

No. 23-380

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IN THE  
**Supreme Court of the United States**

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MILITARY-VETERANS ADVOCACY INC.,

*Petitioner,*

*v.*

DENIS R. MCDONOUGH, SECRETARY OF  
VETERANS AFFAIRS,

*Respondent.*

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

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**BRIEF OF *AMICUS CURIAE* THOMAS A.  
BIANCO JR. IN SUPPORT OF PETITION  
FOR A WRIT OF CERTIORARI**

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**INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>**

LCdr. Thomas A. Bianco Jr., ret. (“Bianco” or “*amicus curiae*”), is a 92-year old veteran of the Korean and Vietnam Wars who served a career on active duty in the U.S. Navy from 1951-82. A “Blue Water Navy” veteran, he was the S-1 Division Officer aboard the aircraft carrier USS Constellation (CV 64) from July 1967 to August 1969, responsible for providing material support to the entire warship. The Constellation was part of Task Force 77, conducting naval air operations from “Yankee Station” in the Gulf of Tonkin roughly 100 miles off the coastal city of Da Nang.

Subsequent to his service in the theatre of conflict surrounding Vietnam—where herbicides such as Agent Orange were present and used—Bianco suffered from debilitating prostate cancer. He contends that his in-service exposure to such herbicides, during the time he served on the Constellation, caused his disease.

Bianco has been seeking recognition from the Department of Veterans Affairs (“VA”) in the form of service connection for residuals of his prostate cancer for over two decades. In an April 13, 2022 decision, the Board of Veterans’ Appeals (“BVA”) denied service connection—

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1. Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amicus* or his counsel made such a monetary contribution. Pursuant to Supreme Court Rule 37.2, counsel for all parties received notice at least 10 days before the due date of *amicus curiae*’s intention to file this brief.

contrary to Bianco’s arguments concerning exposures as well as a positive “private medical opinion” proffered in support—purportedly because:

... [T]he Veteran did not set foot in the Republic of Vietnam based on the evidence of the claims file. While the USS Constellation did deploy twice to the Republic of Vietnam based on the deck logs, the ship did not travel in the territorial waters. As such, there is no evidence that documents that the USS Constellation docked or anchored in a qualifying bay or harbor in Vietnam or that the USS Constellation traveled along inland waterways or within twelve nautical miles off the coast of the Republic of Vietnam during the Veteran’s service.

*See* Order, Docket No. 17-15 505 (BVA Apr. 13, 2022).<sup>2</sup> The BVA relied upon the Blue Water Navy Vietnam Veterans Act, Pub. L. No. 116-23, 133 Stat. 966 (2019) (“BWN Act”) with its non-limiting recognition of presumptions of service connection for those who “served offshore” while “not more than 12 nautical miles seaward.” *Id.*, citing 38 U.S.C. § 1116A(b) & (d).

Service connection was denied by BVA because Bianco’s “ship did not travel in the territorial waters” of Vietnam, which BVA only recognized to extend “within twelve nautical miles off the coast of the Republic of Vietnam during the Veteran’s service.” *Id.* However, Bianco contends that the BWN Act supplemented *but not*

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2. Available at <https://www.va.gov/vetapp22/Files4/22021802.txt>.



*supplanted* the Agent Orange Act, Pub. L. No. 102-4, 105 Stat. 11 (1991). Thus, Bianco contends that he is entitled to presumptive service connection for his prostate cancer in view of the latter. In particular, the legally recognized territorial limits of the Republic of Vietnam extend offshore to include a 200-nautical-mile exclusive economic zone which certainly encompassed Yankee Station where Bianco and the Constellation were deployed.

Bianco appealed BVA's denial to the U.S. Court of Appeals for Veterans Claims ("CAVC") and in a brief September 14, 2023 Memorandum Decision affirming the BVA, CAVC relied on the Federal Circuit's decision in *Military-Veterans Advocacy Inc. v. Sec'y of Veterans Affairs.*, 63 F.4th 935, 945 (Fed. Cir. 2023).<sup>3</sup> The Federal Circuit's *Military-Veterans Advocacy* decision occurred subsequent to BVA's decision on Bianco's appeal and also is the subject of the present petition for a writ of certiorari.

### INTRODUCTION AND SUMMARY OF THE ARGUMENT

The second and third "Questions Presented" in the petition for a writ of certiorari ask: [II.] Whether a Proper Construction of the BWN Act Warrants Certiorari when the Federal Circuit's decision and the VA's BWN Rule conflicts with the plain statutory language and departs from the plain meaning of the Agent Orange Act and the Federal Circuit's Own decision in *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (*en banc*); and [III.] Whether the

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3. *Bianco, Jr. v. McDonough*, No. 22-4633, 2023 U.S. App. Vet. Claims LEXIS 1454, at \*3 (CAVC Sept. 14, 2023) (unpub.) ("We are bound to follow Federal Circuit precedent.").

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. It is *amicus curiae*'s position that grant of certiorari is warranted for these questions presented.

The BWN Act did *not* override the scope of the Agent Orange Act. Rather, Seamen who served on aircraft carriers within the legally recognized territorial limits of the Republic of Vietnam—in the offshore waters comprising a 200-nautical-mile exclusive economic zone—are covered by the latter. The Federal Circuit's decision to exclude such seamen from a statutory presumption of service connection simply cannot be squared with the Agent Orange Act.

“When confronted with a statute which is plain and unambiguous on its face, we *ordinarily* do not look to legislative history as a guide to its meaning.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 n.29 (1978) (emphasis added). But the pro-veteran canon of statutory construction has long dictated that veteran's law 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.” *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (emphasis added). In order to effectuate this canon—which is unique in its treatment of a class of individuals (veterans)—it is appropriate to look to the legislative history of the Agent Orange Act of 1991 to illuminate and confirm the natural, plain, and broad meaning of having served “in the Republic of Vietnam” as used in 38 U.S.C. § 1116. That legislative history puts to rest any debate about the remedial nature of the Act and supports the conclusion that there is no ambiguity in

the phrase at issue. Quite simply, the meaning is broad because Congress sought to short-circuit an endless inquiry—by the scientific community and the executive and legislative branches—into who had been exposed and whether the exposure was clinically meaningful. Without firm answers, Congress chose a wide net for the veterans to be covered.

Courts are obligated to construe the terms of a remedial statute in a manner that does not depart from its remedial purpose. To that end, the plain meaning of service “in the Republic of Vietnam” is consistent with and best effectuates that purpose. The phrase contains no plain words of limitation and indeed the legislative history does not support a narrow construction. Rather, it reflects a recognition that “[v]eterans of the Vietnam war ha[d] waited over 20 years for a meaningful response to the complex issues surrounding their hidden wounds.” 137 Cong. Rec.-Senate 2483 (1991).

The Agent Orange Act was signed into law in the shadow of a study by the Centers for Disease Control (“CDC”) curiously finding an increased risk of non-Hodgkin’s lymphoma in those who served in the Blue Water Navy during the war, while the CDC was “unable to explain the increased risk” yet acknowledged that “[w]e don’t believe it is a fluke.”<sup>4</sup> *See* CENTERS FOR DISEASE CONTROL SELECTED CANCERS STUDY AND SCIENTIFIC REVIEWS OF THE STUDY, HRG. BEFORE THE COMMITTEE ON

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4. It needs scarcely to be emphasized that when the Agent Orange Act became law in 1991, presumptions of service connection were established for three specific diseases: chloracne, soft-tissue sarcoma, and *non-Hodgkin’s lymphoma*.

VETERANS' AFFAIRS, HOUSE OF REPRESENTATIVES (Apr. 4, 1990), Serial No. 101-44, at 16 (W. Roper, M.D., M.P.H., Director, CDC). The legislative history demonstrates that Congress rejected the temptation to exclude *any* service members—*e.g.*, Blue Water sailors—from presumptive exposure based on “inconclusive evidence”:

. . . For too long, we have tried to placate the victims of agent orange with yet another study. Nearly two decades and a generation are enough.

. . . [A]nother study would be just another way of saying: “We’re working on it. We’ll get back to you.” Well, we’ve worked on it, and the time to get back to our veterans is now.

\* \* \*

. . . When there is inconclusive evidence, we have always been generous toward our veterans. This legislation is not treating Vietnam veterans differently. It is a guarantee that they will finally be treated the same.

137 Cong. Rec.-Senate 2491 (J. Biden). By covering *all* veterans regardless of whether their service included presence on or within the landmass of the Republic of Vietnam, Congress provided a “fair and equitable approach to deal with the controversy that surrounds agent orange” by settling matters “once and for all.” 137 Cong. Rec.-Senate 2492 (J. McCain). Here, the broad plain meaning of service “in the Republic of Vietnam” complements the remedial purpose.

There can be no doubt that Congress intended 38 U.S.C. § 1116 to be liberally construed to effectuate its remedial spirit and purpose. When Congress passed the Agent Orange Act, *all* those who served “in the Republic of Vietnam”—including seamen “brown” or “blue”—were presumed to have been exposed to herbicide agents including Agent Orange.

## ARGUMENT

### I. The Plain Meaning of the Phrase “Served in the Republic of Vietnam” in 38 U.S.C. § 1116 Is Illuminated by the Legislative History.

The pro-veteran canon of statutory construction requires that a statute concerning veteran’s matters is “*always* to be liberally construed.” *Boone*, 319 U.S. at 575 (emphasis added). Similarly, “[i]t is of course true that courts are to construe remedial statutes liberally to effectuate their purposes.” *Smith v. Brown*, 35 F.3d 1516, 1525 (Fed. Cir. 1994) (citations omitted); *see also Cloer v. Sec’y of HHS*, 675 F.3d 1358, 1362 (Fed. Cir. 2012) (en banc) (citation omitted) (“Remedial legislation . . . should be construed in a manner that effectuates its underlying spirit and purpose.”); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (“we are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes”). To determine whether a statute is remedial in nature, the legislative history can be quite instructive and it can confirm a liberal, broad, plain meaning.

When the U.S. Senate considered S. 238, a bill substantively identical to H.R. 556 on which it voted, an echo was heard throughout the chamber.

Senator Cranston stated:

...[T]his bill represents an historic compromise  
... Enactment of this bill will be a major step  
toward putting behind us one of the most  
contentious and divisive issues remaining from  
the war in Vietnam.

\* \* \*

[This] is an excellent, well-considered bill that  
addresses in a comprehensive way the concerns  
of Vietnam veterans and their families about  
agent orange.

137 Cong. Rec.-Senate 2478-79.

Senator Specter stated:

... [T]his legislation is the conclusion of very  
lengthy efforts on a very complex matter where  
there has been a great deal of pain and suffering  
by the Vietnam veterans who were exposed to  
agent orange in many ways, themselves and  
their families. . . .

\* \* \*

... We have a contract with the veterans of  
America to treat them fairly, and Vietnam  
veterans have not been treated fairly. . . . Much  
too much time has passed in the failure of the  
Government to come to grips with this very  
important item, and we are taking a significant

step in correcting that by the action we are taking today.

137 Cong. Rec.-Senate 2480.

Senator Daschle stated:

. . . [W]e are finally beginning to resolve a problem that has plagued Vietnam veterans and their families for over 20 years. That problem stems both from veterans' exposure to agent orange and from an inadequate Government response to the consequences of that exposure.

\* \* \*

Enactment of this legislation is long overdue. . . . Veterans of the Vietnam war have waited over 20 years for a meaningful response to the complex issues surrounding their hidden wounds.

137 Cong. Rec.-Senate 2482-83.

Senator Kerry stated:

. . . There are countless numbers of veterans who have died since the war whose families are convinced they died as a consequence of their exposure and who believed as they died that they were doing so as a consequence of their exposure.

\* \* \*

. . . [T]he fact is that 20 years after they returned when the first appearances of this problem really began to manifest themselves, that over a 10-year period there has been a gap between the speeches and the making good on the promises that helped send them there, and everybody knows that. I think all of us are committed that that is not going to be repeated this time.

137 Cong. Rec.-Senate 2489.

Senator Akaka stated:

. . . [I]n this compromise legislation, we now have an opportunity to put behind us one of the most troubling legacies of the war in Southeast Asia, a legacy that has called into question this country's basic commitment to care for those who served under arms, and which has embittered thousands of Vietnam veterans and their families.

As a nation, we are only now beginning to face up to our responsibilities to this lost generation, a generation that was unheralded in war and forgotten in peace. Let us begin to clear our debt to these veterans . . .

137 Cong. Rec.-Senate 2490.



Senator Dole stated:

The [VA] has been in the center of the agent orange controversy for many years. The issue has raged for these years with hard fought opinions, rhetoric and often accusations on all sides. I believe that this legislation gives us the opportunity to create an environment where we can dissipate the rhetoric and controversy and get on with everyone[’s] real goal.

The best possible care to those valiant Americans that answered when their Nation called, the veterans of the United States of America.

137 Cong. Rec.-Senate 2493.

It is clear from the legislative history that the Agent Orange Act was meant to (i) remedy a lengthy period of Congressional paralysis concerning ailing Vietnam veterans and (ii) provide a universal solution that put to rest the controversy concerning herbicide exposures. Those remedial purposes can only be interpreted as supportive of a broad plain meaning for “served in the Republic of Vietnam” in 38 U.S.C. § 1116. Nothing in 38 U.S.C. § 1116A can counter this. The pro-veteran canon of statutory construction requires the plain meaning of § 1116 to be in harmony with the remedial purposes.

## II. The Unambiguous Meaning of “Republic of Vietnam” Includes Offshore Waters Extending 200 Nautical Miles.

As for the legally recognized territorial limits of the Republic of Vietnam, such offshore waters include the 200-nautical-mile exclusive economic zone. *See, e.g.*, STRAIGHT BASELINES: VIETNAM, LIMITS IN THE SEAS, No. 99, U.S. Dep’t of State (Dec. 12, 1983), at 3, available at <https://www.state.gov/wp-content/uploads/2019/12/LIS-99.pdf>. To confine territorial limits within a so-called “territorial sea” having a breadth of 12 nautical miles or a contiguous zone of an additional 12 nautical miles, *id.* at 2, would be inconsistent with the plain meaning of “Republic of Vietnam.”<sup>5</sup>

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5. It would be illogical to exclude seamen on aircraft carriers at “Yankee Station,” about 100 miles offshore from Da Nang, from those who “served in the Republic of Vietnam”. In 2011, the Institute of Medicine noted concerns of Blue Water Navy veterans that they may have been exposed to herbicides via contamination of their potable (drinking) water (derived from the marine water), spray drift through the air, and food contamination. *See* BLUE WATER NAVY VIETNAM VETERANS AND AGENT ORANGE EXPOSURE (2011) at 2, available at <https://www.nap.edu/catalog/13026/blue-water-navy-vietnam-veterans-and-agent-orange-exposure>.

The herbicides may have extended in elevated concentrations out to Yankee Station. The Institute of Medicine’s report from 1994 (produced in accordance with the Agent Orange Act of 1991) provides an accounting for approximately 20 million gallons of herbicides used by U.S. military forces in Vietnam. *See* VETERANS AND AGENT ORANGE: HEALTH EFFECTS OF HERBICIDES USED IN VIETNAM (1994) at 85 available at <https://www.nap.edu/catalog/2141/veterans-and-agent-orange-health-effects-of-herbicides-used-in>. By comparison, about half that amount was spilled by the Exxon Valdez yet the oil slick spread over

**CONCLUSION**

No Blue Water Navy veterans should be left behind. *Amicus Curiae* served within the 200-nautical-mile territorial limits of the “Republic of Vietnam,” and thus he—like so many others—is entitled to presumptive service connection for his prostate cancer in connection with Agent Orange disability benefits. Yet the Federal Circuit has frustrated this statutory presumption, failing to recognize the remedial nature of the Agent Orange Act and the dictates of the pre-veteran canon of statutory construction. *Military-Veterans Advocacy* has it right in its petition. The Court should grant the petition.

Respectfully submitted,

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11,000 square miles of ocean. See OIL POLLUTION RESEARCH AND DEVELOPMENT PROGRAM REAUTHORIZATION ACT OF 2010, HOUSE OF REPRESENTATIVES REPORT 111-553 (July 21, 2010), at 151, available at <https://www.congress.gov/111/crpt/hrpt553/CRPT-111hrpt553.pdf>.