No. 17-1679

In the Supreme Court of the United States

ROBERT H. GRAY,

Petitioner,

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

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RESPONSE TO MOTION

Petitioner Robert Gray agrees with the Government that its formal decision not to seek certiorari in *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (en banc), rendered this case moot on May 28, 2019. Gray respectfully asks the Court to vacate the decision below and remand the case to the Federal Circuit with instructions to dismiss, under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

STATEMENT

1. In 2007, Gray filed a claim for veterans' benefits in connection with herbicide-related disabilities caused by service during the Vietnam War. *See* Pet.App.6a. Veterans seeking disability benefits based on military service must establish "service connection"—*i.e.*, that the "disability is causally related to an injury sustained in the service." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 307 (1985). Congress has created a presumption of service connection for veterans such as Gray who (1) "served in the Republic of Vietnam" between January 9, 1962, and May 7, 1975; and (2) develop a disease linked to herbicides. 38 U.S.C. § 1116(a)(1).

In 2015, the Board of Veterans' Appeals denied benefits to Gray under an unduly narrow regulatory interpretation of the Agent Orange Act adopted by the Department of Veterans Affairs (VA). *See Gray v. McDonald*, 27 Vet. App. 313, 316-17 (2015). Although Gray served aboard a Navy destroyer that anchored several times in Da Nang Harbor—a body "nearly totally surrounded by land" and located "within the territorial boundaries of Vietnam"—the Board

concluded that his service did not take place "in the Republic of Vietnam." *Id.* at 318.

On appeal, the Veterans Court vacated the Board's decision, concluding that VA's interpretation was both "inconsistent with the regulatory purpose" and "irrational." *Id.* at 322. The court explained that VA's varying treatment of bays and harbors led to "inconsistent" and "arbitrary outcomes." *Id.* at 324-25. Because the court could not "discern any rhyme or reason" in VA's "aimless" and "adrift" interpretation, it remanded Gray's case and instructed VA to reconsider its position. *Id.* at 324, 327-28.

VA announced a new (and even narrower) interpretation of the Agent Orange Act and its regulations in February 2016. JA83, JA60-61. Instead of publishing the new interpretation—the "Waterways Provision"—in the Federal Register, VA opted to incorporate it into its *Adjudication Procedures Manual, M21-1* (M21-1 Manual).

2. In March 2016, while his individual benefits claim was still pending, Gray petitioned for review of the Waterways Provision in the Federal Circuit pursuant to 38 U.S.C. § 502. JA8-16. Section 502 provides that "[a]n action of the [VA] Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review" in the Federal Circuit. Section 552(a)(1) refers to a variety of VA actions, including VA "interpretations of general applicability." 5 U.S.C. § 552(a)(1)(D).

In response, VA did not deny that the Waterways Provision is an interpretation of general applicability. Nonetheless, it asserted that the petition should be dismissed for lack of jurisdiction because agency

manuals are more clearly referenced in 5 U.S.C. § 552(a)(2)(C). That argument hinged on the Government's contention that, because Section 552(a)(2)(C) "more specifically referenced" agency manuals, the Waterways Provision was covered solely by that subsection and not by Section 552(a)(1)(D). Pet.App.57a-58a; *see also* BIO 14 (acknowledging that VA advanced the mutual-exclusivity theory below).

A divided panel of the Federal Circuit embraced the Government's mutual-exclusivity argument and dismissed Gray's petition for lack of jurisdiction. Pet.App.1a-28a. Gray sought rehearing en banc. In response, the Government refused to defend the mutual-exclusivity position, arguing that the panel had not actually adopted it. Gov't C.A. Reh'g Opp. 1, 5-14. The Federal Circuit denied Gray's request for rehearing. Pet.App.29a-37a. This Court then granted certiorari.

3. After argument was scheduled in this case, the en banc Federal Circuit decided *Procopio v. Wilkie*, 913 F.3d 1371 (2019). The court rejected VA's interpretation of the Agent Orange Act and concluded that veterans "who served in the 12 nautical mile territorial sea of the 'Republic of Vietnam' are entitled" to the service-connection presumption. *Id.* at 1380-81.

In response to that ruling, on February 1, 2019, the Government filed a memorandum in this case suggesting that the Court might wish to remove the case from its argument calendar pending the Solicitor General's decision whether to seek certiorari in *Procopio*. Gov't Mem. 9. The Court did so and suspended the briefing schedule.

On March 26, 2019, VA Secretary Robert Wilkie publicly announced that VA did not wish to seek certiorari in *Procopio*.[1] Consistent with that announcement, VA began negotiating settlements with Vietnam veterans potentially impacted by *Procopio*, including Gray. Despite Secretary Wilkie's announcement, the Solicitor General continued to consider whether to seek certiorari, and on April 22 and May 21 he obtained extensions of time in which to file a petition.

On May 28, 2019, the Solicitor General formally decided not to seek certiorari in *Procopio*, and the Government thus acquiesced in the Federal Circuit's ruling. Gov't Mot. 4.

The next day, the Veterans Court granted a motion to enter a stipulated agreement to dismiss Gray's individual appeal of the Board's denial of his benefits claim. *See* Order, *Gray v. Wilkie*, No. 16-4042 (Vet. App. May 29, 2019). Although the agreement established that Gray is entitled to benefits under the Agent Orange Act, further proceedings before the VA Regional Office are required before VA (1) determines the actual amount of benefits Gray is owed; and (2) releases the corresponding benefits to Gray.

ARGUMENT

Gray agrees with the Government that its decision not to seek certiorari in *Procopio* moots the underlying dispute in this case over the merits of the interpretation of the Agent Orange Act codified in the

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[1] Video Recording: Hearing on Veterans Affairs Fiscal Year 2020 Budget Request, held by Senate Veterans' Affairs Committee, at 4:58-5:26 (Mar. 26, 2019), https://www.c-span.org/video/?459099-1/veterans-affairs-secretary-wilkie-testifies-fiscal-year-2020-budget-request.

M21-1 Manual. The Government has finally abandoned any defense of that interpretation, and there is no further relief that Gray could obtain through an ultimate decision on the merits in this case.

Nonetheless, the Government's choice to abandon its misguided merits theory should not allow it to preserve its misguided procedural theory severely restricting the Federal Circuit's jurisdiction under 38 U.S.C. § 502. Because the Federal Circuit's decision below has far-ranging legal consequences for future regulatory disputes involving veterans like Gray, and rests on an erroneous procedural theory that the Government originally proposed and then declined to defend, the Court should follow its ordinary practice when a pending case in this Court becomes moot: It should vacate the decision below and remand to the Federal Circuit with instructions to dismiss, under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

1. Gray welcomes the Government's acquiescence in *Procopio*. By confirming that the Government will not seek further review—and that "the Department of Veterans Affairs (VA) will follow *Procopio*'s interpretation of the Act going forward"—the Government has finally agreed to provide Vietnam veterans the benefits they earned according to law. Gov't Mot. 1.

Gray further agrees with the Government that its decision not to seek certiorari in *Procopio* moots his underlying case in this Court. As the Government explains, the purpose of Gray's case has been to invalidate the Waterways Provision in VA's M21-1 Manual. *See* Pet'r Br. 11, 51-52. The Federal Circuit's *Procopio* decision effectively achieved that

objective, and the Government's subsequent decision not to seek certiorari locks in that result. Given the Government's choice to forego a certiorari petition, "the Federal Circuit's construction [of the Agent Orange Act] in [*Procopio*] will remain binding on VA, and the Waterways Provision has no continuing relevance." Gov't Mot. 5. Accordingly, Gray agrees with the Government that its decision rendered this case moot on May 28, 2019.

Because the case was mooted by the Government's decision to acquiesce in *Procopio*, this Court should now vacate the decision below and remand with directions to dismiss. As *Munsingwear* explains, "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 39. Vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.* at 40.

Here, a *Munsingwear* order would wipe the Federal Circuit's erroneous jurisdictional ruling off the books. It would also allow Gray—along with the Blue Water Navy Veterans Association, whose case was consolidated with Gray's below and whose petition for certiorari is now pending (No. 17-1693)—to relitigate the Federal Circuit's Section 502 jurisdiction over challenges to VA Manual provisions, if the need to do so ever arises again.[2]

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[2] In the Federal Circuit, the Blue Water Navy Vietnam Veterans Association's companion suit challenging the Waterways Provision was consolidated with Gray's case for

Munsingwear orders are "commonly utilized," *Munsingwear*, 340 U.S. at 41, and reflect this Court's "normal" practice for mootness, *Camreta v. Greene*, 563 U.S. 692, 713 (2011). There is no reason not to follow that practice here.

2. The Government asserts that Gray's case is also moot in light of the Veterans Court's May 29, 2019 order accepting the parties' stipulated agreement to settle Gray's separate benefits litigation. Gov't Mot. 6-7. Gray disagrees, because the Government's May 28, 2019 decision not to seek certiorari in *Procopio* had already mooted the case. But either way, the Court should vacate the decision below under *Munsingwear*.

a. As noted above, the Veterans Court approved the settlement of Gray's appeal on May 29, one day *after* the Government mooted this case by formally deciding to acquiesce in *Procopio*. Although the parties had agreed among themselves to settle the case ten days earlier, the settlement was styled as a stipulation to be entered by the Veterans Court, and several of the settlement's provisions were premised on the stipulation being approved by that Court. *See* Joint Mot. to Terminate Appeal 1, 5, *Gray v. Wilkie*, No. 16-4042 (Vet. App. May 20, 2019). By the time

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purposes of argument, and was decided on identical Section 502 jurisdictional grounds. *See* Pet.App.1a-2a. On June 18, 2018, the Blue Water Navy Veterans filed its petition for certiorari. This Court has thus far not acted on the petition, presumably because it has been holding the petition for a merits decision in Gray's case. Absent a *Munsingwear* order, the Government might well argue in future cases that the decision below collaterally estops the Blue Water Navy Veterans from asserting the Federal Circuit's Section 502 jurisdiction over other challenges to VA manual provisions.

the Veterans Court approved the settlement, entered the stipulation, and dismissed the appeal, this case had already become moot.

Because the parties agree that the Government's acquiescence in *Procopio* mooted this case on May 28, it does not implicate *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). There, the Court indicated that a *Munsingwear* order is usually not warranted when a case is mooted by settlement, because in that case the mootness results from the "voluntary action" of the party seeking relief on appeal. *Id.* at 24, 29. The Court nonetheless recognized that an appellate court retains its "equitable" discretion to vacate a judgment in those circumstances. *Id.* at 29.

Bancorp has no relevance here, because the Government itself unilaterally mooted the case when it formally decided not to seek review in *Procopio* on May 28. As *Bancorp* recognized (based on the agreement of the parties), a *Munsingwear* vacatur must typically be granted "where mootness results from the unilateral action of the party who prevailed in the lower court." *Id.* at 23. That is what happened here.

b. Even if this Court concludes that this case was mooted by the settlement (not the Government's *Procopio* acquiescence), it should nonetheless vacate the decision below under *Munsingwear*. *Bancorp* confirms that whether or not to vacate a mooted case ultimately turns on equitable principles: "From the beginning we have disposed of moot cases in the manner '"most consonant to justice" . . . in view of the nature and character of the conditions which have caused the case to become moot.'" 513 U.S. at 24 (alteration in original) (citation omitted).

Here, the settlement was plainly spurred by the *Procopio* decision and VA's acquiescence in cases implicating *Procopio* even *before* the Solicitor General formally decided not to seek certiorari. The Government's acceptance of *Procopio* drove the settlement—not any attempt by Gray to trade away (or otherwise short-circuit) this Court's review of the important Section 502 jurisdictional question raised in his petition.

In these unique circumstances, the dispute over Section 502 has become moot by "happenstance"—the Federal Circuit's fortuitous decision in *Procopio*, and then VA's and the Solicitor General's unwillingness to challenge that decision here. *See Bancorp*, 513 U.S. at 25; *see also Alvarez v. Smith*, 558 U.S. 87, 94-95 (2009). It does not reflect, in any real sense, a decision by Gray to "voluntarily forfeit[] his legal remedy" to review of the Waterways Provision under Section 502. *Bancorp*, 513 U.S. at 25 (stating "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance[] ought not in fairness be forced to acquiesce in" that ruling). Indeed, this Court has previously declined to apply *Bancorp* in similar circumstances, where the case in this Court became moot because of the settlement of related proceedings in other courts. *See Alvarez*, 558 U.S. at 96-97 (vacating decision below because the case in this Court "played no significant role" in producing the settlement of related state-court actions).

3. Several other considerations also support vacating the Federal Circuit's decision as an exercise of this Court's equitable discretion under *Munsingwear*, regardless of how it views the *Bancorp* issue discussed above.

First, the Government has essentially confessed error in the legal rationale underlying the decision below. As Gray has explained, the Government won below by persuading the Federal Circuit that interpretations of general applicability embedded in agency manuals cannot be challenged under Section 502 because (1) that provision permits review of interpretations described in Section 552(a)(1), and (2) the more specific reference to manuals in Section 552(a)(2)(C) means that they are necessarily excluded from (a)(1). Pet.App.57a-59a; Pet. 10-12; Pet. Reply 2-4; Pet'r Br. 12-13.

The Government's "mutual exclusivity" theory of Section 502's cross-reference to Section 552 is flat wrong. Pet'r Br. 35-38. And the Government knows it: The Government's brief in opposition to rehearing en banc abandoned the mutual-exclusivity theory, as did its opposition to certiorari and merits brief here. *See* Pet. 14-16; Pet. Reply 2; Pet'r Br. 16-17, 37-38. Instead, the Government defended the judgment based on a series of complicated statutory arguments that the Federal Circuit never passed upon, let alone embraced. Gov't Br. 22-41, 44-51. The Government's wholesale abandonment of the theory that it persuaded the Federal Circuit to adopt strongly supports vacating that court's opinion.[3]

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[3] The Government's new theory is that an interpretive rule that appears in VA's Manual is not "of general applicability" under Section 552(a)(1)(D)—even if it applies generally to every veteran—because Manual provisions are not formally binding on the Board of Veterans' Appeals. *See* Gov't Br. 22-38. *But see* Pet'r Br. 38-43 (rebutting that theory). This Court's recent decision in *Azar v. Allina Health Services*, 139 S. Ct. 1804 (2019), directly undermines that theory. There, the Court emphasized that "many manual instructions surely qualify as guidelines of

Second, although the Government has rightly declined to defend the mutual-exclusivity theory in this Court, it has apparently *not* abandoned it in litigation before the Federal Circuit. In fact, the Government continued to press that theory even after purporting to disavow it in its opposition to Gray's rehearing petition. *See* Pet. 28 (discussing VA's brief in *Krause v. Sec'y of Veterans Affairs*, No. 17-1303 (Fed. Cir. Mar. 19, 2018), 2018 WL 1905196); Pet'r Br. 16 n.9 (same); Pet. Reply 4 (same). Notably, the Government has declined Gray's requests to confirm that it will stop relying on the mutual-exclusivity theory in future litigation against veterans. Vacating the decision below will help prevent the Government from switching gears yet again.

Third, a *Munsingwear* vacatur is especially important in light of Section 502's important role in helping our Nation's veterans defend their legal rights in court. As Gray has explained (Pet'r Br. 48-50), VA regularly promulgates unreasonable interpretations of statutes and regulations, and it frequently chooses to announce such guidance in its Manual. The decision below makes it harder for veterans like Gray—and veterans' organizations like Blue Water Navy Veterans—to challenge such unlawful rules directly in the Federal Circuit.

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general applicability" for purposes of 42 U.S.C. § 1395hh(e)(1), *id.* at 1814 n.1, even though the Government had emphasized that legal interpretations reflected in the Medicare manuals at issue in the case are "not binding in final agency review," *Allina Health* Gov't Br. 22, 2018 WL 5962884; *see also id.* at 5-6, 38-39, 41-42 (same). *Allina Health* confirms that whether or not a manual provision is "binding" has nothing to do with whether it is "of general applicability."

To be sure, a *Munsingwear* vacatur would not eliminate the Federal Circuit's prior decision in *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017), which likewise rejected Section 502 jurisdiction over challenges to the M-21 Manual. *See* Pet'r Br. 13-14. But that decision has been fatally undermined by *Allina Health*, *supra* note 3, and a *Munsingwear* order here (in addition to the grant of certiorari) could help persuade the Federal Circuit to reconsider that ruling. Vacating the Federal Circuit's erroneous decision will send the clearest possible signal—to veterans and the Federal Circuit alike—that this Court is watching, and that the flawed interpretation of Section 502 adopted by that court is not permanently fixed in stone.

CONCLUSION

The Court should vacate the Federal Circuit's judgment and remand with instructions to dismiss the case as moot.

Respectfully submitted,

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