No. 17-1679

In the Supreme Court of the United States

ROBERT H. GRAY, PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

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

MEMORANDUM FOR THE RESPONDENT SUGGESTING THAT THE CASE MAY BECOME MOOT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

Statement ... 2
Discussion ... 6

TABLE OF AUTHORITIES

Cases:

Already, LLC v. *Nike, Inc.*, 568 U.S. 85 (2013) ... 7
American Foreign Serv. Ass'n v. *Garfinkel*, 490 U.S. 153 (1989) ... 7
Gray v. *McDonald*, 27 Vet. App. 313 (2015) ... 2, 3, 4, 6
Gray, In re, Bd. Vet. App. No. 1642510, 2016 WL 7656674 (Nov. 3, 2016) ... 5
Procopio v. *Wilkie*, No. 17-1821, 2019 WL 347202 (Fed. Cir. Jan. 29, 2019) ... 1, 3, 5, 6, 7, 8

Treaty, statutes, and rule:

United Nations Convention on the Territorial Sea and the Contiguous Zone, *done* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639 ... 3
art. 1, ¶ 1, 15 U.S.C. 1608 ... 3
Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 ... 2
38 U.S.C. 502 ... 1, 2, 5, 7, 8
38 U.S.C. 1116(a)(1)(A) ... 1, 2, 3, 6, 7, 8
Sup. Ct. R. 21.2(b) ... 1

Miscellaneous: Page

U.S. Dep't of Veterans Affairs, *Adjudication Procedures Manual M21-1*, https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000073398/M21-1,%20Adjudication%20Procedures%20Manual,%20Table%20of%20Contents (last visited Jan. 31. 2019) 4

In the Supreme Court of the United States

No. 17-1679

ROBERT H. GRAY, PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

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

MEMORANDUM FOR THE RESPONDENT SUGGESTING THAT THE CASE MAY BECOME MOOT

The question presented in this case is whether a provision within a Department of Veterans Affairs (VA) Manual, which guides agency adjudicators in construing the term "served in the Republic of Vietnam" in 38 U.S.C. 1116(a)(1)(A), is reviewable in the Federal Circuit under 38 U.S.C. 502. Oral argument is scheduled for February 25, 2019. Pursuant to Rule 21.2(b) of the Rules of this Court, the Solicitor General, on behalf of the respondent, respectfully submits this memorandum suggesting that this case may become moot in light of the en banc Federal Circuit's January 29, 2019, decision in *Procopio* v. *Wilkie*, No. 17-1821, 2019 WL 347202.

The Federal Circuit in *Procopio* adopted an interpretation of "served in the Republic of Vietnam" that is significantly broader than the one reflected in the Manual, and that unquestionably encompasses petitioner's own military service. Unless VA seeks and obtains reversal

of the Federal Circuit's judgment in *Procopio*, the question whether the disputed Manual provision is subject to pre-enforcement review under Section 502 will be of no continuing practical importance to petitioner, because the Federal Circuit's interpretation in *Procopio*—rather than the disputed Manual provision—will govern his eligibility for the disability benefits he seeks.

Because the Solicitor General has not yet determined whether to file a petition for a writ of certiorari in *Procopio*, this case is not currently moot, and the case is not likely to become moot before the scheduled oral argument on February 25, 2019. It is possible, however, that this case could become moot after the scheduled argument but before the Court has issued a decision.

STATEMENT

1. Under the Agent Orange Act of 1991 (Agent Orange Act or Act), Pub. L. No. 102-4, 105 Stat. 11, veterans who "served in the Republic of Vietnam" during the period when the United States used the herbicide Agent Orange (January 9, 1962 to May 7, 1975), and who develop specified diseases associated with exposure to Agent Orange, are presumptively entitled to disability benefits. 38 U.S.C. 1116(a)(1)(A).

Petitioner served in the United States Navy aboard a ship that anchored in Da Nang Harbor in 1972. *Gray* v. *McDonald*, 27 Vet. App. 313, 316 (2015). In 2007, he filed a claim for veterans' disability benefits, relying on the Agent Orange Act's presumption of service-connection. *Ibid.* The VA regional office and the Board of Veterans Appeals (Board) denied his claim on the ground that anchoring in Da Nang Harbor did not constitute service "in the Republic of Vietnam." *Id.* at 318. At that time, VA interpreted the term "served in the Republic of Vietnam" to include service on either (i) the land mass of

Vietnam or (ii) its "inland waterways." *Id.* at 321. VA defined "inland waterways" to include "rivers, estuaries, canals, and delta areas inside the country," but not "open deep-water coastal ports," including Da Nang Harbor. Pet. App. 6a (citation omitted).

Petitioner appealed the denial of his claim to the United States Court of Appeals for Veterans Claims (Veterans Court). He argued that the term "Republic of Vietnam" in the Agent Orange Act, 38 U.S.C. 1116(a)(1)(A), should be defined by reference to the United Nations Convention on the Territorial Sea and the Contiguous Zone (Convention), *done* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639 (entered into force Sept. 10, 1964). *Gray*, 27 Vet. App. at 318, 326. In relevant part, the Convention provides that "[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea." Art. 1, ¶ 1, 15 U.S.T. 1608; see *Procopio* v. *Wilkie*, No. 17-1821, 2019 WL 347202, at *3 (Fed. Cir. Jan. 29, 2019) (en banc). Because Da Nang Harbor lies within the former Republic of Vietnam's territorial sea, petitioner contended that he had "served in the Republic of Vietnam," 38 U.S.C. 1116(a)(1)(A), for purposes of the Agent Orange Act.

The Veterans Court vacated the Board's denial of petitioner's claim. *Gray*, 27 Vet. App. at 319-327. The court concluded that the Board's interpretation of "inland waterways" was "inconsistent with the regulatory purpose and irrational," because it defined "inland waterways" based on water depth rather than on the likelihood of exposure to Agent Orange. *Id.* at 322. The court, however, also rejected petitioner's contention that "the Republic of Vietnam" should be defined by ref-

erence to the Convention and must include the territorial seas. *Id.* at 326 (citation omitted). The court found "no indication" in the Agent Orange Act, or in the relevant VA interpretations of the Act, that either Congress or the agency had intended to adopt the Convention's sovereignty-based definition of "'the Republic of Vietnam.'" *Ibid.* (citation omitted). The court accordingly remanded petitioner's case to the Board for further proceedings. *Id.* at 328.

2. In response to the Veterans Court's decision, VA amended the definition of "inland waterways" in its *Adjudication Procedures Manual M21-1* (Manual), an "'internal manual used to convey guidance to VA adjudicators.'" Pet. App. 5a (citation omitted); see *id.* at 7a-8a. The revised Manual provision, which the parties call the Waterways Provision, states in relevant part that "[i]nland waterways" are "fresh water rivers, streams, and canals, and similar waterways," while "[o]ffshore waters are the high seas and any coastal or other water feature, such as a bay, inlet, or harbor." Manual IV.ii.1.H.2.a-b (emphases omitted); see Pet. App. 46a-48a (emphases omitted).* The Manual states that Da Nang Harbor is among the "offshore waters" that are excluded from coverage under the Agent Orange Act. Manual IV.ii.1.H.2.c; see Pet. App. 48a.

On remand from the Veterans Court, the Board denied petitioner's claim. Finding the Waterways Provision "instructive" but "not binding," the Board con-

---

* All provisions of the Manual can be accessed through the Table of Contents on VA's website. See https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000073398/M21-1,%20Adjudication%20Procedures%20Manual,%20Table%20of%20Contents.

cluded that anchoring in Da Nang Harbor did not constitute service in "the Republic of Vietnam" under the Agent Orange Act because Da Nang Harbor was not an inland waterway. *In re Gray*, Bd. Vet. App. No. 1642510, 2016 WL 7656674, at *4 (Nov. 3, 2016). The Board also observed that the Veterans Court had rejected petitioner's contention that "VA should have adopted the definition of inland waterways provided in the" Convention. *Id.* at *2.

Petitioner appealed to the Veterans Court. At the joint request of petitioner and VA, his appeal has been stayed in that court since April 2017. See U.S. Br. 14.

3. In March 2016, petitioner filed a petition in the Federal Circuit seeking review of the Waterways Provision under 38 U.S.C. 502, which authorizes direct pre-enforcement review in the Federal Circuit of certain VA actions. J.A. 8-16. Petitioner contended that the Waterways Provision fell within the category of VA actions for which Section 502 authorizes pre-enforcement review, J.A. 9; that the Waterways Provision was unlawful, J.A. 9-15; and that the Federal Circuit should accordingly "invalidate" the Waterways Provision, J.A. 15. The court of appeals dismissed the petition for lack of jurisdiction, holding that the Waterways Provision did not fall within the class of VA actions for which Section 502 authorizes pre-enforcement review. Pet. App. 1a-14a. This Court granted a petition for a writ of certiorari to review that determination.

4. In its merits brief filed on January 16, 2019, the government noted that the en banc Federal Circuit had recently heard oral argument in *Procopio*, *supra*, which presented the question whether 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 "territorial sea" off the coast of the former Republic of Vietnam—the argument petitioner had advanced in the Veterans Court. U.S. Br. 18, 49-50; see *Gray*, 27 Vet. App. at 318, 326. The government observed (Br. 18) that, if "the Federal Circuit ultimately resolves that question in favor of [Mr. Procopio], its decision would necessarily mean that petitioner qualifies for the presumption of service-connection under the Agent Orange Act," because Da Nang Harbor falls within the territorial seas of the former Republic of Vietnam. The government also stated (Br. 50) that, if the Federal Circuit in *Procopio* reached that conclusion, petitioner would "have no need to pursue his pre-enforcement challenge" to the Waterways Provision.

On January 29, 2019, the en banc Federal Circuit issued its decision in *Procopio*. The court concluded that the Agent Orange Act's reference to "the Republic of Vietnam," 38 U.S.C. 1116(a)(1)(A), "unambiguously" includes "both its landmass and its territorial sea" extending 12 miles off the shore, 2019 WL 347202, at *4. In explaining its interpretation, the court relied on (among other sources) the Convention that petitioner had unsuccessfully invoked in the Veterans Court. *Ibid.*; see *Gray*, 27 Vet. App. at 318, 326; p. 3, *supra*. The Federal Circuit accordingly held that "Mr. Procopio, who served in the territorial sea of the 'Republic of Vietnam,' is entitled to § 1116's presumption" of service-connection. 2019 WL 347202, at *4.

DISCUSSION

1. In *Procopio* v. *Wilkie*, No. 17-1821, 2019 WL 347202 (Jan. 29, 2019), the en banc Federal Circuit held that the Agent Orange Act's reference to "the Republic of Vietnam," 38 U.S.C. 1116(a)(1)(A), "unambiguously"

includes "both its landmass and its territorial sea" extending 12 miles off the shore, 2019 WL 347202, at *4. In contrast, the Waterways Provision states that coastal water features "such as a bay, inlet, or harbor" are not "[i]nland waterways," Pet. App. 46a-47a (emphasis omitted), and therefore are not "in the Republic of Vietnam" under 38 U.S.C. 1116(a)(1)(A). The Waterways Provision is irreconcilable with *Procopio*, because any bay or harbor—including Da Nang Harbor where petitioner's ship anchored in 1972—would necessarily fall within the boundaries of the 12-mile territorial sea and thus would be "in the Republic of Vietnam" under *Procopio*. As the government indicated in its merits brief (at 18, 50), the Federal Circuit's decision in favor of Mr. Procopio thus entitles petitioner to a presumption of service-connection under the Agent Orange Act.

2. Unless the government seeks this Court's review of the decision in *Procopio*, petitioner's action seeking to invalidate the Waterways Provision under Section 502 will cease to present a "live" controversy, because the Waterways Provision will be abrogated by the contrary interpretation in *Procopio*. *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted); cf. *American Foreign Serv. Ass'n* v. *Garfinkel*, 490 U.S. 153, 158-159 (1989) (per curiam) (dismissing as moot a dispute over the scope of a regulation that had been invalidated by a lower court and amended by the agency). The absence of a live controversy would be especially evident here because the interpretation of "served in the Republic of Vietnam," 38 U.S.C. 1116(a)(1)(A), adopted in *Procopio* is precisely the one petitioner advocated in his own case, see p. 3, *supra*.

To be sure, *Procopio* does not bear directly on the question presented in this case—whether the Waterways Provision is subject to pre-enforcement review in the Federal Circuit under Section 502. *Procopio* arose not from a petition for review under Section 502, but rather from an appeal of an individual benefits determination through the Board and the Veterans Court. 2019 WL 347202, at *1. If the Federal Circuit's decision in *Procopio* remains in force, however, petitioner will have no practical or legal interest in pursuing his pre-enforcement challenge to the disputed Manual provision, since the rule announced in *Procopio* will govern his pending appeal from the denial of his benefits claim.

3. Because the Solicitor General has not yet decided whether to seek the Court's review in *Procopio*, this case is not currently moot, and the government expects that the case will not become moot before the scheduled oral argument on February 25, 2019. The case will become moot, however, if the government declines to seek further review in *Procopio* or if this Court denies a petition for a writ of certiorari, because the en banc Federal Circuit's decision will then constitute a binding interpretation of the term "served in the Republic of Vietnam," 38 U.S.C. 1116(a)(1)(A), that abrogates the Waterways Provision and terminates the live controversy in petitioner's Section 502 action. Even if the government seeks and this Court grants review in *Procopio*, petitioner's Section 502 action will likely become moot because the Waterways Provision will be superseded by whatever interpretation of "served in the Republic of Vietnam," *ibid.*, this Court adopts (unless this Court's interpretation leaves in place the prior ambiguity that led VA to adopt the Waterways Provision).

Because it is possible that this case could become moot after the scheduled argument but before the Court has issued a decision, the Court may wish to remove this case from the argument calendar until the Solicitor General determines whether to seek review in *Procopio* and this Court conducts any appropriate subsequent proceedings. Alternatively, the government will be prepared to discuss mootness at oral argument on February 25, 2019.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

FEBRUARY 2019