

No. 17-1679

**In the
Supreme Court of the United States**

ROBERT H. GRAY,

Petitioner,

v.

ROBERT WILKIE,

SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

**PETITIONER'S RESPONSE TO THE
GOVERNMENT'S SUGGESTION OF
POTENTIAL FUTURE MOOTNESS**

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**PETITIONER’S RESPONSE TO THE
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Petitioner Robert H. Gray files this response to the Government’s February 1, 2019 memorandum regarding *Procopio v. Wilkie*, No. 17-1821, 2019 WL 347202 (Fed. Cir. Jan. 29, 2019), and the potential future mootness of this case. Gray agrees with the Government that the case is not moot now, and will not be moot in three weeks when the case is scheduled to be argued. While it is possible that the Federal Circuit’s decision could ultimately result in Gray receiving the relief that he seeks—if and when it becomes final and the Department of Veterans Affairs (VA) rescinds the rule at issue—that future possibility does not warrant delay of the Court’s consideration of the important threshold jurisdictional question presented in this case. Sadly, VA has a long history of fighting favorable rulings for veterans to the end. Meantime, the jurisdictional question in this case has broad significance for *all* veterans, and the Court can and should proceed forward with resolving it here, as planned.

1. First and foremost, Gray agrees with the Government that “this case is not currently moot” and “is not likely to become moot before the scheduled oral argument on February 25, 2019.” Gov’t Mem. 2. While the Federal Circuit’s decision in *Procopio* is important and appears to grant significant (and long overdue) relief to blue-water veterans like Gray, it means at most that this case “*could* become moot” at some later point in time. *Id.* (emphasis added).

However, that will not happen until, at the very least, VA formally rescinds the Waterways

Provision—the interpretive rule directly at issue in this case. The Waterways Provision was promulgated by VA through its *Adjudication Procedures Manual, M21-1*. See JA58-79. Gray’s petition for review in the Federal Circuit asked that court to invalidate the Waterways Provision, pursuant to 38 U.S.C. § 502 and the Administrative Procedure Act, 5 U.S.C. § 706. The *Procopio* decision does not mention the Waterways Provision or directly strike it down. Gray’s challenge therefore cannot become moot unless and until VA actually rescinds that rule.

No such rescission has occurred, or even appears imminent. The Government’s memorandum makes clear that VA and the Solicitor General are in the early stages of actively considering filing a petition for certiorari seeking further review in *Procopio*. Gov’t Mem. 2, 8-9. Of course, the Government typically makes such decisions carefully and with due deliberation, following extensive and often time-consuming consultation with stakeholder agencies. See, e.g., *Iancu v. Brunetti*, No. 18-302 (petition for certiorari filed 148 days after Federal Circuit’s decision); *United States v. Allen*, No. 17A800 (petition for certiorari *not* filed, despite Government requests for 30-day and 28-day extensions of 90-day deadline).

Although the outcome of that process is of course not known today, there is a serious possibility that the Solicitor General will seek certiorari in *Procopio*. Indeed, the fact that the Solicitor General has made clear that he expects significant consideration of the matter indicates that the Government already views *Procopio* as a serious candidate for certiorari. Moreover, VA has a long history of resisting the interpretation of the Agent Orange Act embraced by *Procopio*. See Pet’r Br. 7-11; Gov’t Br. 10-14. And

neither the Solicitor General nor VA have suggested, in any way, that they agree with *Procopio* or plan to acquiesce in its holding. In these circumstances, there is a serious possibility that the Government will choose to seek certiorari. Any such petition would most likely not be acted on until next fall, and if it is granted, the Court would not hear *Procopio* until next December—long after the Court would issue a decision in this case if it goes forward as scheduled.

Even if the Government ultimately chooses not to seek certiorari, it is uncertain how long it would take VA to formally withdraw the Waterways Provision and begin granting benefits to veterans such as Gray. It is quite possible that this would not happen for quite some time after this case is argued later this month.

2. Because—as the parties agree—the case is not moot, and is not likely to become moot before oral argument or for some time thereafter, the Court should proceed to hear and resolve the case during the current Term, as planned.

Doing so would serve the interests of justice and provide important clarity for veterans and the Federal Circuit. After all, the jurisdictional question presented in this case is of great importance to *all* veterans, not just those potentially impacted by *Procopio*. See Pet. 30; Pet. Reply 11. The Federal Circuit’s decisions here and in *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017), improperly narrow the scope of preenforcement judicial review granted by Congress in 38 U.S.C. § 502. Clarifying the Federal Circuit’s jurisdiction will provide much-needed guidance to veterans and that court, and (if Gray prevails) will restore a much-needed judicial check on VA

rulemaking. Delaying or avoiding resolution of this issue will only prolong the confusion and likely require the Court to invest significant time and effort in addressing a different version of this case, from scratch, months or years down the road.

This case is now almost fully briefed and ready for decision. Gray’s reply will be filed in less than two weeks, and oral argument is scheduled for later this month. The Court could readily resolve this case before the fate of *Procopio* and the Waterways Provision finally becomes clear, one way or the other. Notably, the Government itself does not ask this Court to remove the case from the argument calendar, further underscoring the uncertainty as to whether it will in fact become moot. Instead, the Government has sensibly suggested that oral argument would provide an opportunity for the Court to ask any questions it may have about mootness.¹

¹ Even if this case does eventually become moot based on future events arising from the *Procopio* decision, that would not present an insuperable Article III obstacle to this Court’s resolving the question presented in this case, because that question—the scope of the Federal Circuit’s jurisdiction over challenges to VA action under 38 U.S.C. § 502—equally implicates subject-matter jurisdiction. *See, e.g., Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007) (noting that “there is no mandatory sequencing of jurisdictional issues” and that “[j]urisdiction is vital only if the court proposes to issue a judgment on the merits” (citations omitted)); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 112-17 (1998) (Stevens, J., concurring in the judgment) (“We have routinely held that when presented with two jurisdictional questions, the Court may choose which one to answer first.”). Gray welcomes the opportunity to address the matter, if and when the Waterways Provision is eventually rescinded.

Finally, removing this case from the calendar at this late date, based on what the Government itself can only say is the possibility of eventual mootness, based on uncertain future events and decisions, could make it difficult to reschedule argument for later this Term (or at the least require the Court to add the case to its April calendar). As a result, postponing or cancelling the upcoming argument might needlessly delay the resolution of this matter until next Term. There is no reason to risk such a result. As Gray has explained, the jurisdictional issue presented here has serious real-world consequences for veterans; it should not be allowed to persist a day longer than necessary.

Accordingly, the Court should proceed with the consideration and resolution of this case as scheduled.

Respectfully submitted,

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February 4, 2019