No. 23-380

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

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QUESTIONS PRESENTED

Whether the Federal Circuit's Decision Warrants Certiorari When the "Airspace" Rule was upheld despite its conflict with the ." Convention on International Civil Aviation, T.I.A.S. No. 1591, arts. 1-2 (Dec. 7, 1944) (Chicago Convention).

Whether a Proper Construction of the BWN Act Warrants Certiorari when the Federal Circuit's decision and the VA's BWN Rule conflicts with the plain statutory language and departs from the plain meaning of the Agent Orange Act and the Federal Circuit's Own decision in *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (*en banc*).

Whether the Secretary conducted a flawed interpretation of the Agent Orange Act contrary to its own established precedent and in contravention of the pro-veteran/pro-claimant canon of construction

CORPORATE DISCLOSURE STATEMENT

Military-Veterans Advocacy Inc. is a registered 501(c)(3) non-profit that is incorporated in the state of Louisiana.

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STATEMENT

In his Brief in Opposition (BIO), the Secretary conceded the difficulties in ascertaining who in Vietnam had been exposed to Agent Orange and other herbicides. BIO at 2. The difficulty is more pronounced at sea. While land-based spraying was subject to the winds that swept across South Vietnam, the contaminated dirt was more or less stable. Not so the South China Sea. Water is more fungible and the tides and currents disperse the waters over a wide area. In this respect, it is almost impossible to identify a contaminated molecule of water ingested into the shup's water distillation system.

The Secretary concedes that the Blue Water Navy Act (BWN Act) defines the phrase "offshore of Vietnam." BIO at 4. What it does not do is define the territorial sea. That is defined by the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639 (Apr. 29, 1958). Nothing in the BWN Act modifies or invalidates the recognized definition of the territorial sea. Instead, it addresses a separate but partially overlapping body of water know as "offshore."

The Secretary notes that the legislation was necessary to "mitigate concerns that VA may narrowly interpret the decision." House Report No. 116-58, BIO at 4. Yet this narrow interpretation is what the Secretary is now trying to achieve.

The Secretary argues that Congress declined to expand the statutory presumption into the airspace. BIO at 4. But the bill in question, HR 2254, the Agent

Orange Equity Act of 2009, included service in a myriad of locations and/or receipt of the Vietnam Service Medal and the Vietnam Campaign Medal. BILLS-111hr2254ih.pdf (congress.gov). HR 2254 was generally thought to be overbroad. But to say or imply that the airspace provision was the basis for the rejection of that bill is misleading.

As conceded by the Secretary, the BWN Act did not address airspace. BIO at 5. This was intentional, since the BWN Act only covered the area offshore – not the land mass. This is buttressed by the comment in the House Report that "aircraft that passed in the airspace above the offshore waters" were excluded from the Act. Congress never said or implied that they were addressing airspace above the Vietnamese land mass. They are two separate geographic areas and should be treated accordingly.

The Secretary argues that "high altitude" missions should not be covered. BIO at 5. High altitude missions were flown solely by B-52 bombers. Based in Guam, these behemoths are covered by the PACT Act. *See* Pub. L 117-168 136 Stat 1759 (August 10, 2022) § 403(d)(5). Low level, close-air support attack craft, embarked on aircraft carriers outside the territorial sea and who flew their mission at treetop levels are not covered. But geysers of contaminated dirt and debris sprayed upwards from the explosive impact of rockets, bombs and cannon touching and adhering to the underside of the aircraft.[1] These were not high-altitude flights claimed by the Secretary.

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[1] The herbicide was mixed with diesel fuel, to allow it to adhere

The Secretary further asserts that the suit on the Airspace Rule was time barred – asserting the six-year statute of limitations pursuant to 28 U.S.C. § 2401(a). While facially correct, the circumstances of this case carve an equitable exception.

In 1993 when the original adjudication manual was issued, the statute of limitations was not six years but sixty days, per then Federal Circuit Rule 15(f). *See, also, Jackson v. Brown*, 55 F.3d 589, 592 (Fed. Cir. 1995) ("[A] request for Section 502 review in this court had to be filed within 60 days of the issuance" of the challenged VA action).

It was not until 2020 that the Federal Circuit recognized that the sixty-day limitation was improper. Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs., 981 F.3d 1360, 1383 (Fed. Cir. 2020) (hereinafter *NOVA*). In *NOVA*, the court below found that the sixty-day rule was inconsistent with Congressional action. 981 F.3d qt 1384. Thus any attempt to file an action in the remaining seventy months would have been futile.

The Secretary rejects the plain language of the BWN Act which adds a new section to the Agent Orange Act. The Court below found a modification to *Procopio* and the Agent Orange Act that simply does not exist. No language in the statute or the legislative history explicitly or implicitly replaced the territorial sea.

ARGUMENT

The Secretary calls this case a "poor vehicle in which to consider the question" of the applicability of the Airspace Rule because they believe it is time barred. The Secretary is wrong.

The parties agree that the statute of limitations for actions brought under 38 U.S.C. § 502 is the six-year statute of limitations codified by 28 U.S.C. § 2401(a). In the instant case, however, petitioners were not permitted to file within the six-year period.. Instead it was improperly limited to sixty days, which tolled the limitations period.

This Court addressed the concept of equitable tolling in *Arellano v. McDonough*, 598 U.S. 1, 143 S. Ct. 543, 214 L. Ed. 2d 315 (2023), finding that the statute concerning the effective dates for benefits for a service-connection is not subject to equitable tolling. *Id* at 8. The Court reasoned that the statute in question, 38 U.S.C. § 5110 represented an exception to the default rule of equitable tolling. In Mr. Arellano's case, Congress provided detailed instructions concerning an earlier effective date.

The *Arellano* exception does not apply here. This case is subject to the presumption that federal statutes of limitations are subject to equitable tolling. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95–96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). Unlike *Arellano*, there is no Congressional signal that an exception would be required. The opposite is true. The *NOVA* court found that Section 502 "does not contain its own statute of limitations." *NOVA*, 981 F.3d at 1383. The Court further noted that other circuits "have

consistently found that actions for judicial review under the APA are subject to the limitations period in section 2401(a)." *Id.* Absent Congressional dictate, the *Irwin* presumption applies and the statute of limitations is tolled.

Even if the equitable tolling presumption did not apply, the Secretary shows a fundamental isunderstanding of the nature of the Rules MVA has challenged. In VA's view, the only action it took on December 31, 2019, was to issue a redline edit to the Airspace Rule, and the BWN Rule. On this basis, VA asserts that MVA's challenge to the Airspace Rule is untimely.

The Secretary's basis for these arguments is incorrect—VA issued the revised sections of the M21-1 Manual as full rules, not simply edits. On December 31, 2019, VA reissued revised sections of its M21-1 Manual by republishing them in their entirety on its website and making those republished sections available, in their entirety, to all front-line VA adjudicators. The Secretary's issuance of Rule "ma[de] a substantive change to the Rule and supersede[d]" the prior version of each Rule as a whole. NOVA, , 981 F.3d at 1382; *see also N.M. Health Connections v. U.S. Dept. of Health & Hum. Servs.*, 946 F.3d 1138, 1156, 1160 (10th Cir. 2019) (revised rule "superseded the original" even where "new rule adopted the same methodology as prior rules" but provided only additional explanation). As a result, the Secretary's myopic focus on only its redline changes, is misguided.

The Secretary's attempt to cast MVA's challenges to the Airspace Rule as directed to decades-old versions of the Manual are similarly off the mark. MVA's petition, filed on March 6, 2020, was well within

the six-year statute of limitations established by 28 U.S.C. § 2401.

The Secretary does not deny that the Airspace Rule eliminates the exposure presumption for veterans who flew through Vietnamese airspace. The salient point is that the Airspace Rule is inconsistent with the plain text of 38 U.S.C. § 1116, with international law, and *Procopio*.

Start with the plain text. In passing the Agent Orange Act, (AOA) Congress granted the presumption of service connection to veterans who served in the "military, naval, or *air service* … in the Republic of Vietnam." 38 U.S.C. § 1116(a). That text is unambiguous. The statute does not limit the presumption to veterans who served only on Vietnamese soil. Although VA argues that the statutory phrase "air service" does *not* plainly cover aviators, it does not explain that the phrase *does* mean, or why it is not superfluous under VA's reading. If the presumption applies to land or water—it applies to veterans who served in the "air" in the Republic of Vietnam, too.

In *Procopio*, the Court below made perfectly clear what the statutory phrase "in the Republic of Vietnam" means. "Congress chose to use the formal name of the country and invoke a notion of territorial boundaries"—as defined by international law—"by stating that 'service *in* the Republic of Vietnam' is included." 913 F.3d at 1375. As applied to long-standing international law, *Procopio*'s rule therefore dictated unambiguously that veterans who served in the territorial sea of the Republic of Vietnam are entitled to the service-connection presumption.

International law concerning airspace sovereignty is equally clear. Every nation "has complete and exclusive sovereignty over the airspace above its territory," including airspace above both "the land areas and territorial waters adjacent thereto." Convention on International Civil Aviation, T.I.A.S. No. 1591, arts. 1-2 (Dec. 7, 1944) (Chicago Convention. "This was true in 1955 when the 'Republic of Vietnam' was created. And this was true in 1991 when Congress adopted the Agent Orange Act." *Procopio*, 913 F.3d at 1375 (citation omitted). Thus, *Procopio*'s logic dictates, just as unambiguously, that aviators flying in territorial airspace above the Republic of Vietnam are entitled to the same presumption of service connection as those who sailed in the territorial sea.

None of the Secretary's counterarguments squarely address, much less refute, this straightforward conclusion. Instead he argues that it would be counterintuitive to conclude that the Congress expected the presumptions of exposure to the "highest vertical reaches" of Vietnamese atmosphere. BIO at 8. Notably the Secretary does not attempt to define the "highest vertical reaches." If referring to the 30,000-foot flight paths of the already covered heavy bombers, they might have a point. But when assessing low-level attack aircraft providing close air support of deployed troops, their point loses its edge. In this scenario, the chances of exposure in not "nonexistent," as postulated by the Secretary. BIO at 9. Instead, exposure is probable.

The Secretary again asserts that Congress rejected coverage for the airspace in the 111th Congress BIO at 8. As discussed *supr*a., that bill, HR 2254 contained many other areas including the many environs of the Pacific Ocen that rated the award of the

Vietnams Campaign Medal. Petitioner is not aware of any bill that solely addressed Vietnamese airspace. Apparently the Secretary does not know of one either.

While the legislative history of the BWN Act does exclude the airspace above the offshore waters, BIO at 9 that is of no moment, That exclusion makes sense since there was no logical way for contaminated water to reach the aircraft. Targets were located ashore and not at sea. Ordinance was not expended at sea and there was little drift of the herbicides cloud out to sea. On land, however, contaminated dirt and debris from explosions caused by bombs, missiles and cannon as well as clouds of herbicide, would logically contaminate the body and the air intakes of the low-flying jet aircraft. Thus contrary to the Secretary's protestations, BIO at 10, there is no logic to extending the restriction to the airspace over land.

This Court must reconcile the holdings of the Court below and the Secretary with national and international law as well as the intent of Congress to provide benefits for those who served in the armed services.

2. The Court below conducted a flawed interpretation of the Agent Orange Act contrary to its own established precedent and in contravention of the pro-veteran/pro-claimant canon of construction. VA can neither expand nor restrict the presumption that Congress has decreed—agency actions "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" and must be set aside. 5 U.S.C. § 706(2)(C).

The BWN Rule is equally inconsistent with VA's own regulations, which have interpreted the statutory phrase "in the Republic of Vietnam" to include the "waters offshore" the Vietnamese coast. 38 C.F.R. §

3.313. Moreover, contemporaneously with that regulation, VA expressly signaled that the presumption of service connection extended to the entire Vietnamese theater of conflict, as defined by Executive. Orders 11,231 and 11,216. VA has never rescinded its regulation, nor changed its language in any relevant respect. As a result, the contemporary meaning that VA itself assigned did *not* purport to interpret the phrase "waters offshore." Instead, it was based solely on its (erroneous) view of the regulatory phrase "duty or visitation"—a view that the Court decisively struck in *Procopio*. 913 F.3d at 1377.

Instead, VA's only substantive attack concerning the BWN Rule relies on the same sleight-of-hand it attempted with the Airspace Rule: VA implies that the BWN Act supplants the AOA or constrains the interpretation of that statute. This ignores the plain meaning of the statute it purports to interpret.

The text of the BWN Act cannot support VA's interpretation. Far from replacing the AOA, the BWN Act creates a new, additional presumption of service connection for service "offshore of the Republic of Vietnam," that stands separate and apart from the presumption created by the AOA for service "in the Republic of Vietnam.38 U.S.C.§§1116(a)(1), 1116A(a); Nothing in §1116A(a)purports to rescind the AOA or limit its scope. Indeed, VA's nonsensical reading of the BWN Act—fixing the outer limits of the presumption created by the AOA—would have the perverse result of *eliminating* any presumption of service connection under the AOA for soldiers who served their tours "in the Republic of Vietnam" on the Vietnamese mainland, but never traveled to the waters offshore. Congress cannot have intended any such absurd result. Rather, the presumptions created by the AOA and the BWN

Act operate in tandem, with the BWN Act supplementing rather than overriding the AOA.

This text does not withdraw the presumption of service connection created by the AOA any more than does subsection (a). Neither does it override any other definition of "offshore" in another statute or regulation. Indeed, nothing in § 1116A(d) purports even to *define* the term "offshore," though Congress is obviously capable of drafting an exclusive definition for the term if it chose to do so. Instead, § 1116A(d) instructs the Secretary only to "treat" the geographic region defined by the statute "as being offshore of Vietnam" for the purposes of the presumption established by § 1116A, regardless of what other offshore regions may be covered by separate statutes or regulations.

This interpretation comports not only with the plain meaning of the statutory text, but with Congress's expressed purpose. Legislative history shows that the Secretary's prior, improper restriction of the presumption of service connection prior to *Procopio* was a primary concern of the BWN Act's drafters. As VA concedes, the legislative history shows that Congress meant the BWN Act to "mitigate concerns that the VA may narrowly interpret [*Procopio*]" and "[t]o ensure that VA construes this bill to extend the presumption to all applicable [Blue Water Navy] veterans." (quoting H.R. Rep. No. 116-58, at 11). The BWN Act fulfills this purpose by setting an irreducible minimum area that the Secretary cannot exclude from a presumption of service connection, regardless of how VA may interpret any other statutes.

Once its flawed basis is cleared away, the Secretary's entire argument collapses. Because the Court below focuses solely—and incorrectly—on the presumption of service connection created by the BWN

Act, it offers no meaningful argument concerning the scope of the presumption created by the AOA. As MVA has repeatedly shown, the area covered by the AOA is not fully contained within the area defined in the BWN Act. *supra*. Indeed, the AOA properly extends the presumption throughout the Vietnamese theater of conflict, as VA acknowledged for nearly a decade after the AOA was enacted.

The legislative history indicated that Congress intended to codify *Procopio*. But they failed to do so. The BWN Act was both over and under inclusive What it did do was abandon a large portion BWN veterans.

Because VA's BWN Rule purports to restrict the presumption of service connection to naval veterans who served within the area defined by the BWN Act, and thus denying the presumption to veterans who served in other areas covered by the AOA, the BWN Rule is contrary to law and the intent of Congress.. This Court should vacate it.

3. The Secretary misapprehends the purpose of the pro-veteran canon and apparently canons of construction in general. BIO at 14. Issues of statutory interpretation are questions of law. *United States v. Almaraz*, 306 F.3d 1031, 1035 (10th Cir. 2002). The Supreme Court provided canons of construction to help interpret statutes and regulations. They assist courts and need not be raised in the initial litigation.

In the instant case, the canon must address whether the BWN Act replaced *Procopio* and the AOA. Under the plain meaning rule it is an addition to the law and not a modification, The pro-veterans canon merely underlines that interpretation.

CONCLUSION

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

Respectfully submitted,

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