

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*

MOTION TO DISMISS AS MOOT

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Pursuant to Rule 21.2(b) of the Rules of this Court, the Solicitor General, on behalf of the respondent, respectfully moves to dismiss this case as moot. The case is moot for two independent reasons.

First, as the government informed the Court in a memorandum filed on February 1, 2019, the Federal Circuit's decision in *Procopio v. Wilkie*, 913 F.3d 1371 (2019) (en banc), adopted an interpretation of the Agent Orange Act of 1991 (Agent Orange Act or Act), Pub. L. No. 102-4, 105 Stat. 11, that removes any practical need for review of the narrower interpretation of the Act at issue in this case. The Solicitor General has decided not to file a petition for a writ of certiorari in *Procopio*, and the Department of Veterans Affairs (VA) will follow *Procopio*'s interpretation of the Act going forward. Petitioner has no legal or practical interest in continuing to challenge the now-abrogated interpretation that was the sole basis of this suit.

Separately, VA and petitioner recently settled his underlying benefits claim. See Order, *Gray v. Wilkie*, No. 16-4042 (Vet. App. May 29, 2019). Because the parties have agreed that petitioner will receive a particular amount of benefits, he has no interest in continuing to challenge the interpretation at issue here, which pertains only to potential statutory eligibility for benefits.

For either or both reasons, this case is moot and should be dismissed.

STATEMENT

1. Under the Agent Orange Act, 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 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,” which VA at that time interpreted to include only (i) the land mass of Vietnam and (ii) its “inland waterways.” *Id.* at 318, 321. The Court of Appeals for Veterans Claims (Veterans Court) reversed, concluding that VA’s definition of “inland waterways” was unlawful. *Id.* at 322.

In response to that decision, VA amended a provision of its *Adjudication Procedures Manual M21-1* (Manual)—an “internal manual used to convey guidance to VA

adjudicators,” Pet. App. 5a (citation omitted)—that defined the term “inland waterways,” *id.* at 6a (citation omitted). As relevant here, the revised Manual provision (which the parties call the Waterways Provision) states 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.” *Id.* at 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. *Id.* at 48a.

On remand from the Veterans Court, the Board denied petitioner’s benefits claim. Finding the Waterways Provision “instructive” but “not binding,” the Board concluded 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). Petitioner appealed again to the Veterans Court, where his case was held in abeyance.

2. 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 dismissed the suit 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 the Federal Circuit's decision.

3. While briefing in this case was ongoing, the en banc Federal Circuit decided *Procopio v. Wilkie*, 913 F.3d 1371 (2019). In that case, the court held that the Agent Orange Act's reference to "the Republic of Vietnam," 38 U.S.C. 1116(a)(1)(A), includes "both its landmass and its territorial sea" extending 12 miles off the shore, 913 F.3d at 1376. In a memorandum filed in this case on February 1, 2019, the government observed (at 1-2, 7) that petitioner would be eligible for benefits under the rule announced in *Procopio* and would accordingly have no continuing interest in challenging the Waterways Provision if the decision in *Procopio* were not ultimately reversed by this Court. Because the Solicitor General had not yet determined whether to file a petition for a writ of certiorari in *Procopio*, the government suggested (at 9) that the Court might wish to remove this case from the argument calendar pending the Solicitor General's determination. The Court removed the case from the argument calendar on February 6, 2019. After consultation with VA and other components of the government, the Solicitor General on May 28, 2019, decided not to file a petition for a writ of certiorari in *Procopio*.

4. Separately, VA and petitioner reached agreement on a settlement under which petitioner will be paid a specified amount of benefits. VA and petitioner subsequently filed a joint motion with the Veterans Court seeking to dismiss petitioner's pending appeal of the Board's denial of his benefits claim. The Veterans Court granted that motion on May 29, 2019. See Order, *Gray v. Wilkie*, No. 16-4042.

ARGUMENT

This case should be dismissed as moot for either or both of two independent reasons.

1. As the government explained in its February 1 memorandum, the en banc Federal Circuit’s holding that the Agent Orange Act’s reference to “the Republic of Vietnam,” 38 U.S.C. 1116(a)(1)(A), includes “both its landmass and its territorial sea,” *Procopio v. Wilkie*, 913 F.3d 1371, 1376 (2019), removes any practical need for review of the now-abrogated Waterways Provision. Regardless of whether waterways like Da Nang Harbor are considered “inland” or “offshore” for purposes of the Manual, they are within the former Republic of Vietnam’s territorial sea and therefore within the “Republic of Vietnam” for purposes of the Agent Orange Act as construed by the Federal Circuit in *Procopio*.

Because the Solicitor General has determined not to seek this Court’s review in *Procopio*, the Federal Circuit’s construction in that case will remain binding on VA, and the Waterways Provision has no continuing relevance. Petitioner’s action seeking to invalidate the Waterways Provision under Section 502 therefore no longer presents a “live” controversy within this Court’s Article III jurisdiction. *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 concerning the scope of a regulation that had been invalidated by a lower court and withdrawn by the agency).

To be sure, the holding in *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. But petitioner has no legally cognizable interest in obtaining

an answer to that question now that his disagreement with the government about the scope of Section 502 “is no longer embedded in any actual controversy about [his] particular legal rights.” *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). As noted above, the objective of petitioner’s suit—persuading the Federal Circuit to set aside the interpretation of “inland waterways” in the Manual—no longer has any practical relevance, because both inland waterways and offshore coastal water features (as defined by the Waterways Provision) within the boundaries of the 12-mile territorial sea are within the “Republic of Vietnam” under *Procopio*. 913 F.3d at 1376. At best, petitioner might assert a general interest in broader reviewability of VA actions under Section 502, but that interest—divorced from any practical stake in obtaining review of the specific Manual provision that is at issue in his suit—is simply “an abstract dispute about the law, unlikely to affect [petitioner] any more than it affects” anyone else. *Alvarez*, 558 U.S. at 93. Such a “dispute solely about the meaning of a law, abstracted from any concrete” interest, “falls outside the scope of the constitutional words ‘Cases’ and ‘Controversies.’” *Ibid.*; see, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (“[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.”).

2. This case is moot for the additional reason that the parties have settled petitioner’s benefits claim. See p. 4, *supra*. Because the settlement entitles petitioner to a particular amount of benefits, he has no practical or legal interest in whether he is statutorily eligible for benefits under the interpretation of “the Republic of Vi-

etnam,” 38 U.S.C. 1116(a)(1)(A), embodied in the Manual. That settlement of the “underlying * * * dispute[]” renders this case moot. *Alvarez*, 558 U.S. at 89; see *id.* at 92 (dismissing as moot where “there is no longer any actual controversy between the parties about ownership or possession of the underlying property”).

CONCLUSION

This case should be dismissed as moot.*

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JUNE 2019

* The decision below dismissed both petitioner’s suit and a companion suit filed by the Blue Water Navy Vietnam Veterans Association (Blue Water Navy Veterans) challenging the Waterways Provision. Pet. App. 1a-14a. The Blue Water Navy Veterans then filed a petition for a writ of certiorari seeking review of the decision on the same grounds asserted by petitioner. No. 17-1693 (filed June 18, 2018). The Court has not acted on that petition. Because the Blue Water Navy Veterans seek review of the same Manual provision that petitioner does, their case is moot for the same initial reason that petitioner’s case is moot—the Waterways Provision has no continuing significance after *Procopio*. See pp. 5-6, *supra*. The government is serving a copy of this filing on counsel for petitioner in *Blue Water Navy Veterans*.