



U.S. Department of Justice

Civil Division

REK:MFHockey
D.J. No. 154-F19-1094

Washington, DC 20530
November 21, 2019

Peter R. Marksteiner
Office of the Clerk
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: Monk v. Wilkie, No. 2019-1094

Dear Colonel Marksteiner:

Pursuant to Fed. R. App. P. 28(j), respondent-appellee, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully submits *Godsey v. Wilkie*, 31 Vet. App. 207 (2019), and *Monk v. Wilkie*, ___ Vet. App. ___, 2019 WL 5406570 (Oct. 23, 2019) (en banc) (*Monk V*).

In *Godsey*, the Veterans Court certified (after modification) a class of claimants who brought a challenge to a particular VA practice, certification of an appeal to the Board of Veterans' Appeals. 31 Vet. App. at 207. The *Godsey* court noted in support of its decision that "the putative class targets specific policies or practices that allegedly violate the law" and that all members of the modified class were solely waiting for appeal certification (those receiving additional development were excluded from the modified class). 31 Vet. App. at 221 (internal quotation marks omitted). This decision is consistent with the argument throughout our brief, but particularly at 44-45, and 46-49, that the Veterans Court's decision on appeal here properly applied the Supreme Court's commonality standard by considering whether the petitioners' challenge was based on "a common harm" from "a specific policy or practice affecting each proposed class member," rather than an "amalgamation of proposed class members' different experiences." Appellee's Br. at 46.

We also alert the Court to the Veterans Court's recent decision in *Monk V*, where the court found that it had jurisdiction over the merits of the nine petitions before it, even though the petitioners had appealed the class action certification question to this Court (*Monk IV*, Fed. Cir. No. 19-1094). Merits Op. at *4-*11. It ultimately dismissed eight of the petitions as moot and denied the ninth petition after conducting a *TRAC* (*Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984)) analysis. Merits Op. at *12-*19, *22-*38 (citing *Martin v. O'Rourke*, 891 F.3d 1338 (Fed. Cir. 2018)).

Very truly yours,

/s/Martin F. Hockey, Jr.
MARTIN F. HOCKEY, JR.
Deputy Director
Commercial Litigation Branch