No. 23-380

In the Supreme Court of the United States

MILITARY-VETERANS ADVOCACY INC., PETITIONER

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Under the Agent Orange Act of 1991, Pub. L. No. 102-4, 104 Stat. 11 (38 U.S.C. 1116), veterans who have prior service "performed in the Republic of Vietnam" (38 U.S.C. 1116(d)(1)) during the period when the United States used the Agent Orange herbicide, and who later develop diseases associated with exposure to that herbicide, are presumptively entitled to disability benefits. In the Blue Water Navy Vietnam Veterans Act of 2019 (BWN Act), Pub. L. No. 116-23, 133 Stat. 966 (38 U.S.C. 1116A), Congress clarified that veterans who served "offshore of the Republic of Vietnam," defined as a 12-nautical-mile area off the country's coast, are entitled to the same presumption. The questions presented are as follows:

1. Whether the Secretary of Veterans Affairs' longstanding interpretation of the Agent Orange Act, under which that statute's presumptions do not extend to veterans whose only contact with Vietnam was flying high-altitude missions in Vietnamese airspace, is contrary to law.

2. Whether the Secretary of Veterans Affairs' incorporation of the BWN Act's definition of "offshore" waters to determine whether a veteran presumptively qualifies for benefits based on Agent Orange exposure is contrary to law.

ADDITIONAL RELATED PROCEEDING

United States Court of Appeals (Fed. Cir.):

Military-Veterans Advocacy Inc. v. *Secretary of Veterans Affairs*, No. 20-1537 (Mar. 22, 2023)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 63 F.4th 935.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2023. A petition for rehearing was denied on July 5, 2023 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on October 3, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Wartime veterans are entitled to seek compensation for disabilities arising from their time in service. 38 U.S.C. 1110; see *Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011). Usually, a veteran applying for such benefits must establish that his or her disability is "'service-

connected,'" meaning that it was "incurred or aggravated" in the "line of duty." 38 U.S.C. 101(16); see 38 U.S.C. 5107(a). For certain types of claims, however, Congress has determined that requiring veterans to establish service connection in each individual case would be overly burdensome. In those circumstances, Congress has instead directed that veterans who served in particular places at particular times, and who subsequently develop particular disabilities, are presumed to be entitled to benefits. See, *e.g.*, 38 U.S.C. 1112(c), 1116-1118.

The Agent Orange Act of 1991 (Agent Orange Act), Pub. L. No. 102-4, 105 Stat. 11 (38 U.S.C. 1116), established such a presumption. Agent Orange was an herbicide widely used by the U.S. military for tactical defoliation during the Vietnam War, and its use in Vietnam raised concerns that veterans exposed to it had encountered certain health-related consequences. Pet. App. 4a-5a. Determining service connection, however, had long been difficult with respect to diseases linked to Agent Orange, both because of the uncertain effects of Agent Orange on human health and because it is not possible to determine precisely who in Vietnam had been exposed. Congress accordingly enacted the Agent Orange Act to make it easier for qualifying veterans to prove their claims. *Id.* at 5a. The Act provides that veterans who performed "covered service," defined as service "performed in the Republic of Vietnam" during the period when the United States used Agent Orange (January 9, 1962 to May 7, 1975), and who later develop specified diseases associated with such exposure, are presumptively entitled to disability benefits. 38 U.S.C. 1116(c) and (d)(1); see 38 U.S.C. 1116(a)(1)(A).

2. In 1993, the Department of Veterans Affairs (VA) promulgated a regulation to define the circumstances when a veteran qualifies under the Agent Orange Act as having served "in the Republic of Vietnam." 38 C.F.R. 3.307(a)(6) (1993); see 58 Fed. Reg. 29,107 (May 19, 1993). The regulation defined service "in the Republic of Vietnam" to include "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. 3.307(a)(6) (1993). That definition drew "a line between service on land, where herbicides were used, and service at sea, where they were not," *Haas* v. *Peake*, 525 F.3d 1168, 1193 (Fed. Cir. 2008), cert. denied, 555 U.S. 1149 (2009), and came to be known as the "foot-on-land" requirement, see Pet. App. 14a-15a.

In 2019, the court of appeals held that the foot-on-land requirement was contrary to law. See *Procopio* v. *Wilkie*, 913 F.3d 1371, 1375 (Fed. Cir.) (en banc). Relying in part on international law, including the Convention on the Territorial Sea and the Contiguous Zone, the *Procopio* court concluded that, when Congress used the term "Republic of Vietnam" to define the Agent Orange Act's geographic coverage, it unambiguously intended to extend the Act's presumptions to veterans who had served in the country's adjacent "12 nautical mile territorial sea." *Id.* at 1376; see *id.* at 1375-1376; see also H.R. Rep. No. 58, 116th Cong., 1st Sess. 11 (2019) (House Report) (explaining that the *Procopio* court had "h[eld] that the 'Republic of Vietnam' unambiguously includes its 12 nautical mile territorial sea").

3. Months after the *Procopio* decision, Congress enacted the Blue Water Navy Vietnam Veterans Act of 2019 (BWN Act), Pub. L. No. 116-23, 133 Stat. 966 (38 U.S.C. 1116A). The BWN Act provides that, "[f]or the

purposes of section 1110 of [title 38]"—*i.e.*, the provision establishing entitlement to veterans' benefits for disability arising from military service—qualifying diseases suffered by "a veteran who * * * served offshore of the Republic of Vietnam" between January 9, 1962 and May 7, 1975 shall be presumed to have a service connection. 38 U.S.C. 1116A(a); see 38 U.S.C. 1116A(b) (providing that a "veteran who * * * served offshore of the Republic of Vietnam" during the relevant period "shall be presumed to have been exposed during such service to an herbicide agent").

The BWN Act also defines the phrase "offshore of Vietnam." It provides that, "[n]otwithstanding any other provision of law, for purposes of this section, the Secretary shall treat a location as being offshore of Vietnam if the location is not more than 12 nautical miles seaward of a line commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia and intersecting the following points," followed by a list of specific geographic locations and mapping coordinates. 38 U.S.C. 1116A(d). The accompanying report of the House Committee on Veterans Affairs explained that the legislation was "codify[ing] the Court's decision" in *Procopio* to "mitigate concerns that VA may narrowly interpret the decision." House Report 11.

Before the enactment of the BWN Act, Congress had considered other legislative proposals that would have extended the Agent Orange Act's presumptions beyond land-based service. Pet. App. 6a-8a. For instance, in 2013 and 2014, Congress considered proposals to include Vietnamese airspace in an extension of Agent Orange-based coverage. *Id.* at 6a-7a (noting that some States and localities had "urged Congress" to extend presumptions of Agent Orange exposure to veterans

who had served "'in the airspace over the Combat Zone' in Vietnam" or in "'airspace' of Vietnam") (citation omitted). The BWN Act, however, did not address Vietnamese airspace. See 38 U.S.C. 1116A. And the accompanying House Report observed that "an aircraft that passed in the airspace above the offshore waters would not have drawn water from the sea and therefore is not considered present within the offshore waters for purposes of this legislation." House Report 11-12.

4. After the BWN Act's enactment, the VA took steps to implement the law. In December 2019, the VA revised its M21-1 Adjudication Procedures Manual—which "provides guidance and instructions to the administrators of veterans' benefits and claims," Pet. App. 2a—to specify that service in "eligible offshore waters as defined in [the BWN Act]" constitutes service in the Republic of Vietnam for purposes of conferring presumptions based on Agent Orange. C.A. App. 16, 21; see Pet. App. 15a. Petitioner calls this manual provision the "Blue Water Navy Rule" or "BWN Rule." Pet. App. 4a, 11a; Pet. 19. The December 2019 update left in place another manual provision directing that "service in the [Republic of Vietnam] does not include service of a Vietnam era Veteran whose only contact with Vietnam was flying high-altitude missions in Vietnamese airspace." C.A. App. 37; see Pet. App. 18a. Petitioner calls this manual provision the "Airspace Rule." Pet. App. 4a, 11a.[1]

In February 2020, petitioner Military-Veterans Advocacy, Inc., a veterans' advocacy organization, filed a petition under 38 U.S.C. 502 challenging both manual

[1] For ease of reference, this brief uses the same shorthand formulations without conceding the accuracy of the term "rule."

provisions as contrary to law. Pet. App. 2a; see *id.* at 24a-34a.

5. The court of appeals denied petitioner's challenges. Pet. App. 1a-20a.

a. The court of appeals rejected petitioner's challenge to the Airspace Rule on two alternative grounds. Pet. App. 19a-20a. First, the court held that petitioner's challenge was time-barred under 28 U.S.C. 2401(a), which states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The court explained that the VA had first adopted the interpretation reflected in the Airspace Rule in 1993, such that petitioner's 2020 challenge to the manual provision was untimely. Pet. App. 18a-19a.

Second, the court of appeals held that, "even if the time bar did not apply," petitioner's challenge would fail on the merits. Pet. App. 19a. Noting that "Congress is presumed to have had knowledge of the VA's Airspace Rule," the court observed that Congress had never taken legislative action to include any of Vietnam's airspace within the Agent Orange Act's presumptions, even as Congress had included the airspace of other countries in a law concerning other benefits presumptions. *Id.* at 20a. The court also observed that the House Report accompanying the BWN Act had indicated that Congress deliberately chose not to include airspace in that recent enactment. *Id.* at 19a-20a.

b. The court of appeals also rejected petitioner's challenge to the BWN Rule. Pet. App. 13a-18a. Petitioner had argued that the Agent Orange Act, as construed by the court of appeals in *Procopio*, extends coverage beyond the 12-nautical-mile territorial sea defined in the BWN Act, to instead encompass any

offshore area in "the Vietnamese theater of combat." *Id.* at 16a (citation omitted). The court disagreed. It explained that *Procopio* had "held that the Republic of Vietnam includes its 12 mile territorial sea," and it noted that the BWN Act had "codified" *Procopio* to govern Agent Orange-based presumptions going forward. *Id.* at 9a; see *id.* at 17a. The court further observed that, if petitioner believed that the BWN Act's offshore coverage was too narrow, "the legislative process is the appropriate forum." *Id.* at 17a.

ARGUMENT

Petitioner contends (Pet. 14-28) that two provisions of the VA's M21-1 Manual, the Airspace Rule and the BWN Rule, are contrary to law. The court of appeals correctly rejected those challenges, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 14-18) that the Airspace Rule is inconsistent with the Agent Orange Act. But this case presents a poor vehicle in which to consider that question because petitioner's challenge is time-barred. Under 28 U.S.C. 2401, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." As the court of appeals correctly observed, the VA first adopted the interpretation reflected in the Airspace Rule in 1993, 30 years ago. Pet. App. 18a. Accordingly, the time to bring a direct challenge to the Airspace Rule (as opposed to challenging its application to an individual benefits claim) has long since expired. *Id.* at 19a. Petitioner does not

assert any contrary argument; indeed, petitioner does not even acknowledge the court's timeliness holding.[2]

In any event, the court of appeals correctly held that petitioner's challenge failed on the merits as well. Pet. App. 19a. The Airspace Rule has long provided that "service in the [Republic of Vietnam]" for purposes of Agent Orange Act coverage "does not include service of a Vietnam era Veteran whose only contact with Vietnam was flying high-altitude missions in Vietnamese airspace." C.A. App. 37; see Pet. App. 18a-19a. Nothing in the text of the Agent Orange Act—which simply extends coverage to service "performed in the Republic of Vietnam" during the relevant period, 38 U.S.C. 1116(d)(1)—suggests that Congress intended the Act's presumptions to apply to veterans who served exclusively in the high-altitude skies above the country. And given that human exposure (and the presumptive likelihood thereof) is the Agent Orange Act's evident concern, it would be counterintuitive to conclude that Congress intended the Act's presumptions to apply to the highest vertical reaches of Vietnam's atmosphere,

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[2] In *Corner Post, Inc.* v. *Board of Governors of the Federal Reserve System*, cert. granted, No. 22-1008 (Sept. 29, 2023), this Court will consider the question whether, under 28 U.S.C. 2401(a), a free-standing challenge to an agency regulation "first accrues" upon the publication of that regulation or upon the events that cause a particular litigant to be adversely affected or aggrieved by the regulation's operation. Petitioner does not request that its petition be held pending the Court's decision in *Corner Post*, and that course would not be appropriate. Petitioner does not contend that it or its members were first aggrieved by the Airspace Rule within the six years preceding its Section 502 petition. In any event, the court of appeals correctly determined, in the alternative, that petitioner's challenge failed on the merits. Pet. App. 19a-20a; see pp. 8-9, *infra*.

where the chances of herbicide exposure were close to nonexistent.

Over the past three decades, moreover, Congress has had multiple opportunities to extend the Agent Orange Act's coverage skyward, and it has instead left the VA's Airspace Rule intact. In 2009, for instance, Congress considered a legislative proposal to amend the Agent Orange Act to clarify that presumptions of herbicide exposure extend to veterans who served in waters offshore of Vietnam or the airspace above Vietnam. Pet. App. 6a (discussing H.R. 2254, 111th Cong., 1st Sess. § 2 (2009)). That bill received hearings but was never enacted. *Ibid.* Beginning in 2013, several States and localities "urged Congress" to extend presumptions of Agent Orange exposure not only to veterans who had served in Vietnam's offshore waters, but also to those who had served "'in the airspace over the Combat Zone' in Vietnam" and in "'airspace' of Vietnam." *Id.* at 6a-8a. But although Congress eventually responded to such proposals in 2019 by enacting the BWN Act—which broadened the scope of Agent Orange-based presumptions to cover certain waters, see pp. 11-12, *infra*—Congress declined to include Vietnam's airspace.

Where, as here, "an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives," the agency's reasonable interpretation is entitled to additional weight. *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979). That principle is especially salient here, since the House Report accompanying the BWN Act observed that "an aircraft that passed in the airspace above the offshore waters would not have drawn water from the sea and therefore is not considered present within the offshore waters for purposes

of this legislation." House Report 11-12. While that statement specifically addressed aircraft flying over the Republic of Vietnam's territorial seas, its logic would naturally extend to aircraft flying over land as well. See Pet. App. 19a-20a.

As the court of appeals also recognized, Congress's failure to extend the Agent Orange Act skyward is particularly significant because Congress recently directed that service in various *other* countries' airspace will trigger a presumption of service-connection. Pet. App. 20a. In the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 (PACT Act), Pub. L. No. 117-168, 136 Stat. 1759, Congress extended presumptive-benefits coverage to veterans who had "performed active military, naval, air, or space service while assigned to a duty station in, *including airspace above*," sixteen designated countries. 38 U.S.C. 1119(c)(1) (emphasis added). That Congress has "explicitly included airspace service in the toxic exposure presumption for certain designated locations, but not Vietnam," makes Congress's silence on the issue in the Agent Orange Act and BWN Act especially telling. Pet. App. 20a; cf. *Ysleta Del Sur Pueblo* v. *Texas*, 142 S. Ct. 1929, 1940-1941 (2022) (deeming it significant that in other related enactments, Congress had demonstrated that "it clearly understood how to" achieve a particular aim "when it wished to do so").

2. Petitioner additionally contends (Pet. 19-25) that the BWN Rule contravenes the Agent Orange Act and the court of appeals' interpretation of that Act in *Procopio* v. *Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (en banc). Petitioner is mistaken.

In *Procopio*, the court of appeals held that the phrase "Republic of Vietnam" in the Agent Orange Act,

38 U.S.C. 1116(d)(1), includes the country's "12 nautical mile territorial sea." 913 F.3d at 1376. Months later, Congress enacted the BWN Act, which specifies that, "[f]or the purposes of" the statutory provision establishing service-based disability benefits, a veteran who "served offshore of the Republic of Vietnam" shall be presumed to have been exposed to Agent Orange, and the veteran's qualifying conditions shall be presumed to have a service connection. 38 U.S.C. 1116A(a) and (b). Consistent with *Procopio*, the BWN Act defines "offshore of Vietnam" as the area "not more than 12 nautical miles seaward of a line commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia and intersecting" a list of specific geographic points. 38 U.S.C. 1116A(d). The VA's BWN Rule accordingly uses the BWN Act's geographic definition to determine which veterans may establish presumptions of Agent Orange exposure and service connection based on service in the waters surrounding Vietnam. C.A. App. 16, 21; see Pet. App. 15a-16a.

In arguing that the VA's incorporation of the BWN Act definition was improper, petitioner asserts that the BWN Act was meant merely to supplement, but not supplant, the Agent Orange Act's preexisting coverage of claims based on service in Vietnam's surrounding waters. Pet. 19-20, 23-24. In other words, petitioner contends that the phrase "Republic of Vietnam" in the Agent Orange Act, as interpreted in *Procopio*, extends to an area larger than the 12-nautical-mile radius delineated in the BWN Act—and that the larger area continues to govern coverage for purposes of claims that otherwise qualify under the Agent Orange Act. Pet. 19-20.

The court of appeals correctly rejected this convoluted theory. Pet. App. 17a. The text of the BWN Act

makes clear that this more recent statute supplies the exclusive definition of the relevant offshore waters for purposes of Agent Orange-based disability claims brought by Vietnam veterans. Like the Agent Orange Act, the BWN Act begins by stating that its provisions apply "[f]or the purposes of section 1110 of this title." 38 U.S.C. 1116A(a); see 38 U.S.C. 1116(a)(1). Both statutes cover the same service period, see 38 U.S.C. 1116(d)(1), 1116A(a), and the BWN Act cross-references the Agent Orange Act's list of qualifying diseases, see 38 U.S.C. 1116A(a). By drafting the BWN Act so that it substantively mirrors the Agent Orange Act—except for the former's exclusive focus on *offshore* service—Congress clearly indicated that the BWN Act would govern presumptive-disability claims based on such offshore service, and would supply an exclusive definition of the relevant geographic area for all such claims. The BWN Act's legislative history confirms that natural reading: The House Report explains that the legislation was meant to "codify the Court's decision" in *Procopio*. House Report 11.

Petitioner's counterarguments are not persuasive. Petitioner's assertion that the Agent Orange Act covers a different, and broader, offshore area than the BWN Act appears to rest on an understanding that *Procopio* interpreted the Agent Orange Act to extend beyond the 12-nautical-mile radius defined in the BWN Act. See Pet. 19-21. But that simply misreads the decision. As the court below noted, *Procopio* "held that the Republic of Vietnam includes its 12 mile territorial sea." Pet. App. 9a; see *Procopio*, 913 F.3d at 1376 (concluding that "all available international law * * * confirms that * * * the 'Republic of Vietnam' included both its landmass and its 12 nautical mile territorial sea"). The

House Report reads *Procopio* the same way—which is why the BWN Act, as a "codif[ication]" of *Procopio*, relies on the same 12-nautical-mile measure. House Report 11.

Petitioner observes (Pet. 21) that the BWN Act "did not amend or modify" the Agent Orange Act (*i.e.*, 38 U.S.C. 1116), but instead "added a new section" (38 U.S.C. 1116A). That is true, but immaterial. As explained above, the text of that new statutory section, and the manner in which it mirrors the Agent Orange Act, make clear that the new provision was intended to comprehensively govern Agent Orange-based claims for veterans who had performed exclusively offshore service during the same time period. That Congress thought it simpler to create a new statutory section rather than amending 38 U.S.C. 1116 is not surprising, especially given the need to address matters like the BWN Act's application to eligible claims that had previously been denied under the old regime. See 38 U.S.C. 1116A(c)(2)(B)(i). Petitioner's reliance (Pet. 24) on the BWN Act's statement that its definition of "offshore" applies "for purposes of this section," 38 U.S.C. 1116A(d), is unavailing for substantially the same reason. That definition applies only to Section 1116A, but Section 1116A is what governs claims based on service in Vietnam's seas.

Petitioner also asserts (Pet. 20-21) that the BWN Act's 12-nautical-mile radius does not include all of the areas that petitioner considers to be part of Vietnam's "territorial sea." But the geographic coordinates that Congress prescribed, see 38 U.S.C. 1116A(d), track what the Socialist Republic of Vietnam claimed as its territorial waters around the time the VA first made herbicide-based presumptions applicable to Vietnam-

era veterans. See C.A. App. 266-267 (1983 State Department report reproducing Socialist Republic of Vietnam declaration). In any event, it was Congress—not the VA—that defined Vietnam's territorial seas by selecting these coordinates. To the extent that petitioner believes Congress's selections were erroneous, the court of appeals rightly observed that "the legislative process is the appropriate forum." Pet. App. 17a.

3. Finally, petitioner contends (Pet. 26-28) that the court of appeals should have applied the pro-veteran canon of construction to resolve statutory ambiguities in petitioner's favor.[3] But petitioner never invoked the pro-veteran canon below, and the court accordingly did not address its application to this case. See, *e.g.*, *Babcock* v. *Kijakazi*, 595 U.S. 77, 82 n.3 (2022) (declining to address an argument that "was neither pressed nor passed upon below").

In any event, petitioner's reliance on the canon is misplaced. Under the pro-veteran canon, "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011) (citation omitted). But "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992); see *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001) (explaining that "canons are not mandatory rules," but instead are "guides * * * designed to help judges determine the Legislature's intent as embodied in particular statutory language").

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[3] It is not clear whether petitioner advances this argument with respect to its Airspace Rule challenge, its BWN Rule challenge, or both. This brief assumes that petitioner invokes the canon with respect to both challenges.

Accordingly, the pro-veteran canon should be invoked only to resolve "interpretive doubt" when the relevant statutory text remains ambiguous after applying traditional tools of statutory interpretation. *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); see *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991). Here, as explained above, several relevant indicators of statutory meaning —including text, context, statutory background, and probative legislative history—support the interpretations reflected in the Airspace Rule and the BWN Rule. See pp. 8-14, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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