2020-2086

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MILITARY-VETERANS ADVOCACY, INC.,
Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent.

BRIEF FOR RESPONDENT

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Pursuant to Rule 47.5, respondent's counsel is unaware of any other appeal in or from these actions that was previously before this Court or any other appellate court under the same or similar title. Respondent's counsel is also unaware of any cases pending before this Court that may directly affect or be directly affected by this Court's decision in this case.

BRIEF FOR RESPONDENT

IN THE UNITED STATES COURT OF APPEALS
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2020-2086

MILITARY-VETERANS ADVOCACY, INC.,
Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent.

STATEMENT OF THE ISSUES

On February 10, 2021, the Secretary of the Department of Veterans Affairs (Secretary) denied a petition for rulemaking from Military-Veterans Advocacy, Inc. (MVA). MVA's petition requested that the Secretary extend a presumption of herbicide exposure to veterans who served in Guam between 1958 and 1980; Johnston Island between 1972 and 1977; and American Samoa. Appx1-9. Having had its petition denied, MVA now seeks review of the Secretary's decision under 38 U.S.C. § 502. The three issues in this case are:

1. Whether MVA has proven standing to challenge the Secretary's decision not to promulgate a rule creating a presumption of herbicide exposure for veterans who served on Johnston Island or American Samoa.

2. Whether the Secretary's decision to deny MVA's petition for a presumption of herbicide exposure to veterans who served in Guam, Johnston Island, and American Samoa violates the Agent Orange Act.

3. Whether the Secretary's decision is arbitrary and capricious.

STATEMENT OF THE CASE

I. The U.S. Military Launches A Large-Scale Tactical Herbicide Operation In The Republic of Vietnam

Between 1962 and 1971, the United States military sprayed approximately 20 million gallons of herbicide[1] over the Republic of Vietnam. Appx2576. Dubbed "Operation Ranch Hand," this tactical military project was the first and only large-scale use of chemical defoliants in U.S. military operations. *Id.* Herbicides were sprayed from C-123 aircrafts 150 feet in the air at a rate of 3 gallons per acre, although the scope of potential coverage could be affected by factors such as climate and wind. Appx2578. The operation had several strategic purposes: (1) remove foliage along thoroughfares used as cover for enemy

[1] Herbicides are chemicals that regulate normal plant growth. Appx2579. Four specific chemicals were used to formulate the herbicides sprayed over Vietnam: 2,4-D (2,4-dichlorophenoxyacetic acid), 2,4,5-T (2,4,5-trichlorophenoxyacetic acid), picloram, and cacodylic acid. *Id.* Herbicides containing 2,4-D are still on the market today, registered by the U.S. Environmental Protection Agency (EPA), and widely available to consumers at stores like Home Depot and Walmart. *See* Appx4502-4504. Herbicides containing 2,4,5-T, however, are no longer permitted in the United States, because a by-product of the manufacturing process for that chemical is the contaminant 2,3,7,8-tetrachlorodibenzo-*p*-dioxin (also known as TCDD or dioxin), which is toxic. Appx2579; *see* Appx2582 (TCDD "is a contaminant of 2,4,5-T, but not of 2,4-D").

ambushes; (2) defoliate vegetative areas surrounding enemy bases and communication routes; (3) improve visibility in heavily canopied jungles; and (4) destroy enemy subsistence crops. Appx2575.

The herbicides the U.S. military used in this tactical operation were formulated specifically by the Department of Defense (DoD) and developed through the testing of thousands of different chemical compositions for maximal effect when aerially spraying at full strength. Appx2169; Appx2175-2179. The primary herbicide employed in Vietnam—Agent Orange, which was a mixture of 2,4-D and 2,4,5-T—was formulated differently from herbicides that were (and still are) used and commercially available in stores across the United States. Appx2179; Appx2582.

In 1970, based on scientific studies associating dioxin (or TCDD, a by-product of the manufacturing process for 2,4,5-T, *see supra* at 2, n.1) with adverse health outcomes, the U.S. military suspended the use of Agent Orange and other herbicides containing 2,4,5-T[2] in military operations. Appx2583. Samples of Agent Orange reflect a level of dioxin "up to 1,000 times higher" than the level found in herbicides that were domestically available at the time. Appx2582 (while

[2] Agents Purple, Pink, and Green (other herbicide formulations) also contained 2,4,5-T, but only accounted for .01 percent of herbicide sprayed in Vietnam (as opposed to Agent Orange, which accounted for 60 percent). Appx2580. Agent White, which accounted for 30 percent of herbicide sprayed, did not contain 2,4,5-T (it contained 2,4-D and picloram). *Id.*

manufacturing standards limited dioxin concentration to .05 parts per million (ppm), Agent Orange samples contained dioxin up to 50 ppm); *see* Appx1592 (Agent Orange concentration was 6 to 25 times manufacturer's suggested rate).[3] The military subsequently discontinued the aerial dissemination of herbicides over Vietnam in 1971. Appx2584.

II. Congress Enacts The Dioxin Act And The Agent Orange Act Arising Out Of Concerns Due To Herbicide Exposure In The Republic Of Vietnam

In 1984, Congress enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, § 5(a)(1)(A), 98 Stat. 2725, 2727 (1984) (the Dioxin Act), which required the Veterans Administration (now the U.S. Department of Veterans Affairs (VA)) to prescribe regulations for benefits claims premised on a veteran's exposure to herbicides containing dioxin "in the Republic of Vietnam." *See id.* § 2(1). That legislation was borne out of Congress' concerns about the health effects of Operation Ranch Hand on veterans who served in that location. *See id*. The explicit purpose of the Act was to ensure that the VA

[3] Dioxin is still widely present in the world today, for instance, as a result of waste incineration, vehicle emissions, forest fires, and various manufacturing processes. Appx2215-2216. What made Agent Orange "particularly concern[ing]" was "the unknown concentration of TCDD [*i.e.*, dioxin] in Agent Orange." Appx2582 (explaining that the level of dioxin found in a given lot of 2,4,5-T depends on the manufacturing process, and specific dioxin concentrations of Agent Orange shipments varied and were not recorded).

compensated certain disabled veterans exposed to herbicides containing dioxin "in the Republic of Vietnam." *Id.* § 3.

In 1985, VA implemented the Dioxin Act with a regulation that enabled the VA to presume that veterans who "served in the Republic of Vietnam" were exposed to herbicides containing dioxin "while in Vietnam." 38 C.F.R. § 3.311a (1985). While noting that herbicides were widely used in the United States and elsewhere by farmers, foresters, and homeowners since the 1940s,[4] and that dioxin can result from many sources (industrial accidents, contaminated industrial wastes, farming and ranching herbicide applications, transportation accidents), VA explained that the magnitude and type of herbicide application in the Republic of Vietnam was unique, with millions of gallons of these specially formulated herbicides dispersed over 3 million acres, at a mean dioxin concentration of 2 parts per million, in order to "defoliate trees, remove ground cover, and destroy crops." 50 Fed. Reg. 15,848, 15,849 (1985).

[4] *See also* Appx2530 (National Academy of Sciences: "Spraying of herbicides in the United States has been a practice of farmers, foresters, railroads, utility companies, and certain government agencies, for many years. Farmers used 2,4,5-T to kill broadleaf plants in pasturelands. Foresters, including the U.S. Forest Service and other federal agencies having jurisdiction over national lands, forests, and parks, have used herbicides to keep down brush and undergrowth and to eliminate unwanted hardwoods in pine forests. Other reasons for using 2,4,5-T were to limit the growth of weeds along railroad tracks, next to power lines, and along highways").

In 1991, Congress enacted the Agent Orange Act, which codified two presumptions. First, the Act instructed the VA to presume that veterans who contracted certain diseases and "served in the Republic of Vietnam" during the Vietnam era had been exposed to an herbicide agent containing dioxin or 2,4-D. Pub. L. No. 102-4, § 2(a), 105 Stat. 11, 12 (1991); *see* 38 U.S.C. § 316(a)(3) (1991) (now 38 U.S.C. § 1116(f)). Second, the Act instructed the VA to presume that certain diseases contracted by veterans who "served in the Republic of Vietnam" during the Vietnam era would be "considered to have been incurred in or aggravated by such service[.]" Pub. L. 102-4, § 2(a); *see* 38 U.S.C. § 316(a)(1) (1991) (now 38 U.S.C. § 1116(a)(1)). The Act defined "herbicide agent" as "a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam" during the Vietnam era, and made clear that the definition applied only "[f]or purposes of this section." Pub. L. 102-4, § 2(a); *see* 38 U.S.C. § 316(a)(4) (1991) (now 38 U.S.C. § 1116(a)(3)).

The Act also required VA to enter into an agreement with the National Academy of Sciences (NAS) to review the associations between particular diseases and herbicide exposure, and assess whether herbicide exposure "during service in the Republic of Vietnam" increased the risk of such diseases. Pub. L. 102-4, § 3(a)-(d). VA was required to render a determination on whether presumptive

service connection was warranted for each disease reviewed. Pub. L. 102-4, § 2(a); *see* 38 U.S.C. § 316(c) (1991).[5]

Shortly thereafter, VA implemented the Agent Orange Act via 38 C.F.R. §§ 3.307(a)(6)(iii) and 3.309(e). *See* 59 Fed. Reg. 5,106 (1994); 58 Fed. Reg. 29,107 (1993). Section 3.307(a)(6)(iii) provided—and still provides—a presumption of herbicide exposure for veterans who "served in the Republic of Vietnam" during the Vietnam era. Section 3.309(e) listed—and still lists—particular diseases that "shall be service-connected" assuming the veteran was exposed to an herbicide agent while in service and that other requirements of § 3.307(a)(6) are met.

III. A Presumption Of Herbicide Exposure Is Extended To Three Additional Groups Of Veterans

In the ensuing years, consistent with Congress's mandate to consider presumptive service connection for additional diseases reviewed by the NAS, VA continued to add additional diseases to the § 3.309(e) presumption. *See, e.g.,* 66 Fed. Reg. 23,166 (2001) (adding type 2 diabetes); 61 Fed. Reg. 57,586 (1996) (adding prostate cancer and acute and subacute peripheral neuropathy).

[5] The VA was further required to file annual reports to Congress addressing the association between disabilities and active "service[ ] in the Republic of Vietnam," Pub. L. 102-4, § 6(a)-(b); establish a tissue archiving system for veterans who performed "service in the Republic of Vietnam," *id.* § 7(a); and authorize blood testing to assess the likelihood of TCDD exposure "while serving in the Republic of Vietnam," *id.* § 9(b).

Congress also amended the Agent Orange Act a number of times in that same period. *E.g.*, Pub. L. No. 104-275, 110 Stat. 3322 (1996); Pub. L. No. 103-446, 108 Stat. 4645 (1994). For instance, in 1996, recognizing that Operation Ranch Hand did not commence until January 1962, Congress tethered the dates of the Agent Orange Act's presumptions to the date the Operation commenced. Pub. L. No. 104-275, § 505(b); *see* S. Rep. No. 104-371, at 21 (1996) ("Herbicides and defoliants . . . were not introduced into the Republic of Vietnam until January 9, 1962 . . . ; [thus, the] provisions of law which specify benefits based on presumptive exposure to herbicides and defoliants . . . would be limited to the period between January 9, 1962, and May 7, 1975."). None of Congress' amendments, however, required VA to presume herbicide exposure for anyone who served *outside* the Republic of Vietnam.

Nevertheless, over the last dozen years, VA (using its authority in 38 U.S.C. § 501(a)(1)) has extended a presumption of herbicide exposure to specific veteran groups serving in areas outside the Republic of Vietnam. First, in 2009, VA found a reasonable basis to extend a presumption of herbicide exposure to veterans who served in or near the Korean Demilitarized Zone (DMZ) within a four year period during the Vietnam War era. 74 Fed. Reg. 36,640, 36,641 (2009) (relying on 38 U.S.C. §§ 501 and 1821 as authority); *see* 38 C.F.R. § 3.307(a)(6)(iv). The DoD confirmed that between April 1968 and July 1969 herbicides were applied along a

strip of land 151 miles long and up to 360 yards wide along the southern edge of the DMZ, and also provided a list of specific military units that operated in that area during the relevant time period. 74 Fed. Reg. at 36,641. Congress ultimately codified this presumption into statute in 2019. *See* 38 U.S.C. § 1116B; Pub. L. No. 116-23, § 3(a), 133 Stat. 966, 969.

Second, in 2015, VA found a basis for extending a presumption to veterans and reservists who regularly and repeatedly operated, maintained, or served onboard C-123 aircraft known to have been used to spray herbicide agents in Operation Ranch Hand. 80 Fed. Reg. 35,246, 35,246 (2015); *see* 38 C.F.R. § 3.307(a)(6)(v). VA explained that a 2015 NAS Institute of Medicine (IOM) report found it "probable" that at least some of these reservists were exposed to herbicide at a level that exceeded established guidelines. 80 Fed. Reg. at 35,246. The report accordingly found a "plausible" basis that servicing specified C-123s contributed to "adverse health consequences." *Id.*

Aside from these VA pronouncements, Congress most recently, in 2019, extended the presumption of herbicide exposure to a third group—Blue Water Navy veterans who served within 12 nautical miles of the Republic of Vietnam. 38 U.S.C. § 1116A; Pub. L. No. 116-23, § 2(a), 133 Stat. at 966.[6]

[6] Congress enacted this statute notwithstanding this Court's *Procopio v. Wilkie* decision, issued in January 2019, which held that the Agent Orange Act of

IV. DoD Completes An Extensive Review Of Tactical Herbicide Use, Testing, Transportation, And Storage Outside Of Vietnam And Korea

In 2018, the Armed Services Committee of the U.S. House of Representatives expressed "concern[ ] that . . . exposures to Agent Orange may have occurred in the U.S. Territory of Guam." H.R. Rep. No. 115-200, at 113 (2017). The Committee directed the Comptroller General of the United States to review the issue, *id.* at 114, which resulted in a November 2018 U.S. Government Accountability Office (GAO) report, Appx2164-2266.

Per its understanding of the Committee's request and the scope of the Agent Orange Act, the GAO's report focused "primarily on the tactical herbicide Agent Orange and its components." Appx2169 n.1; Appx2180 n.33 (recognizing the phrase "herbicide used in support of . . . military operations in the Republic of Vietnam" (38 U.S.C. § 1116) as referring to "tactical herbicides"); Appx2222 (affirming that "the presumption for service-connection applies to exposure to tactical herbicides"). The GAO report acknowledged two relevant but related points. First, it acknowledged that the U.S. military also used commercial herbicides to manage vegetation on its bases worldwide (including Guam). Appx2178. Second, it noted that the tactical herbicides were developed, handled, managed, and deployed differently from their commercial counterparts. *Id*.

1991 itself encompassed Blue Water Navy veterans. 913 F.3d 1371 (Fed. Cir. 2019) (en banc).

More specifically, *tactical* herbicides in Vietnam were (1) deployed at the authorization of the President to defoliate the jungle canopy and destroy food sources, (2) specifically formulated for aerial spraying, (3) applied at full strength without additional solvents, (4) uniquely marked, tracked, and centrally managed by the military, (5) not registered by the U.S. Department of Agriculture under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) review process, and (6) forbidden by DoD policy for domestic use or on military installations. Appx2176-2180. In contrast, *commercial* herbicides used worldwide were (1) approved by the General Services Administration for use by all federal agencies, (2) sprayed by hand or truck, (3) mixed with diesel or water, (4) widely available for standard vegetation control, and (5) registered under FIFRA. *Id.*; *see* Appx2222 (commercial herbicides "were not in the [same chemical] form used in Agent Orange"); *see also* Appx1592 (while commercial herbicides are diluted in oil and water, Agent Orange was not).

For its report, the GAO reviewed the available logbooks for 152 of the 158 vessels that had transported Agent Orange to Vietnam (as well as three of the remaining six vessels' shipping articles). Appx2195. The GAO noted that at least one ship had stopped in Guam en route to Vietnam, and three ships had stopped on return, but there was no evidence of any cargo being offloaded from these ships.

Appx2195-2197. All the stops seemed to be related to offloading injured crew members. Appx2198-2200.

The GAO also reviewed photographs and written statements from veterans alleging the presence of Agent Orange on Guam. Appx2203. Despite these statements, the GAO found that it could not substantiate those claims. *Id.* While veterans purported to witness herbicide spraying along fuel pipelines, the GAO noted that this was consistent with DoD's acknowledgement that commercial herbicides were available in Guam for controlling vegetation. *Id.* At bottom, the GAO confirmed that commercial herbicides were used on Guam, but not tactical herbicides. *See id.*; *contra* Pet. Br. 9.

The GAO further found it challenging to rely on current soil sampling to determine the use of tactical herbicides on Guam decades ago. Appx2213-2220. Specifically, the presence of dioxin in the soil could be the result of permissible present-day uses, such as the burning of materials like wood and waste, volcanic eruptions and forest fires, vehicle emissions, or recent commercial herbicide use, rather than trace remains of tactical herbicides. Appx 2215-2216. Because of these factors, as well as the short half-lives of the chemicals involved, the GAO noted that it would be challenging to render definitive conclusions from on-going testing in Guam. Appx2216-2219.

The GAO did conclude, however, that a DoD list (composed in 2003) purporting to compile locations where herbicides were tested or stored was incomplete and lacked clarity. Appx2204-2206. The GAO ultimately provided six recommendations for DoD and VA related to (1) updating and clarifying the list of locations where Agent Orange was stored or used, and (2) adequately communicating that information to veterans. Appx2220.

Following the GAO's report and recommendation, DoD engaged in a wide search for and review of over 2000 specific documents in DoD and other federal agency record repositories. Appx4500-4501. The 18-month review involved analysis of original source documents dating back to the inception of tactical herbicide testing shortly after the end of World War II. Appx1. Based on VA/DoD joint criteria, DoD identified 24 locations outside of Vietnam where tactical herbicides were tested, used, or stored. Appx4500. The DoD conveyed that list to VA in August 2019, which the VA then published on its website on January 27, 2020. *Id.*; Appx2; Appx2267-2287; *see also* https://www.publichealth.va.gov/exposures/agentorange/locations/tests-storage/index.asp (last visited Aug. 5, 2021). The list includes Cambodia, Canada, India, Johnston Island, Korea, Laos, Thailand, and several States, Appx2267-2287, but makes no mention of Guam or American Samoa. *Id.*

In order to constitute a location where tactical herbicides were used, stored, tested, or transported, the VA/DoD joint criteria required the existence of an official record, to include government reports, unit histories, shipping logs, contracts, or scientific reports or photographs. Appx1-2. In addition, the joint criteria required that a specified location refer to a DoD installation, land under DoD jurisdiction, or a non-DoD location where servicemembers were present during testing, application, transportation, or storage of tactical herbicides. Appx2.

V. MVA's Requests A Rulemaking, Which The Secretary Considers But Ultimately Denies

In December 2018, MVA filed a petition for rulemaking. MVA requested that the Secretary promulgate a regulation extending the presumption of herbicide exposure to veterans who served on Guam, Johnston Island, and American Samoa.[7] Appx10-12. MVA thereafter filed additional letters in support of its petition in December 2019. Appx2087-2088; Appx2134.

In May 2020, the Secretary, through the Acting Under Secretary of Benefits (AUSB), denied MVA's rulemaking petition. Appx2143-2148. About two months later, MVA petitioned for review in this Court. *See* ECF No. 1. In November 2020, the Secretary filed a motion for a limited remand. The Secretary explained

[7] Because MVA's sole argument regarding American Samoa is that veterans who served in American Samoa were processed through Guam, Pet. Br. 17 n.1, American Samoa is not further addressed in this brief beyond Argument I, addressing standing.

that he would render a new decision that would account for veteran affidavits that he had not reviewed, as well as new argument and evidence that MVA had submitted post-dating his May 2020 decision. *See* ECF No. 11. In December 2020, this Court granted the motion. *See* ECF No. 16.

On February 10, 2021, the Secretary, again through the AUSB, issued a revised decision that continued to deny MVA's rulemaking request. Appx1-9. The Secretary concluded that, in light of the record evidence, he would not at this time promulgate a presumption of herbicide exposure for veterans who served on Guam or Johnston Island. *Id.* Regarding Guam, the Secretary explained that:

- DoD's extensive review of records concerning the use, testing, storage, and transportation of tactical herbicides did not find evidence of Agent Orange or other tactical herbicides on Guam, Appx2 (referencing Appx2267-2287);

- after reviewing government documents, other records, and interviewing veterans who alleged exposure, the GAO did not find evidence of tactical herbicides on Guam, *id.* (referencing Appx2188-2203);

- to the extent trace levels of 2,4-D and 2,4,5-T have been found on Guam, that would be expected, given that commercial herbicides were commonly used on foreign and stateside military bases for standard vegetation and weed control, Appx2-3 (referencing Appx2178-2180);

- presumptions are an exception to the general burden of proof, which VA has employed for veterans who came into contact with the deliberate application of herbicides for a tactical military purpose on a broad scale, but the Guam scenario is not comparable, Appx3-6 (citing 38 C.F.R. § 3.307(a)(6)); and

- the photographs and affidavits submitted by MVA are not sufficiently persuasive to show that a presumption of exposure to tactical herbicides is

warranted for all veterans who served on Guam, Appx4-6.

The Secretary further explained that the lack of a presumption does not in any way foreclose veterans from individually proving a present disability that results from in-service herbicide exposure, Appx6 (citing *Polovick v. Shinseki*, 23 Vet. App. 48, 52-53 (2009)), meaning veterans could still make their claims on an individual basis. It was just that a broad presumption was unwarranted.

As to MVA's Johnston Island petition, the Secretary explained that:

- although barrels of Agent Orange were stored in the northwest corner of Johnston Island, civilian contractors were solely responsible for the storage site, which was fenced and off limits to military personnel, Appx7 (referencing Appx3495; Appx3678);

- although drum leaks did occur, the contractors screened the entire inventory daily for leaks and performed de-drumming activities as necessary, *id.* (referencing Appx3495; Appx3678);

- because the storage site's floor was comprised of densely compacted coral, there was little opportunity for any leaked herbicide to become airborne—and due to the storage location and wind patterns, any airborne herbicide would rapidly be dispersed into the open Pacific Ocean, Appx8 (referencing Appx3695; Appx3325, Appx3327-3328; Appx3822; Appx3678); and

- contemporaneous independent monitors found concentrations of 2,4-D and 2,4,5-T in ambient air and water samples to be "well below permissible levels," *id.* (referencing Appx3319-3320).

For these reasons, the Secretary concluded that VA would continue to consider claims of exposure in Guam and Johnston Island on an individual, case-by-case basis, rather than through the use of a presumption. Appx1-9. The

Secretary submitted his determination to the Court on February 19, 2021. *See* ECF No. 17. Briefing in this case followed.

SUMMARY OF THE ARGUMENT

The Secretary's decision must stand. An agency decision not to institute a requested rule may only be overturned in "the rarest and most compelling of circumstances." *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369, 1375 (Fed. Cir. 2016) (citation omitted).

Here, MVA requests that the Secretary institute a rule changing the burden of proof for veterans who served on Guam, Johnston Island, and American Samoa when they make claims alleging in-service herbicide exposure. Currently, these veterans can submit evidence, and receive VA assistance, to establish that they were "as likely as not" exposed to herbicides in service. 38 U.S.C. §§ 5107, 5103A. Dissatisfied by this burden, however, MVA insists that the Secretary must create a presumption of exposure to relieve these veterans of any such obligation.

Exercising his policy expertise and discretion, the Secretary declined to institute such a change at this time and explained to MVA "why [he] chose to do what [he] did." *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001) (internal quotation marks omitted). He explained that: (1) the GAO and DoD did not find any evidence of large-scale or tactical herbicide usage on Guam; (2) although there were trace levels of 2,4-D and 2,4,5-T—which are chemicals

present in herbicides—the levels that were found in Guam are consistent with, in part, commercial herbicide use for standard vegetation and weed control; (3) concentrations of 2,4-D and 2,4,5-T found in Johnston Island were "well below permissible levels"; and (4) presumptions are broad, overinclusive mechanisms reserved for unique situations where there is strong evidence of herbicide exposure in the aggregate, which the record lacked here. Recognizing that the lack of a presumption would not foreclose veterans from proving herbicide exposure in their individual claims, the Secretary declined to institute a broad-based presumption where the record did not support making that finding.

MVA disputes the Secretary's determination, but MVA fails to prove how the Secretary's explanation does not satisfy this Court's "extremely limited" and "highly deferential" standard of review. *Serv. Women's Action Network*, 815 F.3d at 1375. To sidestep that high bar, MVA attempts to cast its challenge as a legal disagreement, insisting that the Secretary's decision must be declared invalid under the Agent Orange Act. But MVA is not correct. The Agent Orange Act bestows a presumption of herbicide exposure only to veterans who "served in the Republic of Vietnam"—not those who served in Guam, Johnston Island, or American Samoa. Nothing in the Agent Orange Act bars what the Secretary did here, and in fact, the text and history of that law supports the Secretary's decision in this case.

The remainder of MVA's arguments boil down to disagreements over the Secretary's policy choice, taking the form of narrow attacks on the weight the Secretary ascribed to certain evidence. None of these arguments are persuasive, nor do they show how the Secretary's decision to credit certain credible evidence over less persuasive evidence amounts to one of these "rarest and most compelling of circumstances" that warrants judicial intervention. *Serv. Women's Action Network*, 815 F.3d at 1375. The Secretary's explanation was rational, and his conclusions well-founded. MVA disputes these assessments, but fails to prove its case. MVA's petition must be denied.

ARGUMENT

I. MVA Has Not Established Standing To Challenge The Secretary's Decision On Johnston Island And American Samoa

At the outset, MVA attempts to demonstrate both associational and direct standing to bring this petition for review. Pet. Br. 22.

To establish associational standing, an organization must demonstrate that (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Pursuant to *Hunt*'s first requirement, an organization challenging a VA decision on rulemaking "must show that it has at least one

veteran member with an actual or potential claim that could be affected by the challenged" decision. *Military-Veterans Advocacy v. Sec'y of Veterans Affairs*, __ F. 4th __, 2021 U.S. App. LEXIS 22608, at *17 (Fed. Cir. July 30, 2021) (*MVA*) (citing *National Organization of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 981 F.3d 1360, 1369-70 (Fed. Cir. 2020) (en banc) (*NOVA*)).

MVA fails to show it has associational standing in this case as it relates to Johnston Island and American Samoa. While MVA identifies two veteran-members who served on Guam and have pending claims, Pet. Br. 23, it does not identify any veteran-members who served on Johnston Island or American Samoa, much less persons with "actual or potential" claims who "could be affected" by the challenge. *MVA*, 2021 U.S. App. LEXIS 22608, at *17. In a clear demonstration that it is unable to carry its legal burden, MVA instead provides the words of its Board Chairman who alleges that MVA "is a membership organization" that includes veterans who "served on Guam, American Samoa and Johnston Island." Pet. Br., A3. But as this Court made clear in *NOVA*, this kind of generalized allegation is insufficient to establish standing. 981 F.3d at 1369 (explaining "that the first prong of the *Hunt* test can[not] be established solely on the basis of [claiming organizational members] without identification of an individual affected member, the nature of his or her claimed injury, and the reasons that the challenged interpretive rule would adversely affect the member" (overturning *Disabled*

American Veterans v. Gober, 234 F.3d 682 (Fed. Cir. 2000)). MVA was required to present a member with an "actual or potential claim" to prove associational standing. *See MVA*, 2021 U.S. App. LEXIS 22608, at *20 (standing not found where organization failed to identify a particular veteran member with an actual or imminent harm due to the challenge at issue). MVA knows this is the law, which is why it met these requirements with respect to Guam. Pet. Br. 23. It has not done the same for Johnston Island and American Samoa, however. Accordingly, MVA's petition as it relates to these latter two areas must be dismissed.

Nor can MVA salvage its argument by claiming direct standing. MVA does not demonstrate a "concrete and demonstrable injury to the organization's activities" sufficient to prove a direct injury claim, nor can it prove causation and redressability. *See MVA*, 2021 U.S. App. LEXIS 22608, at *31 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). MVA alleges that it "has expended its own resources to investigate and develop the facts concerning toxic herbicides" and provides an example about MVA funding a veteran-member's 2019 trip to Guam. Pet. Br. 25-26. But these general assertions about resources and its reference to a trip to *Guam* do not show a concrete and demonstrable injury from the Secretary's decision regarding two entirely separate islands—Johnston Island and American Samoa—that reside thousands of miles away. Nor does MVA's claim about expenditures show how these costs are not "merely part of the

ordinary course of [its] operations," which are insufficient to show that the Secretary's decision subjects MVA to '"operational costs beyond those normally expended to carry out its advocacy mission.'" *MVA*, 2021 U.S. App. LEXIS 22608, at *32-*34 (quoting *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011); *see id.* at *33 ("An organization's use of resources for . . . advocacy are likewise insufficient to give rise to an Article III injury."); Pet. Br., A111 (conceding that it is part of MVA's general mission to provide education and assistance to veterans in obtaining veterans benefits and to advocate for legislation benefitting veterans).

MVA bore a specific burden in this case, and has failed to carry it. This Court should not entertain MVA's petition as it relates to Johnston Island or American Samoa. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992) ("[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III.").

II. The Court's Review Of An Agency's Decision Not To Promulgate A Requested Rule Is "Extremely Limited" And "Highly Deferential"

Under 38 U.S.C. § 502, this Court has jurisdiction to review whether the Secretary's denial of a petition for rulemaking is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Serv. Women's Action Network*, 815 F.3d at 1374 (internal quotation marks omitted); *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1353 (Fed. Cir. 2011). This review, under the

Administrative Procedure Act (APA) standard, is "a narrow one, limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on" and that "those facts have some basis in the record." *Serv. Women's Action Network*, 815 F.3d at 1374. If there is "a rational connection between the facts found and the choice made," the agency's decision must stand. *Motor Vehicles Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

And even though the APA standard is already "highly deferential," this Court has further stated that the standard is "rendered even *more* deferential by the treatment accorded by the courts to an agency's rulemaking authority." *Preminger*, 632 F.3d at 1353 (emphasis added); *Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987) ("[A]n agency's refusal to institute rulemaking proceedings is at the high end of the range [of deference]."). A decision not to institute rulemaking "is to be overturned 'only in the rarest and most compelling of circumstances,'" *Am. Horse Prot. Ass'n*, 812 F.2d at 4-5 (citation omitted), such as "plain error of law or a fundamental change in the factual premises previously considered by the agency," *Serv. Women's Action Network,* 815 F.3d at 1375 (quoting *Nat'l Customs Brokers & Forwarders Assn. of Am., Inc. v. United States*, 883 F.2d 93, 96-97 (D.C. Cir. 1989)). As the Supreme Court makes clear, judicial review of an agency's decision not to promulgate a

requested rule "is 'extremely limited' and 'highly deferential.'" *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (quoting *Nat'l Customs Brokers*, 883 F.2d at 96); *Serv. Women's Action Network,* 815 F.3d at 1375.

Congress reiterated these limits when it most recently amended 38 U.S.C. § 502. Leading up to that amendment, in 2008, the Senate Committee on Veterans' Affairs specifically addressed "challenges . . . in response to a denial by VA of a request for rulemaking." S. Rep. 110-449, at 14 (2008). That Committee described the burden facing petitioners in cases like this one as "daunting," with relief being afforded in "only very limited circumstances." *Id.* at 14-15.

This "extremely limited" and "highly deferential" standard of review takes on added significance here. That level of deference respects the VA's policy expertise and discretion in determining when to relax the evidentiary proof requirements that it alone has been authorized by Congress to impose. 38 U.S.C. § 501(a)(1); *see Serv. Women's Action Network,* 815 F.3d at 1375; *Preminger*, 632 F.3d at 1353. These governing review standards demonstrate the level of deference the Court must afford the Secretary in refusing to "substitute its judgment for that of the agency." *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43; *Mortg. Investors Corp. of Ohio v. Gober*, 220 F.3d 1375, 1378 (Fed. Cir. 2000).

III. MVA Fails To Demonstrate That The Secretary's Decision Must Be Set Aside

When denying a request for rulemaking, the law requires the Secretary to provide "a brief statement of the grounds for denial" of the petition. 5 U.S.C. § 555(e). A detailed explanation is unnecessary and the explanation need only be "minimal." *Butte Co. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010). All the explanation must do is "ensur[e] that the [agency] has adequately explained the facts and policy concerns it relied on," to satisfy the Court "that those facts have some basis in the record." *Preminger*, 632 F.3d at 1353 (citation omitted); *see also Serv. Women's Action Network*, 815 F.3d at 1374. "At its core, this requirement simply forces the agency to explain 'why it chose to do what it did.'" *Ark Initiative v. Tidwell*, 895 F. Supp. 2d 230, 242 (D.D.C. 2012) (quoting *Tourus Records*, 259 F.3d at 737).[8]

The Secretary's decision here far exceeds what the law requires. 5 U.S.C. § 555(e). The Secretary provides a thorough distillation of his reasoning, listing each of the facts and policy concerns he relied upon, *Serv. Women's Action Network*, 815 F.3d at 1374, and explains in detail why the evidence did not support MVA's rulemaking request. Appx1-9.

[8] "The agency explanations that the D.C. Circuit has branded too brief seem to be limited to single, conclusory sentences." *Ark Initiative*, 895 F.Supp.2d at 242 (collecting cases).

As to MVA's Guam petition, the Secretary explained that the DoD's extensive review of records pertaining to tactical herbicides found no evidence of Agent Orange or other tactical herbicides on Guam. Appx2 (referencing Appx2267-2287). The Secretary further noted that the GAO had also independently failed to find any such evidence despite reviewing government documents, other records, and interviewing veterans who alleged exposure. *Id.* (referencing Appx2188-2203). And to the extent that trace levels of 2,4-D and 2,4,5-T had been found on Guam, the Secretary explained that commercial herbicides were commonly used on foreign and stateside military bases for standard vegetation and weed control, meaning that data was insufficient to support MVA's petition. Appx2-3 (referencing Appx2178-2180). Nor did the Secretary find MVA's photographs and affidavits compelling enough to warrant an island-wide presumption. The Secretary explained that presumptions are an exception to the general burden of proof, which VA has historically found applicable only when there is evidence of the deliberate application of herbicides for a tactical military purpose on a broad scale. Appx3-6 (citing 38 C.F.R. § 3.307(a)(6)).

As to MVA's Johnston Island petition, the Secretary explained that all Agent Orange that was stored on the island (which was secluded to the island's northwest corner and the sole responsibility of civilian contractors) was fenced and off-limits

to military personnel. Appx7 (referencing Appx3495; Appx3678). To the extent that leaks did occur, the Secretary cited evidence demonstrating that those same civilian contractors screened the entire inventory daily for leaks and performed de-drumming activities as necessary. *Id*. (referencing same). And because the storage site's floor was comprised of densely compacted coral, the Secretary explained that there was little chance for herbicides to become airborne. Appx8 (referencing Appx3695; Appx3325, Appx3327-3328; Appx3822; Appx3678). The Secretary further explained that, if herbicides did become airborne, location and wind patterns in the area would quickly disperse any such particles over the Pacific Ocean, away from military personnel, thus quickly rendering the chemical composition inert. *Id*. If that were not enough, the Secretary further found that contemporaneous independent monitoring showed concentrations of 2,4-D and 2,4,5-T in ambient air and water samples to be "well below permissible levels." *Id.* (referencing Appx3319-3320).

In spite of these detailed explanations, MVA insists the Secretary's decision must be set aside on two grounds. First, MVA contends that the Secretary's denial is contrary to law, claiming that it conflicts with the text, history, and purpose of the Agent Orange Act. Pet. Br. 21. Second, MVA contends that the record evidence cannot support the Secretary's decision, and that his decision is therefore

arbitrary and capricious. Pet. Br. 54. As we explain below, neither argument is persuasive and MVA's petition must be denied.

A. MVA Is Incorrect That The Agent Orange Act Controls This Case, Nor Can It Show That the Secretary's Decision Is Contrary To Law

MVA claims that the Secretary's decision must be declared invalid because it conflicts with the Agent Orange Act. Pet. Br. 21. According to MVA, the Secretary "has the legal authority under the Agent Orange Act to promulgate rules that [] extend the presumption of exposure to veterans beyond the borders and water of Vietnam." Pet. Br. 29 (citing no support). Relying on this unsupported premise--that the *Agent Orange Act* confers geographically unlimited authority--MVA argues that the Act itself "explicitly delineates its scope in terms of . . . [herbicide] use in support of the Vietnam War," Pet. Br. 31, suggesting that the presumptions in that statute must apply anywhere "herbicide agents," as defined in 38 U.S.C. § 1116(a)(3), were used, even reaching Guam and Johnston Island, *see* Pet. Br. 29-44.

MVA's interpretation of the Agent Orange Act is incorrect. A plain reading of the Act makes clear that the presumptions and terms provided in that statute are limited to those who "served in the Republic of Vietnam." 38 U.S.C. § 316(a)(3) (1991) (now 38 U.S.C. § 1116(f)). Nowhere does the statute mention any other territories or countries "beyond the borders and waters of Vietnam," Pet. Br. 29, much less islands or territories, such as Guam and Johnston Island, thousands of

miles away. In fact, evincing its clear intent to limit the Act's coverage to those that served "in the Republic of Vietnam," Congress (though it did not have to do so) repeats that same geographic limitation in a number of places throughout the statute. *E.g.*, 38 U.S.C. § 316(a)(1) & (a)(3) (1991).[9] To argue that Congress somehow meant for any of the provisions in the Act to apply to territories well-outside the Republic of Vietnam has no footing in the statutory text.

MVA's legal error (and its dozens of pages of briefing on that issue, *see* Pet. Br. 29-54) flows out of two misunderstandings. First, MVA seems to believe that the VA has, in the past, used authority conferred by the Agent Orange Act to extend additional regulatory presumptions to certain veterans who served *outside* Vietnam—for instance, in Korea or service involving C-123 aircrafts. Pet. Br. 29 (citing 38 C.F.R. § 3.307(a)(6)(iv)-(v)). MVA then takes the view that the Agent Orange Act might compel the same result here and require the Secretary to create a new presumption that includes Guam and Johnston Island. Pet. Br. 30-36. But MVA misunderstands the legal grounds for those other presumptions. Those regulatory presumptions were issued, in relevant part, under the authority conferred by 38 U.S.C. § 501(a), which contains no geographic limitation, and authorizes the Secretary to prescribe "regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order

[9] Congress reiterated this geographic limitation in dozens of the Act's provisions. *See, e.g.,* Pub. L. 102-4, § 6(a)-(b), 7(a), 9(b).

to establish the right to benefits under such laws." *E.g.*, 74 Fed. Reg. at 36,641 (establishing presumption in Korea and citing, in relevant part, section 501(a)); 80 Fed. Reg. at 35,249 (establishing presumption for service involving C-123 aircraft and citing, in relevant part, section 501(a)). If MVA's petition had been granted, it would have been granted (at least in part) under *that* statute. And nothing in that statute precludes the outcome that the Secretary reached here.

Second, although the Secretary does refer to the Agent Orange Act and its history in explaining his decision, MVA seems to misunderstand the basis for why the Secretary did so. The Secretary did not refer to the Act because any particular definition or term in the Act bound him to a particular outcome. Rather, the circumstances and history surrounding the Act itself provide an instructive reference point as to what kinds of facts reasonably trigger the types of presumptions MVA requested. Appx3-4. MVA attempts to treat this as a legal issue, but it is not. Nothing in the Agent Orange Act required any specific result in this case. Rather, the history and text surrounding the Agent Orange Act provide a helpful reference point for one type of *circumstance* where a presumption might be granted. As the Secretary explained, and as we explain further below, that reference point supports his decision here.

Regardless of the source of MVA's confusion, MVA cannot reasonably argue that this case is governed by the plain letter of the Agent Orange Act. MVA

is not correct that Congress, through its definition of "herbicide agent" in 38 U.S.C. § 316(a)(4) (1991) (now 38 U.S.C. § 1116(a)(3)), intended to "delineate[ ] scope in terms of . . . [herbicide] use in support of the Vietnam War," rather than by geography. Pet. Br. 31. The geographic limitation in the Agent Orange Act—"service in the Republic of Vietnam"—is clear on its face,[10] and MVA cannot infuse ambiguity into statute where there is none. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008) (rejecting "petitioner's attempt to create ambiguity where the statute's structure and text suggest none"); *see also* Appx4 (Secretary explaining that the Agent Orange Act's presumption is "solely for Veterans who served in Vietnam").

Nor can MVA argue that Congress, by veiled implication, inserted a more expansive situational and geographic presumption into the Agent Orange Act than what it expressly states. Accepting an unstated, broader rule dependent on a maximalist reading of a definition clause would obliterate a clear and explicit geographic limitation imposed by Congress. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (stating that statutory terms should not be treated as "surplusage"). If Congress had meant to do such a thing, it "easily could have written" the statute in

[10] As the Court is aware, there has been much litigation over the meaning of the phrase "in the Republic of Vietnam" as that phrase is used in the Agent Orange Act. But as far as we are aware, no one has ever claimed (as MVA now seems to do) that the statute encompasses other independent Pacific islands over 5,000 miles away from Vietnam.

any number of different ways to accomplish that purpose, *see Ali*, 552 U.S. at 227, most notably, by *not* limiting its presumptions to those who "served in the Republic of Vietnam." That Congress did not do so should end the inquiry.[11]

B. MVA Fails To Demonstrate That The Secretary's Decision Is Arbitrary and Capricious

The driving question in this case is whether the grounds and bases underlying the Secretary's decision satisfy deferential legal standards. The record demonstrates that the Secretary provided a detailed explanation supporting his decision, and his reference to the history and language surrounding the Agent Orange Act provides a helpful reference point that supports his decision. *See* Appx3 (explaining a number of grounds for its decision and then referring to the Agent Orange Act as additional support: "[a]dditionally . . . it is clear that Congress did not enact the Agent Orange Act of 1991 and codify presumptive service connection" for exposure to "commercial herbicides commonly used worldwide for standard vegetation and control"). MVA's near-singular focus on the Agent Orange Act as being dispositive in this matter is misplaced. Pet. Br. 29-54. Any review of the Secretary's decision must evaluate the *entirety* of the

[11] Indeed, when Congress has desired to expand the presumption to certain groups who served outside of the land of Vietnam, Congress has enacted *new* statutes to encompass those groups. *See* 38 U.S.C. §§ 1116A, 1116B. The fact that Congress felt the need to codify a new presumption of herbicide exposure for these groups demonstrates that the Agent Orange Act's presumption is geographically limited.

Secretary's decision, under "extremely limited" and well-accepted "highly deferential" standards. *Massachusetts*, 549 U.S. at 527-28 (2007) (quoting *Nat'l Customs Brokers*, 883 F.2d at 96); *Serv. Women's Action Network,* 815 F.3d at 1375.

With that backdrop, MVA cannot reasonably contest that the Secretary provides an "adequate" "expla[nation of] the facts and policy concerns . . . relied on" in arriving at his decision. *Preminger*, 632 F.3d at 1353. MVA instead attacks the Secretary's underlying rationale on two narrow fronts. *First*, MVA contends that neither the Agent Orange Act nor its history and implementing regulations support the distinction the decision makes between tactical and commercial herbicides. Pet. Br. 29-44. *Second*, MVA disagrees with the Secretary's weighing of the record evidence, particularly the Secretary's decision to credit official Government records, investigations, and reports, over the photographs and affidavits that MVA provided as a counterweight. Pet. Br. 54-67. We address each argument in turn and explain why neither argument has merit.

1. The Agent Orange Act and Its Implementing Regulations Do Not Undermine The Secretary's Decision

To start, MVA contends that the Agent Orange Act precludes the Secretary from distinguishing between tactical and commercial herbicides. Pet. Br. 29-44. MVA observes that the Act defines the noun-phrase "herbicide agent" as an herbicide "used in *support* of . . . military operations in the Republic of Vietnam"

during specified time periods. 38 U.S.C. § 316(a)(4) (1991) (emphasis added). Advocating for a liberal definition of the word "support," MVA argues that the Act's reach must include even "commercial" herbicide agents because commercial agents can also be used to "support" military efforts. Pet. Br. 29-36. MVA insists that this interpretation alone is enough to set aside the Secretary's decision. *Id*.

The problem with MVA's argument is twofold. First, even assuming that text of the Agent Orange Act bound the Secretary's policy choice here (as we explained above, it did not), MVA bases its argument on a clear misreading of the statutory language. The definition of "herbicide agent" is plainly modified in a way to preclude a reading that might otherwise include all other possible "herbicide agent[s]," *see* 38 U.S.C. § 316(a)(4), meaning the definition itself is a limitation—not an expansion. Nowhere is that clearer than the remainder of the definition, which states that the phrase applies *only* during specified time periods, *only* to "military operations in the Republic of Vietnam," and *only* "[f]or purposes of this section." *Id*. Accordingly, when the Act defines an "herbicide agent" as an herbicide "used in support of . . . military operation in the Republic of Vietnam" during specified time periods, all that language does is prevent the phrase's application to inapplicable contexts—namely, situations where herbicides

were *not* "used in support of . . . military operations" or *not* used "in the Republic of Vietnam"—which is precisely what MVA seeks to do here.[12]

The second problem with MVA's approach is that it makes implausible assumptions about the Agent Orange Act by ignoring clear history. The singular purpose of the Act was to alleviate issues veterans had encountered due to the military's use of tactical herbicides "in the Republic of Vietnam" during Operation Ranch Hand. These were "large-scale" applications—involving 20-plus million gallons—of particular types of specially-formulated *tactical* herbicides, including Agent Orange, disseminated by "aerial spraying" in and throughout the Republic of Vietnam. Appx3 (citing 137 Cong. Rec. H719 (Jan. 29, 1991) (Rep. Long) & S. Rep. 101-82 at 25 (1989)). The Agent Orange Act was Congress' direct attempt to address the fall-out linked to those specific events. It was not, as MVA seems to suggest, an attempt to address unsupported risks associated with commercially available herbicides that the military and the public (even homeowners) still use today. *See* Pet. Br. 29-44.

But even putting these statutory issues aside, MVA's position has a more intuitive problem. Assuming MVA were correct that the definition of "herbicide

[12] Our interpretation does not "read[ ] . . . out of the statute" the term "support," Pet. Br. 33, but gives the proper meaning to that term. Befitting its role in the statutory scheme, the word "support" clarifies that the only "agents" included within the presumption are those that were used to "support" "military operations in the Republic of Vietnam."

agent" is more inclusive than the text itself indicates, the distinction MVA attempts to eliminate—that between commercial and tactical herbicides—has no effect on *why* Congress had no need to make that distinction in the Act in the first place. By the time the statute was enacted, Congress saw a persuasive causative connection between the large-scale aerial deployment of millions of gallons of unregistered, undiluted, and specially-formulated herbicides in and throughout Vietnam and adverse veterans' health issues. Given that connection, and the sheer magnitude and scope of how these herbicides were deployed, the point of the Act was to concede toxic-levels of exposure in the precise location where these herbicides were inarguably used—"in the Republic of Vietnam." Congress had no need to expressly distinguish commercial herbicides from those used to "support military operations in the Republic of Vietnam" within the Act itself because no one disputed that the *latter*—the tactical form—had been widely and pervasively used there. *See* Appx3 (citing 137 Cong. Rec. H719 (Jan. 29, 1991) (Rep. Long) & S. Rep. 101-82 at 25 (1989)). To argue that Congress, by virtue of its silence, also had serious concerns about *commercial* herbicide use (including in *other locations*) is pure fiction and has no support in the record.[13]

[13] Other legislative history supports our view. A draft Senate bill to the Agent Orange Act would have permitted VA to extend a presumption of service connection to veterans with certain diseases who have proven exposure to a herbicide agent "outside Vietnam." Veterans Benefits and Health Care Amendments of 1991, S. 127, 102 Cong. (1991); *see also* Appx2352. But the fact

MVA cannot bypass its burden of proving the facts necessary to show that a presumption is warranted by hinging its argument on a perceived textual technicality in the Agent Orange Act. That is one problem with MVA's case. MVA insists that the VA must (as a matter of law) assume a conclusion under the Agent Orange Act, even without evidence of similar widespread use in the places it argues that these presumptions should apply. But MVA is not correct. To prove that a presumption is warranted, MVA must present *facts* necessary to make the showing. It cannot sidestep that burden by focusing on selective portions of the legislative history of the Agent Orange Act, whereby members of Congress expressed concern about the military's use of "herbicide agents" meeting a certain "chemical composition" used throughout "the Republic of Vietnam." Pet. Br. 42.

For instance, MVA argues repeatedly that the problem *in Vietnam* "was not just Agent Orange," *id*. 38, and that the Act itself, therefore, contemplates a broader "scope" of herbicide coverage, *id*. 40. How this helps MVA is unclear. As we said before, when the Act became law, there was clear evidence showing the military's widespread use *throughout Vietnam* of herbicides contaminated with dioxin (which is a by-product of 2,4,5-T), including Agent Orange. Appx2582; *see supra* at 2-3, n.1, n.2. It is, therefore, unsurprising that members of Congress were

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that this unenacted provision referencing "outside Vietnam" was listed as a *supplement* to the presumptions that would ultimately be codified in the Agent Orange Act, Appx2352, confirms that the codified presumptions were not intended to encompass those who served outside Vietnam.

concerned about the military's use of tactical herbicides throughout Vietnam, like Agent Orange, which was "formulated differently from the materials for commercial application that were readily available in the United States," and applied in a large-scale and tactical manner. Appx2582. Congress' concerns stemmed only from the herbicides that were formulated for a tactical purpose, deployed in a tactical manner, and had known causative harms. Congress never expressed any concern about the small-scale use of commercially available herbicides that are still used throughout the world today.[14]

This is also why MVA's reliance on *O'Farrell v. DoD* is misplaced. Pet. Br. 34-36 (citing 882 F.3d 1080, 1088 (Fed. Cir. 2018)). In *O'Farrell*, this Court held that the statutory phrase "support of a contingency operation" in 5 U.S.C. § 6323 also included the more expansive notion of indirect support. *Id*. Relying on *O'Farrell*, MVA argues that this means the word "support"—which is also used by Congress when defining "herbicide agent" in the Agent Orange Act—should take on a broad enough meaning to include even widely available commercial herbicides used outside of Vietnam. Pet. Br. 34-36. But the text of the Agent Orange Act explicitly limits its application to the unique circumstances faced by

[14] Because many legislators questioned the link between the large-scale exposure to Agent Orange in Vietnam and adverse health effects, *see, e.g.,* Appx2305, Appx2371, Appx2468, a presumption for veterans *outside* Vietnam based on small-scale applications of *registered, commercial* herbicides was not even a topic for discussion.

veterans "in the Republic of Vietnam," evincing a clear recognition that veterans serving in Vietnam faced risks associated with toxic herbicide exposure far different than veterans that served elsewhere. Appx3 (citing Appx2326 (Rep. Long recognizing the unique circumstances of veterans who served in Vietnam, "the first to experience widespread exposure to agent orange") and Appx2372 (Senate Committee report noting that the "vast majority" of the 20-plus million gallons of herbicides "used in Vietnam were disseminated by aerial spraying" utilizing fixed-wing aircraft at a rate of three gallons per acre)).

MVA's task in this case is straightforward. If it wishes to show why a broad presumption is warranted for veterans who served in Guam and Johnston Island, it must begin by showing that the *circumstances* in Guam and Johnston Island—that is the types and prevalence of herbicide use in those areas—are at least somewhat similar to what Congress (and the VA) faced with respect to Vietnam (or even Korea or service involving C-123 aircrafts). MVA cannot discard this burden by arguing that a definitional phrase in the Agent Orange Act does not seem to expressly preclude its case. The central point of the Secretary's decision was that the record did not reveal circumstances supporting a presumption of herbicide exposure as it did in these other instances. Appx1-9. MVA fell well-short of making that showing in its petition, and clear evidence shows that the Secretary's decision is well-supported by the record.

MVA also attacks the Secretary's decision based on semantics. It accuses the Secretary of "grasping at straws" to support his decision, claiming that the phrases "tactical" and "commercial" herbicides "appear[] nowhere in the legislative record" of the Agent Orange Act. Pet. Br. 40, 41. But as we said before, even if the Agent Orange Act dictated the result here, the text and history of the Agent Orange Act clearly defines "herbicide agents" as agents used in support of military operations, and Congress limited its presumption to the exact location where herbicides formulated for a *tactical* purpose were deployed in a *tactical* manner—"in the Republic of Vietnam," 38 U.S.C. § 1116(a)(3). Contesting terminology has no effect on the result because the text and structure of the Agent Orange Act (as well as the data and record evidence) support that precise distinction.

And if MVA's real grievance is a distinction based on terminology, then that grievance lies with the GAO because it is the GAO that made the distinction. Appx2169 n.1; Appx2180 n.33 (recognizing the phrase "herbicide used in support of . . . military operations in the Republic of Vietnam" (38 U.S.C. § 1116) as referring to "tactical herbicides"); Appx2222 (affirming that "the presumption for service-connection applies to exposure to tactical herbicides"). As the GAO explained, after conducting an in-depth study on the issue, it observed that tactical herbicides deployed in Vietnam were managed, developed, and handled differently

than commercial herbicides used to manage vegetation on military bases worldwide. Appx2176-2180.[15] And this distinction makes sense. Commercial agents "were not in the [same chemical] form used in Agent Orange." Appx2222; *see* Appx1592 (commercial herbicides diluted in oil and water). And tactical herbicides like Agent Orange were *specifically* formulated to be more potent and disseminated aerially, Appx2178, correlating directly to higher toxicity and higher risk of exposure, Appx2179 ("[T]he toxicity of the dioxin is dependent on multiple factors, including the route of exposure (for example, spraying by hand or aerial spraying) and the dose being administered.").[16] It was perfectly sensible for GAO

[15] As we explained above, unlike commercial herbicides, tactical herbicides were specially formulated, not registered by FIFRA, and uniquely applied at full strength without additional solvents. Appx2176-2180. Commercial herbicides, on the other hand, were approved by the General Services Administration for use by all federal agencies, formulated differently, and registered under FIFRA. *Id*. MVA is correct that the Secretary misstated that commercial herbicides were registered with the EPA. Pet. Br. 38 n.4. They were registered under FIFRA. Appx2176-2180.

[16] We do not dispute that commercial and tactical herbicides can share some of the same chemicals. *Contra* Pet. Br. 38. The issue is their toxicity, formulation, and dissemination. Agent Orange was formulated differently from commercial herbicides that were (and still are) readily available commercially across the United States. Importantly, samples of Agent Orange reflect a level of dioxin up to 1,000 times higher than the level of dioxin found in herbicides that were domestically available at the time. Appx2582; *see also* Appx1592 (Agent Orange concentration was 6 to 25 times manufacturer's suggested rate). So, though some commercial herbicides applied in Guam may have contained 2,4,5-T, Appx2094-2095, that does not mean veterans who served in Guam should be treated the same as those who served in Vietnam.

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.

MVA further claims that the distinction the Secretary made between large-scale tactical herbicide use, and small-scale commercial herbicide use has no grounding in VA's own regulations. Pet. Br. 42-44. Insisting that VA's regulatory definition of "herbicide agent" lists specific chemical names rather than focusing on how or why those agents were used, MVA argues that the Secretary was required to base his decision on whether data showed trace remains of these specific chemicals. Pet. Br. 42 (citing 38 C.F.R. § 3.307(a)(6)(i) (defining herbicide agent as a "chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam. . . , specifically: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram")).

But this argument is essentially the same argument that MVA presents under the Agent Orange Act, and it fails for the same reason. Identical to the Agent Orange Act, the regulation MVA relies upon limits the definition of "herbicide agents" to those that were "used in support of . . . military operations in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(i). And the regulation limits the presumption of herbicide exposure itself to only those veterans who "served in the Republic of Vietnam," served "in or near the Korean DMZ," or were involved with

C-123 aircraft. 38 C.F.R. § 3.307(a)(6)(iii)-(v). Again, the geographic and situational limitations embedded into these laws matter. These specific circumstances were found to have resulted in the type and amount of exposure to tactical herbicides that warrant the extension of the presumption in the first place, *i.e.*, the *circumstances* supported the presumption. That is why these limits were placed in the text of the law—to make clear that they should not extend to *circumstances* where they otherwise should not apply.

MVA next devotes a portion of its brief to discussing *Massachusetts v. EPA*, Pet. Br. 50-51, but it is not clear why. In *Massachusetts*, the EPA denied a petition for rulemaking with the argument that "it lacked [statutory] authority" to regulate carbon dioxide. The Supreme Court reversed that decision, finding, in part, that the EPA did not lack such authority. 549 U.S. at 528. That holding does not apply here. The Secretary never denied that he had authority promulgate a rule if the evidence supported it. Rather, the Secretary *chose* not to grant MVA's request because, in his judgment, the available evidence supported a different finding. Appx6-9. *Massachusetts* thus has no bearing on this case.[17]

[17] The EPA had an alternative basis for denying the petition for rulemaking—that it would "conflict with other administration priorities." *Id.* The Supreme Court, however, found that the statute in question precluded the agency from declining to regulate deleterious pollutants on those ambiguous grounds. *Id.* at 533. Where there was a "clear statutory command" to regulate pollutants upon a finding of endangerment, EPA could not refuse to comply based on abstract claims about inefficiency, other Executive Branch programs, or the President's ability to

Nonetheless, MVA seems to take the view that *Massachusetts* serves as a reminder that certain statutes—in MVA's view, the Agent Orange Act—convey flexibility to encompass situations not originally contemplated by the drafters of that legislation. Pet. Br. 53 (citing 549 U.S. at 532). Nowhere does *Massachusetts*, or any other case we are aware of, provide that courts should ignore clear and unambiguous statutory language to derive outcomes that Congress never intended. By suggesting that the Court overlook the circumstantial, geographic, and situational limitations in the Agent Orange Act, however, that is precisely what MVA is urging the Court to do here. MVA's near-limitless view on the reach and scope of the Agent Orange Act is insensible. It conceivably extends the statute's reach to every military base, simply because certain commercial herbicides with a certain chemical composition were used there. Appx4 n.3. That cannot have been what Congress intended, nor is it reasonable for MVA to demand that the Court agree with that outcome.

Finally, MVA cites four non-precedential Veterans Court cases that purportedly demonstrate that the Secretary's position has been "repeatedly questioned and rejected by the Veterans Court." Pet. Br. 47. MVA claims that these individuals' benefits cases should sway the Court in its favor. Pet. Br. 46-47.

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negotiate with other nations. *Id.* That portion of the decision does not apply here either. There is no "clear statutory command" to presume herbicide exposure to veterans who served in Guam or Johnston Island.

But two of the cases MVA submits involve the presence of tactical herbicides on *Thailand*, not Guam or Johnston Island. *Hollenkamp v. Wilkie*, No. 18-6628, 2020 WL 698547, at *4 (Vet. App. Feb. 12, 2020); *Gray v. Wilkie*, No. 18-0123, 2019 WL 1982253, at *3 (Vet. App. May 6, 2019). It is unclear what import those cases have in this case. The DoD has confirmed the presence of tactical herbicides on Thailand, Appx2282, and VA has committed to engage in rulemaking for veterans that served there. *See* Respondent's Brief, *Military Veterans Advocacy, Inc. v. Sec'y of Veterans Affairs*, No. 20-1537 (Fed. Cir.), ECF No. 33 at 38. MVA's petition pertains to entirely different geographic areas, where the DoD found no evidence of tactical herbicide usage.

MVA's third case, *Kerwin v. McDonald*, No. 14-0875, 2015 WL 1931974, at *5 (Vet. App. Apr. 29, 2015), involves a veteran who served in Guam, and notes that some claimants have been able to individually prove their herbicide exposure claims while others have not. But that merely highlights that individual experiences, even in the same geographic locations, are not the same. Claimants may present evidence in support of their respective cases, and some are able to sufficiently prove that they were exposed to harmful herbicides, *see, e.g.,* Appx4521, and others are not. 38 C.F.R. § 20.1303. These different outcomes should not be surprising given that different veterans present different evidence in

an attempt to demonstrate that they personally experienced an in-service event or injury. *See* 38 U.S.C. § 5107(a).

MVA's fourth non-precedential Veterans Court decision, *Spencer v. Shinseki*, No. 12-1599, 2013 WL 2529261, at *2-*3 (Vet. App. June 11, 2013), is similarly unilluminating. In that case, the petitioner claimed direct Agent Orange exposure under governing regulations. Given that direct exposure claim, the Veterans Court explained that it did not matter whether that exposure occurred in a "tactical" or "non-tactical" context because proof of direct exposure to Agent Orange was enough. *Id*. at *3. That is not at all inconsistent with the Secretary's position here, as the Secretary agreed that all veterans have an opportunity to prove direct exposure to herbicides. Appx6. The question, here, however is whether the Secretary must create a broad-based presumption relieving veterans of providing any evidence of *exposure* based purely on the fact that they served in Guam and Johnston Island. That is a different type of question both in substance and scope.[18]

[18] MVA also invokes other non-precedential Veterans Court decisions that remanded appeals for the board to address veteran allegations that small-scale herbicide spraying occurred in Guam and Germany. Pet. Br. 63 (citing *Bender v. McDonald*, No. 14-3867, 2015 WL 6955353 (Vet. App. Oct. 30, 2015), and *Tobin*, 2014 WL 1375560). Those decisions are consistent with the Secretary's position here: even where there is no evidence of tactical herbicides, veterans certainly should have the opportunity to prove a personal exposure to commercial herbicides. Appx6. But, again, that is an altogether separate issue from the Secretary's policy choice whether to institute an evidentiary presumption.

MVA cannot compel an outcome simply based on its selective reading of the Agent Orange Act and its implementing regulations. As the Secretary explained, "[p]resumptions are a blunt tool" that are necessarily overinclusive, and "should be employed only when the evidence demonstrates risk of exposure at meaningful levels." Appx6. It is the *circumstances* surrounding the Agent Orange Act (and its implementing regulations) that the Secretary found instructive to his analysis, and nothing in that Act requires a presumption here. MVA must do more than seek to prevail on a perceived technicality while ignoring the text and purpose of the Act itself. MVA must actually prove its case, and it has not done so.

2. MVA Fails To Show How The Secretary's Decision Is Otherwise Arbitrary And Capricious

Aside from its Agent Orange Act arguments, MVA also disagrees with the Secretary's weighing of the record evidence. Pet. Br. 54-67. In particular, MVA challenges the Secretary's reliance on official Government reports and investigations—which MVA characterizes as a conclusion founded upon an "absence of evidence"—rather than MVA's affidavits, photographs, and smattering of other data. *Id*.

The chief problem with MVA's argument is that it misunderstands the law. The APA review standard is a "narrow one," merely to ensure that the facts the agency "relied on" "have some basis in the record." *Serv. Women's Action Network*, 815 F.3d at 1374. It does not require the decisionmaking agency, here,

the Secretary, to affirmatively prove or disprove every fact relied upon in order for the decision stand. All that is required is "a rational connection between the facts found and the choice made." *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43.

As we explained above, the Secretary provided a detailed explanation for his decision, easily exceeding what the law requires. *Supra* at 15-16, 25-27. MVA, nonetheless, questions the Secretary's reliance on the GAO's and the DoD's investigations, claiming that their findings do not necessarily conclude that tactical herbicides were *not* used in Guam. Pet. Br. 57-58. Claiming that these investigations' findings do not reach a categorical conclusion, *id*. at 56 (quoting *AZ v. Shinseki*, 731 F.3d 1303 (Fed. Cir. 2013)), MVA argues that the Secretary arrived at his conclusion based on an absence of evidence. Pet. Br. 54-58.

MVA's argument fails for two reasons. *First*, no part of the law requires the Secretary to grant a petition unless he can *disprove* the presence of herbicides or *disprove* the need for a presumption. As the Secretary explained, a presumption is a blunt and overbroad mechanism, reserved for unique situations where there is strong evidence of herbicide exposure in the aggregate. Appx6. That strong evidence was lacking here. *Id*. Absent affirmative evidence proving broad-based tactical herbicide use—and there was none—it was perfectly sensible for the Secretary to find that a presumption was not warranted.

Second, MVA's attempt to diminish the GAO's and DoD's investigative findings by presenting spot numbers from those reports in an incomplete fashion is not persuasive. For instance, MVA claims that government records are missing for nearly two millions gallons of herbicides. Pet. Br. 56-57. But conveying that number, which is presented on the cover page of the GAO's report, Appx2165, shows that MVA chooses to ignore the contents of the report itself. In the body of the report, the GAO explains that available government records and estimates appear to account for *all* of the Agent Orange procured in the Vietnam War. *See* Appx2189.[19] The NAS reached a similar conclusion for all herbicides used in Operation Ranch Hand. Appx2588. And contrary to MVA's claim that the military kept no meaningful track of how herbicides were used, the record evidence shows that *tactical* herbicides were uniquely marked, centrally managed, and specifically tracked. Appx2176; Appx2178; Appx2588. Given these established practices, the fact that GAO found no evidence of tactical herbicide use in Guam should be telling.

The DoD's findings are similarly persuasive. Prior to the GAO report, the DoD maintained records on the 6,539 aerial herbicide missions that sprayed 17.6

[19] MVA may be alluding to the NAS's assumption back in 1974 that 2.4 million gallons of herbicides might not be accounted for in DoD records of aerial spray missions. Appx2588-2589. But DoD's 1986 investigation largely remedied that issue, by chronicling 1.6 million gallons of herbicide sprayed through helicopter, backpack, and ground in Vietnam. *Id*.

million gallons over Vietnam, as well as an additional 1.6 million gallons sprayed through helicopter, backpack, and ground. Appx2588-2589. Following the GAO report, the DoD re-reviewed over 2,000 documents in an attempt to clarify every location where tactical herbicides were stored, used, or transported. Appx4500-4501. That review confirmed that tactical herbicides were used in ten States, six countries, and one territory—but *not* Guam. Appx2267-2287. Moreover, the 158 DoD-chartered vessels that shipped Agent Orange maintained logbooks of their journeys. Appx2195. The GAO reviewed 152 logbooks and three shipping articles, covering 155 vessels, and that review revealed that only one vessel was marked in Guam en route to Vietnam, and only three vessels marked in Guam as returning from that location. Appx2197. There is no record of any cargo offloads from these ships. *Id*.

The GAO's and DoD's investigations were based on the best available evidence—evidence showing that tactical herbicides were monitored and tracked—and that evidence shows no indication that tactical herbicides were transported to or present in Guam. MVA may feel that these findings are less persuasive than the evidence that MVA itself submitted, but there is no dispute that the Secretary had every right to consider and credit these facts in making his determination. *AZ*, 731 F.3d at 1311 ("Pertinent evidence is evidence that . . .

tend[s] to prove or disprove a material fact. . . . The absence of certain evidence may be pertinent if it tends to disprove (or prove) a material fact.").

MVA's real dispute is its insistence that "commercial" or "small-scale" spraying—that is, spot applications—may not have been recorded, Pet. Br. 56-57, not that the military was engaging in a broad-based practice in Guam that would make the extension of a presumption warranted. It may very well be possible that government records today cannot account for every last gallon of herbicide procured during the Vietnam War. But that does not diminish the fact that the records the GAO and DoD relied upon were robust, and persuasively show that pervasive tactical herbicide use in and throughout Guam is not supported.

MVA relies on *AZ* to argue that an absence of evidence cannot serve as evidence of absence. 731 F.3d at 1316. *AZ* has no bearing here. That case involved the standard for the admissibility of evidence in trials or individual claim proceedings, *id*. at 1316-17, which has nothing to do with the APA, an agency's choice whether to promulgate a regulation, or whether record evidence bears "a rational connection between the facts found and choices made," *Motor Vehicles Mfrs. Ass'n,* 463 U.S. at 43. And in any event, MVA is incorrect that the Secretary reached his decision based on an absence of evidence. The Secretary relied on negative evidence, which is evidence that "tends to disprove the existence of" an allegation. *See Forshey v. Principi*, 284 F.3d 1335, 1358 (Fed. Cir. 2002) (en

banc); *see also* "Negative evidence," BLACK'S LAW DICTIONARY (11th ed. 2019) ("[e]vidence suggesting that an alleged fact does not exist").

MVA's absence of evidence argument is more than incorrect, however, it contradicts itself. MVA argues that the Secretary was wrong to purportedly base his decision on the absence of evidence of tactical herbicide use in Guam, Pet. Br. 54-57, but then 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. *See* Pet. Br. 57. Not only is that position indefensible, it does not accord with reality. Information in any record case could always be better, but if giving weight to extensive and robust government investigations and conclusions is improper, then it is hard to imagine how the Secretary is supposed to reach any decision on any given matter. *See Charron v. United States*, 412 F.2d 657, 660 (9th Cir. 1969) ("[A] witness may clearly testify as to his failure to find the records after a search. This, in fact, is frequently the only way in which a negative fact can be proved." (citation omitted)).

And even while MVA challenges the weightiness of the government reports and investigations cited by the Secretary, it fails to meaningfully show how the available record evidence demands a different result. *See* Pet. Br. 54-67. The evidence MVA offers is underwhelming—*i.e.*, some veterans' affidavits, photographs, and present-day sampling reports—and comes nowhere close to

proving the broad and pervasive tactical herbicide dissemination that would normally justify the grant of these kinds of presumptions. That is the overarching problem in this case. MVA insists the evidence the Secretary relied upon had its faults, but MVA fails to show how its evidence was on par, much less any better. Rather than squarely addressing these issues, MVA makes incorrect claims, such as insisting that the Secretary "reject[ed]" the veterans' affidavits, Pet. Br. 59, when the record shows that is not true. The Secretary considered them, Appx5-6, but found that these anecdotal representations were insufficient to warrant the grant of a broad-based presumption to every veteran who served in Guam, Appx6. As the Secretary explained, nothing precludes veterans from establishing their claims individually through lay evidence or otherwise, *id*.; *see*, *e.g., Jandreau v. Nicholson*, 492 F.3d 1372, 1376 (Fed. Cir. 2007), but the grant of a presumption is something entirely different—it is an *exception* to the statutory burden of proof in VA cases. *See Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998) ("The presumption affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue.").[20]

MVA also emphasizes that one of the veterans who submitted an affidavit received a non-precedential board decision finding that he had been exposed to

[20] The Secretary's decision does not "unduly elevate[ ] the hill a veteran must climb" in order to prove his or her claim. ECF No. 31 at 20 (AUN). It maintains the status quo provided in statute. *See* 38 U.S.C. § 5107(a).

herbicides. Pet. Br. 59; 38 C.F.R. § 20.1303. But the Secretary's decision on review here acknowledged as much. Appx5. The Secretary merely found that the grant of one claim has nothing to do with whether he should establish a *presumption* of herbicide exposure for all veterans in Guam. *Contra* ECF No. 31 at 8 (AUN asserting that the Secretary's position is "at odds with" the board);[21] *cf. U.S. v. Mead Corp*., 533 U.S. 218, 233 (2001) (rejecting notion that Customs rulings "churned out at a rate of 10,000 a year at an agency's 46 scattered offices" have any force of law).[22] Indeed, the fact that veterans who served on Guam can prove herbicide exposure at the board contradicts MVA's suggestion that a presumption is a veteran's only realistic route to benefits. *See* Pet. Br. 60.

MVA also raises a variety of other factual disagreements. For instance, MVA argues that *commercial* herbicides were sprayed small-scale without record-keeping. But that does not undermine the Secretary's conclusion that there is no evidence that tactical herbicides—that is, the specially-formulated, unregistered,

[21] In *Hudgens v. McDonald*, 823 F.3d 630, 638-39 (Fed. Cir. 2016), this Court looked to board decisions to assess whether the agency's position on a legal question had been consistent and thus was entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). But the question in MVA's case is the Secretary's policy choice not to create a regulatory presumption, not whether VA is legally entitled to *Auer* deference. And the board has absolutely no authority, through individual adjudications, to force the Secretary's hand on that policy choice.

[22] MVA further disputes the Secretary's characterization of another board decision. Pet. Br. 60 n.10. There was no mischaracterization. The Secretary directly quoted the board decision's findings. Appx5; Appx4510.

undiluted kind—were used broadly. As the GAO explained, the transportation and use of Agent Orange was strictly recorded, and all Agent Orange procured is accounted for in government records, and there is no evidence of its presence in Guam. Appx2189; Appx2195. MVA also highlights a segment of the NAS's report that the dregs of used 55-gallon barrels in Vietnam were sometimes pumped into smaller drums and sent to military camps around Vietnam for local defoliation. Pet. Br. 57 (citing Appx2586). But that has nothing to do with *Guam* and, in any event, MVA knows well that not all 55-gallon drums contained Agent Orange or tactical herbicides. Appx2202. To suggest that this should somehow prove that Agent Orange was regularly being shipped to and used on *Guam*, particularly when there are no records to support that finding, is unfounded.

MVA next asserts that finding traces of dioxin in Guam today is "remarkable" in light of time and environmental degradation, and argues that the Secretary "trivialize[d] the testing data." Pet. Br. 63. But it is an unjustified leap to assume that trace amounts of dioxin in an area should prove the past presence of tactical herbicides in that area, particularly where there are no records to support it. As the Secretary explained, trace levels of dioxin "would be expected" on Guam given commercial herbicide usage and especially around firefighting training centers. *See* Appx5; Appx2432 ("Dioxin is omnipresent, existing in household products, dust particles, and water. . . . Millions of people have been exposed to it

through industrial accidents, fly ash from waste incinerators, herbicide spraying, manufacturing plants, and even in some edible fish."); Appx2216 (waste incineration, plastic incineration, forest fires, manufacturing processes, herbicide applications, and vehicle emissions contribute to the presence of dioxins in the environment); Appx2215 ("[A]ccording to the World Health Organization, dioxins . . . are primarily released to the environment with the burning of materials such as wood and waste."); Appx3305 (noting exposure to dioxin for workers in occupations associated with waste incineration, firefighting, chemical research, paper bleaching, and herbicides). The Secretary's conclusions with respect to Guam were rationally supported and proper.

MVA concludes its brief by devoting a portion of its argument to its Johnston Island petition. There, MVA criticizes the Secretary's discussion of the testing data from Johnston Island, asserting that dioxin was found in contemporaneous water samples and was still present in the island as of 2002. Pet. Br. 64. But the Secretary acknowledged these findings. Appx8. He explained, however, that the contemporaneous samples reflected a level of dioxin at well below permissible levels. *Id.*; *see* Appx3320 ("Concentrations of 2,4-D and 2,4,5-T found in the ambient air and water samples were minimal. . . . Exposure of workers to airborne 2,4-D and 2,4,5-T were well below permiss[i]ble levels"). And MVA provides no evidence to the contrary. Instead, MVA cites portions of

these same record documents selectively referring to findings that might favor its cause, while omitting any related language that undermines its point. *See* Pet. Br. 13 (citing Appx3460 for the proposition that water samples "tested positive for 2,4,5-T," but omitting the conclusion that the positive test "did not exceed established water quality criteria" and is "considered negligible"; citing Appx3468 as a positive test, but omitting the conclusion that "[n]o samples were in violation of currently accepted drinking water standards"). Ignoring the record does not prove that the Secretary's decision lacks support; it merely shows that MVA is unable to show how the Secretary erred.

Lacking the evidence to support its position, MVA next presents a theory that the civilians responsible for handling Agent Orange on Johnston Island could have passed contaminants to servicemembers. Pet. Br. 64. But MVA provides no meaningful support for this theory. *See* Appx8 (noting that MVA's only support for this theory was Dr. Dwernychuk's statement, which was based solely on a communication with MVA itself (referencing Appx2159-2160)). Nor does the record evidence support it. As the Secretary explained, records show that civilians on Johnston Island showered separately and had their clothes laundered to prevent cross-contamination. Appx8-9 (referencing Appx3447). MVA speculates for the first time on appeal that these procedures may have occurred only in July and August 1977, Pet. Br. 65, but still cites nothing to support its broader theory.

MVA next claims that veterans might have been exposed on Johnston Island by swimming or eating seafood caught in coastal waters. Pet. Br. 65. But the Secretary explained, with supporting scientific citations, that: (1) any leaked herbicide would have been bound to coral or dispersed into the open ocean; and (2) an independent monitor found contemporaneous water samples of any dioxin contamination to be "well below permissible levels." Appx8 (referencing Appx3319-3320; Appx3695; Appx3325, Appx3327-3328; Appx3822; Appx3678). MVA ultimately provides no actual data that the dioxin contamination in the water or soil of Johnston Island was beyond permissible levels or posed any meaningful risk of harm to veterans in that area.

At bottom, MVA's real objection here is the fact that the Secretary did not treat its affidavits, and its other evidence, as dispositive in spite of weightier evidence the Secretary relied upon, such as the GAO's report and DoD's investigation. No provision of law requires the Secretary to credit individual affidavits and other incomplete evidence and data over official government findings and investigations, particularly as it relates to making policy for an entire cohort of veterans. The Secretary's decision is well-supported and rationally connected to the record facts. MVA's petition should be denied.

CONCLUSION

For these reasons, this Court should deny MVA's petition.

Respectfully submitted,

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August 30, 2021

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify under penalty of perjury that on this 30th day of August 2021, a copy of the foregoing "BRIEF FOR RESPONDENT" was filed electronically. The filing was served electronically to all parties by operation of the Court's electronic filing system.

I further certify that pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, this brief complies with the Court's type-volume limitation rules. According the word count calculated by the word processing system with which this brief was prepared, the brief contains a total of 12,584 words.

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