No. 22-605

IN THE

Supreme Court of the United States

MILITARY-VETERANS ADVOCACY INC., PETITIONER

v.

SECRETARY OF VETERANS AFFAIRS

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

REPLY BRIEF

JOHN B. WELLS
Counsel of Record

769 Robert Blvd.
Suite 201D
Slidell, LA 70458
johnlawesq@msn.com
985-641-1855

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 350-9073

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

MVA's petition seeks three forms of relief: vacatur of the Secretary's denial of MVA's petition, remand to the Secretary, and vacatur of the Court's opinion. As to vacatur of the Federal Circuit's Court's opinion, the Secretary is wrong at both steps of the analysis. MVA's appeal is moot, and the Secretary's argument to the contrary misunderstands the remedies MVA sought below and on appeal. Given that mootness, the Court should vacate the Federal Circuit's opinion. While vacatur entails an equitable inquiry, the equitable factors favor vacatur, and the Court should grant MVA's Petition.

REASONS FOR GRANTING THE PETITION

I. This Case is Moot and Should be Vacated.

This Case Became Involuntarily Moot Following the Federal Circuit's Opinion and Should be Summarily Vacated.

The Secretary does not dispute that the PACT Act applies to this still-pending litigation, nor that a statutory change can moot a rulemaking case. Most importantly, he does not dispute that the PACT Act provides the presumption of exposure sought by rulemaking. Instead, the Secretary asserts a live dispute because the statutory presumption covers a narrower period of service than MVA proposed. BIO at 10. The Secretary's argument misunderstands the

nature of the relief sought in MVA's petition and this appeal—namely, the initiation of rulemaking. Considering the narrow relief available in this posture, MVA's petition and appeal are moot.

The Secretary's argument against mootness might be stronger, had not the same panel of the same Court based on oral argument heard on the same day as the instant case, reviewed a similar petition for rulemaking to cover herbicide use in an area also incorporated y the PACT Act ruled that that portion of the Petition was moot. *Mil.-Veterans Advoc. Inc. v. Sec'y of Veterans Affs.*, 63 F.4th 935, 943 (Fed. Cir. 2023)

A. The Secretary's mootness argument misconstrues the available relief.

1. The Secretary misconstrues the narrow relief sought by MVA's petition and appeal. MVA sought merely to commence rulemaking to consider whether a regulatory presumption of exposure was warranted. Certainly, MVA offered a rule with proposed periods of service. But to provide all the relief sought by petition, the Secretary would merely have needed to commence rulemaking; he need not have agreed with MVA's proposed periods of service or any other part of MVA's proposal. He need not even have agreed that a rule should issue at all—just that rulemaking should be initiated to consider the question.

2. The same goes for this Petition. MVA sought review of the Secretary's decision not to commence rulemaking, not review of a rule on its merits. In this posture, that is all MVA could have asked of the Court. *See Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1350-51 (Fed. Cir. 2011) (per curiam). A dispute over the scope of a rule, including the periods of service, would be premature. MVA could only raise such a challenge in a subsequent appeal directed to the substance of a promulgated rule. Review of a § 553(e) rulemaking petition is "distinct from the more typical challenge to a rule or the process by which a rule was made". It would be "premature" to review the merits of a rule (e.g., its temporal scope) before the agency "produce[s] a rule with which petitioners continue to disagree." *Cent. La. Elec. Co. v. ICC*, 724 F.2d 173, 176 (D.C. Cir. 1983) (per curiam). The mootness cases cited by the Secretary concern whether a party has obtained relief on the merits of an adjudicated claim; none concern the relief at issue in § 553(e) rulemaking appeals. The mootness inquiry should be driven by the relief available in this posture, which the Secretary ignores. In short, the Secretary is arguing about whether some future, hypothetical appeal—not this one—is moot.

3. In further support of MVA's mootness argument, Congress is currently considering HR 1191, which would backdate the commencement date of the presumptive process to August 15, 1958, the date proposed by MVA. *See*, BILLS-118hr1191ih.pdf (congress.gov).

B. Congress has resolved the parties' dispute, and the petition and appeal are moot.

4. When the analysis is properly framed in terms of the narrow relief sought by petition and appeal, both are moot. The only relief the Secretary could have granted was to initiate rulemaking, which would have left the temporal scope of any rule for another day. See 5 U.S.C. § 553. The only relief the Court can grant in this Petition is to set aside the Secretary's denial and remand for rulemaking; it cannot in this posture direct that a rule issue or spell out the temporal scope of such a rule. See id. § 706(2); *Flyers Rights Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 747 (D.C. Cir. 2017). The PACT Act provides far more than MVA sought under § 553(e), bypassing the rulemaking process MVA requested and providing the presumption directly by statute. When Congress enacts "a new law that resolves the parties' dispute during the pendency of an appeal," that law "renders the case moot."

E.g., *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1167 (9th Cir. 2008); accord *Coal. of Airline Pilots Ass'ns v. FAA*, 370 F.3d 1184, 1191 (D.C. Cir. 2004).

5. The parties' dispute was whether rulemaking on a presumption should commence, and the PACT Act preempts and moots that debate by providing the presumption itself. It is immaterial that Congress enacted a period of service shorter than MVA proposed. Contrary to the Secretary's arguments, the rule of mootness arising from intervening legislation holds even if Congress disagrees with the petitioner's position and legislates a different result. *See, e.g.*, *Stratman*, 545 F.3d at 1167-72; *Airline Pilots*, 370 F.3d at 1191. And again, the relief requested (and available) here was initiation of rulemaking, not issuance of a rule with a particular temporal scope.

6. Consider an analogous example: When an agency decides to initiate rulemaking, that decision typically moots pending petitions for rulemaking, appeals, and mandamus actions. See, e.g., *Cent. La.*, 724 F.2d at 175-76. This is true even though the agency might ultimately decline to issue a rule—or issue a rule different from a petitioner's. "To hold otherwise" would ignore "the very limited relief this court may grant" on review of a

rulemaking petition. Id. at 176. The same applies here: The limited relief available—initiating rulemaking to consider a presumption—has been mooted by Congress's judgment that a presumption is warranted. There remains no question whether the Secretary should consider a presumption of exposure. Congress has provided the answer—yes— and has now done the consideration for us. Accordingly, MVA's petition and appeal are moot.

7. Concerns about the temporal scope of that presumption were not presented by MVA's petition, the Secretary's denial, or this appeal, and they cannot keep alive this threshold dispute about whether to commence rulemaking.

C. If not moot, the case should be remanded.

8. If the Court agrees with the Secretary that the petition and appeal are not moot, it should grant rehearing, vacate, and remand. As noted above, the Secretary does not dispute that the PACT Act applies to this pending case. That change in applicable law warrants remand. To the extent there is still a live dispute as the Secretary urges—for instance, about temporal scope—it is a dispute for the Secretary to resolve in the

first instance. *Burlington N. Inc. v. United States*, 661 F.2d 964, 975-76 (D.C. Cir. 1981) ("[W]e decline to address the applicability … of the newly enacted statute and leave its initial application to the Commission on remand.")

II The Secretary's Argument of Tactical versus Commercial Herbicide Use Is Without Merit.

9. The Secretary in his brief in opposition, urges the Court to consider that the Secretary's finding that only commercial herbicide was used on Guam, rather than tactical herbicides. BIO at 5. This argument historically relied upon by the Secretary is simply a red herring. At the same time, the Secretary concedes that the presence of "f 2,4- dichlorophenoxyacetic acid and 2,4,5-trichlorophenoxyacetic acid that were found in soil samples on the island were "expected". BIO at 5. Effectively, the Secretary makes MVA's case that herbicides were used on Guam within the scope of the Agent Orange Act of 1991

10. Notably, the Agent Orange Act of 1991, Pub. L. 102-4, does not mention the terms "commercial" or "tactical." In their opposition, the Secretary states that the VA explained Congressional intent to cover only "tactical;" herbicides. BIO at 6. Yet these bald assertions fail to cite to any legislative history to support their proposition –

because, of course, there is none. Notably, there is no official source differentiating in the chemical components of so-called tactical and commercia herbicides. Instead, the terms address use rather than intensity, composition and frequency of use. Tactical and commercial are made up terms that have no relation to Congressional desire to cover veterans sickened by the use of the herbicides. One could call the herbicide a "pork chop" and it would or should have the same weight attributed to the terms by the Secretary. In other words, it is a distinction without a difference.

11. Most notably, in providing herbicide coverage for Guam and other areas, Congress did not differentiate between tactical and commercial herbicides. The Secretary, while going to great lengths to replicate the Secretary's tactical/commercial deception, they failed to address this irreconcilable and contradictory dichotomy. If, in fact, the Secretary was correct and Congress intended to cover only tactical herbicides, it is bizarre that they did not use the PACT Act to clarify that position. Instead, Congress covered all herbicide use on Guam irrespective of the tactical/commercial designations.

12. Unfortunately, the Court below fell for the Secretary's bait and switch illusion. BIO at 8. They allowed the Secretary to pull the wool over

their eyes. Despite the lack of official support for a distinction that would be relevant to treating veterans disabled by herbicide. No such distinction exists.

13. In reaching their decision, the Court below failed to follow the dictates of this Court concerning statutory interpretation. The plain language, given its contemporary meaning, controls. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019); *O'Farrell v. Dep't of Def.*, 882 F.3d 1080, 1084 (Fed. Cir. 2018). Here, the pertinent provision of the statute reads as follows:

> For purposes of establishing service connection for a disability or death resulting from exposure to a herbicide agent, including a presumption of service. connection under this section, a veteran who performed covered service, shall be presumed to have been exposed. during such service to an herbicide agent containing dioxin or 2,4-dichlorophenoxyacetic acid, and may be presumed to have been exposed during such service to any other. chemical compound in an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

38 U.S.C. § 3116(c). Notably, the words tactical or commercial do not appear in the legislative provision. When properly read, the statute commands that any veteran exposed to 2,4-D or dioxin be covered by the presumption of exposure.

14. The Secretary relied upon a report by the Government Accounting Office (GAO) that 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." BIO at 5. *See*, *also* "Agent Orange: Actions Needed to Improve Accuracy and Communication of Information on Testing and Storage Locations,"GA0-19-24 (Nov.15, 2018). Such reliance is misplaced. Subsequent to the GAO report, the Environmental Protection Agency, working with MVA confirmed the presence of dioxin and concluded that it was most probably caused by herbicide spraying. The EPA report found as follows:

> As previously discussed, OCDD and 1,2,3,4,6,7,8-HpCDD concentrations may be attributed to other sources. Whereas the congener 1,2,3,4,6,7,8-HpCDD is not associated with. chlorinated herbicides, higher OCDD concentrations could be a marker indicating that TCDD was initially higher but has degraded. 2,3,7,8-TCDD

concentrations are anticipated in soils where residual 2,4,5-T is detected.

Taking into consideration the length of time since the reported use of chlorinated herbicides on Guam and their subsequent weathering, TCDD and/or other congeners have undergone environmental degradation. Concentrations may have originally. been higher because the relative degradation rates vary depending. on the congener and environmental conditions (EPA, 1989). Migration of dioxin congeners within the soil profile is possible over time. (Fan and others, 2006; Banout and others, 2014).

It is probable that TCDD dioxin congener concentrations detected. in soils are associated with chlorinated herbicides. Records of chlorinated herbicide use by the military on Guam (Navy, 1958) and veteran affidavits documenting the use of 2,4,5-T and 2,4,5-TP along with data collected from previous soil sampling. events suggest the presence and use of chlorinated herbicides. was likely. Finally, the herbicides in question were known to contain TCDD.

15. Guam Chlorinated Herbicides Investigation – October 2019 Data Results Task Order Number: 68HE0919F0113 Document Control Number: 0035-08-AAJD at 5.

report_to_epa_concerning_dioxin_on_guam.pdf (militaryveteransadvocacy.org).

16. As discussed above, Congress extended coverage to the veterans who served in Guam and Samoa. The EPA report, published subsequent to the GAO report provides clear and convincing evidence that the dioxin found in the soils of Guam, decades later, was a result of herbicide spraying and validated the Congressional inclusion of herbicide exposure to the sick and disabled veterans who served on Guam.

CONCLUSION

For the foregoing reasons and those stated in this Petition, Petitioner respectfully requests that the Court grant certiorari.

Respectfully submitted,

John B. Wells
Counsel of Record
MILITARY-VETERANS ADVOCACY INC.
P.O. Box 5235
Slidell, LA 70469-5235
(985) 641-1855
JohnLawEsq@msn.com