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February 5, 2019

Mr. Scott Harris
Clerk of the Court
Supreme Court of the United States
1 First Street NE
Washington, DC 20543

Re: *Gray v. Wilkie*, No. 17-1679

Dear Mr. Harris:

I am writing on behalf of petitioner Robert H. Gray to alert the Court to a further development that relates to the memoranda the parties recently filed concerning *Procopio v. Wilkie*, No. 17-1821, 2019 WL 347202 (Fed. Cir. Jan. 29, 2019) (en banc). As Gray explained in the response memorandum he filed yesterday morning, the Federal Circuit's *Procopio* decision has not rendered this case moot and could not do so unless the Department of Veterans Affairs acquiesces to that decision and rescinds the rule at issue here. Gray further explained that there is a serious possibility that the Solicitor General will seek certiorari in *Procopio*.

Yesterday evening, several hours after Gray filed his response memorandum, the Government filed a motion with the Federal Circuit asking it "to stay the mandate in [*Procopio*] pending the Government's consideration of whether to seek a petition for a writ of certiorari." Respondent-Appellee's Motion to Stay the Mandate 1 (attached hereto). Citing its own *Procopio* merits brief and Judge Chen's dissenting opinion, the Government asserts that "there are substantial grounds for disagreement [with the *Procopio* decision] that warrant the granting of a petition for a writ of certiorari." *Id.* at 3. The Government further argues that it may suffer irreparable harm if the mandate is not stayed, because if this Court grants review and overturns the Federal Circuit's ruling, it could be difficult to recoup disability compensation paid to veterans in the interim. *Id.* at 1, 4-5.

Regardless of whether the Federal Circuit grants the requested relief, the Government's motion to stay the *Procopio* mandate further demonstrates that the Government is very seriously considering seeking this Court's review of that decision. Accordingly, for the reasons explained in Gray's response memorandum, this case is unlikely to become moot in the near future and should be considered and resolved as planned.

Sincerely,



Roman Martinez

cc: Noel J. Francisco

ATTACHMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ALFRED PROCOPIO, JR.)	
)	
Claimant-Appellant,)	
)	17-1821
v.)	
)	
ROBERT WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Respondent-Appellee.)	

RESPONDENT-APPELLEE’S MOTION TO STAY THE MANDATE

Pursuant to Rule 41 of the Federal Circuit Rules and the Federal Rules of Appellate Procedure, respondent-appellee, Robert Wilkie, the Secretary of Veterans Affairs, respectfully requests this Court to stay the mandate in this case pending the Government’s consideration of whether to seek a petition for a writ of *certiorari*. Mr. Procopio does not consent. As we demonstrate below, a stay is warranted because this case presents a substantial question and because the Government may suffer irreparable harm absent a stay. *See* Fed. R. App. P. 41(d).

BACKGROUND

Under the Agent Orange Act of 1991 (Agent Orange Act), Pub. L. No. 102-4, 105 Stat. 11, 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). In its January 29, 2019 decision in this case, the Court held that the Agent Orange Act’s reference to “the Republic of Vietnam,” 38 U.S.C. § 1116(a)(1)(A), unambiguously includes “both its landmass and its territorial sea” extending 12 miles off the shore. *Procopio v. Wilkie*, No. 17-1821, 2019 WL 347202, at *4 (Fed. Cir. 2019) (en banc). The Court overruled its earlier decision in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), which had upheld the Department of Veterans Affairs’ (VA) interpretation of § 1116 as distinguishing between service on land or inland waterways and service in offshore waters. 2019 WL 347202, at *4. The mandate has not yet issued.

DISCUSSION

An applicant for a stay of the mandate pending the filing of a petition for a writ of *certiorari* “must show that the [certiorari] petition would present a substantial question and that there is good cause for a stay.” Fed. R. App. P. 41(d)(1). The inquiry must focus on whether the applicant has “a reasonable probability of succeeding on the merits and whether the applicant will suffer irreparable injury.” *See Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) (per curiam). We are mindful of the general rule that the stay of a mandate is not necessary in order to petition for a writ of *certiorari*. However, because the issue in

this appeal presents a substantial question and the Government may suffer irreparable harm if the mandate is not stayed, this case meets the necessary requirements.

The issue in this appeal is a substantial one – whether the Agent Orange Act unambiguously provides a presumption of service connection for diseases medically associated with exposure to Agent Orange to tens of thousands of veterans who served within the 12-mile territorial sea of the Republic of Vietnam, but did not set foot on land. As we explained in our *en banc* briefing, and as the Court held eleven years ago in *Haas*, the Agent Orange Act’s reference to “served in the Republic of Vietnam” in 38 U.S.C. § 1116(a) does not demonstrate that Congress unambiguously intended the statutory presumption to extend beyond the geographic landmass of Vietnam, where the United States sprayed Agent Orange during the Vietnam War. To the contrary, (1) the statutory text, (2) Congress’s codification of two pre-existing regulatory presumptions, only one of which provided a presumption for veterans with service off the coast of Vietnam, and (3) the lack of probative legislative history, suggest the statute’s ambiguity. As reflected in these arguments and Judge Chen’s dissenting opinion, as well as the Court’s *sua sponte* decision to hear this case *en banc*, there are substantial grounds for disagreement that warrant the granting of a petition for a writ of *certiorari*.

If the Court's mandate issues, veterans who served within Vietnam's 12-mile territorial sea but never went ashore will become entitled to presumptive service connection for the diseases listed in the Agent Orange Act and VA's implementing regulation at 38 C.F.R. § 3.309(e). The Veterans Benefits Administration, which oversees VA's benefits programs, anticipates that tens of thousands of veterans will file presumptive claims with VA's regional offices within the first year. Staying the mandate while the Government considers petitioning for a writ of *certiorari* will likely have little effect on whether these claims are filed with VA, but it will allow VA to avoid paying disability compensation that it would need to recoup should the Supreme Court ultimately reverse the Court's decision. Although there are procedures for VA to seek recoupment of benefits improperly paid, the administrative burden on the agency of doing so here would be immense. Moreover, many veterans and their families would be harmed by relying on the improperly granted entitlements, and VA would likely need to waive collection on many of the resulting overpayment debts. *See* 38 C.F.R. § 1.911.¹ Conversely,

¹ To the extent that 38 U.S.C. § 5112(b)(6) prevents VA from recouping disability compensation paid to veterans entitled to presumptive service connection under this Court's decision, the harm to VA remains significant. VA would not only be unable to recoup the payments, but would suffer the administrative burden of re-adjudicating thousands of claims in order to discontinue the awards. Staying the mandate would avoid this burdensome scenario.

staying the mandate will minimally burden veterans seeking benefits based on the Court's decision because veterans will remain free to file their claims despite the stay, and will thereby preserve the effective date of their claims.

CONCLUSION

For these reasons, we respectfully request this Court to stay the mandate pending the filing of a petition for a writ of *certiorari* or a decision by the Government not to file such a petition.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/Martin F. Hockey, Jr.
MARTIN F. HOCKEY, JR.
Deputy Director

/s/Eric P. Bruskin
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February 4, 2019

Attorneys for Respondent-Appellee

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ALFRED PROCOPIO, JR.)
)
 Claimant-Appellant,)
) 17-1821
 v.)
)
ROBERT WILKIE,)
Secretary of Veterans Affairs,)
)
 Respondent-Appellee.)

ORDER

Upon consideration of Respondent-Appellee’s Motion To Stay The
Mandate, it is

ORDERED that the motion be GRANTED.

For the Court

Dated: _____

cc: Eric P. Bruskin
 Melanie L. Bostwick
 John B. Wells

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, respondent-appellee's counsel certifies that this motion complies with the Court's type-volume limitation rules. According to the word count calculated by the word processing system with which this motion was prepared, the motion contains a total of 933 words.

/s/Eric P. Bruskin

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 4th day of February, 2019, a copy of the foregoing Respondent-Appellee's Motion To Stay The Mandate was filed electronically. This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/ Eric P. Bruskin