

20-2086

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MILITARY-VETERANS ADVOCACY INC.,

Petitioner

v.

SECRETARY OF VETERANS AFFAIRS,

Respondent

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

**BRIEF OF AMICUS CURIAE
SENATOR THERESE M. TERLAJE IN SUPPORT OF PETITIONER**

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April 22, 2021

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2020-2086
Short Case Caption Military-Veterans Advocacy v. Secretary of Veterans Affairs
Filing Party/Entity Senator Therese M. Terlaje

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 04/22/2021

Signature: /s/ Stanley J. Panikowski

Name: Stanley J. Panikowski

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>
<p>Senator Therese M. Terlaje</p>		

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Senator Therese M. Terlaje is currently the Speaker of the 36th Guam Legislature and Chairperson for the Committee on Health, Land, Justice and Culture. The Committee oversees all matters related to health care, public health, social welfare, sustainable land management, issues relating to justice and legal affairs, and cultural affairs.

Senator Terlaje was elected into the 34th Guam Legislature in 2016 and served as the Vice Speaker and Chairperson for the Committee on Culture and Justice. During the 35th Guam Legislature, she served as the Chairperson for the Committee on Health, Tourism, Historic Preservation, Land and Justice.

In these roles, Senator Terlaje is entrusted with advancing the interests and promoting the well-being of the people of Guam. Consistent with these interests is her support of benefits for U.S. military veterans who served on Guam during the Vietnam conflict. Among other things, such benefits are necessary to compensate veterans for injuries associated with toxic herbicides sprayed on Guam in support of the U.S. military operations in Vietnam. The veterans who served the United States in this conflict include thousands of Guamanians, dozens of whom gave their lives to this effort. *See* Jamie Ward, Guam Marks National Vietnam War Veterans Day, THE GUAM DAILY POST (Mar. 30, 2018).

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus curiae certifies that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and that no person other than amicus curiae or her counsel contributed money that was intended to fund preparing or submitting the brief. Each party consented to the filing of this amicus brief in this case.

II. ARGUMENT

The VA's refusal to engage in rulemaking here rests on two flawed premises. A single sentence of the VA's letter denying MVA's petition encapsulates both of these fundamental errors: "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." Appx2. The relevant statute is not limited to "tactical herbicides," and the relevant facts are not limited to "official record[s]." Once these errors are corrected, the need to remand for rulemaking is plain.

First, as MVA has thoroughly demonstrated in its opening brief, the VA's exclusion of so-called "commercial" herbicides from the scope of 38 U.S.C. § 1116 is pure fiction. The statute provides "the term 'herbicide agent' means a chemical in an herbicide used in support of the United States and allied military

operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.” 38 U.S.C. § 1116(a)(3). There is no distinction whatsoever between purportedly “tactical” and “commercial” herbicides in the statute.

Instead, the only requirement is that the herbicide have been “used in support of” the specified military operations during the identified period. *Id.* This is a case where the statute simply means what it says. *See, e.g., Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”); *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 776 (2018) (“When a statute includes an explicit definition, we must follow that definition,”) (citation omitted). The VA’s attempt to rewrite it is contrary to law. *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 328 (2014) (“We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”).

Applying the statute as written, there is no doubt that toxic herbicides were used on Guam in support of the United States military operations in the Republic of Vietnam during the relevant period. Guam’s crucial strategic role as a base for the U.S. military operations in the Republic of Vietnam during this time is well-documented. *See, e.g., MVA Op. Brief at 7-8* (citing Appx574 and Appx2203);

Nat'l Veterans Legal Servs. Program & Veterans Legal Servs. Clinic, *White Paper Confirming That Veterans Who Served in Guam from 1958-1980 Were Likely Exposed to Dioxin-Containing Herbicide Agents Including Agent Orange* at 6-9 (updated Feb. 11, 2021), <https://perma.cc/4TF7-9W26>, also last accessed on April 22, 2021 at https://law.yale.edu/sites/default/files/area/clinic/2021.02.11_-_nvlsp_white_paper_-_clean.pdf (“NVLSP White Paper”).

As the NVLSP White Paper explains in detail, “Guam became ‘the site of the most immense buildup of air power in history’” during the U.S. involvement in the Vietnam conflict. NVLSP White Paper at 6 (quoting Jeffrey N. Meyer, Andersen AFB’s Legacy: Operation Linebacker II, ANDERSEN AIR FORCE BASE NEWS (Dec. 18, 2017)). “At the height of bombing operations during Vietnam, three-quarters of all U.S. B-52 aircraft available for operations in Southeast Asia were based in Guam.” *Id.* (citing Meyer article).

Enabling and sustaining “this rapid and massive buildup” imposed significant infrastructural demands on Guam. *Id.* at 7-8. U.S. military personnel needed to be housed. *Id.* Water needed to be conserved, which in turn elevated the risk of dangerous fires. *Id.* Pipelines, runways, roads, and fuel storage facilities needed to be maintained and operated. MVA Op. Brief at 8; NVLSP White Paper at 12-13. Flightlines and perimeters needed to be secured and maintained. MVA Op. Brief at 8; NVLSP White Paper at 8, 12-13. Massive quantities of toxic

herbicides were sprayed on Guam as part of all these activities—clearing vegetation to prevent fires, create pathways, enhance security, improve visibility, and the like. MVA Op. Brief at 7-10; NVLSP White Paper at 6-13. And all of this was done in support of the U.S. military operations in Vietnam. *See, e.g.*, NVLSP White Paper at 6-9, 12-14.

As a result, the statutory definition of herbicide agent is fully satisfied here.

Second, as MVA’s opening brief also has shown, the VA’s “official record” requirement is unreasonable. The VA is not authorized to ignore facts simply because no official government record contains them. Again, the facts establishing the use of herbicide agents on Guam in support of the U.S. military operations in Vietnam during the relevant period are legion. *See, e.g.*, MVA Op. Brief at 7-11, 59-66; NVLSP White Paper at 6-14. The diversity of these sources—veterans’ affidavits, historical records, a Superfund investigation, and more—testifies to the strength of the evidence.

Moreover, the U.S. government generally did not keep records of small-scale spraying of toxic herbicides on Guam even though such activities are otherwise well-documented. *See, e.g.*, MVA Op. Brief at 6, 10, 14-15, 18, 55-56; NVLSP White Paper at 15-17. The general rule that the VA cannot rely on the absence of evidence as substantive negative evidence thus applies with even greater force here. *See Fountain v. McDonald*, 27 Vet. App. 258, 272 (2015);

Buczynski v. Shinseki, 24 Vet. App. 221, 224 (2011). And in all events, there is abundant affirmative evidence that establishes the need for rulemaking here. The VA’s complete discounting of any evidence that does not appear in an “official record” is the opposite of the reasoned agency decision-making that the Administrative Procedure Act requires.

III. CONCLUSION

As a result, this matter should be remanded with instructions for the VA to engage in rulemaking consistent with 38 U.S.C. § 1116 and the Administrative Procedure Act.

Dated: April 22, 2021

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Case Number: 2020-2086

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