No. 17-1693

IN THE

Supreme Court of the United States

BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION, 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

SUPPLEMENTAL BRIEF

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Preliminary Statement

Now comes before this Court, petitioner Blue Water Navy Vietnam Veterans Association (BWNVVA) who pursuant to Rule 15(8) files this supplemental brief.

The government has moved to dismiss the petition of Robert Gray in the case of *Gray v. Wilkie* NO. 17-1679 as moot. In their Motion, the government cites two reasons: (1) the *en banc* case *Procopio v. Wilkie*, 913 F.3d 1371 (2019) requires that the Department of Veteran's Affairs *Adjudication Procedures Manual M21-1* HEREINAFTER (M21-1) provisions be rewritten and (2) Gray has entered into a settlement agreement with the Secretary.

While Petitioner Blue Water Navy Vietnam Veterans Association (BWNVVA) does not contest the dismissal in G*ray*, the re-write of M21-1 may lead to another request for judicial review. Additionally, BWNVVA has not settled its case with the Secretary and the case or controversy remains ripe for adjudication. Alternatively, the Court should follow the decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950), by vacating the decision below and remanding with directions to dismiss.

Argument

The instant case falls squarely within the "exception to the mootness doctrine for a controversy that is capable of repetition, yet evading review." *Kingdomware Technologies, Inc. v. United States*, 579

U.S. ——, ——, 136 S.Ct. 1969, 1976, 195 L.Ed.2d 334 (2016). This exception occurs "if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Turner v. Rogers,* 564 U.S. 431, 439–440, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011).

It is obvious that the first prong of this test is met. *Procopio* arose during the pendency of this litigation and after *certiorari* was granted in *Gray*. Additionally, it is foreseeable that the Secretary's re-write of the M21-1 will give rise to challenge by Petitioner. The Secretary routinely attempts to circumvent reviewability by forsaking the rule making provisions of 5 U.S.C. § 553 and using the M21-1 which he classifies as an "internal manual used to convey guidance to VA adjudicators". This carefully selected language results in the M21-1 Manual being treated as a procedural rule rather than a substantive rule. However, *JEM Broadcasting*, 306 U.S. App. D.C. 11, 22 F.3d 320 (1994) concluded that a "critical feature" of a procedural rule is that it does not "alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency". The M21-1 may indeed be utilized by VA personnel, nevertheless it has a direct and substantive impact on the extent of benefits available to veterans. As such, the M21-1 should be subject to judicial review. As this same controversy is expected to rise again, the case qualifies for the mootness exception and review of the instant case should move forward.

In the alternative, should the Court decide not to grant *certiorari*, it should apply the relief authorized by *United States v. Munsingwear*, 340 U.S. 36 (1950). In *Munsingwear*, the Court explained that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 39. By vacating this erroneous decision, the court "clears the path for future litigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.* at 40.

A *Munsingwear* order is the "normal" procedure for mootness, *Camreta v. Greene*, 563 U.S. 692, 713 (2011), and is "commonly utilized." *Munsingwear*, 340 U.S. at 41. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 377 (2017); *Burke v. Barnes*, 479 U.S. 361, 365 (1987); *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979) (per curiam). There is no reason not to follow that practice here.

It is common practice for the VA to avoid judicial review by forsaking the notice and comment provisions of 5 U.S.C. §553 by promulgating rules binding on adjudicators via the M21-1. Whether they choose to do this in response to *Procopio* or not, it certainly will happen in the future. Allowing *Gray* to stand will require a veteran challenging the M21-1 to overcome the high bar of existing precedent. Vacating the underlying decision will help preserve the issue for another day.

Conclusion

Petitioner prays that the court will grant certiorari in the instant case or in the alternative, pursuant to *Munsingwear*, vacate the decision below and remand with directions to dismiss.

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