19-1094

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CONLEY F. MONK, JR., JAMES BRIGGS, TOM COYNE, WILLIAM DOLPHIN, JIMMIE HUDSON, SAMUEL MERRICK, LYLE OBIE, STANLEY STOKES, and WILLIAM JEROME WOOD II,

Petitioners-Appellants,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims, No. 15-1280
Chief Judge Robert N. Davis, Judge Amanda L. Meredith, Judge Coral Awong Pietsch, Judge Joseph L. Toth, Judge Margaret C. Bartley, Judge Mary J. Schoelen, Judge Michael P. Allen, and Judge William S. Greenberg

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BRIEF OF *AMICI CURIAE* FORMER GENERAL COUNSELS OF THE VA WILL A. GUNN AND MARY LOU KEENER IN SUPPORT OF PETITIONERS-APPELLANTS SEEKING REVERSAL

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CERTIFICATE OF INTEREST

Counsel for Amici Curiae Will A. Gunn and Mary Lou Keener certify the following:

1. The full name of every party represented by us is Will A. Gunn and Mary Lou Keener.
2. There are no other real parties of interest.
3. There are no parent corporations or publicly held companies that own ten percent or more of the stock of the party represented by us.
4. The names of all law firms and the partners or associates that appeared for the amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are: Jennifer McTiernan, Elana S. Bildner, and Lora Johns.
5. The following case will directly affect or be directly affected by this Court's decision in the pending appeal: U. S. Court of Appeals for Veterans Claims (Case No. 15-1280).

Dated: January 24, 2019

By: /s/ Jonathan M. Freiman
Jonathan M. Freiman

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INTEREST OF AMICI CURIAE[1]

Amicus Will A. Gunn served as General Counsel of the Department of Veterans Affairs (VA) from May 2009 until July 2014. He has an interest in this case because its outcome will have a significant impact on the men and women who have served in the armed forces, and on the VA, which now must process and adjudicate their claims for benefits. His judgment is based on his service as a 25-year veteran of the Air Force and as the VA's senior attorney for five years.

Amicus Mary Lou Keener served as General Counsel of the VA from 1993 to 1998. She has an interest in this case because its outcome will have a significant impact on the men and women who have served in the armed forces, and on the VA, which must process and adjudicate their claims for benefits. Her judgment is based on her five years of service as the VA's senior attorney.

Amici filed an amicus brief when this case previously came before the Federal Circuit. In its decision, the Court cited their brief for its practical observations on claim aggregation's possible effects on the VA appeals backlog. *See Monk v. Shulkin*, 855 F.3d 1312, 1321 (Fed. Cir. 2017) (citing Amicus Br. of Former General Counsels of the VA).

[1] No party or counsel for a party authored or paid for this brief in whole or in part, or funded the brief's preparation or submission. No one other than Amici or their counsel made a monetary contribution to the brief. *Amici* file this with the consent of the parties, per Fed. R. App. Proc. 29(a) and Federal Circuit Rule 29(c).

INTRODUCTION

Amici last appeared before the Court in this case in 2015 to detail the enormous pressure on the VA benefits system, and the necessary and proper role that claim aggregation could play in easing that burden. *See* Amicus Br. of Former General Counsels of the VA, *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017) (filed December 16, 2015). At the time, the U.S. Court of Appeals for Veterans Claims ("CAVC") believed that it lacked the power to hear class actions, and so declined to entertain a proposed class action from petitioner Conley F. Monk Jr., who filed suit for himself and similarly situated veterans whose appeals had been pending in the VA system for a year or more.

When this Court reversed, it articulated a procedural power: the CAVC can certify classes for aggregate action. *Monk*, 855 F.3d at 1320. But it also did more, recognizing the utility of that power in a particular context. Put simply, "a claim aggregation procedure may help the Veterans Court achieve the goal of reviewing the VA's delay in adjudicating appeals." *Id.* at 1320. Indeed, the "underlying problem of overall delay" may be "best addressed in the class-action context." *Ebanks v. Shulkin*, 877 F.3d 1037, 1040 (Fed. Cir. 2017).

The CAVC refused to apply its newly enunciated procedural power to address that very problem. To be sure, it acknowledged its power to certify classes, (as it had to), and it settled on a makeshift method for deciding whether to use that

power. Anticipating that it would someday adopt an as-yet unwritten "rule on aggregate claims that is appropriate for this court," it decided to use Fed. R. Civ. P. 23 as an interim "guide." *Monk v. Wilkie*, 30 Vet. App. 167, 170 (2018).

From there the court split. Four judges thought Appellants' proposed class did not satisfy Rule 23, because although the petitioners had articulated a common *delay* in the processing of their appeals, they had not alleged a common *cause for that shared delay*. *Id.* at 181 (opinion of Schoelen, J.). Four judges disagreed, stating that the first four were "imposing too high a bar for certification and conflating resolution of the merits of the petitioners' claims with the procedural question of commonality." *Id.* at 184 (opinion of Allen, J.); *see also id.* at 201, 202 (Greenberg, J., dissenting) (finding that the class should be certified and observing that "[l]imitations on our jurisdiction have been merely self-imposed," with Rule 23 used "to keep classes out"). Because the court divided evenly on this question, it denied class certification. *Id.* at 170.

The CAVC decision formally rested on a strained reading of the commonality requirement of Rule 23, but it seems to have been driven by the four judges' views of the manageability of the proposed class. In *amici*'s view, profound litigation-management difficulties are presented by the huge backlog of veterans' appeals—not by a proposed class that would help clear that backlog. The CAVC misses this common-sense point by reading Rule 23 too narrowly, and

indeed by binding itself to the rule at all. The All Writs Act gives the CAVC the power to aggregate claims so that it can "promote efficiency, consistency, and fairness in its decisions." *Monk*, 855 F.3d at 1321.

Claim aggregation is not an abstract procedural tool; it is a power that can and should be used by the CAVC to promote efficiency, consistency, and fairness. That power, first recognized as a way to help "achieve the goal of reviewing the VA's delay in adjudicating appeals," *id.*, allows the certification of a class that aims to achieve that goal by addressing the "underlying problem of overall delay" in resolving veterans' claims. *Ebanks,* 877 F.3d at 1040.

ARGUMENT

The class sought by Appellants is straightforward and would present few if any management difficulties. Any challenges created by claim aggregation could be managed by the CAVC's newly articulated, flexible powers under the All Writs Act, as well as its powers under 38 U.S.C. § 7264. Most important, any challenges created by claim aggregation would pale in comparison to the very real litigation-management difficulties that exist in the current system, where appeals are considered in piecemeal fashion; nearly always in non-precedential decisions; and years after they are filed.

I. The backlog of appeals has increased.

Since *amici* were last before this Court, the numbers of outstanding initial claims by veterans remain formidable. *See* Dep't of Veterans Affairs, Office of Inspector General, *Review of Accuracy of Reported Pending Disability Claims Backlog Statistics* 4-5 (Sept. 10, 2018), https://www.va.gov/oig/pubs/VAOIG-16-02103-265.pdf (finding 63,600 overdue claims omitted from official reporting, and nearly 10,000 more claims incorrectly recorded, which would nearly double reported numbers in 2016).

Meanwhile, pervasive, systemic delays continue to plague the VA appeals process. It is a matter of public record that, on average, a veteran waits nearly six years from filing a Notice of Disagreement with the VA's initial denial of benefits until a ruling from the Board of Veterans' Appeals (BVA). *See* Veterans Appeals Improvement and Modernization Act (VAIMA), Pub. L. 115-55, 131 Stat. 1105, 1115. The VA's website states as much: "When you request a review from a Veterans Law Judge at the Board of Veterans' Appeals, it could take 5-7 years for you to get a decision." File a VA Disability Appeal, https://www.va.gov/disability/file-an-appeal (last visited Jan. 22, 2019).

As of 2017, there were over 470,000 appeals pending in the VA system. Appx1044. This number has risen quickly, as has the waiting time for a final decision. *See* Dep't of Veterans Affairs, Office of Inspector General, Office of

Audits and Evaluations, *Veterans Benefits Administration: Review of Timeliness of the Appeals Process* i (March 28, 2018), https://www.va.gov/oig/pubs/VAOIG-16-01750-79.pdf. ("At the end of FY 2012, [the Veterans Benefits Administration, or] VBA reported having 254,604 appeals pending nationwide and an overall average of 903.1 days to resolve appeals. By the end of FY 2015, VBA reported its pending appeals had increased to 318,532 nationwide, and the overall average days to resolve appeals had risen to 935.9.").

The years veterans spend waiting for decisions in their appeals are often years of grave illness, old age, and indigent circumstances. About 1 in 14 die while waiting for a ruling. *Id.* at v. And to add insult to injury, the VA, "[i]n accordance with its procedures . . . count[s] these as resolved appeals." *Id.* at iv. This Court has witnessed that sad result. *See, e.g.*, *Martin v. O'Rourke*, 891 F.3d 1338, 1349 (Fed. Cir. 2018) ("Finally, and regretfully, the parties have informed us that Mr. Myers passed away during the course of this appeal, and the parties agree that his appeal is now moot."). Younger veterans who spend years awaiting appeals (for example, for disability claims related to PTSD) are arguably at no less risk during the lengthy adjudication process. *See, e.g.,* Han K. Kang et al., *Suicide Risk among 1.3 Million Veterans Who Were on Active Duty During the Iraq and Afghanistan Wars,* 25 Annals of Epidemiology 96-100 (2015) (finding risk of suicide for veterans on

active duty during the Iraq and Afghanistan Wars to be 41-61 percent higher than that of the general population, regardless of whether they were deployed).[2]

II. Only the VA knows the causes of delay in any particular appeal, but it generally cannot explain them.

Only the VA can know the cause of delay in the appeal of any particular claimant. Many delays appear to lack any explicable cause at all. For example, Judge Moore recently described the process of certification from a Regional Office to the Board of Veterans' Appeals as follows:

> Once the appeal is received, it takes the VBA an average of 773 days to certify the appeal. This is a ministerial process that involves checking that the file is correct and complete and completing a two-page form which could take no more than a few minutes to fill out. . . . As can be seen, the form consists of a total of 13 items to be filled out, each requiring nothing more complicated than the veteran's name, the dates of various prior actions before the VA, and whether or not a hearing was requested. Unsurprisingly, the government has provided no reason why such a simple task takes over two years to complete, and I cannot conceive of any rational explanation.

Martin, 891 F.3d at 1349–50 (Moore, J., concurring). When under oath, VA personnel have not been able to identify the causes of delays at the various stages

[2] VAIMA becomes effective on February 19, 2019. But while VAIMA allows some veterans with backlogged appeals to opt into a new appeals system, the VA still cannot or will not say when it will fully resolve the backlogged "legacy" appeals. *See, e.g.*, Dep't of Veterans Affairs, *Comprehensive Plan for Processing Legacy Appeals and Implementing the Modernized Appeals System, Public Law 115-55, Section 3*, *February 2018 Update* 7, https://benefits.va.gov/benefits/docs/appeals-report-201802.pdf. ("Given the complex, non-linear legacy process, it is difficult for VA to project when all legacy appeals will be resolved, or provide timeliness goals for legacy appeals.").

of appeal. *See, e.g.*, *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 859 (9th Cir. 2011), *opinion vacated on reh'g en banc*, 678 F.3d 1013 (9th Cir. 2012) (in testimony before the trial court, senior VA officials were unable "to provide the court with a sufficient justification for the delays incurred," while the Chairman of the Board of Veterans' Appeals "was unable to explain the lengthy delays inherent in the appeals process before the Board."). As the Ninth Circuit concluded, "[m]uch of the delay appears to arise from gross inefficiency, not resource constraints." *Id*. at 885.[3]

This conclusion was echoed most recently in an analysis of VBA appeals processing by the VA's own Office of Inspector General. The report "found significant periods of inactivity throughout all phases" of the appeals process. Dep't of Veterans Affairs, Office of Inspector General, Office of Audits and Evaluations, *Veterans Benefits Administration: Review of Timeliness of the Appeals Process* ii (March 28, 2018), https://www.va.gov/oig/pubs/VAOIG-16-01750-79.pdf. While some appeals had multiple periods of inactivity, "[o]n

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[3] An *en banc* Ninth Circuit vacated *Shinseki* after concluding that only the CAVC and this Court had jurisdiction over the claims at issue. 678 F.3d at 1016 ("As much as we as citizens are concerned with the plight of veterans seeking the prompt provision of the health care and benefits to which they are entitled by law, as judges we may not exceed our jurisdiction.")

average, a single period of inactivity accounted for approximately 45 to 76 percent of the total processing time in each phase." *Id.*

In requiring the petitioners to identify a common reason for delay in order to qualify for aggregate treatment, 30 Vet. App. at 181, the CAVC demands from them an explanation that the VA itself has never provided. And it demands this at the outset of the case, before discovery would provide the opportunity to determine whether there is any common cause of delay more specific than the lack of "any rational explanation" that Judge Moore observed.

III. The backlog of appeals presents profound litigation-management challenges.

The last step in a veteran's appeal process is the CAVC. The CAVC confronts an enormous caseload every year: thousands of appeals, petitions for extraordinary relief, claims for attorney's fees under the Equal Access to Justice Act, and motions for reconsideration. In FY 2017 alone, the CAVC disposed of 4,095 appeals. U.S. Court of Appeals for Veterans Claims, Annual Report (Fiscal Year 2017), https://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf. Of those, 1,685 (41 percent) were decided by a single judge. *Id.* Only 21 appeals (one half of one percent) were decided by a multi-judge panel. And only one was decided by the full CAVC.[4] Under CAVC rules, only published opinions issued by

[4] The rest (2,651) were disposed of by the Clerk of the Court through alternative dispute resolution methods, such as staff conferencing. *Id.*

a panel of three judges or more carry precedential value. *See Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992). Single-judge dispositions are not binding in another case. *Id*. In sum, one half of one percent of the CAVC's 2017 decisions in appeals created precedent.

Similar trends were evident in each of the last five years.[5]

Fiscal Year	**Total appeals decided**	**Single-judge decisions**	**Precedential Decisions**
2016	4,212	36.4 percent	0.7 percent
2015	4,030	32.6 percent	0.7 percent
2014	3,686	44 percent	0.9 percent
2013	3,673	45.5 percent	0.7 percent
2012	4,355	50 percent	0.5 percent

The resolution of the vast majority of cases by non-precedential single-judge opinions or by alternative dispute resolution means that there are few opportunities

[5] Numbers were drawn from:

U.S. Court of Appeals for Veterans Claims, Annual Report (Fiscal Year 2016), https://www.uscourts.cavc.gov/documents/FY2016AnnualReport.pdf; U.S. Court of Appeals for Veterans Claims, Annual Report (Fiscal Year 2015), https://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf; U.S. Court of Appeals for Veterans Claims, Annual Report (Fiscal Year 2014), https://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf; U.S. Court of Appeals for Veterans Claims, Annual Report (Fiscal Year 2013), https://www.uscourts.cavc.gov/documents/FY2013AnnualReport.pdf; U.S. Court of Appeals for Veterans Claims, Annual Report (Fiscal Year 2012), https://www.uscourts.cavc.gov/documents/FY2012AnnualReport.pdf.

to clarify the law.[6] As recently as 2011, the CAVC's reversal rate was "about 70 percent." *Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs* of the H. Comm. on Veterans' Affairs, 112th Cong. 22-23 (2011) (Statement of Hon. Bruce E. Kasold, Chief Judge, U.S. Court of Appeals for Veterans Claims) at 22 (suggesting that this Court's precedential decisions do not occur often enough to clarify the law in a manner that allows the BVA or administrative law judges to apply it correctly). In 2017, only 12 percent of appeals (499 of 4,095) were fully affirmed; the remainder were reversed and/or remanded in whole or in part, or dismissed for procedural reasons. U.S. Court of Appeals for Veterans Claims, Annual Report (Fiscal Year 2017), https://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf.

Finally, the CAVC has adopted a "narrowest possible grounds" policy that allows cases to be remanded as soon as a single error—even a factual one—is discovered. *See Best v. Principi*, 15 Vet. App. 18, 19-20 (2001); *Mahl v. Principi*,

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[6] The CAVC's use of mediation and other alternative dispute resolution methods leads to faster results but does little to clarify the law. *See Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs* of the H. Comm. on Veterans' Affairs, 111th Cong. 5 (2009) (Statement of Hon. Bruce E. Kasold). Cases addressed through mediation generally result in a remand to the BVA for further fact-intensive inquiries. *Id.* While ADR has helped the CAVC to resolve cases faster, it does not promote consistent application of the law or the creation of clarifying precedent. *See, e.g.*, Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992, 2000 (2012) at 2034.

15 Vet. App. 37, 38 (2001). This approach further erodes the precedential value of the CAVC's decisions. By leaving other alleged errors unaddressed, cases raising the same legal issue are often resolved on entirely different grounds, never reaching their common question of law. This process of disposing of cases on a piecemeal basis sets the CAVC apart from Article III courts, which consistently reject piecemeal appeals. *See, e.g.*, *Ali v. Fed. Ins. Co.*, 719 F.3d 83, 89 (2d Cir. 2013); *see also Microsoft v. Baker*, 137 S. Ct. 1702, 1707 (2017) (describing "the debilitating effect on judicial administration caused by piecemeal appeal disposition") (internal citation omitted).

IV. Claim aggregation eases the profound litigation-management challenges presented by the current backlog of claims, and has proven useful in the benefits context.

As this Court has recognized, claim aggregation can help ameliorate these profound litigation-management challenges. "Class actions may help the Veterans Court consistently adjudicate cases by increasing its prospects for precedential opinions," and would "permit the Veterans Court 'to serve as lawgiver and error corrector simultaneously, while also reducing the delays associated with individual appeals.'" *Monk*, 855 F.3d at 1321 (citation omitted).

Claim aggregation should allow the CAVC to resolve cases raising legally identical claims at one time, promoting uniform standards and relieving some of the strain of its immense caseload. Until now, when the CAVC in an individual

case articulated a rule affecting a large group of veterans, each individual veteran in that group would have to find the decision and ask the Regional Office to re-adjudicate his claim. Because more than 99 percent of CAVC dispositions are non-precedential, the Regional Office would likely not be bound by the previous CAVC decision, and could follow or reject it. Veterans applying for benefits thus often lacked guidance as to the relevant rule, and the VA itself could find itself wracked by competing determinations of Regional Offices or contradictory rulings by the CAVC. With similarly situated claims aggregated, this Court can clarify benefits rules for all relevant veterans at the same time, allowing it to cut through overwhelming backlogs and provide a consistent standard for both veterans and the VA.

While the CAVC recognized the theoretical possibility of claim aggregation, it refused to aggregate claims here because it thought that a class action would be ill-suited to address across-the-board delays in benefits processing. 30 Vet. App. at 181. In fact, aggregate claim proceedings have proven useful in precisely that context. One notable example is the Supplemental Nutrition Assistance Program (SNAP), a federal-state hybrid benefits program, where applications for food stamps must be decided within 30 days. 7 C.F.R. § 273.10. An individual applying for food stamps can pursue an administrative appeal. 7 C.F.R. § 273.15. If a state agency fails to comply with the law, recipients may bring a class action seeking an

injunction, ordinarily under Rule 23(b)(2). *See, e.g.*, *Briggs v. Bremby*, 792 F.3d 239, 247 (2d Cir. 2015) (affirming certification of Rule 23(b)(2) class).

Where statutory or constitutional rights are not dependent on the underlying reasons for the delay, the delay itself is the tie that binds the class. *See Garnett v. Zeilinger,* 301 F. Supp. 3d 199, 208 (D.D.C. 2018) (holding that "the key question for liability under the statute is whether the District is systemically processing applications and sending recertification notices within the statutory deadlines, not why it has failed to do so in any particular case or on a systemic level"). The remedy: injunctions that impose uniform duties on state agencies with respect to the entire class. *See Briggs*, 792 F.3d at 247 (affirming motion for preliminary injunction on behalf of class, requiring state agency to comply with federal application processing deadlines); *Booth v. McManaman*, 830 F. Supp. 2d 1037, 1045 (D. Haw. 2011) (same); Marc Cohan & Mary R. Mannix, *National Center for Law and Economic Justice SNAP Application Delay Litigation Project,* Clearinghouse Rev.: J. of Poverty L. & Policy 208-17 (Sept.-Oct. 2012).

V. The Secretary's claims about class action management difficulties relied on overbroad and long-rejected arguments, or are easily accommodated within the CAVC's All Writs Act powers.

At the CAVC, the Secretary contended that managing the proposed class would pose "extensive difficulties." Secretary's Response to Amended Petition ["Sec'y Br."] at 31. This argument makes little sense and merely echoes arguments

rejected more than half a century ago. He asserted that the class definition is "not defined by any set period of time," Sec'y Br. at 33, even though Monk's petition explicitly sought "an order from the Court directing the Secretary to decide certain appeals within one year of the date on which a Notice of Disagreement (NOD) was submitted," as the CAVC noted in its January 23, 2018 opinion. While it is true that individual appeals will continue to turn one year old, and other appeals will be decided, the Secretary could certainly understand an order directing him to decide appeals within a year.

Nor does it make any sense to say that an injunctive class action becomes unmanageable merely because the affected class gains and loses members over time. If that were enough to defeat class certification, then—for example—school desegregation suits could never have been brought as injunctive class actions on behalf of students. After all, children continuously reach high school age (entering the class) and then graduate (leaving the class). While segregated school districts sought to block desegregation suits by prolonging litigation until an individual plaintiff graduated, or by offering admission to individual plaintiffs to moot suits, the injunctive class action mechanism allowed African-American students and their families to obtain class-wide relief against segregationist exclusion. *See e.g.*, *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (holding, in the context of class actions originating in four states, that race-based segregation of children in

public schools deprives minority children of equal protection); *see also Gratz v. Bollinger*, 539 U.S. 244, 268 (2003) (upholding certification of class of Caucasians challenging state university's use of race to achieve diversity and stating that "class action treatment was particularly important in this case because 'the claims of the individual students run the risk of becoming moot'" and the class action "provides a mechanism for ensuring that a justiciable claim is before the Court").

Indeed, Rule 23(b)(2) "has been used extensively to challenge the enforcement and application of complex statutory schemes." Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1775. These injunctive class actions have challenged such enforcement and application in the context of benefits applicants or recipients, i.e., groups that routinely gain and lose members. For instance, the Supreme Court has approved a class action challenging the Social Security Administration's award and termination of Social Security benefits, *California v. Yamasaki*, 442 U.S. 682, 699-701 (1979) ("the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion"), and courts have likewise approved class actions challenging delayed decisions under the Medicaid Act, *e.g., Menking ex rel. Menking v. Daines,* 287 F.R.D. 166, 173 (S.D.N.Y. 2011) (certifying Rule 23(b)(2) class action of Medicaid applicants alleging that New York agencies routinely failed to

issue or implement a fair hearing decision within ninety days from the date of the request). *See generally* Wright, Miller & Kane, Civil 3d § 1775 (citing dozens of class actions approved to challenge the administration of complex statutory schemes involving classes that routinely gain and lose members).

The Secretary's remaining concerns are either superseded or easily accommodated. The Secretary argued that it would be hard to determine whether a claimant has "a medical or financial hardship," and so is a class member, Sec'y Br. at 32, but the CAVC's January 23, 2018 opinion granting Monk's request to remove that limiting factor from the alleged class makes the argument inapposite. *See also id.* at 33-34 (making related arguments about whether the 12-month period begins with the NOD or some later event first causing a medical or financial hardship). The Secretary speculated that some individual veterans may not want their appeals decided within a year, creating "due process concerns," Sec'y Br. at 34, but even if the CAVC wished to address that speculation, it could issue an order aggregating claims but excepting any "individual class member who specifically asked VA to wait for her to submit a private medical opinion before deciding her appeal or certifying her case to the Board." *Id.*

At a more fundamental level, any litigation-management difficulties associated with the proffered class can be managed with the CAVC's flexible powers under the All Writs Act, together with its explicit grant of power to create

its own rules and procedures, 38 U.S.C. § 7264. While the Secretary asserts that the CAVC's power to shape an appropriate class are more limited than the federal district courts, Sec'y Br. at 35, the reverse is true. Federal district courts must consider requests for class certification under Federal Rule of Civil Procedure 23, but the CAVC may fashion aggregate resolution procedures not precisely aligned with Rule 23. *See Monk*, 855 F.3d at 1318-19; *see also* 38 U.S.C. § 7264. As this Court noted, the All Writs Act is flexible enough to "permit[] courts to create 'appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage." *Monk*, 855 F.3d at 1319 (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)); *see also U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115, 1126 (2d Cir. 1974) (affirming the use of "an analogous procedure" where "the precise provisions of Rule 23 [were] not applicable"). The CAVC's use of Rule 23 is—by its own description—merely a "guide," and the CAVC certainly should not hew to a strained interpretation of that Rule.[7]

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[7] The CAVC does not explain why its 4-4 split necessitates a denial of the motion. While the CAVC functions as an appellate court, it also functions at times as a trial court: the class certification request was made directly to the CAVC. An evenly divided appellate court affirms a decision below, but there is already a decision below that stands unless reversed. Here there was no standing decision, only a request, and the lack of a majority in support of either a grant or denial of class certification should lead to an unresolved motion, not to a denial that failed to garner a majority of the court. Where, as here, a tribunal acting as a trial court fails to achieve a majority, the tribunal should strive to appoint additional jurists eligible to sit by designation, so that a majority can be achieved.

CONCLUSION

For the reasons above, this Court should conclude that the current backlog of appeals creates significant litigation-management difficulties throughout the VA appeals process; that those difficulties far outweigh whatever minor management challenges that might come with the claim aggregation sought by Mr. Monk; and that any such minor challenges accompanying class certification can be managed through the CAVC's flexible powers under the All Writs Act. This Court should reverse the decision below, direct the CAVC to aggregate the claims, and remand for further proceedings. Alternatively, this Court should reverse the decision below and remand to the CAVC for the parties to conduct pre-certification discovery.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing Brief of *Amici Curiae* in support of Petitioners-Appellants complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Circuit Rule 32(g) because it contains 4,597 words as determined by the word-count function of Microsoft Word 2013, excluding parts of the motion exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b)(1).

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced, 14-point, Times New Roman typeface using Microsoft Word 2013.

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CERTIFICATE OF SERVICE

I hereby certify that, on January 24, 2019, the foregoing *Amici Curiae* Brief was filed with the Court electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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