No. 22-605

In the Supreme Court of the United States

MILITARY-VETERANS ADVOCACY INC., PETITIONER

v.

DENIS R. MCDONOUGH, 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 court of appeals' judgment upholding a federal agency's denial of a petition for rulemaking should be vacated under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

ADDITIONAL RELATED PROCEEDING

United States Court of Appeals (Fed. Cir.):

Military-Veterans Advocacy, Inc. v. *Secretary of Veterans Affairs*, No. 20-2086 (June 17, 2022)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 38 F.4th 154.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2022. A petition for rehearing was denied on September 23, 2022 (Pet. App. 46a-47a). The petition for a writ of certiorari was filed on December 19, 2022. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner filed a petition asking the Department of Veterans Affairs (VA) to issue a rule related to certain service-connected disability compensation benefits. The VA denied the petition. Pet. App. 21a-35a. The

court of appeals denied the petition for review. *Id.* at 1a-20a.

1. Wartime veterans are entitled to seek compensation for disabilities arising from their time in service. 38 U.S.C. 1110; see *Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011). A veteran applying for such benefits generally must establish, among other requirements, 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). As to certain types of claims, however, Congress has determined that requiring the veteran to establish a service connection could be overly burdensome. In those circumstances, Congress has instead directed that, when veterans who served in particular places at particular times develop particular disabilities, those disabilities are presumed to be service-connected. See, *e.g.*, 38 U.S.C. 1112, 1116-1118. The inapplicability of any such presumption, however, does not by itself bar a veteran from benefits, since a veteran who is not entitled to a statutory presumption generally may offer individualized proof that his own disability is service-connected. See 38 U.S.C. 1113(b).

The Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11, establishes one such presumption. See 38 U.S.C. 1116. Agent Orange is an herbicide (composed of equal parts 2,4-dichlorophenoxyacetic acid and 2,4,5-trichlorophenoxyacetic acid, the latter of which contains dioxin, a highly toxic contaminant) that was widely used by the U.S. military for tactical defoliation during the Vietnam War. Pet. App. 2a. The Agent Orange Act provides that "a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era and has a disease" listed in the statute

or in regulations promulgated by the VA generally "shall be presumed to have been exposed during such service to an herbicide agent containing dioxin or 2,4-dichlorophenoxyacetic acid" and "to any other chemical compound in an herbicide agent." Sec. 2(a)(1), § 316(a)(3), 105 Stat. 12; see § 316(a)(2)(A)-(C), 105 Stat. 11 (listing diseases); § 316(a)(1)(B), 105 Stat. 11 (authorizing the VA to adopt regulations specifying "additional disease[s]"). The Agent Orange Act further provides that, if one of those listed diseases manifests "in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era," that disease "shall be considered to have been incurred in or aggravated by such service." § 316(a)(1), 105 Stat. 11. Congress later changed the relevant service period from "during the Vietnam era" to "during the period beginning on January 9, 1962, and ending on May 7, 1975." Veterans' Benefits Improvements Act of 1996, Pub. L. No. 104-275, § 505(b), 110 Stat. 3342; cf. 38 U.S.C. 101(29) (defining "Vietnam era" to encompass a different time period). Following notice-and-comment rulemaking, the VA promulgated regulations to implement the Agent Orange Act. 58 Fed. Reg. 29,107, 29,109 (May 19, 1993) (final rule); see 38 C.F.R. 3.307(a)(6)(iii).

In 2011, citing *inter alia* its general rulemaking authority under 38 U.S.C. 501, the VA extended the presumption of herbicide exposure to "[a] veteran who, during active military, naval, or air service, served between April 1, 1968, and August 31, 1971, in a unit that, as determined by the Department of Defense, operated in or near the Korean DMZ in an area in which herbicides are known to have been applied during that period." 76 Fed. Reg. 4245, 4248 (Jan. 25, 2011) (final

rule); see 38 C.F.R. 3.307(a)(6)(iv). Congress later enacted a statute to similar effect. Blue Water Navy Vietnam Veterans Act of 2019, Pub. L. No. 116-23, § 3(a), 133 Stat. 969; see 38 U.S.C. 1116B.

In 2015, again citing *inter alia* its general rulemaking authority, the VA further extended the regulation to cover "[a]n individual who performed service in the Air Force or Air Force Reserve under circumstances in which the individual concerned regularly and repeatedly operated, maintained, or served onboard C-123 aircraft known to have been used to spray an herbicide agent during the Vietnam era." 80 Fed. Reg. 35,246, 35,248 (June 19, 2015) (interim final rule); 83 Fed. Reg. 53,179, 53,182 (Oct. 22, 2018) (adopting interim final rule as final rule); see 38 C.F.R. 3.307(a)(6)(v).

2. On December 3, 2018, petitioner requested that the VA engage in rulemaking to promulgate new regulations extending "the presumption of Agent Orange exposure to veterans serving on Guam from January 9, 1962 through December 31, 1980 and on Johnston Island from January 1, 1972 until September 30 1977." Pet. App. 51a; see *id.* at 51a-54a; see also 5 U.S.C. 553(e); 38 U.S.C. 501(d). Petitioner later amended its request to change the starting date for Guam veterans to August 15, 1958, C.A. App. 2152, and to include veterans who served in American Samoa, Pet. App. 48a; C.A. App. 2087, 2152-2153.

In support of its request, petitioner included affidavits from servicemembers who claimed to have seen Agent Orange in Guam during the relevant time, along with reports "confirming the presence of dioxin on Guam" and "trace [a]mounts" of 2,4-dichlorophenoxyacetic acid and 2,4,5-trichlorophenoxyacetic acid. Pet. App. 48a-49a; see *id.* at 51a-52a. Petitioner also averred

that Johnston Island "was a storage site for Agent Orange drums between 1972 and 1977," during which time "corrosion caused significant leakage which seeped into the grounds," causing "rampant" contamination. *Id.* at 52a-53a.

3. The VA denied petitioner's request for rulemaking. Pet. App. 21a-35a. The VA explained that the Department of Defense (DoD), "working closely with the VA," *id.* at 22a, had completed "an extensive review of records concerning the use, testing, storage, and transportation of tactical herbicides," and had "found no evidence of Agent Orange or other tactical herbicides on Guam," *id.* at 23a. The VA observed that the Government Accountability Office (GAO) had conducted a similar review and had "found no evidence of tactical herbicides on Guam after reviewing DoD documents and other government records, and interviewing Veterans who alleged Agent Orange exposure while serving on Guam." *Ibid.*

The VA further explained that the trace levels of 2,4-dichlorophenoxyacetic acid and 2,4,5-trichlorophenoxyacetic acid that were found in soil samples on the island were "expected" because those chemicals "were components of commercial herbicides that were commonly used on foreign and stateside military bases, in Guam and elsewhere, for standard vegetation and weed control." Pet. App. 23a. The VA observed that "[c]ommercial products containing" those chemicals "continue to be sold in the United States and throughout the world." *Ibid.* "Thus," the VA concluded, "the presence of trace levels" of those chemicals "cannot be construed as evidence of the presence of Agent Orange or tactical herbicides in such locations." *Id.* at 24a. Petitioner contended that "the difference between tactical herbicides

and commercial herbicides 'is of no moment.'" *Ibid.* In rejecting that contention, the VA explained that "Congress established [the] presumptive service connection" because of "the uniquely high risk of exposure, and corresponding risk to Service members' health, posed by large-scale application of herbicides for the deliberate purpose of eliminating plant cover for the enemy, as was done in the Republic of Vietnam"—not to address the "routine use of standard commercial herbicides" that are "commonly used worldwide for standard vegetation and weed control." *Id.* at 24a-25a (citation omitted).

The VA acknowledged that its regulation "recognizes two other specific situations where the risk of exposure was high for an ascertainable group of people: Veterans who served in or near the Korean demilitarized zone where herbicides were known to have been applied, and individuals whose duty regularly and repeatedly brought them into contact with the C-123 aircraft that conducted Agent Orange spray missions in Vietnam." Pet. App. 26a. But the VA explained that "[t]he exposure scenario [petitioner] would like included in the presumption is not comparable" to those situations, both of which "directly relate to the deliberate application of herbicides for a tactical military purpose on a broad scale." *Ibid.* The VA observed that "[e]xpanding the regulation as [petitioner] urge[d] would leave no principled reason why all military personnel throughout the United States and the world whose bases engaged in standard vegetation and weed control or contained trace amounts of dioxin would not qualify for a [service-connection] presumption." *Ibid.*; see *id.* at 33a n.3 (observing that petitioner's June 2020 letter to the agency recognized as much).

The VA further explained that affidavits and photographs that petitioner had submitted in support of its request did not establish the widespread use of Agent Orange that would justify a presumption of exposure for every veteran who had served in Guam. Pet. App. 27a-28a. The VA emphasized, however, that individual servicemembers, including the affiants, retained "the opportunity to establish that any current disabilities were the result of herbicide exposure in service." *Id.* at 28a.

Finally, the VA explained that, although "nearly 25,000 barrels of Agent Orange were moved to Johnston Island" and stored there from 1972 to 1977, testing showed that "concentrations of [2,4-dichlorophenoxyacetic acid and 2,4,5-trichlorophenoxyacetic acid] in ambient air and water samples on Johnston Island" were "'well below permissible levels,'" perhaps because of the "densely compacted coral" at the storage site, "the storage location," and "wind patterns." Pet. App. 30a-31a (citation omitted). The VA explained that "DoD's extensive review of records concerning the use, testing, storage, and transportation of tactical herbicides found no evidence of Agent Orange or any other tactical herbicide having been present on American Samoa." *Id.* at 32a.

4. The court of appeals denied petitioner's petition for review. Pet. App. 1a-20a.

Petitioner argued that, in denying the petition for rulemaking, the VA had "misinterpreted the Agent Orange Act as applying only to tactical herbicides—not commercial ones." Pet. App. 12a. In rejecting that argument, the court of appeals explained that the statute "provide[s] a decent example reflecting the kinds of circumstances that have merited presumptions in the past," and that the VA reasonably had "looked to those

circumstances, compared them to Guam's, [and] found them not comparable." *Id.* at 12a-13a. "That comparison and judgment," the court concluded, "did not rest on any misconception about what the Act *itself* does." 38 F.4th at 161; see Pet. App. 13a. The court further explained that, "even assuming (for argument's sake) that the Act *itself* does not distinguish between tactical and commercial herbicides when giving *its* presumptions, the VA did not rest its denial [of rulemaking] on any contrary understanding of the Act." *Ibid.* "Rather," the court observed, the VA had "rested its denial on the view that Congress gave those presumptions because it was concerned about the spraying of millions of gallons of tactical herbicides—and that Guam did not present comparable circumstances." Pet. App. 13a.

The court of appeals also rejected petitioner's contention that the VA's denial of rulemaking "'lacked a rational basis in this record' and was therefore arbitrary and capricious." Pet. App. 15a (citation omitted). The court explained that it was not "arbitrary (or capricious, or irrational) for the VA to rely on the GAO's and DoD's no-evidence findings" in determining that "the nature and extent of herbicide activity in Guam" did not "'warrant[] a presumption of exposure for all veterans' who served there during the relevant period." *Ibid.* (brackets and citation omitted). The court also observed that the VA had "explicitly considered" the affidavits that petitioner had submitted, and it held that the VA's "giving more weight to the DoD's and GAO's findings" was not arbitrary or capricious. *Id.* at 15a-16a. Finally, the court explained that the VA had adequately explained why the trace levels of 2,4-dichlorophenoxyacetic acid and 2,4,5-trichlorophenoxyacetic acid found on Guam

and Johnston Island "did not warrant presuming exposure for every single veteran who served" in those areas "during the relevant period." *Id.* at 16a; see *id.* at 16a-18a.

5. Approximately two months after the court of appeals issued its decision, Congress enacted the Veterans Agent Orange Exposure Equity Act of 2022, Pub. L. No. 117-168, Tit. IV, § 403, 136 Stat. 1780. As relevant here, that statute, which petitioner calls the "PACT Act," amends the Agent Orange Act to extend the presumptions of herbicide exposure and service connection to cover "active military, naval, air, or space service * * * performed on Guam or American Samoa, or in the territorial waters thereof, during the period beginning on January 9, 1962, and ending on July 31, 1980, or served on Johnston Atoll or on a ship that called at Johnston Atoll during the period beginning on January 1, 1972, and ending on September 30, 1977." § 403(b)(3), 136 Stat. 1781 (38 U.S.C. 1116(d)(5)).

After the PACT Act was enacted, petitioner moved the court of appeals to vacate its decision and petitioned the court for rehearing. C.A. Doc. 60 (Aug. 29, 2022); C.A. Doc. 61 (Aug. 29, 2022). The court summarily denied both requests. Pet. App. 46a-47a.

ARGUMENT

Petitioner contends (Pet. 9-17) that enactment of the PACT Act has mooted its challenge to the Secretary's denial of the petition for rulemaking, and that this Court should therefore grant the petition for a writ of certiorari and vacate the judgment below under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Intervening events that postdate a court of appeals decision justify *Munsingwear* vacatur only if (1) those events have rendered the case moot and (2) but for the moot-

ness, the decision would have warranted this Court's review. Neither of those prerequisites is satisfied here. For the same reason, petitioner's alternative request (Pet. 17-26) for plenary review likewise should be denied.

1. a. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox* v. *Service Employees International Union, Local 1000*, 567 U.S. 298, 307 (2012) (citation and internal quotation marks omitted). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* at 307-308 (brackets and citation omitted).

This case is not moot. That is most obvious given the difference between what petitioner requested from the VA and what Congress subsequently enacted. The PACT Act extends the presumptions of herbicide exposure and service connection to certain servicemembers who served on Guam or American Samoa between January 9, 1962, and July 31, 1980. 38 U.S.C. 1116(d)(5). Petitioner, in contrast, asked for the relevant service period for eligible individuals to begin on August 15, 1958. Pet. App. 21a, 33a; C.A. App. 2152. Petitioner's request, if granted, would thereby extend the presumptions to a larger class of veterans than the statute does. Although petitioner labels that difference "marginal[]" and "immaterial," Pet. 12, this Court has made clear that any remaining "concrete interest, however small," prevents a case from becoming moot, *Knox*, 567 U.S. at 307 (citation omitted).

Petitioner contends (Pet. 12) that its petition for rulemaking was a "solely procedural" request untethered to the substantive scope of any resulting rule. But petitioner's request to initiate rulemaking remains un-

fulfilled by the agency, which has not initiated new rulemaking, and it could be granted if petitioner prevailed in this litigation. Put differently, it would not be "impossible," *Knox*, 567 U.S. at 307, for a court to grant petitioner meaningful relief. If the agency's denial of the petition for rulemaking were held to be arbitrary and capricious, a court could (for example) remand to the agency to reconsider the petition free of the flawed rationales that underlay the earlier denial, which could in turn result in the initiation of rulemaking proceedings. Cf. *Massachusetts* v. *EPA*, 549 U.S. 497, 518, 525-526 (2007). And while the PACT Act may make that resolution unlikely, that does not render the case moot. Cf. *Mission Product Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (explaining that, even if "[u]ltimate recovery on [the plaintiff's] demand may be uncertain or even unlikely," a case is not moot if there remains "any chance" of recovery).

b. Even if this case were moot, vacatur under *Munsingwear* would be unwarranted. Vacatur of a lower court's decision because of intervening mootness is generally available only to "those who have been prevented from obtaining the review to which they are entitled." *Camreta* v. *Greene*, 563 U.S. 692, 712 (2011) (quoting *Munsingwear*, 340 U.S. at 39). It therefore has long been the position of the United States that, when a case becomes moot after a court of appeals enters its judgment, but before this Court acts on a petition for a writ of certiorari, *Munsingwear* vacatur is appropriate only if the question presented would have warranted this Court's review if the case had remained live. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States,* cert. denied, 435 U.S. 942 (1978) (No. 77-900); Gov't Pet. for Cert. at 16-17, *Yellen* v. *United*

States House of Representatives, 142 S. Ct. 332 (2021) (No. 20-1738); see also Stephen M. Shapiro et al., *Supreme Court Practice* 19-28 & n.34 (11th ed. 2019) (listing cases). Only in that circumstance does a post-appeal mooting event deprive the losing party of any further appellate review that it would otherwise have received. For reasons explained immediately below, this case does not satisfy that requirement.

2. The court of appeals correctly upheld the VA's denial of the petition for rulemaking, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

a. The court of appeals correctly held that the VA's denial of the petition for rulemaking was not based on an incorrect interpretation of the Agent Orange Act. Petitioner argued below that the VA had denied the petition because it "misinterpreted the Agent Orange Act as applying only to tactical herbicides—not commercial ones." Pet. App. 12a; see Pet. C.A. Br. 30 ("In VA's view, the Agent Orange Act applies only to so-called tactical herbicides, and according to VA, only commercial herbicides were used on Guam and Johnston Island."). But as the court correctly recognized (Pet. App. 12a-14a), the VA did not base its denial on any such misinterpretation.

Nowhere did the VA state that the Agent Orange Act forbids extending the presumptions of herbicide exposure and service connection to servicemembers who had sufficiently high exposures only to commercial herbicides. See 38 F.4th at 162 ("[T]he VA's denial did not claim that the VA lacked *authority* to grant the petition."); Pet. App. 14a; cf. Pet. App. 21a-35a. Rather, the VA merely explained that the statute does not *require* extending the presumptions to the circumstances pro-

posed by petitioner, in particular because the Agent Orange Act requires those presumptions "solely for Veterans who served in Vietnam." *Id.* at 25a. Nevertheless, the VA recognized that it could invoke its general rulemaking authority to extend the presumptions of herbicide exposure and service connection to circumstances beyond those required by the Agent Orange Act itself. Indeed, the VA observed that it already had done so twice by regulation. See *id.* at 26a.

As the VA explained, "a presumption is an *exception* to the general burden of proof, designed for unique situations, such as where evidence of a toxic or environmental exposure, and associated health risk, are strong in the aggregate, but hard to prove on an individual basis." C.A. Doc. 20, at 87 (Apr. 15, 2021); see Pet. App. 28a-29a. The VA further explained that "[p]resumptions are a blunt tool, contemplate false positives, and, in the area of potential exposure to toxic substances, should be employed only when the evidence demonstrates risk of exposure at meaningful levels." Pet. App. 29a. The VA concluded that a presumption was unwarranted for the "exposure scenario" that petitioner had identified, *id.* at 26a, because petitioner had not adduced sufficient evidence to demonstrate that the class of affected veterans suffered a widespread "risk of exposure at meaningful levels," *id.* at 29a; because extending the regulatory presumptions would "implicate" "false positives," *ibid.*; and because petitioner's proposal generally was not "comparable" to the other circumstances in which the VA had determined that presumptions of herbicide exposure and service connection were warranted, *id.* at 26a.

Petitioner does not challenge those conclusions in this Court. Instead, petitioner argues (Pet. 22-26) that

the court of appeals violated the rule announced in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), by upholding the VA's denial of rulemaking on grounds that the agency itself had not invoked. According to petitioner, the VA "based [its] denial of [petitioner's] petition on statutory interpretation of the Agent Orange Act whereas the Federal Circuit based its denial of review on the exercise of the Secretary's policy discretion under 38 U.S.C. § 501." Pet. 22. That contention is incorrect.

As noted above, the VA never claimed that it lacked statutory authority to issue the regulation that petitioner had requested. See Pet. App. 14a. To the contrary, the agency made clear that, although the Agent Orange Act itself establishes a presumption of herbicide exposure and service connection "solely [for] Veterans who served in Vietnam," the VA had previously invoked its general rulemaking authority to extend the presumptions to certain "Veterans who served in or near the Korean demilitarized zone" and to "individuals whose duty regularly and repeatedly brought them into contact with the C-123 aircraft that conducted Agent Orange spray missions." *Id.* at 25a-26a. The VA then explained that "[e]xpanding the regulation as [petitioner had] urge[d]" would "go far beyond" both "Congress's intent in passing the Agent Orange Act" and the "VA's intent to cover comparable scenarios in the current regulation." *Id.* at 26a.

That discussion makes clear that the VA denied the petition for rulemaking not because it construed the Agent Orange Act to forbid extending the presumptions to the circumstances petitioner had identified, but because (1) the statute does not *require* extending the presumptions in that manner, and (2) the "exposure scenario" that petitioner had identified was not sufficiently

"comparable" to the circumstances covered by existing statutory and regulatory presumptions so as to warrant the exercise of the VA's discretionary rulemaking authority to extend the regulation in the manner petitioner had proposed. Pet. App. 26a. Consistent with *Chenery*, the VA defended its decision to deny the petition for rulemaking on those very grounds, see Gov't C.A. Br. 29-30, with which the court of appeals agreed, see Pet. App. 12a-14a.

b. Except for its invocation of *Chenery*, *supra*, petitioner does not contend that the decision below conflicts with any decision of this Court or another court of appeals. And whether or not the PACT Act formally moots this case, it is a strong reason for this Court to deny plenary review. Petitioner agrees (Pet. 11) that its "interests" have been "satisfied as a result of the PACT Act." That result substantially diminishes the importance of this case. Petitioner asserts (Pet. 16) that it "is now forced to adhere to a judgment which [it] can no longer challenge on the merits," but petitioner does not explain what that judgment forces it to do. The court of appeals simply denied a petition for review of the VA's denial of a petition for rulemaking. Nothing in the court's judgment precludes petitioner from filing a new petition for rulemaking, including to implement the PACT Act.

c. Petitioner briefly contends (Pet. 14-17) that the court of appeals erred in refusing to grant rehearing and vacate its own final judgment. That contention lacks merit. Rehearing is a purely discretionary remedy, and petitioner cites no authority holding that a court of appeals must grant rehearing in circumstances like these. Petitioner likewise cites no authority holding that an appellate court must vacate its own final judg-

ment if Congress later enacts a statute addressing the same topic. Cf. *Azar* v. *Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (explaining that vacatur is a case-specific equitable remedy); *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 29 (1994) (same). And to the extent petitioner contends that the court of appeals "diverged from the standard practice of its own precedent," Pet. 17; see Pet. 15, any such divergence would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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