No. 20-2086

IN THE
United States Court of Appeals for the Federal Circuit

MILITARY-VETERANS ADVOCACY INC.,

Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for Review Pursuant to 38 U.S.C. § 502

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Other Authorities

INTRODUCTION

Military-Veterans Advocacy represents the interests of veteran members who were exposed to toxic herbicides while serving on Guam, Johnston Island, and American Samoa during the Vietnam War era. In the years since, these veterans have routinely been denied benefits on the basis that they cannot prove individual exposure because, for example, these veterans are not trained chemists. Recognizing that evidence of widespread exposure is plentiful—but that evidence of any given individual exposure is scarce—MVA petitioned the Secretary of Veterans Affairs to promulgate a regulation affording these veterans a presumption of exposure.

In denying that petition for rulemaking, the Secretary adopted and relied upon an erroneous statutory interpretation of the Agent Orange Act of 1991. VA imposed a distinction—between so-called tactical and commercial herbicides—that is both illusory and absent from the text and history of the Act. Having done so, the Secretary erred again when he concluded that there was no evidence of tactical-herbicide exposure on Guam, Johnston Island, and American Samoa.

From eyewitness veteran affidavits to photos and testing data, there is extensive evidence of exactly that.

Faced with these errors, VA retreats, offering new theories and new factual determinations on appeal. For example, instead of defending the Secretary's no-evidence determination, VA now contends the Secretary recognized and weighed evidence that cut both ways. The Secretary's denial cannot be sustained on these alternative grounds as a legal matter, and they fail to persuade on the merits in any case.

ARGUMENT

I. MVA Has Standing

As an organization with veteran members whose claims would be affected by the proposed regulation, MVA has standing to bring this petition. VA does not dispute this with respect to Guam. *See* Answering Brief ("AB") 22. MVA likewise has direct standing to seek relief independent of its veteran members.

With respect to Johnston Island and American Samoa, all three prongs of the associational-standing analysis are satisfied: (1) the members would "have standing to sue in their own right," (2) the interests MVA seeks to protect are "germane to [its] purpose," and

(3) nothing "requires the participation of individual members in the lawsuit." Opening Brief ("OB") 22 (alteration in original) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). VA does not dispute the second and third prongs—only whether MVA's members would have standing to sue. *See* AB20-21.

VA's quibble is that MVA did not present affidavits from individual veterans. As this Court is aware, the state of the law on veterans' associational standing has been in flux. At the time MVA filed its opening brief, this Court had recently begun to require organizations to show, "by affidavit or other evidence," that they have a "veteran member [who] has an actual or potential claim." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs* (*NOVA*), 981 F.3d 1360, 1370 (Fed. Cir. 2020) (en banc) (internal quotation marks omitted). MVA did precisely this, submitting an affidavit from its leadership explaining that MVA has veteran members with affected claims. Opening Brief Addendum ("OB Add.") 3-4.

VA now scrutinizes the language in this Court's recent opinions and contends that more specificity is required, namely, in the form of an affidavit directly from the veteran member. AB20-21 (citing *Military-*

Veterans Advocacy v. Sec'y of Veterans Affairs (*MVA*), 7 F.4th 1110 (Fed. Cir. 2021)). MVA disagrees: *NOVA* made clear that the traditional summary-judgment burden of production applies, 981 F.3d at 1370, and VA has not shown that MVA's affidavit was inadmissible or otherwise not competent evidence. Regardless, to the extent such a requirement has been imposed by this Court's intervening case law, MVA includes the relevant veteran affidavits in the addendum to this brief. MVA member Richard Elliott has a pending claim arising from his service in American Samoa, and member Gerrit Kuiken has a potential claim arising from exposure on Johnston Island. Reply Addendum 1-3.

MVA has submitted sworn and admissible evidence that it has members whose service in all three locations gave rise to claims that would be affected by the proposed regulation. VA has not challenged the admissibility of that evidence, nor has it presented evidence of its own to the contrary. MVA therefore has associational standing to bring this petition for review.

MVA also has direct standing. VA's intransigence on the Johnston Island matter has required MVA to provide support to—and expend funds on behalf of—veterans whose claims would be granted if a

presumption were promulgated. *See* OB Add. 3. This is not the kind of abstract harm this Court has described as arising from innocuous agency rules like "procedures for filing." *MVA*, 7 F.4th at 1130. Rather, it is a concrete and substantive harm like that arising from a rule that "directly foreclose[s] claimants from obtaining benefits." *Id.* That ongoing injury is sufficient to confer direct standing on MVA. *See id.* at 1129-30 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1100 (D.C. Cir. 2015) (Millett, J., dubitante)).

II. The Court Should Grant the Petition in Light of the Secretary's Legal Error

Reviewing the text, purpose, and history of the Agent Orange Act, MVA's opening brief demonstrated that VA adopted an erroneous statutory interpretation. OB28-53. On that basis, MVA asked this Court to set aside VA's denial of MVA's petition for rulemaking. VA disagrees on two fronts, arguing that it properly interpreted the Act and that, regardless, any legal error does not undermine its denial.

VA is wrong on both fronts. On statutory interpretation, it does little more than repeat the assertions debunked in MVA's opening brief. And even though the remedy for an erroneous legal conclusion is to set

aside the agency's action, VA now backs away from its denial and says it was not making a legal judgment after all. This Court should not be swayed.

A. The Secretary's tactical-herbicide interpretation of the Agent Orange Act is contrary to law.

VA does not dispute that the Secretary interpreted the Agent Orange Act in the process of denying MVA's petition for rulemaking. *See, e.g.*, AB30 (citing Appx3-4). MVA begins by addressing in this section why that interpretation was legally erroneous. The following section addresses what this Court should do with that error.

The legal error asserted by MVA is that the Secretary misconstrued what kinds of chemicals are properly considered "herbicide agents" for purposes of the Agent Orange Act. The statute provides for this by explicit definition: "the term 'herbicide agent' means 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). According to VA, this definition secretly includes a further restriction: Only tactical herbicides count. Where is that restriction in the text or legislative record of the Act? VA never says.

1. The Secretary's interpretation is contrary to the Act's text.

Nothing in the text of § 1116 even hints at the tactical-commercial distinction adopted by VA. The statute applies to "herbicide[s]" and includes all those that were used to support Vietnam War operations. Section 1116 goes on to identify particular chemical compositions, including dioxin and 2,4-dichlorophenoxyacetic acid ("2,4-D"). None of this text is limited to tactical herbicides. As VA repeatedly points out, commercial herbicides containing 2,4-D are still widely available to retail customers even today. *E.g.*, AB2 n.1. By including the common commercial product 2,4-D on its own—rather than in combination with the other component of Agent Orange, 2,4,5-T—the text contradicts VA's interpretation.

Brushing past this inconvenient text, VA asserts that § 1116 is limited to herbicides that were used in Vietnam. VA's assertion is unavailing for two reasons. First, the distinction VA made in its denial was between tactical and commercial herbicides, not between uses inside and outside of Vietnam. Second, the statute does not actually say that the herbicides must have been used in Vietnam. Consider the

statutory definition Congress enacted compared to the one VA now imagines:

> Section 1116(a)(3): a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam
>
> VA's interpretation: a chemical in an herbicide used in the Republic of Vietnam in support of the United States and allied military operations

VA's parsing of this text is untenable. The phrase "in the Republic of Vietnam" modifies "operations," not "used." There is no question that herbicides used on Guam, Johnston Island, and American Samoa during the Vietnam War were used "in support of the United States and allied military operations in the Republic of Vietnam"—regardless of whether they were tactical or commercial. For example, Linebacker II was a bombing campaign over Hanoi and Haiphong, North Vietnam, using planes that took off from and landed in Thailand and Guam. *See* Appx574. This was undoubtedly a "military operation[] in the Republic of Vietnam." When American soldiers sprayed herbicides along the runways of Guam so that these bombers had clear flightlines, that was

a use of herbicides in support of those operations. *See, e.g.*, *Gray v. Wilkie*, No. 18-0123, 2019 WL 1982253, at *3 (Vet. App. May 6, 2019) ("It is unclear why herbicides employed in Thailand could not be chemicals used 'in support of' military operations in Vietnam."); Br. of Amicus Curiae Sen. Terlaje, at 2-5 (documenting the extensive use of herbicides on Guam to support its crucial role in Vietnam operations).

VA does not dispute this understanding of the word "support," which is well grounded in this Court's case law. OB35-36 (citing *O'Farrell v. Dep't of Def.*, 882 F.3d 1080, 1084 (Fed. Cir. 2018)). It relies only on its mistaken view that the herbicides—rather than the operations—must have been in Vietnam. AB38-39.

To the extent there is any interpretive doubt about the phrase "in the Republic of Vietnam," that doubt should be resolved in the veterans' favor, as MVA explained. OB46 (citing *Procopio v. Wilkie*, 913 F.3d 1371, 1380 (Fed. Cir. 2019) (en banc)). VA's brief does not respond to this point.

2. The Secretary's interpretation conflicts with the Act's purpose and history.

VA's contortion of the statutory text should be the end of the matter. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364

(2019) ("Where, as here, that examination [of the text and structure] yields a clear answer, judges must stop."). But even taking into account the legislative purpose and history, VA still gets the interpretation wrong.

Legislative purpose. As MVA's opening brief explained, VA is wrong that Congress intended the scope of "herbicide agent" to be limited to tactical herbicides rather than commercial. That distinction is illusory, OB37-38, and there is no reason to think Congress intended it.

VA argues that herbicides commissioned by the Department of Defense (the "tactical" ones) had different formulations and procurement processes from those used for vegetation management (the "commercial" ones). That is only marginally accurate. As VA acknowledges, 2,4,5-T and its toxic contaminant TCDD were often present in both cases. *See, e.g.*, AB15. And although Agent Orange had a distinctive formulation, "only Agent Orange" was this way; the other so-called tactical herbicides (like Agents Pink and Purple) had the same formulations as "the materials for commercial application that were readily available in the United States." Appx2582. Yet VA does not

dispute that Agents Pink and Purple are covered by the Act. *See* AB3 & n.2. The upshot, in VA's view, is that a chemical in a barrel labeled "Agent Pink" is covered, whereas the exact same chemical in a barrel labeled "commercial herbicide" is not. The tactical-commercial distinction is grounded in VA's outcome-oriented misgivings with the Act, not any reasonable understanding of history or science. The Court of Appeals for Veterans Claims has accordingly rejected it. *See* OB47 (collecting cases).[1] Since MVA's opening brief was filed, that Court's criticism of the tactical-commercial distinction has persisted. *Benjamin v. McDonough*, No. 20-1333, 2021 WL 3260319, at *1 (Vet. App. July 30, 2021) (adopting veteran's argument concerning VA's "tunnel vision").

The herbicides were not easily classified as tactical or commercial based on their uses, either. VA does not dispute that so-called commercial herbicides were sprayed at small scales, such as by hand or truck, around American military installations and that records were not

[1] VA's brief argues that these cases—which concern Thailand, Guam, and Japan—do not prove the presence of tactical herbicides on Guam. AB44-46. But that was not the purpose for which those cases were cited. Rather, these cases confirm that the Secretary's tactical-commercial distinction is illusory and unreasonable, regardless of where a veteran served. OB47.

kept of such spraying. AB54. But it asserts that MVA's evidence on this front "does not undermine the Secretary's conclusion that there is no evidence that tactical herbicides—that is, the specially-formulated, unregistered, undiluted kind—were used broadly" in small-scale spraying. AB54-55.

That is precisely what the evidence shows. Agent Orange itself was used in this manner: In addition to aerial spraying, Agent Orange was "sprayed from the ground around base perimeters," among other places. Appx2581, *cited at* OB55. Even VA's own commissioned report says this, describing such "non-recorded" small-scale spraying as "a significant, if not major source of exposure for ground forces." OB56-57 (quoting Appx1593). Again, VA asks this Court to rely on its own say-so rather than any meaningful examination of the historical record.

Lastly, this Court should not be misled by VA's refrain that so-called commercial herbicides were safe.[2] As already discussed, they

[2] The Secretary's denial maintained that so-called commercial herbicides were monitored for safety at the time by the Environmental Protection Agency. Appx2-3. VA now concedes that the EPA did not exist; VA had no basis for its assertion about safety screening. AB41 n.15.

carried the same toxins. And even if commercial herbicides were relatively safer in terms of dilution, it would not matter for present purposes. The Act applies on its face to the relatively safer 2,4-D. If Congress passed a law explicitly banning sodium chloride, it would not matter how safe we perceive table salt to be. We cannot ignore the statute's text.

Legislative history. There is no question that Congress was concerned about the historic risks posed by aerial spraying of Agent Orange when it passed the Agent Orange Act. VA briefs this issue extensively, *e.g.*, AB35-38, but MVA could hardly contest the point.

The problem is that this is not the end of the story. In its opening brief, MVA demonstrated that in passing the Act, Congress was also aware of and concerned about the risks from dioxin more generally and, in particular, the effects of small-scale spraying. OB38-41. Legislators repeatedly explained that the Act was meant to reach not just Agent Orange but also "dioxin[] and other debilitating chemicals." 137 Cong. Rec. 2361 (statement of Rep. Richardson). The Secretary of Veterans Affairs at the time did, too. *Id.* at 2345. VA insists that the "singular

purpose" of the Act was to address exposure to Agent Orange from aerial spraying, AB35, but there was nothing singular about it.[3]

VA's other resorts to the legislative history are similarly futile. Without elaboration, VA relies on two legislative records cited in its denial of MVA's petition for rulemaking. AB35-36. But MVA's opening brief explained that these records do not support and, if anything, undermine VA's position. First, VA relies on a single statement by a legislator offering the uncontroversial proposition that "Vietnam-era veterans were the first to experience widespread exposure to [A]gent [O]range." 137 Cong. Rec. H719 (Appx2326) (Jan. 29, 1991) (statement of Rep. Long). This is factually true, but it proves nothing about the meaning of the text of the Act. They were also the first exposed to Agent Pink, for instance, which is undoubtedly covered by the Act. Second, VA relies on a Senate report explaining that the "vast majority of the herbicides used in Vietnam were disseminated by aerial

[3] VA suggests that a subsequent amendment to the Act—to modify the eligibility dates—ties the Act to the aerial spraying campaigns of Operation Ranch Hand. AB8. But the Senate report on which VA relies undercuts its argument: It only discusses the Act's application to "herbicides and defoliants" generally; there is not a single mention of Agent Orange or Operation Ranch Hand. S. Rep. 104-371 (1996).

spraying." S. Rep. 101-82, at 25 (Appx2372) (1989). But two sentences later, that same report acknowledges small-scale spraying by trucks and backpacks. *Id.*[4]

In its opening brief, MVA explained these problems with VA's accounting of the legislative history. OB40-41. VA has no response. It somehow maintains that Congress never expressed any concern about small-scale spraying, AB37-38, despite expressly relying on a Congressional report that did just that. VA's interpretation cannot be salvaged by the legislative history.

As MVA has previously explained, it is not enough for VA to point to what it views as the gestalt of the statute, without some textual or legislative support for its interpretation. OB51-52. That is the same interpretive move the Supreme Court recently rejected in *Bostock v.*

[4] VA also relies in passing on an unenacted Senate bill that would have extended the presumption of service connection beyond Vietnam. AB36 n.13. But as VA has previously argued to this Court, unenacted bills "are not reliable indicators of congressional intent." Br. of Appellee, at 16, *Terry v. Principi*, 367 F.3d 1291 (Fed. Cir. 2004) (internal quotation marks omitted), 2003 WL 24305638. Moreover, a debate about whether to apply a presumption outside of Vietnam does not speak to whether Congress intended to cover so-called commercial herbicides, which were used without regard to borders.

Clayton County, 140 S. Ct. 1731 (2020). There, employers argued that their "discrimination against homosexual or transgender persons cannot be sex discrimination" within the meaning of Title VII of the Civil Rights Act of 1964. *Id.* at 1746. According to the employers, "few in 1964 would have expected Title VII to apply to discrimination against" these classes of employees. *Id.* at 1749. The Supreme Court ruled in the employees' favor, explaining that the "employer[s'] logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it." *Id.* at 1750. The Secretary's logic here is even worse; it has none of the historical and legislative support that the employers marshaled in *Bostock*. *See id.* at 1749-53. And the statute here is even clearer than Title VII: It names the herbicides in question by their chemical components.

The Secretary is arguing that Congress meant to cover "2,4 dichlorophenoxyacetic acid," but not *that kind* of 2,4-dichlorophenoxyacetic acid. 38 U.S.C. § 1116(f); *accord* 38 C.F.R. § 3.307(a)(6)(i) ("specifically: 2,4-D"). That strained interpretation should be rejected.

3. The other interpretive tools fail to support VA's interpretation.

MVA also argued (1) that VA's denial conflicts with its own regulation, (2) that its interpretation is not entitled to deference, and (3) that VA's professed fears of a slippery slope are unfounded. VA does little to dispute these points.

With respect to VA's regulation, 38 C.F.R. § 3.307(a)(6)(i), VA resorts to the same argument it made about the Act, i.e., that the scope of "herbicide agent" is limited to herbicides used in Vietnam. For the reasons described above, that misreads the text. *Supra* pp. 7-9. VA's regulation identifies specific chemical formulations, including 2,4-D, and makes no mention of the tactical-commercial distinction VA now seeks to impose.

In its brief, VA does not seek deference to its legal interpretation. As MVA explained, no deference would be warranted under *Chevron*, *Auer*, or otherwise. OB44-48.

In response to VA's slippery-slope concerns, MVA explained that the slope is not all that slippery. OB48-50. The Act is still tied to a particular era and still requires a nexus to the Vietnam War. To the extent the Act reaches relatively safer herbicides like 2,4-D, that is a

problem of Congress and VA's own making. VA could have attempted to narrow its regulation to "herbicides like Agent Orange [that] were specifically formulated to be more potent and disseminated aerially," as it now claims, AB41 (emphasis omitted), but it did not do so. Instead, it drew its regulation in chemical terms broad enough to reach even a commercial 2,4-D product, so long as it was used in support of Vietnam War operations. 38 C.F.R. § 3.307(a)(6)(i).

Finally, VA contends that MVA's challenge to the tactical-commercial distinction is a "grievance [that] lies with the [Government Accountability Office] because it is the GAO that made that distinction." AB40. According to VA, "It was perfectly sensible for GAO to treat those types of herbicides differently from those commercially available in the marketplace, and similarly sensible for the Secretary to rely on that distinction in making his assessment." AB41-42. VA appears to be urging a novel kind of inter-agency deference: If a different agency interpreted the statute a certain way, VA can rely on that interpretation so long as "sensible." This deflection should be rejected. An agency cannot cleanse an erroneous statutory interpretation by

relying on another agency making the same error. *See N.Y. Shipping Ass'n v. Fed. Maritime Comm'n*, 854 F.2d 1338, 1375 (D.C. Cir. 1988).

B. The Court should grant the petition in light of the Secretary's legal error.

VA asks this court to deny MVA's petition notwithstanding any legal error in its interpretation of the Agent Orange Act. This is because, VA says, the Secretary was merely using the Act as a "helpful reference point" in making a distinct policy choice. AB32. He was not, according to VA, actually grounding his decision in an interpretation or application of the Act. Instead, he was applying 38 U.S.C. § 501, the general grant of rulemaking authority.

The Secretary's denial did not even mention § 501, much less express a policy choice by the Secretary under that statute. Nor is there any indication in the Secretary's denial of the "helpful reference point" theory that VA now advances on appeal. Instead, the denial turns on the Secretary's view that the Agent Orange Act's scope is limited to tactical herbicides. *E.g.*, Appx3 (relying on "the primary purpose of the statute"); Appx4 (asking what "Congress, in the Agent Orange Act, was addressing"). Indeed, VA reasoned that the petition for rulemaking should be denied because the proposed regulation "would go far beyond

Congress's intent in passing the Agent Orange Act." Appx4. As MVA's opening brief explained, when an agency's action turns on its erroneous understanding of the relevant statute, that action must be set aside. OB50-53 (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

VA's prior, similar regulations confirm that this was not some freewheeling policy choice that only contemplates the Agent Orange Act by analogy. VA argues that, in extending presumptions to veterans with service in the Korean Demilitarized Zone and on C-123 aircraft, it relied "in relevant part" on "the authority conferred by 38 U.S.C. § 501(a)." AB29. This is uncontroversial to the extent that, as a procedural matter, virtually every regulation issued by VA is issued in part under § 501, the agency's general grant of rulemaking powers. But those prior regulations relied in substance on the Agent Orange Act as statutory authority—a fact VA just omits from its brief. Better yet, the regulations did not just rely on the Act in general; they relied on the specific definitional provision for "herbicide agent" that is at issue here, 38 U.S.C. § 1116(a)(3). *E.g.*, Herbicide Exposure and Veterans with Covered Service in Korea, 76 Fed. Reg. 4245, 4248 (Jan. 25, 2011) (citing § 1116(a)(3)); Presumption of Herbicide Exposure and

Presumption of Disability During Service for Reservists Presumed Exposed to Herbicide, 80 Fed. Reg. 35,246, 35,249 (June 19, 2015) (same). The Secretary conceded as much in his denial, when he explained that the Agent Orange Act is "the statute underlying [38 C.F.R. §] 3.307(a)(6)"—the provision that includes the Korea and C-123 presumptions. Appx3.

Having hidden behind the shield of an erroneous statutory interpretation, VA cannot now claim to have made a mere policy decision—under a statute it did not invoke until this appeal. Unlike appeals from district court, in reviewing administrative actions, this Court must hold an agency to the rationale it offered below. *SEC v. Chenery Corp.*, 318 U.S. 80, 93-95 (1943). *Chenery* squarely applies here. As the Supreme Court explained, this rule of judicial review is not a formality. *Id.* at 95. It is an important principle of government accountability. When an agency hides behind its interpretation of a statute, it shifts responsibility from itself to Congress and the courts, and it avoids the scrutiny and accountability that would accompany a pure policy choice. *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 676 (D.C. Cir. 1989) (Starr, J., concurring) ("*Chenery* is, after all, not a

prudential doctrine designed to facilitate judicial review. To the contrary, *Chenery* helps maintain the proper spheres of court and agency…."). This Court should apply *Chenery* and reject VA's attempt to retreat from the rationale it offered below.

Even if this Court agrees with VA that the Secretary was applying § 501 without mentioning it, the legal error in interpreting the Agent Orange Act undoubtedly played a major role in the Secretary's analysis. For example, if VA had wanted to deny the petition as a matter of policy, it could have done so without combing through the legislative history for the tenuous citations discussed above. *Supra* pp. 14-15. And as just noted, VA itself described the Agent Orange Act as "the statute underlying" its regulatory presumptions—even those that apply outside of Vietnam. Appx3. To be clear, VA did not make and therefore has forfeited any harmless-error argument. *See, e.g.*, *United States v. Priority Prods., Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986). Even if it had done so, this is not a case of harmless error, such as when the agency's error "clearly had no bearing on the procedure used or the substance of the decision reached." *In re Watts*, 354 F.3d 1362, 1370 (Fed. Cir. 2004)

(quoting *Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964)).

The Secretary's interpretation of the Agent Orange Act was at least a key plank of his denial. The Secretary had an opportunity to deny MVA's petition as a policy matter under § 501, and he declined to do so. This Court should set aside his denial and remand for rulemaking.

III. The Secretary's Finding of No Toxic-Herbicide Exposure Was Arbitrary and Capricious

If this Court concludes that VA was correct to apply the tactical-commercial distinction in response to MVA's petition for rulemaking, it should nevertheless set aside VA's denial. There was no rational connection between the evidence before the Secretary and his factual determination. That is arbitrary and capricious action under the Administrative Procedure Act. *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1353-54 (Fed. Cir. 2011) (per curiam).

VA's primary tactic on appeal is to mischaracterize the factual determination in question. In denying MVA's petition, the Secretary avowed that there was "no evidence" of tactical-herbicide exposure. Appx2; Appx5; Appx6. In fact, there was at least some evidence of this,

even if VA thought it weak. OB7-14, 54-55. Now shifting gears, VA asserts that it denied MVA's petition because there was not evidence of exposure widespread enough to warrant a presumption. *E.g.*, AB53. This is another attempted deflection, and this Court should reject it under *Chenery*. And for the same reasons: By insisting that there is no evidence of a problem, an agency avoids the accountability that would arise if it were to make the more difficult, less popular decision to weigh the evidence. Here, for example, the Secretary's invocation of "no evidence" allowed him to avoid explaining why he did not credit the sworn statements of individual veterans. *See* OB61.

VA also falls back on the standard of review, insisting that the Secretary was under no obligation to "prove or disprove every fact relied upon." AB48. MVA has never argued that. Instead, MVA agrees that the Secretary was obliged to show a "rational connection" between the facts in the record and his conclusions. *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)). That is where VA falls short: In its opening brief, MVA cataloged each of the irrational connections that undergirded VA's denial.

1. The absence of official records is not rational evidence in this context.

This Court has recognized the common-sense proposition that if there is no reason to believe that records of a certain activity were kept, then the absence of such records is not evidence that the activity did not occur. *AZ v. Shinseki*, 731 F.3d 1303, 1318 (Fed. Cir. 2013). Suppose an eager law student breaks the rules and removes a book from the library without checking it out. When later asked about it, she points to the circulation card inside the book's cover, which shows no record of her borrowing it. "See?" she says, "I didn't take the book."

The same framework applies to small-scale spraying of tactical herbicides during the Vietnam War, with harmful consequences. There is undisputed evidence that tactical herbicides were sprayed at small scales, such as around military bases, and that records were typically not kept of such spraying. OB55 (citing Appx2576; Appx2581; Appx2585-2586; Appx2598); Appx2586 (explaining officials gave "little thought" to record-keeping because the spraying "seemed so obvious

and so uncontroversial at the time").[5] VA's own report acknowledged that this "non-recorded" spraying was "a significant, if not major source of exposure for ground forces." Appx1593. And those records were not kept because, like the library bandit, the activities in question were in violation of official policy. Appx2178.

It should be no surprise, then, that inquiries by the GAO and the Department of Defense found few official records of this spraying. It would not be reasonable to expect such records. And that absence is not proof of anything—other than poor record-keeping. *See AZ*, 731 F.3d at 1318.[6] There was no rational connection, then, between the results of

[5] VA criticizes MVA for purportedly misrepresenting the data on herbicides. AB49 & n.19. But VA's own citations reveal that as many as 1.6 million gallons of herbicides were used in small-scale spraying that "was either improperly recorded, incompletely documented, or omitted from the [military tape records]" and had later to be reconstructed. Appx2588, *cited at* AB49. As for the GAO report, the relevant figure is the 1.8 million gallons for which the GAO could find no shipping records or logbooks, Appx2165, undermining the GAO's assurances that no herbicide was transported to or through Guam. And whichever number you look at, there was still a substantial amount of herbicide for which the government could not account.

[6] VA asks this Court to ignore *AZ* because it concerned principles of evidence that purportedly apply only in federal litigation and in individual benefits cases. AB51. But those principles demonstrate why the Secretary acted irrationally here by relying on the absence of

the GAO's records search and the Secretary's conclusion that there was no tactical-herbicide use. VA acknowledges that these record searches were the principal basis for its factual conclusions, *see* AB49-51, which should be set aside in light of that irrationality.

VA criticizes MVA's no-evidence argument because, according to VA, MVA wants its petition granted on a similar no-evidence basis. AB52 ("[B]ut [MVA] argues that it is perfectly sensible to grant a petition based on the lack of evidence showing that tactical herbicides were *not* used on Guam."). That is not the case. For the proposition that there was tactical-herbicide use on Guam, MVA has actual, affirmative evidence, including eyewitness veteran affidavits. For VA's proposition that there was no tactical-herbicide use, it points only to absences, like the absence of official records. MVA's position is rationally grounded in record evidence; VA's is not.

Lastly, VA fearmongers: "[I]f giving weight to extensive and robust government investigations and conclusions is improper, then it is

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records. Perplexingly, on the very next page, VA cites a federal criminal case in support of its own evidentiary argument. AB52. VA cannot have it both ways.

hard to imagine how the Secretary is supposed to reach any decision on any given matter." AB52. It is very easy to imagine this, so long as there is a rational connection between the investigation and the Secretary's decision. Taking the above example, it would be irrational to rely on a library investigation that looked only at circulation cards to prove that there was no stealing, because you could not reasonably expect to find anything. The GAO rejected veterans' eyewitness statements because there were no official, corroborating records. Where no such records would be expected, *AZ* provides that is irrational.

2. In the face of eyewitness statements, the Secretary irrationally concluded there was no evidence of tactical-herbicide use.

When it comes to the eyewitness veteran affidavits in the record, VA again retreats from the rationale it offered below. The Secretary determined there was no evidence of tactical-herbicide use on Guam, and in doing so he rejected those affidavits to the contrary. Now on appeal, VA contends the Secretary actually weighed the affidavits. According to VA's brief, the Secretary merely found that the affidavits were not persuasive evidence of spraying widespread enough to warrant a presumption. *See* AB53. The denial belies this new position: The

Secretary attempted to debunk or ignore the veterans' affidavits, not weigh them. Appx5-6. And his reasons for debunking them were irrational (including, with respect to two veterans, an irrational refusal to consider them for no reason at all). *E.g.*, OB61; Br. of Amicus Curiae Ass'n of the U.S. Navy, at 13-18 (cataloging VA's misrepresentations and misuse of a veteran's account).

Perhaps recognizing now that the affidavits are at least some evidence of tactical-herbicide use, VA insists that veterans resort to the individual benefits process rather than rulemaking. And it points to one grant of benefits in one instance as proof that a presumption is not necessary. AB54. But as MVA has demonstrated, veterans are routinely denied benefits on absurdist grounds, like a lack of specialized chemistry training to identify particular molecular compounds. *See* OB60 (citing Appx837). That is where a presumption is meant to come in—where there is evidence that many were exposed, but where any individual will likely not be able to prove a particular exposure.

3. The Secretary irrationally dismissed corroborating evidence of widespread tactical-herbicide exposure.

Guam. All the above demonstrates that the Secretary had no rational basis for concluding that there was no evidence of tactical herbicides on Guam. There was such evidence, and the Secretary's decision to the contrary should be set aside. But even if this Court accepts VA's narrower framing—that the evidence was insufficient to show widespread use warranting a presumption—it should still set aside the denial.

Testing data reveals both 2,4-D and 2,4,5-T as late as 2019 in multiple locations on Guam, including those identified by MVA's representative. OB10-11, 26. This despite all the odds stacked against a positive result: the passage of time, environmental degradation, the government's purported remediation efforts, its sloppy testing procedures, and its failure to report on some samples. *Id.* Even the manufacturers of Agent Orange acknowledged astronomical levels of "TCDD contamination as a result of Agent Orange handling … on Guam." Br. of Amicus Curiae Ass'n of the U.S. Navy, at 8 (citing

Appx277) (1900 parts per million, compared to safe levels of 1 part per *billion*).

VA writes off the data as inconclusive: A positive result would be expected, "given that commercial herbicides were commonly used." AB15. This was irrational. The government refused to test for TCDD, the toxic contaminant in Agent Orange, because it is also produced in combustion. Appx2216. And VA dismissed particularly high levels of dioxin at the firefighting training site as indicative of combustion. Appx6. But according to eyewitness evidence, the combustion in question included leftover barrels of herbicides, including Agent Orange. OB63-64 (citing Appx19; Appx531). VA does not respond; it just reiterates its irrational conclusion. AB55-56.

American Samoa. In agency proceedings and now in this Court, VA has not disputed that servicemembers who served in American Samoa likely also passed through Guam. MVA has recently come to understand that this was not universally the case. Nevertheless, the evidence indicates herbicide exposure in American Samoa, too. For example, in 1983, the EPA recognized that "pesticides labeled as … 2,4,5-T [were] stored in open, deteriorating containers and spilled

across the floor of the warehouse" on a territory-owned farm. U.S. EPA, *Superfund: Record of Decision* 3 (Dec. 1983), https://perma.cc/J7HL-FJLQ.

Johnston Island. There is no dispute that massive quantities of Agent Orange were stored and spilled on Johnston Island. OB12-14 (49,000 pounds leaked per year); AB16. The question is whether the Secretary rationally concluded that there is no evidence servicemembers were exposed to that leaking Agent Orange. The Secretary's determination was without basis in the record.

There is undisputed evidence of widespread dioxin contamination on Johnston Island: Dioxin reached the intake site for drinking water, OB13, 64 (citing Appx3468), and despite the government's purportedly "complete[]" remediation in 1989, Appx2186, 80% of samples taken in 2002 adjacent to contamination sources tested positive for dioxins, including TCDD, OB13-14, 64 (citing Appx2112-2113).

As evidence that servicemembers were protected from dioxin exposure during the relevant period, 1972 to 1977, the Secretary pointed to heightened security measures that were temporarily put in place for two months, July and August 1977. OB65 (citing Appx8-9;

Appx3407-3410; Appx3447). VA's evidence undermines its own conclusion: It suggests that such safety precautions were not in place during the remainder of those five years. VA brushes this off as "speculat[ion]," AB57, but it is VA who is speculating about undocumented safety measures prior to July 1977. VA does not respond substantively to MVA's point or address this conspicuous flaw in its evidence. *Id.* That, again, is irrational.

/ / /

CONCLUSION

The Secretary erred when he denied MVA's petition on the basis of an erroneous statutory interpretation. Even accepting that interpretation, he erred again by concluding—without a rational basis in the record—that there was no evidence of exposure to tactical herbicides on Guam and Johnston Island. MVA respectfully asks that this Court grant its petition for review, set aside the Secretary's denial, and remand for rulemaking.

Respectfully submitted,

/s/ James Anglin Flynn

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September 20, 2021

Addendum

REPLY ADDENDUM TABLE OF CONTENTS

I Richard Elliott a person of the age of majority who, pursuant to 28 U.S.C. § 1746, under penalties of perjury states the following:

I served on active duty in the United States Navy from April of 1968 until January of 1970. I was assigned to the *USS Segundo* (SS 398) as a Fire Controlman. The *Segundo* was based out of San Diego, CA. We deployed to the Western Pacific between April 1969 and September 1969. The *Segundo* called into Pago Pago American Samoa harbor on August 30, 1969 and remained there until September 1, 1969. I did go ashore several times.

I am a member in good standing of Military-Veterans Advocacy since April 2019 and have served on their Board of Directors since November of 2020. I personally suffer from diabetes mellitus II, ischemic heart disease, neuropathy in upper and lower extremities, hypertension and erectile dysfunction. My right leg was amputated below the knee due to complications from diabetes. I currently have a claim pending with the Department of Veterans Affairs claim number 25953223. My claim is based on herbicide exposure. I believe that I was exposed during the visit to Pago Pago in 1969.

I am a member of the United States Submarine Veterans Inc. I know many submarine veterans who, like me called into Guam and American Samoa. Some of them are MVA members.

Signed this 3 day of September, 2021.

Richard Elliott

I - Gerrit Kuiken - a person of the age of majority who, pursuant to 28 U.S.C. § 1746, under penalties of perjury) states the following:

I am a life member of Military-Veterans Advocacy since May 21, 2019. (enlisted in the USAF on 17 Nov 52 & retired on 31 Jul, 82, During 18 Jul 1973 and 18 Jul, 1974 time period, I was assigned full time to and served on Johnston Island.

Johnston Atoll is a man-made island is less than one square mile/2.2 miles long and about ½ mile wide and almost all of it consists of 620 acres of coral material, dredged from the lagoon. There was only one desalination/water distribution system on the island, a desalination plant whose intake pipe took water from the surrounding ocean/lagoon and converted it into potable water for the drinking/bathing/other facility use of the 610 assigned military and civilian personnel. The desalination Plant's intake pipe was approximately 3 city blocks from the Herbicide Orange Storage site.

During the Vietnam War draw-down, the left-over Herbicide Orange was shipped to Johnston Island via the SS Transpacific around Apr 18, 1972, and remained there until o/a14 Jul, 1977, when it was vaporized using a Dutch Catalyzing ship. The Herbicide Orange was placed in storage in 55 Gal steel drums in the N.W. corner of Johnston Island. Given that the concentrated Herbicide Orange is extremely corrosive, the 55 gallon steel drums would soon begin leaking in 6 months or less, and 5 dedicated civil service workers worked full time, re-barreling it. (I often wondered what health problems these workers suffered, given they literally were sloshed by Herbicide Orange daily without having/wearing any kind of protective gear.)

Storage of the 3M gallons of Herbicide Orange, much of which leaked into the dredged-up coral island – and this leakage surely migrated to the nearby lagoon where the Water Desalination Plant intake was located and that drew it's water intake from the lagoon. The lagoon water was contaminated by the spilled Agent Orange and obviously – any water generated from the desalinization plant.

There was a common water facility used between all civilians and military of every base facility (including the housing showers/kitchens) and also included the base laundry, which facility washed everyone clothes and

uniforms. Also, the Base Dining facilities as well as the military NCO/Officer's/Top 3 Clubs and the Civilian Club used that water for cooking, etc.

During my time on Johnston Island, there were about 100 Air Force members, 200 Army members and about 310 civilian workers/supervisors who altogether used or was exposed to that contaminated water for their drinking/dining/bathing needs, as well as everyone's clothes were all base laundry facility contaminated. Everyone, both civilian and military, sent all of their clothes to this base laundry - this facility was huge/one of the biggest besides the central dining halls/clubs where 610 men all used as part of their benefits for serving on Johnston Island. We all used the same huge dining halls/clubs/other facilities and a huge effort was made for morale to have every kind of facility available, including a huge fresh water swimming pool, which obviously was filled with that contaminated water.

I have not yet received any benefits for my Agent Orange exposure, which conceivably has contributed to my hypertension/(High Blood Pressure), Adult on-set diabetes II, and peripheral neuropathy in my hands and feet, and irregular heartbeat/Afib. I also have chronic skin problems on my feet which I attribute to and began with my Johnston Island service.

Signed this 14th day of September, 2021.

Gerrit Kuiken

CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limitation of Fed. Cir. R. 32(b)(1) because this brief contains 6380 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Century Schoolbook 14-point font.

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