No.

IN THE

Supreme Court of the United States

MILITARY-VETERANS ADVOCACY INC., PETITIONER

v.

SECRETARY OF VETERANS AFFAIRS

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Whether under the *United States v. Munsingwear* 340 U.S. 36 (1950) the Court should grant certiorari and vacate the decisions below in this case that became involuntarily moot following the Court of Appeals' opinion?

Whether the Federal Circuit contravened *SEC v. Chenery*, 318 U.S. 80 (1943) by sustaining the Secretary's rulemaking denial on a ground other than the one adopted by the agency?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

None

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent company and no publicly held company owns 10% or more of it's stock.

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OPINIONS BELOW

The June 17, 2022 opinion of the United States Court of Appeals for the Federal Circuit is unpublished. (1a). The September 30, 2022 denial of vacatur and petition for rehearing from the Federal Circuit is published and reported at 38 F.4th 154 (Fed. Cir. 2022). (46a). The opinion of the Secretary of Veterans Affairs is unpublished. (36a)

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on June 17, 2022. A petition for rehearing and a motion to vacate and remand was denied on September 30, 2022. (46a) The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different

States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

38 U.S.C. §502

An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provisions of chapter 72 of this title, the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.

38 U.S.C. §7292(c)

The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

38 U.S.C. §501(a)

The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including--
(1) regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws;
(2) the forms of application by claimants under such laws;
(3) the methods of making investigations and medical examinations; and
(4) the manner and form of adjudications and awards.

38 U.S.C. §553(e)

Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

38 U.S.C. §1116(c)

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.

5 U.S.C. §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those

parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxics Act of 2022, Pub. L. No. 117-168, §403(b)(3) 136 Stat. 1759 Pub. L. No. 117-168, 136 Stat. 1759

In this section, the term 'covered service' means active military, naval, air, or space service –
Performed on Guam or American Samoa, or in the territorial waters thereof, during the period beginning on January 9, 1962, and ending on July 31, 1980, or served on Johnston Atoll or on a ship that called at Johnston Atoll during the period beginning on January 1, 1972, and ending on September 30, 1977.

STATEMENT

Since 1958, veterans exposed to toxic herbicides, while deployed in the service of our nation, have been wrongfully denied compensation for service-connected injuries or disabilities. Despite strong evidence to the contrary, the Department of Veterans Affairs ("the VA") rationalized the denial of disability compensation. No matter how much evidence was offered, the VA simply said that it was not enough. Due to the decades long injustice that these veterans have endured at the behest of their own government that they swore an oath to protect, MVA and Congress requested the Government Accountability Office ("GAO") to conduct an investigation into the use of Agent Orange on Guam.

On November 15, 2018, the GAO issued its report which found that, while record keeping on behalf

of the Department of Defense was deficient, (1) at least one vessel carrying Agent Orange stopped at Guam; (2) two chemical components – n-butyl 2,4-D and n-butyl 2,4,5-T – had a half-life deterioration in soil ranging from several days to several months; (3) the suggested half-life of the dioxin 2,3,7,8-TCDD – a byproduct of the 2,4,5-T manufacturing process is longer although dioxin can be generated by sources other than Agent Orange; and (4) 2,4,5-T was used on Guam as late as 1980. J.A. 2164–266. The GAO report also examined and compared tactical herbicides with commercial herbicides which the VA concedes were used by military personnel on Guam. The GAO report found that four commercial herbicides which contained some form of 2,4,5-T, the component that contained the contaminant 2,3,7,8-TCDD, also known as dioxin, were used.

Following this revelation, in December 2018, MVA petitioned the Secretary of Veterans Affairs to commence rulemaking under the Agent Orange Act of 1991 38 U.S.C. §1116 to implement a presumption of exposure to all toxic herbicides containing 2,4-T for veterans who served on Guam in support of combat operations in Vietnam from January 9, 1962, to December 31, 1980, Johnston Island from January 1, 1972 to September 30, 1977, and American Samoa. Appx3a. MVA's stance asserted that the Act did not limit its applicability to Agent Orange or other tactical herbicides. Military forces in Guam supported the United States and allied operations in the Republic of Vietnam through air strikes, logistics, force replenishment and refugee processing, and considering the immense support provided for Vietnam, these veterans undoubtedly fell within the scope of the Act. *Id.*

After a year without a response from the Secretary, MVA sent an amplification of the rulemaking request on December 3, 2019. Appx48a. The amplification included several additional documents with evidence showing the use of toxic herbicides. These included an excerpt of a Public Health Assessment showing 19,000 ppm level of dioxin at the Andersen AFB fire training school, an excerpt from the Guam Land Use Plan confirming herbicide use and the presence of 2,4,5-T and 2,4-D as late as 1980, and a treatise which confirmed storage of 25,000 barrels of Agent Orange on the Atoll along with other toxic chemicals.[1] Additional data collected by the Guam Environmental Protection Agency found higher than average dioxin levels in the soil on Guam and concluded it was due to herbicide use by the military.[2]

In May 2020, the Secretary denied MVA's petition for rulemaking, despite conceding the presence of 2,4,5-T and 2,4-D in the soil on Guam. Appx36a. MVA subsequently petitioned the Federal Circuit for review pursuant to 38 U.S.C. §502, arguing that the VA had misinterpreted the Agent Orange Act 38 U.S.C. §1116(c and violated its own precedent. The VA has previously expanded the scope of the Agent Orange Act to include the use of herbicides outside of Vietnam on three separate occasions for veterans who served: (1) in the demilitarized zone of Korea; (2) on the C-123 aircraft;

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[1] "Aspects of the Biology and Geomorphology of Johnston and Wake Atolls, Pacific Ocean." (PDF) Aspects of the Biology and Geomorphology of Johnston and Wake Atolls, Pacific Ocean (researchgate.net).

[2] Guam Environmental Protection Agency, "Herbicide Investigation," (Apr. 17, 2020) http://epa.guam.gov/herbicides-investigation/

and (3) in Thailand on the perimeter of several Royal Thai airfields. The Secretary's denial to expand the Agent Orange Act to veterans who served on Guam was unjustifiable. Appx36a-46a.

In June 2022, the Federal Circuit denied MVA's petition for review claiming that MVA's argument of the VA's flawed statutory interpretation is "simply beside the point." Appx12a. The Federal Circuit found that the VA's decision was not based on a misconception about what the Act itself does because the Secretary compared previous circumstances that merited an extension of presumptions, to the situation on Guam, and declined to exercise rulemaking to extend this presumption.

Shortly after the denial, the President signed the Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxics Act of 2022 ("the PACT Act") into law, which mooted MVA's petition for rulemaking. Pub. L. No. 117-168, 136 Stat. 1759. Applicable portions of the PACT Act amended the Agent Orange Act to provide a presumption of toxic herbicide exposure to veterans who "performed on Guam or American Samoa, or in the territorial waters thereof, during the period beginning on January 9, 1962, and ending on July 31, 1980, or served on Johnston Atoll or on a ship that called at Johnston Atoll during the period beginning on January 1, 1972 and ending on September 30, 1977." *Id.* §403(b)(3), sec. 1116(d)(5), 136 Stat. at 1781.

On August 29, 2022, MVA filed a vacatur motion before the Federal Circuit to vacate and remand their previous opinion denying MVA's petition for review. The motion stressed that the PACT Act effectively mooted MVA's petition for rulemaking and absolved the Federal Circuit's jurisdiction over the matter. MVA

also simultaneously filed a petition for rehearing alleging that the mootness of MVA's claim discharged the Federal Circuit of its authority over the case and that the Federal Circuit erred on the merits because it sustained the Secretary's denial of MVA's petition on grounds other than the Secretary adopted. On September 30, 2022, the Federal Circuit denied MVA's motion for vacatur and petition for rehearing without any reasoning.

This petition examines the Federal Circuit's misapplication of the issue of involuntary mootness to this case under *U.S. v. Munsingwear*, 71 S. Ct. 104 (1950. It also examines the Federal Circuit's flawed application of *SEC v. Chenery Corp.* to the merits of this case because the Federal Circuit sustained the Secretary's denial of rulemaking on grounds other than what the Secretary adopted. 318 U.S. 80, 87 (1943).

REASONS FOR GRANTING THE PETITION

I. This Case is Moot and Should be Vacated.

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

This case became involuntarily moot following the Federal Circuit's opinion and the Court should therefore summarily vacate and remand this case to United States Court of Appeals for the Federal Circuit under *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 71 (1950) with instructions to dismiss the matter as moot.

MVA initiated this suit to challenge the Secretary's denial of MVA's rulemaking petition, not to seek an adjudication on the exact dates of coverage.

MVA's rulemaking petition sought to request the Secretary to provide a presumption of toxic herbicide exposure under the Agent Orange Act for Guam, Johnston Island, and American Samoa. In August 2022, Congress passed, and the President signed into law the PACT Act (Pub. L. 117-168) which provides for precisely what MVA petitioned the Secretary for. The Secretary is now expected to issue implementing regulations. Since the PACT Act now requires for this exact toxic herbicide presumption, the rulemaking petition is moot. *E.g.*, *Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1201 (Fed. Cir. 2014) ("[I]f a judicial decision is not yet final, Congress may change the law applicable generally, and the court must apply the changed law to pending cases.").

Article III of the United States Constitution states that judicial power extends to "cases or controversies" arising under the Constitution. U.S. Const. Art. III. A case becomes moot when the presented issues are no longer live, or the parties no longer have a cognizable interest in the outcome. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). This mootness requirement hinges on whether the "relief sought, if granted, would 'make a difference to the legal interests of the parties …'" *Acceleration Bay LLC v. 2K Sports Inc.*, 15 F.4th 1069, 1076 (Fed, Cir. 2021) (quoting *Nasatka v. Delta Sci. Corp.*, 58 F.3d 1578, 1580 (Fed. Cir. 1995)). When mootness arises before the Court can review the underlying judgment, vacatur ensures that no party is "prejudiced by a [lower-court] decision" and "prevent[s] a judgment unreviewable because of mootness from spawning any legal consequences." *Munsingwear*, 340 U.S. 36, 29. Thus, an appeal should be dismissed as moot when, as a result of

an intervening event, a court of appeals cannot grant any relief in favor of the appellant. *Calderon v. Moore*, 518 U.S. 149, 150 (1996).

When MVA's veteran members seek service-connected disability under the Agent Orange Act due to toxic herbicide exposure on Guam, Johnston Island, or American Samoa, they are now entitled to a presumption of toxic herbicide exposure. Previously, and as conceded by the Secretary's denial of rulemaking, veterans were denied this presumption and often denied service-connected benefits for toxic herbicide exposure on a case-by-case basis. Now, if the Secretary denies veterans service connection for presumptions to herbicide exposure on Guam, Johnston Island, or American Samoa for certain dates under the Agent Orange Act, he will be acting contrary to an established law. This is exactly the type of situation the Court discussed in *Munsingwear* and sought to dispose of.

MVA's interests are also satisfied as a result of the PACT Act. MVA's advocacy for disabled veterans by way of petitioning the Secretary to conduct rulemaking proceedings for a presumption of toxic herbicide exposure, have been extinguished by the PACT Act. This is because MVA no longer has a cognizable interest in the outcome of the case nor are MVA's legal interests affected by vacatur. The Secretary, likewise, also has no cognizable interest in this case as the VA is now required under Federal law to provide a presumption of toxic herbicide exposure to veterans that fall within the newly expanded scope of the Agent Orange Act. Vacatur as a matter of course is warranted here because the relief previously sought before the Federal Circuit and now before this Court

would have no effect on the legal interests of MVA or the Secretary and are, therefore, moot.

Through litigation, the Secretary argued that the PACT Act does not moot MVA's petition because MVA's proposed timeframe for presumption of herbicide exposure differs marginally from the PACT Act. MVA proposed a rule to extend the presumption of herbicide exposure for the period of: August 15, 1958 – December 31, 1980 for Guam. The PACT Act created a presumption of herbicide exposure for the period of January 9, 1962 to July 31, 1980. Pub. L. 117-168, §403(b)(3), 136 Stat. 1780-81. The Secretary argues that, since MVA's petition proposed coverage period different from what the PACT Act provided, MVA's relief is not fully satisfied. This argument misconstrues the available relief and is immaterial to MVA's overall claim of mootness.

MVA sought to commence rulemaking to consider whether a regulatory presumption of exposure was warranted. Appx51a. To ensure this, MVA offered proposed rules with periods of service to provide a persuasive basis for its petition. However, the only relief sought by MVA was to request the Secretary to commence rulemaking proceedings on MVA's proposed presumption under 38 U.S.C. §553(e) which is a procedural form of relief. The Secretary's argument seeks to review the merits of the proposed rule while MVA's relief is solely procedural. Only after a rule was promulgated could MVA bring a petition on a substantive matter. Here, the Secretary and the court below put the cart before the horse. Conducting an analysis into the proposed dates at this stage was premature, unwarranted, and cut against judicial efficiency.

This Court has a long-established precedent of summarily granting certiorari to vacate a court of appeal's judgment in a case that has become moot on its way to this Court. *Munsingwear, Inc.*, 340 U.S. at 39 (1950). *see also, e.g.*, *PNC Bank Nat. Ass'n v. Secure Axcess, LLC*, —— U.S. ——, 138 S. Ct. 1982, 1982, 201 L.Ed.2d 243 (2018). *Yellen v. U.S. House of Representatives*, 142 S. Ct. 332 (2021) ; *Biden v. Knight First Amendment Institute*, 141 S. Ct. 1220 (2021); *Blue Water Navy Vietnam Veterans Association v. Wilkie*, 139 S. Ct. 2740 (2019); *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 377 (2017); *Hollingsworth v. U.S. Dist. Court for Norther Dist. Of California*, 131 S. Ct. 372 (2010); *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 3028 (1993); *Alabama v. Davis*, 100 S. Ct. 1827 (1980). Since the issue addressed in MVA's petition for rulemaking became involuntarily moot after the Federal Circuit denied MVA's petition for review and before MVA could seek review from this Court, the Court should summarily grant certiorari to vacate the Federal Circuits decision. Indeed, the Court has previously vacated its own decisions in cases that become moot pending rehearing. *See Stewart v. S. Ry.*, 315 U.S. 784, 784 (1942) (per curiam).

The normal practice of this Court is to vacate cases that have become moot through "no fault of the party seeking review." *Camreta v. Greene*, 563 U.S. 692, 715 (2011). The enactment of the PACT Act was an intervening event which mooted MVA's petition for rulemaking and petition for review on its face and thus extinguished MVA's legal and cognizable interests. MVA also bears no fault in the mootness of its claims as Congress and the President used their legislative and executive powers to pass the PACT Act which definitively resolved an issue before the Federal Circuit.

E.g., *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 645 (D.C. Cir. 2016); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1309 (D.C. Cir. 2004) (per curiam) ("Where Congress enacts intervening legislation that definitively resolves the issues a litigant seeks to put before us, the claims are moot and we are precluded from deciding them."). Congress and the President exercising their powers under the United States Constitution is not attributable in any way to the actions of MVA in this pending case.

Thus, the Court should grant certiorari, vacate the Federal Circuit's opinion, and remand with instructions to dismiss as moot. *Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990).

B. The Federal Circuit Erred in Refusing to Vacate its own Decision and the Underlying Agency Action After it Became Involuntarily Moot.

The Federal Circuit erred when it refused to vacate its own decision after this case became involuntarily moot. As argued above, this case is controlled by Article III of the United States Constitution and this Court's precedent in *Munsingwear*, 71 S. Ct. 104 (1950). In *Munsingwear*, the Court determined that the "established practice of the Court in dealing with a civil case from a court in a federal system which has become moot while on its way here or pending a decision on the merits is to *reverse or vacate the judgment below and remand with a direction to dismiss*." *Id.* at 39. (emphasis added). Mootness of the *Munsingwear* type arises by happenstance, generally "from external causes over which the parties have no control, or from the unilateral act of the

prevailing party." *Tafas v. Kappos*, 586 F.3d 1369, 1371 (Fed. Cir. 2009)(en banc). Cases which have been mooted by statutory changes are considered intervening causes and fall under the *Munsingwear* doctrine. *Nuclear Energy Inst., Inc.*, 373 F.3d at 1309. Alternatively, in *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, the Court expanded and clarified the *Munsingwear* doctrine and held that where parties mutually moot a case, such as through settlement, the parties forfeited their right to vacatur unless "exceptional circumstances" exist. 513 U.S. 18, 29 (1994).

Since the PACT Act was an intervening cause which neither MVA nor the Secretary had control over, this case is moot under *Munsingwear* and the Federal Circuit should have vacated the Secretary's denial of MVA's rulemaking petition. In dolling out a blanket denial with no explanation, the Federal Circuit acted contrary to its well-established precedent as well as the precedent of this Court. Appx1a. The Federal Circuit has repeatedly and frequently relied on *Munsingwear* to vacate agency actions. *See Valspar Sourcing, Inc. v. PPG Indus. Inc.*, 780 Fed.Appx. 917, 921 (Fed. Cir. 2019) (citing, *Ebanks v. Shulkin*, 877 F.3d 1037, 1040 (Fed. Cir. 2017); *LSI Corp. v. Int'l Trade Comm'n*, 401 F. App'x 545, 546–47 (Fed. Cir. 2010); *DiOrio v. Nicholson*, 216 F. App'x 974, 975 (Fed. Cir. 2007); *Lerman v. Nicholson*, 125 F. App'x 997, 997 (Fed. Cir. 2005). These line of cases and *Munsingwear* instruct the Federal Circuit to vacate cases that have become involuntarily moot "to prevent appellants from being forced to acquiesce in a judgment that they can no longer challenge on the merits." *Id.* Since the PACT Act was a statutory change which mooted MVA's rulemaking petition, the Federal Circuit had an obligation to vacate and dismiss the agency decision

below. *Apple Inc. v. Voip-Pal.com, Inc.*, 976 F.3d 1316, 1321, 1321 (Fed. Cir. 2020). In failing to do so, MVA is now forced to adhere to a judgment which they can no longer challenge on the merits, contradicting the Court's fundamental holding in *Munsingwear*.

Likewise, it is the standard practice throughout federal appeals courts to vacate decisions that have become moot after the Court of Appeals decision issues. In *United States v. Caraway*, 483 F.2d 215 (5th Cir.1973), the en banc court vacated a panel decision because the case had become moot after the panel opinion issued but before the issuance of the mandate. *Id.* at 216. Similarly, in *In re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir.1983), a panel vacated its decision when the case became moot after the opinion issued, but before the time limit for seeking en banc ran or the mandate issued. *See* also, *Cardpool, Inc. v. Plastic Jungle, Inc.*, 564 F. App'x 582, 583 (Fed. Cir. 2014); *Att'y Gen. of Guam v. Thompson*, 441 F.3d 1029, 1030 (9th Cir. 2006); *Hain v. Mullin*, 327 F.3d 1177, 1180-81 (10th Cir. 2003) (en banc). Moreover, since the Court conventionally grants certiorari and would vacate a court of appeals' opinion in moot cases, the standard practice of this Court and a Court of Appeals calls for vacatur. *Clarke*, 915 F.2d at 706. *See also*, 13C Wright & Miller, Federal Practice & Procedure § 3533.10.3 (3d ed. Through Apr. 2022) ("Given the Supreme Court practice, it is appropriate for a court of appeals to vacate its own judgment if it is made aware of events that moot the case during the time available to seek certiorari.").

Accordingly, the Federal Circuit erred in refusing to vacate the Secretary's denial of rulemaking after the PACT Act unequivocally mooted this case. The Federal Circuit had timely notice of the events that mooted this case but decidedly refused to vacate,

despite MVA petitioning the Federal Circuit to do so. The Federal Circuit, thus, diverged from the standard practice of its own precedent and precedent in other circuits, muddying the legal waters for future litigants and undermining judicial efficiency.

II. The Federal Circuit Erred in Sustaining the Secretary's Denial of Rulemaking on Grounds Other than those Adopted by the Agency.

As a preliminary matter, MVA asserts that the Federal Circuit denied MVA's rulemaking petition on grounds other than what the Secretary adopted. MVA contends that the Secretary adopted a flawed interpretation of the *Agent Orange Act* – not the PACT Act – whereas the Federal Circuit upheld this flawed interpretation under 38 U.S.C. §501 as a matter of the Secretary's policy discretion. The Secretary, in his denial of MVA's rulemaking petition, explicitly conducted a statutory analysis of the Agent Orange Act by analyzing a plethora of evidence presented to them by MVA. In its denial, the Secretary conceded that the VA had previously interpreted the Act more broadly than they were willing to do in this case, proving that denial was based upon his own statutory interpretation.

The basis of MVA's *Chenery* argument is not that the Secretary erred as a matter of statutory interpretation of the PACT Act, rather, that the Federal Circuit based its decision to deny MVA petition for review on the basis of the Secretary's interpretation of the Agent Orange Act. At this point the PACT Act was not even before Congress. The Secretary previously argued that MVA conflates the two and that neither the PACT Act, nor well-established precedent in the federal circuits, allow for

the retroactive application of a law. While the PACT Act does not apply retroactively, this is not MVA's argument. MVA has only argued, that as a procedural issue, the PACT Act moots the present case. In the event this Court does not vacate for mootness, MVA argues that the Federal Circuit erred in its finding on the merits of the case prior to the PACT Act being passed.

MVA's arguments surrounding the PACT Act start and end with the procedural issue of mootness. Thus, MVA's merits-based argument hinges on the Federal Circuit's error in faithfully applying *Chenery* because it determined the Secretary exercised its §501 policy discretion powers to deny MVA's rulemaking petition when the Secretary based his determination on a flawed statutory interpretation of the Agent Orange Act. The Federal Circuit inserted its own statutory interpretation into the analysis on a basis otherwise not asserted by the Secretary.

A. 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.

The issues presented in this case show that the Secretary impermissibly interpreted the Agent Orange Act to the detriment of disabled veterans. Before the enactment of the PACT Act, the Agent Orange Act stated, in the event of disability or death due to exposure to an herbicide agent containing dioxin or 2,4-dichlorophenoxyacetic acid, a veteran may be presumed to have been exposed during service "*to any other chemical compound in an herbicide agent*" so long as there is no affirmative evidence to the contrary. 38

U.S.C. §1116(c); 38 CFR §3.307(a)(6)(i) [emphasis added].[3] In interpreting the statute, it is abundantly clear that Congress intended to extend the presumption to those exposed to herbicides of any type so long as they were exposed to dioxin or 2,4-D used in support of operations in the Republic of Vietnam. The text is unambiguous. If veterans who served this nation, supported US military operations in Vietnam, and were exposed to dioxin or 2,4-D, they are irrefutably entitled to a presumption of herbicide exposure. Indeed, the parties even agree that herbicides present in Guam and Johnston Island met the Act's textual criteria—i.e., they had the same chemical compositions as the rainbow herbicides like Agent Orange. *See* Appx48a, Appx51-52a.

On three separate occasions, the Secretary has covered veterans outside of Vietnam. Namely, veterans who served near the Korean demilitarized zone, veterans associated with the C-123 aircraft, and veterans in Thailand who served on the perimeter of several Royal Thai Airfields Appx40a. In denying MVA's rulemaking petition to extend this toxic-herbicide presumption to veterans on Guam, Johnston Island, and American Samoa, the Secretary concluded that the Act's coverage was limited to "tactical herbicides" rather than "commercial products" although they contain the same toxic chemical components. Appx39a. The Secretary claimed that granting the request would broaden the regulation beyond its intended function. He refused to consider an

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[3] Herbicide agent, as described by the statute meant a "chemical in an herbicide agent used in support of the United States and allied military operations in the Republic of Vietnam during the Vietnam Era."

interpretation of the Act which would encompass anything but "the deliberate application of herbicides for a tactical military purpose on a broad scale." *Id.*

Despite MVA's compelling and first-hand evidence and the Secretary's previous extension of a presumption on three separate occasions, the Secretary found that there was no use of tactical herbicides on Guam, Johnston Island, or American Samoa and refused to grant MVA's proposed presumption and disregarded MVA's evidence of commercial herbicide use on military bases on these islands. Appx36a-42a. The Secretary's interpretation of the Act not only conflicted with the statutes plainly stated text and purpose but conflicted with the Secretary's own regulation.

The Secretary's flawed interpretation of the Agent Orange Act runs contrary the long-standing duty of the VA and Federal Courts to interpret statutes in the most veteran friendly manner. Even if there is an ambiguity in the Act, which there is none here, the Secretary is obligated to interpret the Act in the most veteran friendly manner possible. *See e.g.*, *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Boone v. Lightner*, 319 U.S. 561 (1943); *Henderson v. Shinseki*, 562 U.S. 428 (2011).

In allocating jurisdiction among the federal courts, Congress has identified a select few areas of law where there is a pronounced need for national uniformity and clarity. Veterans' benefit appeals are one of those categories, and Congress granted the Federal Circuit exclusive jurisdiction over these appeals, as well as challenges to VA regulations. 38 U.S.C. §§ 502. In assigning this exclusive jurisdiction, Congress was motivated by a "strong[] desir[e] to avoid the possible disruption of VA benefit administration

which could arise from conflicting opinions in the same subject due to the availability of review in the 12 Federal Circuits or the 94 Federal Districts." H.R. Rep. No. 100-963, at 28.

The pro-veteran canon has been a fixture in our law for nearly 80 years. In *Boone v. Lightner*, the Court considered the Soldiers' and Sailors' Civil Relief Act of 1940, a federal law providing protections for active-duty servicemembers and explained that legislation conferring a benefit to veterans "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." 319 U.S. 561, 575 (1943).

Since its pronouncement in *Boone*, the Court has consistently applied the pro-veteran canon. For example, in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) the Court again explained that it must construe separate provisions of the Selective Training and Service Act of 1940 "as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Id.* Decades later, in *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980), the Court once again explained that statutes that confer benefits upon veterans are "to be liberally construed." *Id.* at 196. *See also*, *Henderson v. Shinseki*, 562 U.S. 428 (2011)(the pro-veteran cannon has been "long applied" and Congress could not have intended for the "harsh consequences" that would result from applying a jurisdictional bar").

This pro-veteran/pro-claimant canon requires that the Secretary and courts resolve any ambiguities in favor of the disabled veterans. Instead, the Secretary deliberately interpreted the Agent Orange Act to the

detriment of disabled veterans, causing permanent financial harm and decreased life expectancy to veterans who fought bravely for this country. While the Federal Circuit's application of the pro-veteran canon has long been inconsistent, especially when deciding whether to defer to an agency's interpretation of a statute, *see Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the long-established precedent of this Court counsels the application of the pro-veteran canon to an agency's statutory interpretation.

B. The Federal Circuit Misapplied Chenery when it Denied MVA's Petition for Rulemaking Review on Grounds Different from those Relied Upon by the Secretary.

The present case falls squarely within the purview of this Court's reasoning in *Chenery*. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). As explained below, the Secretary based his denial of MVA's petition on statutory interpretation of the Agent Orange Act whereas the Federal Circuit based its denial of review on the exercise of the Secretary's policy discretion under 38 U.S.C. §501. The Federal Circuit erred in its analysis, ruled contrary to *Chenery's* customary precedent, and diverted from the consensus of other Federal courts that faithfully apply *Chenery*.

"It is black-letter law "that an agency's action may not be upheld on grounds other than those relied on by the agency." *Nat'l R.R. Passenger Corp. v. Bos. &*

Me. Corp., 503 U.S. 407, 420 (1992). It is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 576 U.S. 743, 758 (2015)*; see also DHS v. Regents of the Univ. of Cal.*, —— U.S. ——, 140 S. Ct. 1891 (2020)("An agency must defend its actions based on the reasons it gave when it acted."); Reviewing courts are bound to evaluate an administrative law decision on the "grounds ... upon which the record discloses that its action was based," *Fargnoli v. Massanari*, 247 F.3d 34, 44 n.7 (3d Cir. 2001).

The Secretary invited a *Chenery* error by asking the Federal Circuit to sustain the petition denial as an exercise of policy discretion under 38 U.S.C. §501instead of the Agent Orange Act by asserting that the Agent Orange Act was only a "helpful reference point." The Federal Circuit then adopted post hoc reasoning in its opinion by finding that the Secretary determined the circumstances of the Agent Orange Act were not comparable to Guam and ultimately declined to exercise rulemaking authority. Appx13a. Precedent of this Court dictates that courts cannot accept appellate counsel's post hoc reasoning for an agency action. *Burlington Truck Lines Inc., v. U.S.*, 371 U.S. 156, 167-69 (1962). *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself, otherwise litigants are burdened with the impossible task to chase everchanging agency discretion. 332 U.S. at 164.

Chenery has been faithfully applied throughout the federal courts. However, the Federal Circuit diverted from the common practice under *Chenery* and committed error based on the grounds in which it ruled

against MVA. *See e.g.*, *Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth.*, 452 U.S.App.D.C. 436, 443-44 (D.C. Cir. 2021)(refusing to adopt the Federal Labor Relations Authority's post hoc reasoning that it relied on a section of the Union's Proposal to deny the union's expanded telework request but, in fact, it based its decision on an entirely different section of the proposal.); *Mayfield v. Nicholson*, 444 F.3d 1328, 1334-36 (Fed. Cir. 2006)(finding that the Court of Appeals for Veterans Claims erred when it sustained the Board of Veteran's Appeals decision that the notification requirement had been met by relying on a notice letter from 2001 when the Board relied on a letter dated from 1999.); *DHS*, 140 S. Ct. at 1907–09(declining to consider post hoc reasons for agency's decision to rescind the Deferred Action for Childhood Arrivals program because "[a]n agency must defend its actions based on the reasons it gave when it acted").

In reviewing MVA's petition, the Secretary concluded that the Act does not apply to "commercial herbicides" as opposed to "tactical herbicides." Appx39a. In coming to this determination, the Secretary considered the Act's text, primary purpose, and legislative history and concluded that MVA's petition for toxic herbicide exposure went far beyond what Congress intended and what VA intended to "cover comparable scenarios in the current regulation." *Id.* The Federal Circuit, thus erred, when it claimed the Secretary's interpretation did not "rest on any misconception about what the Act itself does." Because the Secretary's denial did just that. Appx12a. By analyzing comparable scenarios under the Act itself and ultimately deciding against adopting one of them, the Secretary's denial was unambiguously premised upon statutory interpretation of the Act. Indeed, the

Secretary conceded that, when the VA previously promulgated a presumption that applied outside the borders of Vietnam, it did so by using its Agent Orange Act authority specifically—not by using the Act as a point of comparison for policy purposes. Appx40a.

Despite MVA briefing and arguing the issue, the Federal Circuit overlooked this *Chenery* dispute entirely. See Fed. R. App. P. 40(a)(2). Instead, the Court adopted the post hoc reasoning provided by the Secretary on appeal. Appx12-15a. These actions invite the dangers Chenery is meant to avoid. It gives political cover for an executive official to tell the public that he is merely applying the law as Congress wrote it, while obtaining the benefit of the Court's deference to his controversial but unstated policy preferences. In so doing, the Secretary deflects accountability to Congress and the Court with impunity and without a proper check on the scope of the agency's authority. Outlawing the use of post hoc rationalizations of agency rulemaking decisions is an essential component to the balance of powers between the executive and the judiciary and serves an important role in promoting "agency accountability." *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986).

Bypassing *Chenery* thus enables agencies to evade political accountability for their decisions, and it impedes judicial review by foregrounding agency reasoning "that did not form the true basis for the [agency]'s decision but which now present[s] convenient litigating positions." *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 28 n.17 (1st Cir. 2020); accord *DHS*, 140 S. Ct. at 1909(explaining that Chenery errors "markedly undermine[]" "these values" of accountability, public confidence, and orderly judicial review). When basing review of an agency decision

upon different grounds then that of the agency itself, the courts make policy and litigation a "moving target" rendering litigants vulnerable to the changing whims of either the agency or judiciary and incapable of asserting their rights before our adversarial system. *Id.* at 1912.

Thus, without *Chenery*, agencies have a license to craft whatever arguments suits their agenda to wind their way out of legal decisions which they may deem unfavorable. By suppling its reasoning to uphold the Secretary's denial on grounds which he did not himself articulate, the Federal Circuit has encouraged "executive agencies' penchant for changing their views about the law's meaning almost as often as they change administrations," *BNSF Ry. Co. v. Loos*, 586 U.S. ——, 139 S.Ct. 893, 908, 203 (2019)(Gorsuch, J., dissenting), a practice which is inconsistent with the Administrative Procedure Act. 5 U.S.C. §706.

When delegating rulemaking authority to agencies, Congress intended for agencies to offer genuine justifications for important decisions, reasons which can be scrutinized by courts or the public. *Norris*, 969 F.3d 12, 27-28. This *Chenery* error was thus neither beside the point nor harmless as thousands of disabled veterans were left without owed benefits. Accordingly, the Court should grant certiorari for a hearing on the merits of this *Chenery* dispute.

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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United States Court of Appeals, Federal Circuit.

MILITARY-VETERANS ADVOCACY INC.,
Petitioner

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent

2020-2086

Decided: June 17, 2022

Petition for review pursuant to 38 U.S.C. Section 502.

Attorneys and Law Firms

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Before Newman, Prost, and Cunningham, Circuit Judges.

Opinion

Prost, Circuit Judge.

Military-Veterans Advocacy Inc. ("MVA") petitioned the Secretary of Veterans Affairs ("VA")[1] to issue a rule that would presume herbicide exposure for veterans who served in Guam or Johnston Island during specified periods. The VA denied MVA's rulemaking petition. MVA now petitions this court under 38 U.S.C. § 502 to set aside the VA's denial and remand for rulemaking. We deny the petition.

BACKGROUND
I

The U.S. military sprayed over 17 million gallons of herbicides over the Republic of Vietnam during the Vietnam War. Dubbed "Operation Ranch Hand," this operation had two main objectives: (1) defoliate trees and plants to improve visibility for further military operations, and (2) destroy enemy food supplies.

Agent Orange was the primary herbicide used in Operation Ranch Hand. It consisted of an undiluted mixture of equal parts 2,4-dichlorophenoxyacetic acid ("2,4-D") and the n-butyl ester of 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T"). The latter ingredient, 2,4,5-T, includes a highly toxic contaminant, 2,3,7,8-tetrachlorodibenzo-p-dioxin ("TCDD" or "dioxin").

Concerns about the health effects of veterans' exposure to Agent Orange led Congress to pass the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11. For veterans who "served in the Republic of Vietnam" during a specified period, the Act presumes

exposure to an herbicide agent[2] containing 2,4-D or dioxin. 38 U.S.C. § 1116(f). It also presumes (for those same veterans) service connection for certain diseases associated with herbicide-agent exposure, such as non-Hodgkin's lymphoma and soft-tissue sarcoma. Id. § 1116(a)(2).

The VA has since issued regulations extending similar presumptions to other groups of veterans. For example, in light of Department of Defense ("DoD") information that herbicides were applied near the Korean demilitarized zone ("DMZ"), the VA presumes herbicide-agent exposure for veterans who served during a specified period "in a unit that, as determined by the [DoD], operated in or near the Korean DMZ in an area in which herbicides are known to have been applied during that period."[3] 38 C.F.R. § 3.307(a)(6)(iv); see Herbicide Exposure and Veterans With Covered Service in Korea, 74 Fed. Reg. 36,640, 36,641, 36,646 (July 24, 2009) (proposed rule). Likewise, an Institute of Medicine report led the VA to presume herbicide-agent exposure for veterans who "regularly and repeatedly operated, maintained, or served onboard C-123 aircraft known to have been used to spray an herbicide agent during the Vietnam era." 38 C.F.R. § 3.307(a)(6)(v); see Presumption of Herbicide Exposure and Presumption of Disability During Service for Reservists Presumed Exposed to Herbicide, 80 Fed. Reg. 35,246, 35,246, 35,248–49 (June 19, 2015) (interim final rule).

II

In 2017, the Armed Services Committee of the U.S. House of Representatives expressed concern that additional exposures to Agent Orange may have occurred in Guam. H.R. Rep. No. 115-200, at 113 (2017).

It therefore directed the U.S. Comptroller General to review and submit a report on the issue. Id. at 114. The U.S. Governmental Accountability Office ("GAO") submitted its report in 2018. J.A. 2164–266.

The GAO report began by characterizing Agent Orange as a "tactical" herbicide—i.e., one "developed specifically by [the] DoD to be used in combat operations"—as distinguished from a "commercial" herbicide. J.A. 2169 & n.1; see J.A. 2178–80. Although the report acknowledged that tactical and commercial herbicides might have shared some of the same chemical compounds, see J.A. 2179, it noted differences between the two. For example, according to the report, tactical herbicides were (1) centrally managed by the military; (2) unauthorized for domestic use; and (3) undiluted and sprayed aerially. J.A. 2176 n.21, 2178–79; see also J.A. 1592 (VA-commissioned report noting that, "[u]nlike civilian applications of the components contained in Agent Orange[,] which are diluted in oil and water, Agent Orange was sprayed undiluted in Vietnam"). Commercial herbicides, by contrast, were (1) widely available worldwide for vegetation management; (2) approved for use by all federal agencies; and (3) diluted and sprayed by hand or truck when used on military installations. J.A. 2178–79.

The GAO report then examined the extent of the government's information concerning the procurement, distribution, storage, use, and disposition of Agent Orange in Guam. See J.A. 2170; see also J.A. 2225–34 (Appendix I identifying objectives, scope, and methodology). Recognizing that ships from the continental United States carried most of the tactical herbicides supporting U.S. military operations in Vietnam, the GAO obtained the available logbooks for 152 of the 158 identified voyages that transported

Agent Orange to Southeast Asia.[4] J.A. 2195 (noting further that, for three of the six voyages for which logbooks could not be located, the GAO obtained copies of the vessels' shipping articles). The report identified just four voyages involving a stop in Guam; one ship stopped on the way to Vietnam, and the other three stopped on the way back to the United States. J.A. 2197–98. After reviewing available shipment documentation, the GAO "found no evidence indicating that Agent Orange or any other tactical herbicides were offloaded" from those ships. J.A. 2197; see J.A. 2198–200 (noting that each stop appeared related to offloading injured crew members).

The GAO also recounted veteran statements alleging Agent Orange use in Guam, but it nonetheless "could not substantiate the presence or use of Agent Orange or other tactical herbicides" there. J.A. 2203. Rather, these allegations were consistent with DoD information indicating that commercial herbicides were available in Guam for controlling vegetation. See J.A. 2203; see also J.A. 2188 ("[W]hile [DoD] documents identify the use of commercial herbicides on Guam, they do not identify the use of tactical herbicides there."); J.A. 2201 ("Available records show that [the DoD] stored and used commercial herbicides on Guam, possibly including those containing n-butyl 2,4,5-T, during the 1960s and 1970s, but documents do not indicate the use of tactical herbicides on Guam.").

The GAO did conclude, however, that a DoD list on the VA's website that identified herbicide-testing and -storage locations outside of Vietnam was inaccurate and incomplete. The report included several recommendations to the DoD and VA related to updating and clarifying the list. After receiving the GAO report, the DoD conducted an 18-month review of

records to update the list. The DoD and VA also developed joint criteria for what should be listed as a location where tactical herbicides were used, tested, or stored. Those joint criteria required that (1) an official record existed (e.g., a government report, unit history, shipping log, or contract); and (2) the location was a DoD installation, land under DoD jurisdiction, or a non-DoD location where service members were present during use, testing, storage, or transportation. The DoD's record search and these joint criteria resulted in an updated list, which identified 24 locations outside of Vietnam where tactical herbicides were used, tested, or stored. J.A. 2267–82. Such locations included Cambodia, Canada, India, Johnston Island,[5] Korea, and Laos—but not Guam.

III

In December 2018, MVA petitioned the VA to issue rules presuming herbicide-agent exposure for veterans who served in Guam or Johnston Island during specified periods.[6] J.A. 10–12. As to Guam, MVA's petition included photographs and four veterans' affidavits in support. The photographs showed browned-out vegetation that purportedly evidenced herbicide spraying in Guam, see J.A. 13, while the affidavits recounted the veterans' Vietnam-era service in Guam and attested to their being aware of, witnessing, or conducting herbicide spraying there, J.A. 14–19. As to Johnston Island, MVA noted that it was a storage site for Agent Orange drums between 1972 and 1977. MVA asserted that corrosion caused the drums to leak during that storage period and that military personnel stationed there were exposed to that leakage. J.A. 11.

When discussing Guam, MVA's rulemaking petition discouraged distinguishing between tactical and commercial herbicides. According to MVA, because commercial herbicides contained 2,4,5-T, and because exposure to herbicides with that compound can suffice to establish service connection for certain diseases, "[w]hether that exposure came from Agent Orange, another tactical herbicide[,] or a commercial herbicide is of no moment." See J.A. 10.

MVA supplemented its rulemaking petition twice in December 2019. Those supplements referenced, among other things, a report concerning testing of soil taken from Guam in 2018, which found "only trace amounts" of 2,4-D and 2,4,5-T. J.A. 2134 (citing J.A. 2135–41).

In May 2020, the VA denied MVA's rulemaking petition. MVA sent the VA a letter responding to that denial in June 2020, J.A. 2149–53, and it petitioned this court for review in July 2020. In November 2020, the VA sought a remand so that it could consider the aforementioned photographs and veterans' affidavits, which it had not considered before rendering its May 2020 denial. We granted the VA's request and remanded so that it could consider these materials, and we ordered the VA to render a new decision on MVA's rulemaking petition no later than February 19, 2021. Order (Dec. 21, 2020), ECF No. 16.

On remand, the VA again denied MVA's rulemaking petition. J.A. 1–9. As to Guam, the VA cited the DoD's record search and noted that the DoD "found no evidence of Agent Orange or other tactical herbicides on Guam." J.A. 2. It also cited the GAO report, which said that the GAO "found no evidence indicating that Agent Orange or any other tactical

herbicides were offloaded ... or used in ... Guam." J.A. 2 (alteration in original) (quoting J.A. 2197).

The VA further observed that, "[t]o the extent that trace levels of 2,4-D and 2,4,5-T have been found on Guam, that would be expected," as commercial herbicides containing these compounds were commonly used during the Vietnam era (in Guam and elsewhere) for standard vegetation and weed control. See J.A. 2–3 ("Thus, the presence of trace levels of 2,4-D and 2,4,5-T cannot be construed as evidence of the presence of Agent Orange or tactical herbicides in such locations."). Likewise, it explained that any high concentration of dioxin "would be expected" at, for example, a firefighting training area in Guam because dioxin can "be released into the environment through forest fires, burning of trash or waste, or industrial activities." J.A. 6 (concluding that basing presumptions on dioxin levels in a firefighting training area would implicate issues of "false positives").

The VA also addressed MVA's argument against distinguishing between tactical and commercial herbicides. Although MVA had argued that such a distinction was "of no moment," the VA disagreed—at least insofar as extending presumptions was concerned:

> It is clear that Congress did not enact the Agent Orange Act ... and codify presumptive service connection for veterans who served in the Republic of Vietnam because of commercial herbicides commonly used worldwide for standard vegetation and weed control. Rather, Congress established presumptive service connection ... due to the unique nature of the application and exposure in that country.

J.A. 3 (emphasis added) (cleaned up); id. ("[T]he primary purpose of the [Agent Orange Act] was to acknowledge the uniquely high risk of exposure, and corresponding risk to [s]ervice members' health, posed by large-scale application of herbicides for the deliberate purpose of eliminating plant cover for the enemy, as was done in the Republic of Vietnam." (emphasis added)). The VA summarized its view of this issue:

> Though [MVA] asserted that the spraying method and the commercial-tactical distinction is of no real import ..., Congress, in the Agent Orange Act, was addressing the question of when to presume the service connection of certain diseases, and the spraying method and the extensive scale of application in Vietnam were critical factors in the decision to authorize a presumption—solely for veterans who served in Vietnam. The fact that veterans serving in Guam supported the effort in Vietnam or may have worked with vehicles that traveled to or from Vietnam ... does not place these veterans in the same position as veterans who served in Vietnam insofar as a presumption is concerned.

J.A. 4 (emphasis in original) (cleaned up); see id. (reasoning that the Korean-DMZ and C-123-aircraft scenarios covered by regulation "all directly relate to the deliberate application of herbicides for a tactical military purpose on a broad scale" and that the exposure scenario in Guam was "not comparable").

The VA then considered the photographs and veterans' affidavits MVA submitted with its petition, but those materials did not persuade it to issue a

presumption-conferring rule for Guam. J.A. 4–5. For example, the VA observed that "[w]hile the degradation of foliage and vegetation—resulting in the 'brown-out' effect shown in the photographs—would be expected from the use of commercial herbicides, which were routinely used in Guam for vegetation management, it would be pure speculation to opine as to the cause of the 'brown-out' effect." J.A. 5. In the VA's view, the photographs did "not provide sufficient evidence of the testing, use, storage, or transportation of Agent Orange or other tactical herbicides in Guam so as to warrant a presumption of exposure for all [v]eterans serving in Guam" during the relevant period. J.A. 5. And although the VA considered each of the four veterans' affidavits, they did "not alter this conclusion." J.A. 5.

As to Johnston Island, the VA acknowledged that it was a storage site for Agent Orange drums between 1972 and 1977 and that some leakage occurred. J.A. 7. But it noted that (1) civilian contractors, not military personnel, were responsible for storage-related activities; (2) procedures existed for those contractors to shower separately and change into clean clothing before entering certain other areas of the island; (3) those contractors screened the entire inventory daily for leaks and performed de-drumming activities as necessary; and (4) the storage area was fenced and off-limits from a distance. J.A. 7. The VA also noted that the storage site's floor consisted of "densely compacted coral," which would have bound any leaked herbicide, thus "providing little opportunity for the herbicide to become airborne." J.A. 8. And while the VA recognized that contemporaneous independent monitors found concentrations of 2,4-D and 2,4,5-T in ambient air and water samples, it noted that those monitors concluded

that any exposure was "well below permissible levels." J.A. 8 (citing J.A. 3319–20). Accordingly, the VA decided not to issue a presumption-conferring rule for Johnston Island, either.

MVA petitions this court to review the VA's denial of MVA's rulemaking petition. We have jurisdiction under 38 U.S.C. § 502.

DISCUSSION

We review the VA's denial of a rulemaking petition to determine whether the denial was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Serv. Women's Action Network v. Sec'y of Veterans Affs., 815 F.3d 1369, 1374 (Fed. Cir. 2016). This "highly deferential" standard is "rendered even more deferential by the treatment accorded by the courts to an agency's rulemaking authority." Preminger v. Sec'y of Veterans Affs., 632 F.3d 1345, 1353 (Fed. Cir. 2011); see also Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4–5 (D.C. Cir. 1987) (observing that arbitrary-and-capricious review "encompasses a range of levels of deference to the agency" and that "an agency's refusal to institute rulemaking proceedings is at the high end of the range").

When, as here, a proposed rulemaking "pertains to a matter of policy within the agency's expertise and discretion," our scope of review is "narrow," limited to "ensuring that the agency has adequately explained the facts and policy concerns it relied on and to satisfy ourselves that those facts have some basis in the record." Serv. Women's Action Network, 815 F.3d at 1374 (cleaned up). In other words, we ask "whether the agency employed reasoned decisionmaking in rejecting

the petition." Id. (cleaned up). Overturning an agency's judgment not to institute rulemaking is appropriate in only the "rarest and most compelling of circumstances." Id. at 1375 (cleaned up).

MVA advances two main arguments in its petition for review. First, it argues that the VA's rulemaking denial was "contrary to law" for resting on an impermissible interpretation of the Agent Orange Act. E.g., Pet'r's Br. 21; see 5 U.S.C. § 706(2)(A) (requiring a reviewing court to set aside agency action "otherwise not in accordance with law"). Second, it argues that the denial "lacked a rational basis in this record" and was therefore arbitrary and capricious. Pet'r's Br. 54. We address each argument in turn.

I

MVA styles its first argument as one of statutory interpretation. It says that, in denying the petition as to Guam, the VA misinterpreted the Agent Orange Act as applying only to tactical herbicides—not commercial ones. Pet'r's Br. 30 ("In [the] VA's view, the Agent Orange Act applies only to so-called tactical herbicides .... [This] interpretation of the Act fails at every stage of a traditional statutory-interpretation analysis."). According to MVA, the Act's scope depends instead on an herbicide's chemical composition, aspects of which were common to both tactical and commercial herbicides. See Pet'r's Br. 31–32.

MVA's statutory-interpretation argument is simply beside the point. The Agent Orange Act does not give presumptions to anyone other than those who "served in the Republic of Vietnam"—nor does it require the VA to do so. It does, however, provide a decent example reflecting the kinds of circumstances

that have merited presumptions in the past. The VA looked to those circumstances, compared them to Guam's, found them not comparable, and ultimately declined to exercise rulemaking authority to extend a presumption to Guam. That comparison and judgment did not rest on any misconception about what the Act itself does.

The tactical-commercial distinction in particular arose when the VA considered the circumstances that led Congress to pass the Agent Orange Act in the first place. The VA reasoned that Congress gave veterans who "served in the Republic of Vietnam" presumptions because of "the uniquely high risk of exposure ... posed by large-scale application of herbicides for the deliberate purpose of eliminating plant cover for the enemy," as occurred in that country—not "because of commercial herbicides commonly used worldwide for standard vegetation and weed control." J.A. 3. And, when comparing the nature and extent of herbicide activity in Vietnam (and in the other scenarios where the VA has extended presumptions) to that in Guam, the VA determined that the activity in Guam was not comparable and therefore did not warrant exercising rulemaking authority to extend a presumption there. See J.A. 3–7. Thus, even assuming (for argument's sake) that the Act itself does not distinguish between tactical and commercial herbicides when giving its presumptions, the VA did not rest its denial on any contrary understanding of the Act. Rather, it rested its denial on the view that Congress gave those presumptions because it was concerned about the spraying of millions of gallons of tactical herbicides—and that Guam did not present comparable circumstances.[7]

MVA relies on Massachusetts v. EPA, 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), to support its argument. But that case only highlights the difference between legal errors requiring judicial correction and what the VA did here. In Massachusetts, several organizations filed a rulemaking petition asking the EPA to regulate greenhouse-gas emissions under the Clean Air Act. Id. at 510, 127 S.Ct. 1438. The EPA denied the petition, reasoning that (1) it lacked statutory authority to regulate greenhouse-gas emissions; and (2) even if it had such authority, doing so would be unwise because it would conflict with other administration priorities. Id. at 511, 528, 127 S.Ct. 1438. The Supreme Court held that each justification was contrary to statute. As to the first, the Court interpreted the Clean Air Act as "unambiguous[ly]" supplying the EPA with the authority it professed to lack. Id. at 528–29, 532, 127 S.Ct. 1438. As to the second, the Court held that the statute required certain things of the EPA before it could decline to regulate and that the EPA had not done those things. Id. at 533, 127 S.Ct. 1438 (observing that the "EPA has refused to comply with [a] clear statutory command"). Because the EPA rested its denial on a statutory misinterpretation and reasons that failed to comply with what the statute required, the Court remanded to the EPA for further proceedings. Id. at 535, 127 S.Ct. 1438.

MVA identifies no analogous potential error in this case. For example, the VA's denial did not claim that the VA lacked authority to grant the petition. And although MVA argues that the VA's denial was "not in accordance with law" under 5 U.S.C. § 706(2)(A), it does not demonstrate how the denial failed to comply with any particular legal requirement. In sum, MVA has not shown that the VA's decision was contrary to law.

II

MVA's second argument concerns how the VA weighed the evidence before it. According to MVA, the VA's denial "lacked a rational basis in this record" and was therefore arbitrary and capricious. Pet'r's Br. 54. We are unpersuaded.

As to Guam, MVA's primary contention is that the VA erred by relying on the GAO's and DoD's findings of "no evidence" of tactical herbicides there because those findings rested on the absence of official records documenting as much. See Pet'r's Br. 54–56. MVA argues that the absence of official records is probative only if there is some basis for believing that records would have been kept, and it observes that the military generally kept no records of "small-scale" spraying around American bases. But the VA was not merely determining whether "small-scale" spraying occurred in Guam; it was determining whether the nature and extent of herbicide activity in Guam "warrant[ed] a presumption of exposure for all [v]eterans" who served there during the relevant period. J.A. 5. And MVA has not convinced us that, in making that determination, it was arbitrary (or capricious, or irrational) for the VA to rely on the GAO's and DoD's no-evidence findings.

MVA's other evidence-weighing arguments are also unconvincing. For example, MVA points to the four veteran affidavits it submitted and says that the VA "erred in rejecting" them. Pet'r's Br. 59. But the VA explicitly considered them and found that they did "not alter [its] conclusion" that the record lacked sufficient evidence "so as to warrant a presumption of exposure for all [v]eterans serving in Guam" during the relevant period. See J.A. 5–6 (emphasis added).[8] In

denying the petition, the VA emphasized the "extensive nature" of the DoD's record search as well as the GAO's investigation and report. J.A. 6–7. Nothing in these affidavits leads us to conclude that the VA's giving more weight to the DoD's and GAO's findings—and ultimately deciding not to issue a broadly applicable, presumption-conferring rule—was arbitrary or capricious.

In a similar vein, MVA says that the VA improperly "trivialize[d]" soil testing data as showing only trace levels of 2,4-D and 2,4,5-T because finding even trace levels today is remarkable (given the passage of time, environmental degradation, and alleged shortcomings in the testing process). Pet'r's Br. 63. But the VA found that such trace levels would be expected because commercial herbicides containing the same chemical compounds were used in Guam. J.A. 2–3. The VA likewise explained that any high concentration of dioxin in, for example, a firefighting training area in Guam would be expected since dioxin can "be released into the environment through forest fires, burning of trash or waste, or industrial activities." J.A. 6; see also J.A. 2215 (GAO report observing that "there are multiple sources of dioxin[ ], ... and the specific source of dioxin contamination is difficult to identify").

Again, our scope of review is "narrow"; we ask only whether the VA "employed reasoned decisionmaking in rejecting the petition." Serv. Women's Action Network, 815 F.3d at 1374 (cleaned up). The VA did so here. It had evidence bearing on the nature and extent of herbicide activity in Guam, and it determined that the evidence did not warrant presuming exposure for every single veteran who served in Guam during the relevant period. This determination—and the VA's explanation for it—was

more than adequate to survive our narrow, highly deferential review.

As to Johnston Island, MVA's critiques of the VA's reasoning likewise do not persuade us that its denial was arbitrary or capricious. For example, MVA challenges the VA's rationale that civilian contractors, not military personnel, were responsible for activities concerning the storage of Agent Orange drums. According to MVA, cross-contamination occurred because those civilians showered and ate in the same facilities as military personnel. See Pet'r's Br. 64; J.A. 2152. But the VA considered this argument and found that MVA's support for it was "not persuasive." J.A. 8 (referencing J.A. 2159–60). Nothing in MVA's petition for review convinces us that this assessment was arbitrary or capricious. MVA also challenges the VA's rationale concerning the separate-showering and clean-clothing procedures that existed; it says that the evidence the VA relied on for that rationale "suggests" that those procedures existed for only a limited period. Pet'r's Br. 65 (citing J.A. 3407–10, 3447). MVA's argument on this score, however, amounts to little more than speculation. And, particularly in view of MVA's own lack of support for its cross-contamination theory, this argument hardly demonstrates that the VA's reliance on this evidence was irrational—much less that its overall decision on Johnston Island was arbitrary or capricious.

Finally, MVA argues that test samples from Johnston Island undermine the VA's finding that the isolation of the Agent Orange drums protected veterans. Pet'r's Br. 64. But, as the VA observed in its denial, the contemporaneous testing that MVA alludes to showed exposure to 2,4-D and 2,4,5-T that was "well below permissible levels." J.A. 8 (citing J.A. 3320

("Concentrations of 2,4-D and 2,4,5-T found in the ambient air and water samples were minimal.... [E]xposure of workers to airborne 2,4-D and 2,4,5-T w[as] well below permiss[i]ble levels."); see also J.A. 3468 ("No samples were in violation of currently accepted drinking water standards ....").

Like its arguments concerning Guam, MVA's arguments concerning Johnston Island simply do not overcome our narrow, highly deferential standard of review.

CONCLUSION

We have considered MVA's remaining arguments but find them unpersuasive. For the foregoing reasons, we deny MVA's petition for review.

DENIED

COSTS
No costs.

Footnotes
1Because neither party identifies any distinction between the Secretary of Veterans Affairs and the Department of Veterans Affairs that is relevant to the issues presented here, this opinion refers to the two interchangeably as the VA.
2The Agent Orange Act defines "herbicide agent" as "a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975." 38 U.S.C. § 1116(a)(3). VA regulations mirror this statutory definition and further provide that herbicide agents are

"specifically: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram." 38 C.F.R. § 3.307(a)(6)(i).

3Congress later did similarly via statute. See Blue Water Navy Vietnam Veterans Act of 2019, Pub. L. No. 116-23, sec. 3(a), 133 Stat. 966, 969 (codified at 38 U.S.C. § 1116B).

4The GAO report focused primarily on Agent Orange, as opposed to other tactical herbicides (e.g., Agents Pink, Purple, Green, Blue, and White). See J.A. 2169 n.1; see also J.A. 2194 n.57 (observing that there are limited shipment records available for Agents Pink, Green, and Purple and that Agents Blue and White did "not contain n-butyl 2,4,5-T").

5Johnston Island is the largest island in the Johnston Atoll. This opinion's references to Johnston Island contemplate both the island and the atoll.

6In later supplements to its petition, MVA mentioned including American Samoa along with Guam and Johnston Island. See J.A. 2087; J.A. 2134. The VA denied MVA's petition as to American Samoa, J.A. 9, and MVA's opening brief to this court did not include any argument concerning American Samoa that was separate and distinct from its arguments concerning Guam or Johnston Island. See Pet'r's Br. 17 n.1. We therefore do not address American Samoa separately.

7MVA makes a similar argument with respect to a VA regulation, 38 C.F.R. § 3.307, saying that it doesn't distinguish between tactical and commercial herbicides. Pet'r's Br. 42–44. But this argument fails for similar reasons—namely: (1) the VA did not rest its decision on a contrary understanding; and (2) § 3.307 presumes herbicide-agent exposure only for veterans who served in specific circumstances involving herbicide activity that the VA determined was not comparable to that in Guam.

8The VA stressed that its decision not to issue a presumption-conferring rule does not foreclose individual veterans from proving herbicide-agent exposure in the normal course of filing a benefits claim. J.A. 6.

DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

February 10, 2021

Commander John B. Wells, U.S. Navy (Retired)
Military-Veterans Advocacy, Inc.
Post Office Box 5235
Slidell, LA 70469-5235

Dear Commander Wells:

Pursuant to the U.S. Court of Appeals for the Federal Circuit's December 21, 2020, order in Military-Veterans Advocacy v. Secretary of Veterans Affairs, Fed. Cir. No. 20-2086, this is a new response to your petition for Department of Veterans Affairs (VA) rulemaking that would extend the presumption of herbicide exposure in 38 C.F.R. § 3.307(a)(6) to Veterans who served on Guam from January 9, 1962, through December 31, 1980; Johnston Island from January 1, 1972 until September 30, 1977; and American Samoa.fn1

In reviewing disability claims premised on exposure to herbicides, VA relies on the Department of Defense (DoD) for information regarding the presence or absence of tactical herbicides in locations outside the Republic of Vietnam. VA and DoD have reviewed a Government Accountability Office (GAO) report concerning the use, testing, storage, and transportation of Agent Orange and other tactical herbicides outside of Vietnam and Korea. See "Agent Orange: Actions Needed to Improve Accuracy and Communication of

Information on Testing and Storage Locations," GAO-19-24 (Nov. 15, 2018). DoD, working closely with VA, has also recently completed its own extensive review of documentation concerning the presence of Agent Orange and other tactical herbicides outside of Vietnam and Korea. The 18-month review involved analysis of thousands of original source documents dating back to the inception of tactical herbicide testing shortly after the end of World War II.

Based on a review of the GAO report and DoD's own findings, VA revised the list of locations outside of Vietnam and Korea where Agent Orange and other tactical herbicides were used, stored, tested, or transported. This list was published on January 27, 2020, and can be found at https://www.publichealth.va.gov/exposures/agentorange/locations/tests-storage/outsidevietnam.asp. In order to constitute a location where tactical herbicides were used, stored, tested, or transported, the VA/DoD joint criteria required the existence of an official record, to include government reports, unit histories, shipping logs, contracts, or scientific reports or photographs. The location must have been a DoD installation, land under DoD jurisdiction, or a non-DoD location where Service members were present during testing, application, transportation or storage of tactical herbicides.

Guam

In your December 2018, December 2019, and June 2020 letters, you suggested GAO found dioxin present on Guam, and that a draft Environmental Impact Statement of the Department of the Navy confirmed the use of herbicides on the island. You also

provided many documents, to include four Veterans' affidavits, photographs, excerpts from a U.S. Navy manual, a press release from the Guam Environmental Protection Agency, a letter from Weston Solutions, and a public health assessment of a firefighting training area at Andersen Air Force Base on Guam.

DoD conducted an extensive review of records concerning the use, testing, storage, and transportation of tactical herbicides; however, found no evidence of Agent Orange or other tactical herbicides on Guam. Furthermore, GAO's report 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. See GAO-19-24, at 29 ("[W]e found no evidence indicating that Agent Orange or any other tactical herbicides were offloaded . . . or used in . . .Guam.").

To the extent that trace levels of 2,4-D and 2,4,5-T have been found on Guam, that would be expected. During the 1960s, these chemicals were components of commercial herbicides that were commonly used on foreign and stateside military bases, in Guam and elsewhere, for standard vegetation and weed control. Herbicides used for regular vegetation control were registered with the Environmental Protection Agency prior to market availability and would have been used according to the manufacturer's instructions. Commercial products containing 2,4-D, such as Scotts® TurfBuilder®, continue to be sold in the United States and throughout the world. See https://scottsmiraclegro.com/products/24d-answers/ (last visited Feb. 4, 2021).

Thus, the presence of trace levels of 2,4-D and 2,4,5-T cannot be construed as evidence of the presence of Agent Orange or tactical herbicides in such locations. See GAO-19-24, at 20 ("[W]hile D[o]D documents identify the use of commercial herbicides on Guam, they do not identify the use of tactical herbicides there."). Additionally, although your December 2018 letter suggested that the difference between tactical herbicides and commercial herbicides "is of no moment," it is clear that Congress did not enact the Agent Orange Act of 1991 and codify presumptive service connection for Veterans who "served in the Republic of Vietnam" because of commercial herbicides commonly used worldwide for standard vegetation and weed control. Pub. Law No. 102-4, § 2(a)(1) (1991). Rather, Congress established presumptive service connection associated with "herbicide[s] used in support of the United States and allied military operations in the Republic of Vietnam" due to the unique nature of the application and exposure in that country. 38 U.S.C. § 1116(a)(3); 38 C.F.R. § 3.307(a)(6)(i).

More specifically, the primary purpose of the statute underlying section 3.307(a)(6) was to acknowledge the uniquely high risk of exposure, and corresponding risk to Service members' health, posed by large-scale application of herbicides for the deliberate purpose of eliminating plant cover for the enemy, as was done in the Republic of Vietnam. See, e.g., 137 Cong. Rec. H719 (Jan. 29, 1991)(Rep. Long) (recognizing the unique circumstances of Vietnam Veterans, "the first to experience widespread exposure to agent orange"); S. Rep. 101-82, at 25 (1989)(noting that the "vast majority" of the 20-plus million gallons of

herbicides "used in Vietnam were disseminated by aerial spraying"). It was not intended to presume service connection for any Veteran that served in an environment containing trace amounts of dioxin coinciding with the routine use of standard commercial herbicides. See H.R. Rep. 101-672 at 5 (1990) (recognizing that "[d]ioxin is omnipresent, existing in household products, dust particles and water. It has been found in significant levels across the world. Millions of people have been exposed to it through industrial accidents, fly ash from waste incinerators, herbicide spraying, manufacturing plants, and even in some edible fish."); Institute of Medicine, Veterans and Agent Orange 174-75 (1994) (recognizing that 2,4-D "has been used commercially in the United States since World War II to control the growth of broadleaf plants and weeds on range lands, lawns, golf courses, forests, roadways, parks, and agricultural land").

In sum, though your June 2020 letter asserted that the "spraying method" and the commercial-tactical distinction is of no "real import" where Service members "were contaminated with herbicide sprayed by their government," Congress, in the Agent Orange Act, was addressing the question of when to presume the service connection of certain diseases, and "the spraying method" and the extensive scale of application in Vietnam were critical factors in the decision to authorize a presumption—solely for Veterans who served in Vietnam.fn2 The fact that Veterans serving in Guam supported the effort in Vietnam or may have worked with vehicles that traveled to or from Vietnam, as you stated in your June 2020 letter, does not place these Veterans in the same position as Veterans who

served in Vietnam insofar as a presumption is concerned.

VA's regulation also recognizes two other specific situations where the risk of exposure was high for an ascertainable group of people: Veterans who served in or near the Korean demilitarized zone where herbicides were known to have been applied, and individuals whose duty regularly and repeatedly brought them into contact with the C-123 aircraft that conducted Agent Orange spray missions in Vietnam. 38 C.F.R. § 3.307(a)(6)(iv)-(v). The exposure scenario you would like included in the presumption is not comparable. The scenarios now covered in the regulation all directly relate to the deliberate application of herbicides for a tactical military purpose on a broad scale. See, e.g., 38 U.S.C. § 1821(d). Expanding the regulation as you urge would leave no principled reason why all military personnel throughout the United States and the world whose bases engaged in standard vegetation and weed control or contained trace amounts of dioxin would not qualify for a presumption.fn3 Such an expansion would go far beyond Congress's intent in passing the Agent Orange Act, and VA's intent to cover comparable scenarios in the current regulation.

In support of your petition, you have provided copies of photographs seemingly showing barrels (what appear to be 55 gallon drums) of Agent Orange in Guam and areas of "browned-out" vegetation in Guam alleged to have resulted from Agent Orange being employed on the island. Such barrels had various uses in military operations, including shipment of lubricants, fuel additives, cleaning fluids, and non-pesticide chemicals

as well as the storage of any number of materials. Furthermore, the photographs do not reveal the contents of the barrels. While the degradation of foliage and vegetation – resulting in the "brown-out" effect shown in the photographs – would be expected from the use of commercial herbicides, which were routinely used in Guam for vegetation management, it would be pure speculation to opine as to the cause of the "brown-out" effect. Additional pictures including images of an airplane, pipeline, personnel and wildlife were also submitted, which do not contain any objective evidence of tactical herbicide use. Thus, the photographs submitted do not provide sufficient evidence of the testing, use, storage, or transportation of Agent Orange or other tactical herbicides in Guam so as to warrant a presumption of exposure for all Veterans serving in Guam from 1958 to 1980.

Your submission of four Veteran affidavits also does not alter this conclusion. Veteran L.F.'s affidavit stated that he prepared, mixed, and sprayed herbicides at Andersen Air Force Base, at off-base fuel facilities, and near the cross country pipeline. According to a 2018 Board of Veterans' Appeals (Board) decision, L.F. worked with "vegetation control" and "aviation fuels," and "likely" was "exposed to chemicals" in service. But the Board found that the evidence did not warrant "conceding exposure [to]
herbicides in service."

In his affidavit, Veteran R.S. stated that he performed maintenance on fuel systems and the cross country pipeline and often could not leave the area when L.F. sprayed. A 2014 Board decision found the evidence in equipoise as to whether R.S. was exposed

to herbicides in service—and awarded direct service connection on that basis. See 38 U.S.C. § 5107(b) ("in a case before the Secretary . . . , the Secretary shall give the benefit of the doubt to the claimant"). But, importantly, the Board commented that this determination for this one Veteran, 38 C.F.R. § 20.1303, was premised on the "vacuum of evidence from the government regarding herbicide usage in Guam." Since 2014, the GAO and DoD have engaged in extensive reviews of available records and confirmed no evidence of tactical herbicides on Guam. (And, indeed, in R.S.'s case, the Board conceded exposure to "vegetation killing sprays," not tactical herbicides of "the same type as that used in Vietnam.")

We were provided insufficient information to verify the claim status of Veterans C.V. and R.F. But Veteran C.V. did not state that he observed any spraying; rather, he stated that he worked and walked in areas with brown vegetation and that L.F. later informed him that those areas had been sprayed. Veteran R.F. stated that he tried to move away from spraying, but it would drift, and he would feel the spray. If Veterans C.V. and R.F. file for VA benefits, they—like all other Veterans—will have the opportunity to establish that any current disabilities were the result of herbicide exposure in service.

In that regard, it is important to note that the lack of a presumption of herbicide exposure in certain locations does not foreclose Veterans from proving such an exposure that caused a current disability. Polovick v. Shinseki, 23 Vet. App. 48, 52-53 (2009) (lack of a presumption does not preclude establishing direct service connection). But a presumption is an exception

to the general burden of proof, designed for unique situations, such as where evidence of a toxic or environmental exposure, and associated health risk, are strong in the aggregate, but hard to prove on an individual basis. Presumptions are a blunt tool, contemplate false positives, and, in the area of potential exposure to toxic substances, should be employed only when the evidence demonstrates risk of exposure at meaningful levels.

Basing a presumption on, for instance, the dioxin levels in a firefighting training area at Andersen Air Force Base would implicate this issue of false positives. A high concentration of dioxins would be expected in an area that was used for firefighting activities. Dioxins are not only a byproduct of the production of the Agent Orange chemical component 2,4,5-T, but can also be released into the environment through forest fires, burning of trash or waste, or industrial activities.fn4 Therefore, any high concentration of dioxins in a firefighting training area at Andersen Air Force Base would be no different from any other environment where there were fires or where firefighting equipment was utilized.fn5

In view of the extensive nature of the most recent review conducted by DoD, as well as the investigation completed by GAO, which found no evidence of use, transportation, testing, or storage of Agent Orange or other tactical herbicides on Guam, VA has decided not to promulgate a rule extending a presumption of herbicide exposure to Veterans who served on Guam.fn6 VA will continue to consider claims of exposure on an individual, case-by-case basis.

Johnston Island

In your December 2018, December 2019, and June 2020 letters, you stated that Johnston Island was downwind of the fallout from several atmospheric nuclear tests and was a storage site for Agent Orange drums that leaked due to corrosion. DoD documents reflect that, in April 1972, nearly 25,000 barrels of Agent Orange were moved to Johnston Island (also known as Johnston Atoll) and stored in the northwest corner of the island. From July 15 to September 3, 1977, the barrels were transferred to the incinerator ship, Vulcanus, for incineration at sea.

Johnston Island was under the jurisdictional control of the Pacific Air Forces (PACAF) command. Personnel on the island included Air Force, Army, and Coast Guard servicemembers, and Holmes and Narver, Inc., contractors. PACAF contracted with the civilian company for maintenance of the Agent Orange storage site on Johnston Island. Civilian contractors, not military personnel, were responsible for site monitoring and re-drumming/de-drumming activities. The area was fenced and off limits from a distance. Drum leakage did occur, due to degradation of the metal drums under the environmental conditions of the island; but, on a daily basis, civilian contractors screened the entire inventory for leaks. The leaking drums were de-drummed, fresh spillage was absorbed, and the surface soil was scraped and sealed.fn7

When an herbicide containing dioxin (such as Agent Orange) enters the environment, it is either rapidly destroyed by photodegradation or quickly binds to the soil.fn8 The floor of the Johnston Island storage

site was comprised of densely compacted coral. Because of the composition and properties of coral, any leaked herbicide was bound to the coral, providing little opportunity for the herbicide to become airborne. Moreover, due to the storage location and wind patterns, any airborne herbicide would rapidly be dispersed away from Johnston Island and into the open Pacific Ocean.fn9 Overall, although contemporaneous independent monitors found concentrations of 2,4-D and 2,4,5-T in ambient air and water samples on Johnston Island, they concluded that any exposure was "well below permissible levels."fn10

Notwithstanding the military-civilian division of responsibilities at Johnston Island, your June 2020 letter asserted that "cross-contamination . . . would have been rampant," as "civilians and military shared common areas including latrine and shower facilities, recreational facilities, a common laundry, dining hall, chapel etc." Your support for this assertion, however, is the statement of Dr. Wayne Dwernychuk—and Dr. Dwernychuk's support for his statement is a personal communication with you. Such circular evidentiary support is not persuasive. And, to the contrary, the aforementioned independent monitors chronicled that civilian contractors (1) were provided with protective coveralls that were laundered daily, and (2) had a distinct place to shower and change into clean clothing before entering into any common areas on the island.fn11

In sum, because any 2,4-D and 2,4,5-T exposure was "well below permissible levels," and because civilian contractors (not military personnel) were directly responsible for control of the storage site, VA

has decided not to promulgate a rule extending a presumption of herbicide exposure to Veterans who served on Johnston Island. VA will continue to consider claims of exposure on an individual, case-by-case basis. If evidence shows that a particular Veteran was directly involved with the storage site or other activities directly associated with Agent Orange on Johnston Island, exposure to Agent Orange may be conceded.

American Samoa

Your December 2019 letters requested that VA extend the presumption of herbicide exposure to Veterans who served on American Samoa. DoD's extensive review of records concerning the use, testing, storage, and transportation of tactical herbicides found no evidence of Agent Orange or any other tactical herbicide having been present on American Samoa. Accordingly, VA has decided not to promulgate a rule extending a presumption of herbicide exposure to Veterans who served on American Samoa.

Thank you for your efforts in support of our Nation's Veterans. If you or your colleagues have any questions, please contact Mr. Cleveland Karren, Compensation Service, Veterans Benefits Administration at 202-461-1753.

Sincerely,
Thomas J. Murphy
Acting Under Secretary for Benefits

Footnotes

1 The original petition was dated December 3, 2018, and has since been supplemented by letters dated December 2, 2019, December 23, 2019, and June 8, 2020. The June 2020 letter modified the petition by requesting that the presumption of herbicide exposure apply to Veterans who served on Guam from August 15, 1958, to December 31, 1980.

2 Congress has also recently extended presumptions to Veterans who served in or near the Korean Demilitarized Zone (DMZ) and offshore of the Republic of Vietnam. Pub. L. 116-23, §§ 2(a), (3)(a) (2019). These extensions are directly related to the unique nature of the herbicide application in and around Vietnam and the Korean DMZ based on the military exigencies in those areas.

3 In your June 2020 letter, you affirmed your position that any Service member who served on duty at a base in the United States or overseas where there was use of a product containing 2,4-D (e.g., Scotts® TurfBuilder®) warrants a presumption of service connection for certain diseases.

4 See National Toxicology Program, U.S. Department of Health and Human Services, "2,3,7,8-Tetracholorodibenzo-p-dioxin," REPORT ON CARCINOGENS, FOURTEENTH EDITION (2016), available at https://ntp.niehs.nih.gov/ntp/roc/content/profiles/tetrachlorodibenzodioxin.pdf.

5 See A. Schecter et al., "Characterization of Dioxin Exposure in Firefighters, Residents, and Chemical Workers in the Irkutsk Region of Russian Siberia,"

47(2) CHEMOSPHERE 147-56 (Apr. 2002), available at https://www.ncbi.nlm.nih.gov/pubmed/11993630.

6 The "pro-veteran" canon, mentioned in your June 2020 letter, does not alter my conclusion. This canon applies to the interpretation of a governing text, and "only applies in the situation where the statute or regulation at issue is ambiguous." Kisor v. Wilkie, 969 F.3d 1333, 1343 (Fed. Cir. 2020). To the extent you suggest this should somehow impact the interpretation of section 1116(a) as applied to this situation, the statute is not ambiguous about whether it covers Veterans serving in Guam: it does not. Of course, the Veteran-friendly nature of VA's mission is reflected in other ways beyond the canon. For example, 38 U.S.C. § 5107(b) contains the "benefit of the doubt rule", which requires VA to resolve issues in favor of the claimant "in a case before the Secretary" on which there is an approximate balance of positive and negative evidence. Regardless of whether section 5107(b) could be considered to apply to requests for liberalizing changes to VA regulations such as this one, rather than just to VA benefits decisions, VA seeks to ensure that Veterans receive all the benefits to which they are legally entitled. In any event, however, we do not view the evidence in favor of establishing a presumption in the matter at hand to be in equipoise.

7 See T.J. Thomas et al., "Land Based Environmental Monitoring at Johnston Island -Disposal of Herbicide Orange - Final Report for Period 11 May 1977 - 30 September 1978," TR-78-87, at Part II, page 154 (Sep. 1978), available at https://apps.dtic.mil/dtic/tr/fulltext/u2/a076025.pdf; see also M21-1, IV.ii.1.H.5.b, available at

https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000014940/M21-1-Part-IVSubpart-ii-Chapter-1-Section-H-Developing-Claims-for-Service-Connection-SC-Basedon-Herbicide-Exposure.

8 See N. Karch et al., "Environmental fate of TCDD and Agent Orange and Bioavailability to Troops in Vietnam," 66 ORGANOHALOGEN COMPOUNDS 3689, 3690 (2004), available at http://www.dnrec.delaware.gov/dwhs/SiteCollectionDocuments/AWM%20Gallery/Hercules/Environmental%20Fate%20and%20Bioavailablity%20of%20TCDD%20and%20Agent%20Orange001.pdf.

9 See T.J. Thomas, supra at Part I, pages 2, 4-5; Department of the Air Force, "Final Environmental Statement on Disposition of Orange Herbicide by Incineration" 108 (Nov. 1974), available at https://www.nal.usda.gov/exhibits/speccoll/files/original/0545f78d07574ee445e99187e3af4175.pdf; see also M21-1, IV.ii.1.H.5.b.

10 See T.J. Thomas, supra at Report Documentation Page, § 20.

11 See T.J. Thomas, supra at Part I, page 106.

DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

May 12, 2020

Commander John B. Wells, U.S. Navy (Retired)
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Post Office Box 5235
Slidell, LA 70469-5235

Dear Commander Wells:

This is in response to your letters to the Department of Veterans Affairs (VA) dated December 3, 2018, December 2, 2019 and December 23, 2019, petitioning for a rulemaking that would extend the presumption of herbicide exposure in 38 C.F.R. § 3.307(a)(6) to Veterans who served on Guam from January 9, 1962 through December 31, 1980; Johnston Island from January 1, 1972 until September 30, 1977; and American Samoa.

In reviewing disability claims premised on exposure to herbicides, VA relies on the Department of Defense (DoD) for information regarding the presence or absence of tactical herbicides in locations outside the Republic of Vietnam. VA and DoD have reviewed a Government Accountability Office (GAO) report concerning the use, testing, storage and transportation of Agent Orange and other tactical herbicides outside of Vietnam and Korea. See "Agent Orange: Actions Needed to Improve Accuracy and Communication of Information on TestingandStorageLocations,"GA0-19-24 (Nov.15, 2018). DoD, working closely with VA, has

also recently completed its own extensive review of documentation concerning the presence of Agent Orange and other tactical herbicides outside of Vietnam and Korea. The 18-month review involved analysis of thousands of original source documents dating back to the inception of herbicide testing shortly after the end of World War II.

Based on a review of the GAO report and DoD's own findings, VA revised the list of locations outside of Vietnam and Korea where Agent Orange and other tactical herbicides were used, stored, tested or transported. This list was published on January 27, 2020 and can be found at https://www.publichealth.va.gov/exposures/agentorange/locations/testsstorage/outside-vietnam.asp. In order to constitute a location where tactical herbicides were used, stored, tested or transported, the VA/DoD joint criteria required the existence of an official record, to include government reports, unit histories, shipping logs, contracts, scientific reports or photographs. The location must have been a DoD installation, land under DoD jurisdiction or a non-DoD location where Service members were present during testing, application, transportation or storage of tactical herbicides.

Guam

In your December 2018 and December 2019 letters, you suggested that GAO found dioxin present on Guam, and that a draft Environmental Impact Statement of the Department of the Navy confirmed the use of herbicides on the island. You also provided a press release from the Guam Environmental Protection Agency, a letter from Weston Solutions and a public

health assessment of a firefighting training area at Andersen Air Force Base on Guam.

DoD's extensive review of records concerning the use, testing, storage and transportation of tactical herbicides; however, found no evidence of Agent Orange or other tactical herbicides on Guam. Furthermore, GAO's report 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. See GAO-19-24, at 29 ("[W]e found no evidence indicating that Agent Orange or any other tactical herbicides were offloaded ... or used in . .. Guam.").

To the extent that trace levels of 2,4-D and 2,4,5-T have been found on Guam, that would be expected. During the 1960s, these chemicals were components of commercial herbicides that were commonly used on foreign and stateside military bases, in Guam and elsewhere, for standard vegetation and weed control. Herbicides used for regular vegetation control were registered with the Environmental Protection Agency prior to market availability and would have been used according to the manufacturer's instructions.

Thus, the presence of trace levels of 2,4-D and 2,4,5-T cannot be construed as evidence of the presence of Agent Orange or tactical herbicides in such locations. See GAO-19-24, at 20 ("[W]hile D[o]D documents identify the use of commercial herbicides on Guam, they do not identify the use of tactical herbicides there."). And, although your December 2018 letter suggested that the difference between tactical herbicides and

commercial herbicides "is of no moment," presumptive service connection only applies to chemicals in "an herbicide used in support of the United States and allied military operations." 38 U.S.C. § 1116(a)(3); 38 C.F.R. § 3.307(a)(6)(i).

To the extent your petition can be construed as a request that VA interpret its regulation to apply to commercial herbicides used for standard vegetation and weed control, we must reject this request. This would broaden the regulation far beyond its intended function. The primary purpose of the statute underlying the regulation was to acknowledge the uniquely high risk of exposure, and corresponding risk to Service members' health, posed by large-scale application of herbicides for the deliberate purpose of eliminating plant cover for the enemy, as was done in the Republic of Vietnam. See, e.g., 137 Cong. Rec. H719 (Jan. 29, 1991) (Rep. Long) (recognizing the unique circumstances of Vietnam veterans, "the first to experience widespread exposure to agent orange"); S. Rep. 101-82, at 25 (1989)(noting that the "vast majority" of the 20-plus million gallons of herbicides "used in Vietnam were disseminated by aerial spraying"). It was not intended to presume service connection for any Veteran that served in an environment containing trace amounts of dioxin as a result of routine use of standard commercial herbicides. See H.R. Rep. 101-672 at 5 (1990) (recognizing that "[d]ioxin is omnipresent, existing in household products, dust particles and water. It has been found in significant levels across the world. Millions of people have been exposed to it through industrial accidents, fly ash from waste incinerators, herbicide spraying, manufacturing plants and even in some edible fish."); Institute of Medicine, Veterans and

Agent Orange 174-75 (1994) (recognizing that 2,4-D "has been used commercially in the United States since World War II to control the growth of broadleaf plants and weeds on range lands, lawns, golf courses, forests, roadways, parks and agricultural land").

VA's regulation also recognizes two other specific situations where the risk of exposure was high for an ascertainable group of people: Veterans who served in or near the Korean demilitarized zone where herbicides were known to have been applied, and individuals whose duty regularly and repeatedly brought them into contact with the C-123 aircraft that conducted Agent Orange spray missions in Vietnam. 38 C.F.R. § 3.307(a)(6)(iv)-(v). The exposure scenario you urge us to include in the presumption is not comparable. The scenarios now covered in the regulation all directly relate to the deliberate application of herbicides for a tactical military purpose on a broad scale. See e.g., 38 U.S.C. § 1821 (d).

Expanding the regulation as you urge would leave no principled reason why all military personnel throughout the United States and the world whose bases engaged in standard vegetation and weed control or contained trace amounts of dioxin would not qualify for a presumption. Such an expansion would go far beyond Congress's intent in passing the Agent Orange Act, and VA's intent to cover comparable scenarios in the current regulation.

It is important to note that the lack of a *presumption* of herbicide exposure in certain locations does not foreclose Veterans from proving such an exposure that caused a current disability. *Palovick v.*

Shinseki, 23 Vet. App. 48, 52-53 (2009) (lack of a presumption does not preclude establishing direct service connection). But a presumption is an *exception* to the general burden of proof, designed for unique situations where evidence of a toxic or environmental exposure, and associated health risk, are strong in the aggregate, but hard to prove on an individual basis. Presumptions are a blunt tool, contemplate false positives and should be employed only when the evidence demonstrates risk of exposure at meaningful levels.

Basing a presumption on, for instance, the dioxin levels in a firefighting training area at Andersen Air Force Base implicate this issue of fa lse positives. A high concentration of dioxins would be expected in an area that was used for firefighting activities. Dioxins are not only a byproduct of the production of Agent Orange chemical component 2,4,5-T, but can also be released into the environment through forest fires, burning of trash or waste, or industrial activities.fn1 Therefore, any high concentration of dioxins in a firefighting training area at Andersen Air Force Base would be no different from any other environment where there were fires or where firefighting equipment was utilized.fn2

In view of the extensive nature of the most recent review conducted by DoD, as well as the investigation completed by GAO, which found no evidence of use, transportation, testing or storage of Agent Orange or other tactical herbicides on Guam, VA has decided not to promulgate a rule extending a presumption of herbicide exposure to Veterans who

served on Guam. VA will continue to consider claims of exposure on an individual, case-by-case basis.

Johnston Island

In your December 2018 and December 2019 letters, you stated that Johnston Island was downwind of the fallout from several atmospheric nuclear tests and was a storage site for Agent Orange drums that leaked due to corrosion. DoD documents reflect that, in April 1972, nearly 25,000 barrels of Agent Orange were moved to Johnston Island (also known as Johnston Atoll) and stored in the northwest corner of the island. From July 15, 1977 to September 3, 1977, the barrels were transferred to the incinerator ship, Vulcanus, for incineration at sea.

Johnston Island was under the jurisdictional control of the Pacific Air Forces (PACAF) command. Personnel on the island included Air Force, Army, and Coast Guard Service members, and Holmes and Narver, Inc., contractors. PACAF contracted with the civilian company for maintenance of the Agent Orange storage site on Johnston Island. Civilian contractors, not military personnel, were responsible for site monitoring and re-drumming/de-drumming activities. The area was fenced and off limits from a distance. Drum leakage did occur, due to degradation of the metal drums under the environmental conditions of the island, but, on a daily basis, civilian contractors screened the entire inventory for leaks. The leaking drums were de-drummed, fresh spillage was absorbed and the surface soil was scraped and sealed.fn3

When an herbicide containing dioxin (such as Agent Orange) enters the environment, it is either rapidly destroyed by photodegradation or quickly binds to the soil.fn4 The floor of the Johnston Island storage site was comprised of densely compacted coral. Because of the composition and properties of coral, any leaked herbicide was bound to the coral, providing little opportunity for the herbicide to become airborne. Moreover, due to the storage location and wind patterns, any airborne herbicide would rapidly be dispersed away from Johnston Island and into the open Pacific Ocean.fn5 Overall, although contemporaneous independent monitors found concentrations of 2,4-D and 2,4,5-T in ambient air and water samples on Johnston Island, they concluded that any exposure was "well below permissible levels."fn6

Because any 2,4-D and 2,4,5-T exposure was "well below permissible levels," and because civilian contractors (not military personnel) were directly responsible for control of the storage site, VA has decided not to promulgate a rule extending a presumption of herbicide exposure to Veterans who served on Johnston Island. VA will continue to consider claims of exposure on an individual, case-by-case basis. If evidence shows that a particular Veteran was directly involved with the storage site or other activities directly associated with Agent Orange on Johnston Island, exposure to Agent Orange may be conceded.

American Samoa

Your December 2019 letters requested that VA extend the presumption of herbicide exposure to

Veterans who served on American Samoa. DoD's extensive review of records concerning the use, testing, storage and transportation of tactical herbicides found no evidence of Agent Orange or any other tactical herbicide having been present on American Samoa. Accordingly, VA has decided not to promulgate a rule extending a presumption of herbicide exposure to Veterans who served on American Samoa.

Thank you for your efforts in support of our Nation's Veterans. If you or your colleagues have any questions, please contact Mr. Rodney Grimm, Compensation Service, Veterans Benefits Administration at Rodney.Grimm1@va.gov or 202-461-9733.

Sincerely,

Paul R. Lawrence, Ph.D.

Footnotes

1 *See* National Toxicology Program, U.S. Department of Health and Human Services, "2,3,7,8-Tetracholorodibenzo-p-dioxin ," REPORT ON CARCINOGENS, FOURTEENTH EDITION (2016), available at https://ntp.niehs.nih.gov/ntp/roc/content/profiles/tetrachlorodibenzodioxin.pdf.

2 *See* A. Schecter et al. , "Characterization of Dioxin Exposure in Firefighters, Residents, and Chemical Workers in the Irkutsk Region of Russian Siberia," 47(2) CHEMOSPHERE 147-56 (Apr. 2002), available at https://www.ncbi.nlm.nih.gov/pubmed/11993630.

3 See T.J. Thomas et al., "Land Based Environmental Monitoring at Johnston Island -Disposal of Herbicide Orange - Final Report for Period 11 May 1977 - 30 September 1978," TR-78-87, at Part 11, page 154 (Sep. 1978), available at https://apps.dtic.mil/dtic/tr/fulltext/u2/a076025.pdf; see also M21-1 , IV.ii.1 .H.5.b, available at https://www.knowva.ebenefits.va.gov/system/templates /selfseNice/va ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000014940/M 21 -1-Part-lV-Su bpart-i i-C hapter-1-Section-H-Developinq-C la i ms-for-SeNice-Con nectio nSC-Based-on-H erbicide-Exposu re.

4 See N. Karch et al., "Environmental fate of TCDD and Agent Orange and Bioavailability to Troops in Vietnam," 66 ORGANOHALOGEN COMPOUNDS 3689, :3690 (2004), available at http://www.dnrec.delaware.gov/dwhs/SiteCollectionDocuments/AWM%20Gallery/Hercules/Environmental%20Fate%20and%20Bioavailablity%20of%20TCDD%20and%20Aqent%20Orange001 .pdf.

5 See T.J. Thomas, supra at Part I, pages 2, 4-5; Department of the Air Force, "Final Environmental Statement on Disposition of Orange Herbicide by Incineration" 108 (Nov. 1974), available at https://www.nal.usda.gov/exhibits/speccoll/files/oriqinal/0545f78d0757 4ee445e9918 7e3af4175.pdf; see a/so M21-1 , IV.ii.1.H .5.b.

6 *See* T.J. Thomas, *supra* at Report Documentation Page,§ 20.

NOTE: This order is nonprecedential. United States

United States Court of Appeals, Federal Circuit.

MILITARY-VETERANS ADVOCACY INC.,
Petitioner

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent

2020-2086

Petition for review pursuant to 38 U.S.C. Section 502.

ON PETITION FOR PANEL REHEARING AND ON MOTION

Before NEWMAN, PROST, and CUNNINGHAM, Circuit Judges. PER CURIAM.

O R D E R

Military-Veterans Advocacy Inc. ("MVA") moves for the court to vacate its June 17, 2022 opinion and to remand the above-captioned appeal. Secretary of Veteran Affairs ("VA") responds in opposition and MVA replies

MVA subsequently filed a petition for panel rehearing. A response to the petition was invited by the court and filed by VA. Upon consideration thereof, IT IS ORDERED THAT: The motion to vacate and remand is denied. The petition for panel rehearing is denied. The mandate of the court will issue September 30, 2022.

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner Clerk of Court

September 23, 2022
Date

Military-Veterans Advoacy, Inc.
Post Office Box 5235
Slidell, Louisiana 70469-5235

December 23, 2019

Hon. Robert Wilkie
Secretary of Veterans Affairs
810 Vermont Ave. NW
Washington, DC 20420

Re: Amplification of rulemaking request concerning the presence of herbicide on Guam, American Samoa and Johnston Island.

Dear Mr. Secretary,

I write in amplification of our rulemaking request dated December 3, 2018 to extend the presumption of exposure to herbicide to those veterans serving on Guam from January 9, 1962 through December 31, 1980 and on Johnston Island from January 1, 1972 until September 30th, 1977. As you remember, we also met on that date.

During our December 3, 2018 meeting, we presented you with documents confirming the presence of dioxin on Guam. Additionally, there is a public health assessment of the fire fighting training area at Andersen Air Force Base revealing a dioxin concentration of 19000 ppm. (excerpt enclosed). Unfortunately, most veterans were assigned to this area for periodic fire fighting training.

The Guam land use plan, an excerpt which I have enclosed, confirm the use of herbicides on Guam through 1980. Including in the package we left with you where affidavits from several veterans who sprayed herbicide on the island,

On Johnston Island, the chemical was stored for several years until destroyed at sea . I have enclosed additional information concerning leakage from those steel drum stored in the open air. This resulted in the military contingent on Johnston Atoll being exposed to dioxin. Today the atoll is uninhabited. It is easy to see why.

I am also enclosing a press release from the Guam EPA confirming the presence of trace Amounts of 2, 4-D and 2,4,5-T based on random sampling. Earlier this year we funded our Director of Central Pacific Islands, Mr Brian Moyer, to travel to Guam. Mr Moyer, a veteran of Guam, identified specific areas where spraying occurred. Unfortunately, we were denied access to Andersen Air Force Base. The federal EPA and Guam EPA did take samples in off base areas identified by Mr Moyer. Test results are expected by the end of January 2020.

On April 11, 2019 you wrote me that you were looking into the situation on Guam. I know you spent some time there this past summer, I also recognize that the rulemaking process can be lengthy. Based on current information, however, there is sufficient evidence to justify the Favorable action. Additionally, our December 3, 2018 letter contained draft regulations which could easily be adopted.

A year has passed and we have not received a substantive response to our rulemaking request. Unfortunately, many of these veterans are sick and dying. Time is certainly of the essence. We understand that you may wish to see the results of the latest round of testing and I will forward that to you as soon as I receive it. Given the urgent health concerns, however, we must ask for expedited action. Accordingly, if we do not see the notice of proposed rulemaking or receive an estimated date of the promulgation of such notice within 60 days of your receipt of those results, we will assume that you are denying our request for rule-making.

As Always, our goal is to work with the VA and not against you. I am certain you understand, however, that the health concerns of the veterans come first.

Wishing you the best in the future I remain,

Sincerely,

John B. Wells
Commander USN (Retired)
Executive Director

Military-Veterans Advoacy, Inc.
Post Office Box 5235
Slidell, Louisiana 70469-5235

December 3, 2018

Hon. Robert Wilkie
Secretary of Veterans Affairs
810 Vermont Ave. NW
Washington, DC 20420

Re: Request for Rulemaking 38 C.F.R. Sec. 3.307 and M21-1 Manual

Dear Mr. Secretary,

Pursuant to 5 U.S.C. Sec 553(e), Request that you issue rules recognizing the presumption of Agent Orange exposure to Veterans serving on Guam from January 9, 1962 through December 31, 1980 and on Johnston Island from January 1, 1972 until September 30 1977.

The recent GAO report was unable to confirm the presence of Agent Orange on the island although there are sworn affidavits to the effect that it was there. They did confirm that at least one ship carrying agent orange docked in Guam. Unfortunately there are no records showing whether any of the barrels were offloaded or whether the herbicide was ever shipped by other means to the island. Routine destruction protocols at the time resulted in many documents being destroyed.

As confirmed by other scientific studies, the GAO found that the chemical 2, 4, 5-T was present on Guam.

A by-product of this chemical contained is the lethal 2, 3, 7, 8-TCDD otherwise known as dioxin. This was present in commercial herbicides as well as the tactical herbicides which was widely used on Guam until at least 1980. This was confirmed by the draft environmental impact statement for the disposal and reuse of surplus Navy property identified in the Guam land use published plan in 1994.

Most of the discussion surrounding veteran exposure has centered on tactical herbicides. Inclusion of 2, 4, 5-T in commercial herbicides make this a difference without distinction. It is the exposure to 2, 4, 5-T and it's dioxin by-product, while on active duty in the armed forces, that is relevant. Whether that exposure came from Agent Orange, another tactical herbicide or a commercial herbicide is of no moment. The name of the agent is not the determining factor. It is the chemical composition. If military personnel were exposed to this chemical, and it appears that they were, any disease or disorder flowing from that chemical component should be service-connected pursuant to 38 U.S.C. Sec 1113(b). While many veterans who served on Guam felt that they were exposed to Agent Orange, we must not obsessed with that term. The important thing is that they were exposed to herbicides with toxic components. That is sufficient to trigger coverage.

Exposure on Johnston island is even clear. Johnson Island consists of four small uninhabited a atolls covering 1.03 square miles in the Pacific Ocean. During and after World War II, it was the site of United States military facilities. It was downwind of the Fallout from several atmospheric nuclear tests. Additionally, it was a storage site for Agent Orange drums between 1972 and

1977. The herbicide was disposed at sea during the summer of 1977. However, during the storage period, corrosion caused significant leakage which seeped into the grounds. Military personnel stationed on the island were exposed to the leakage during the storage and disposal phases. Between 1990 and 1993 incineration of chemical weapons occurred on the island. Significant clean up occurred in 2002. The last military left the island in 2004. Since then it has been designated a wildlife refuge.

While only a small number of veterans were stationed on this atoll, contamination was rampant. There is no question, scientific or otherwise, concerning the island and its environmental toxicity. A presumption of exposure to herbicide would affect only a small number of people. MVA estimates approximately 2,000 personnel were stationed there during the storage. With decreasing number thereafter.

MVA Suggest that the Secretary can and should use his rule-making authority to provide a presumption of exposure to herbicides on Guam and Johnston Island as delineated in the attached proposal

Sincerely,

John B. Wells
Commander USN (Retired)
Executive Director

Proposed additions to 38 C.F.R. Sec 3.307

38 C.F.R. Sec 3.307(a)(6)(vi)

A veteran who, during active military, naval, or air service, served on the island of Guam, or within The harbors and territorial seas of that island during the period beginning on January 9th, 1962, and ending on July 31, 1980, shall be presumed to have been exposed during such service to a herbicide agent, within the scope of this Part, unless there is affirmative evidence to establish that the veteran was not exposed to any such as during that service.

38 C.F.R. Sec 3.307(a)(6)(vii)

A veteran who, during active military, naval, or air service, served on Johnston atoll or on a ship that called at that atoll during the period beginning on January 1, 1972, and ending on September 30, 1977, shall be presumed to have been exposed during such service to a herbicide agent, within the scope of this Part, unless there was affirmative evidence to establish that the veteran was not exposed to any such agent during that service.