumstances, the court concluded, it is "by no means clear that [the canon's] application would have required that the statute cover [petitioner's] case." *Id.* at 68a-69a.

ARGUMENT

In deferring to the VA's reasonable construction of its own regulation and of the statutory presumption at issue in this case, the court of appeals correctly applied basic principles of statutory construction and administrative law. The decision of the court of appeals does not conflict with any decision of this Court or any other

court of appeals. Further review is therefore unwarranted.

1. Petitioner contends (Pet. 18-22) that, under the unambiguous terms of the relevant statutory text, he is entitled to the presumption of service connectedness based on his service on a ship stationed in the ocean off the coast of Vietnam, even though the ship never moored in a Vietnamese port and petitioner never set foot on shore. That argument lacks merit.

Congress did not directly address the question whether a veteran who served on a naval vessel in the Pacific Ocean near Vietnam is entitled to the statutory presumption of service connectedness. The Agent Orange Act provides that veterans who "served in the Republic of Vietnam" and who later develop specified diseases are entitled to a presumption that their diseases are service connected. 38 U.S.C. 1116(a)(1)(A). Although Congress defined a number of other terms in the Act—including "veteran," "service connected," "active military, naval, or air service," and "Vietnam era," 38 U.S.C. 101(2), (16), (24) and (29)—it did not define the term "served in the Republic of Vietnam."

Both of the courts below agreed that the statute is ambiguous with respect to the question presented here. Pet. App. 27a-32a, 69a-70a (court of appeals); *id.* at 80a-92a (Court of Appeals for Veterans Claims). As the court of appeals explained (*id.* at 28a-29a), the identification of a nation's outer boundary depends on the issue presented for resolution. The territory under a nation's jurisdiction may include the nation's land mass, airspace, internal waters, territorial sea, archipelagic waters, contiguous zone, continental shelf, and exclusive economic zone. See, *e.g.*, 1 E.D. Brown, *Sea-Bed Energy*

and Mineral Resources and the Law of the Sea: The Areas Within National Jurisdiction I.1 3 (1984).

At least one statute that identifies Vietnam veterans for purposes of awarding them expanded rehabilitation and educational benefits refers separately to the country's land mass, its airspace, and its waters. See Act of Oct. 17, 1980, Pub. L. No. 96-466, § 513(b), 94 Stat. 2208 (38 U.S.C. 4107 note) (stating that "veterans who served * * * in Vietnam, in air missions over Vietnam, or in naval missions in the waters adjacent to Vietnam shall be considered to be veterans who served in the Vietnam theatre of operations"). Those references suggest that terms such as "Vietnam" and "the Republic of Vietnam" do not unambiguously encompass waters adjacent to the Vietnamese land mass. A prior statute applicable to veterans who served during the Mexican Border War similarly referred to veterans who "served in Mexico, on the borders thereof, or in the waters adjacent thereto." 38 U.S.C. 101(30). Under that law, the term "served in Mexico" clearly did not encompass service on ships stationed off the Mexican coast, since service on such vessels was separately provided for.

In various other contexts, Congress has adopted different definitions of a nation's boundaries. For example, geographical distinctions between United States territory and United States territorial waters have historically been prevalent in immigration policy. See, *e.g.*, *Taylor* v. *United States*, 207 U.S. 120, 125 (1907) (to "land" in the United States, immigrants must depart from their vessels and come ashore onto United States soil); 8 U.S.C. 1158(a)(1) (stating that "[a]ny alien who is physically present in the United States or who arrives in the United States * * * may apply for asylum"); 8 U.S.C. 1101(a)(38) (defining "United States" to include

"the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States"); *Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters*, 17 Op. Off. Legal Counsel 77, 85 (1993) (concluding that the "United States" does not include aliens interdicted in territorial waters). And, as the court of appeals noted, "[i]n at least one instance, the term 'United States' is defined differently in different sections within the same title, in one case expressly including the territorial waters and in another not." Pet. App. 69a (citing 26 U.S.C. 638, 7701(a)(9)); see 49 U.S.C. 40102(a)(46) (defining "United States" to include "the territorial sea and the overlying airspace"). Those examples confirm that Congress's unadorned reference to "the Republic of Vietnam" does not unambiguously encompass or exclude waters near the Vietnamese coast.

Petitioner contends (Pet. 19-21) that Congress's reference to the "Republic of Vietnam" necessarily includes its territorial waters because all accepted definitions of a sovereign nation include that nation's territorial waters. That is incorrect. There are a number of definitions, discussed in detail by the courts below, that define a nation's boundaries without respect to its territorial waters. Pet. App. 28a-29a, 69a-70a, 80a-82a. There is no suggestion, either in the statutory text or the legislative history, that Congress intended to incorporate international law principles relating to the territorial sea in determining which veterans were entitled to the presumption of service connectedness.

Petitioner also observes (Pet. 23-24) that other parts of 38 U.S.C. 1116 refer to "active military, naval or air service in the Republic of Vietnam." Those references, however, simply make clear that veterans who served

"in the Republic of Vietnam" are entitled to the statutory presumption regardless of which branch of the Armed Forces they were part of. Under the Secretary's regulatory definition of "service in the Republic of Vietnam," which encompasses even very brief periods of duty on the Vietnamese land mass, the presumption of service connectedness would be available to numerous Navy and Air Force veterans. The statute's reference to naval and air service therefore does not shed light on the choice between the competing interpretations of the term "served in the Republic of Vietnam."

Petitioner also contends (Pet. 25-27) that Congress, in enacting 38 U.S.C. 1116(a), intended to adopt a preexisting regulation under which veterans in his position would have been entitled to a presumption of service connectedness. That is incorrect. To the extent the regulatory history preceding the Agent Orange Act is instructive, it supports the Secretary's interpretation. See Pet. App. 30a-32a.

Before the Agent Orange Act was enacted, the Secretary had adopted two different regulations that listed different statutory presumptions for chloracne (38 C.F.R. 3.311a (1986)) and for non-Hodgkins lymphoma (38 C.F.R. 3.313). Section 3.311a resulted from the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725, which directed the Secretary to establish standards for resolving whether certain diseases, such as chloracne, should be treated as service connected based upon likely herbicide exposure. By contrast, the Section 3.313 presumption, which extends to sailors regardless of whether they set foot in Vietnam, "was not predicated on exposure, but instead was based on evidence of an association between non-Hodgkin's lymphoma and service in the Viet-

nam theater, including service aboard ships." Pet. App. 31a-32a; see 55 Fed. Reg. 43,124 (1990).

As the court of appeals explained, Sections 3.311a and 3.313 did not use identical language in defining the classes of Vietnam-era veterans to whom the regulations would apply. See Pet. App. 11a-12a, 16a-17a. A close reading of the two regulations suggests that veterans who served exclusively in Vietnamese territorial waters would not be covered by the former regulation but would be covered by the latter. See *id.* at 16a-17a. In enacting the Agent Orange Act, Congress borrowed the phrase "service in the Republic of Vietnam" from Section 3.311a, *id.* at 32a, and the current regulation now utilizes Section 3.311a's "duty or visitation" language, 38 C.F.R. 3.307(a)(6)(iii). There is consequently no reason to believe that Congress intended to adopt the formulation in Section 3.313, which did not concern herbicide exposure, as opposed to the different language in Section 3.311a, which did.

2. Petitioner renews his argument (Pet. 28-30), made for the first time in his petition for rehearing in the Federal Circuit, that the court of appeals should have applied the pro-veteran canon of statutory construction to resolve any statutory ambiguity in his favor. In its supplemental opinion, the court of appeals correctly rejected that argument. This Court has never held that the Secretary's reasonable construction of a statute he is entrusted to administer should be disregarded whenever the statute is ambiguous and the agency has declined to adopt the most pro-veteran construction possible. Under well-established principles of administrative law, an agency's interpretation of the statute it is entrusted to administer is entitled to deference so long as it is reasonable. See, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*,

467 U.S. 837, 843 (1984). The canon that statutory ambiguities should be resolved in the veteran's favor comes into play only *after* the court has used all interpretive tools at its disposal, which of course include principles of *Chevron* deference. See *Sears* v. *Principi*, 349 F.3d 1326, 1331-1332 (Fed. Cir. 2003) (disagreeing with the claimant's contention that an "ambiguity must always be resolved in favor of the veteran because the pro-claimant policy underlying the veterans' benefits scheme overrides *Chevron* deference"); *Terry* v. *Principi*, 340 F.3d 1378, 1384 (Fed. Cir. 2003) (similar). Acceptance of petitioner's argument would largely eviscerate the VA's authority to apply its expertise and policy judgment to fill in gaps in the statutory scheme.

Petitioner's reliance (Pet. 27-28) on *Brown* v. *Gardner*, 513 U.S. 115 (1994), and *King* v. *St. Vincent's Hospital*, 502 U.S. 215 (1991), is misplaced. In *Brown*, this Court struck down, as inconsistent with the controlling statute, a regulation that required a claimant for certain veterans' benefits to prove that his disability resulted from negligent treatment by the VA or an accident during treatment. 513 U.S. at 116-118. The Court did not find any ambiguity in the statute, *id.* at 120; instead, it determined that the statute's plain language did not "carry with it any suggestion of fault attributable to the VA," *id.* at 118. The Court noted the canon that interpretive doubt should be resolved in favor of veterans, *id.* at 118, but it did not use that canon to resolve the case, let alone hold that the canon could trump principles of *Chevron* deference.

This Court's decision in *King* is similar. In that case, which concerned the length of military service after which a member of the Armed Forces retains a right to civilian re-employment under 38 U.S.C. 2024(d), the

Court likewise determined that the statutory language was unambiguous. 502 U.S. at 519-522. The Court mentioned the pro-veteran canon at issue in passing, but it did not use the canon to resolve the case, and it did not consider any regulatory interpretation offered by the Secretary. The decision below therefore does not conflict with this Court's decisions in *Brown* and *King*.

In any event, this case would not be an appropriate one in which to resolve any uncertainty regarding the interaction between principles of *Chevron* deference and the canon that statutory ambiguities be interpreted in favor of veterans. As the court of appeals explained (Pet. App. 68a-69a), it is not clear that the canon petitioner invokes would require that his reading of the statute be adopted, because the Secretary already has interpreted the statute in veterans' favor by applying the presumption to any veteran who set foot on the land mass of Vietnam, however briefly.[3] The pro-veteran

[3] Petitioner contends (Pet. 28 n.8) that the agency's interpretation is the most restrictive construction the statute permits, but that is plainly not the case. The agency has interpreted the statutory term "service in the Republic of Vietnam" to include service involving incidental visits to the Vietnamese land mass (*e.g.*, for a stopover to change planes or for a scheduled "rest and relaxation" tour). The agency's interpretation has included inland waterways, see, *e.g.*, 66 Fed. Reg. at 23,166; 69 Fed. Reg. at 44,620; 73 Fed. Reg. at 20,568, although the VA could reasonably have confined the presumption to the land mass alone. Moreover, the pro-veteran canon surely should not be taken so far as to require an interpretation that is arguably consistent with the statutory text but is inconsistent with the statute's rationale. Under the Agent Orange Act, certain diseases are presumed to be service connected because those diseases are linked to herbicide exposure and the Department of Defense did not accurately track the specific locations where herbicides were sprayed. That rationale does not apply to veterans who served exclusively in areas where herbicides were not sprayed. See pp. 17-19 & note 4, *infra*.

canon does not require a "pro-claimant outcome in every imaginable case." *Sears*, 349 F.3d at 1331-1332; see *ibid.* (regulation that "[i]n the vast majority of cases * * * provides veterans complete relief" is "generally consistent with the pro-claimant policy suffusing the statute" and need not also be interpreted to permit every possible claim).

3. Having determined that the statute is ambiguous, the court of appeals correctly deferred to the Secretary's interpretation. The court first observed that the Secretary's regulation, which speaks of "duty or visitation," 38 C.F.R. 3.307(a)(6)(iii), although "probably" most naturally read as the government suggested, did not "resolve the issue with certainty." Pet. App. 33a. The court therefore applied the established rule that the Secretary's interpretation of the agency's own rule is controlling unless it is "plainly erroneous or inconsistent with the regulation[]." *Id.* at 32a-33a. As the court explained, the Secretary has taken the same position for at least a decade, and that position is consistent with both the text and purposes of the statute. *Id.* at 32a-51a.

Petitioner contends (Pet. 30) that the agency's interpretation was not entitled to *Chevron* deference because it was not embodied in the regulation itself but instead was set forth in other informal agency pronouncements. But whenever an agency regulation is ambiguous, it is necessarily because the agency's clarifying gloss is not embodied in the rule itself. See Pet. App. 34a-35a. This Court has made clear that an agency's interpretation of its own rule is entitled to substantial deference, see, *e.g.*, *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and it has not imposed the self-defeating limitation that petitioner suggests.

4. In establishing a statutory presumption of service connectedness for certain diseases linked to Agent Orange, Congress evidently sought to define a class of veterans who served in an area where exposure to herbicides was likely. The title of the enacting legislation ("The Agent Orange Act"), the title of the codified section ("Presumptions of service connection for diseases associated with exposure to certain herbicide agent, presumption of exposure for veterans who served in the Republic of Vietnam"), and the discussion of the statute's purpose in the legislative history all concerned herbicide exposure. See 137 Cong. Rec. 2491-2492 (1991) (statement of Sen. Biden); *id.* at 2492 (statement of Sen. McCain); *id.* at 2494 (statement of Sen. Bradley). Agent Orange was used as a defoliation agent on vegetation on land; it was not used at sea. *E.g.*, Pet. App. 46a-48a, 121a. Absent any sound reason to believe that veterans who served in the waters off Vietnam were likely to be exposed to Agent Orange, the rationale for treating such veterans' diseases as presumptively service connected does not apply.

Contrary to petitioner's suggestion, the effect of the VA's approach is not to "rule out" (Pet. 31) veterans who served in Vietnamese waters as potential victims of herbicide exposure. Veterans in petitioner's position are not barred from obtaining benefits or otherwise subject to disfavored treatment, but are simply required to establish that their disabilities are service connected under the same rules that apply to disabled veterans generally. See Pet. App. 48a. Although individual veterans may have been exposed to herbicides while serving offshore and may have developed the specified diseases as a result, the Secretary permissibly limited the *presumption* of service connectedness to those who are most

likely to have come into contact with Agent Orange. *Id.* at 46a-48a.[4] By providing that certain diseases would be presumed to be service connected when developed by veterans who "served in the Republic of Vietnam," 38 U.S.C. 1116(a)(1)(A), without defining that term further, Congress left to the Secretary the task of further identifying the class of veterans to whom the statutory presumption applies. The court of appeals correctly declined to second-guess the agency's judgment on that question.

Petitioner also argues (Pet. 31) that the Secretary's interpretation is unreasonable because it is not supported by sufficient scientific evidence. That is incorrect. The vast majority of—if not all—herbicides that were used as defoliants in Vietnam were sprayed over land. *E.g.*, Pet. App. 100a, 121a, 132a. In any event, insofar as such empirical judgments bear on the identification of the class of veterans who "served in the Republic of Vietnam," those judgments are primarily entrusted to the responsible agency rather than to the courts.

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[4] Petitioner asserts that the ship on which he served passed "within 100 feet of the coast of Vietnam," and that clouds of defoliants sprayed on coastal forests "drifted out over the water" and "engulf[ed]" his ship. Pet. 15-16; see note 1, *supra*. Evidence of such exposure would be relevant to the determination whether petitioner had established that his disability is service connected. Petitioner does not suggest, however, that the statutory term "served in the Republic of Vietnam" could plausibly be construed in a way that would encompass his own service yet exclude service at the outer reaches of Vietnam's territorial seas. See Pet. App. 51a (court of appeals observes that "[a] standard such as 'near the shore' is unmanageably vague, not to mention its lack of mooring in the statutory or regulatory language").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2008