No. 19-1094

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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

v.

ROBERT L. WILKIE, Secretary of Veterans Affairs,
Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in Case No. 15-1280 (Chief Judge Davis and Judges Schoelen, Pietsch, Bartley, Greenberg, Allen, Meredith, and Toth)

SUPPLEMENTAL BRIEF OF RESPONDENT-APPELLEE

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Respondent-Appellee Robert L. Wilkie, Secretary of Veterans Affairs, respectfully submits this response to the Court's June 4, 2020, order regarding the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), Pub. L. No. 115-55, 31 Stat. 1105 (2017), and its relation to the requested class action.

I. Appellants' Petition Was Premised On Delay In The Legacy[1] Appeals System

This matter originates from Petitioner-Appellant Conley F. Monk Jr.'s April 2015 petition for extraordinary and collective relief, which requested that the U.S. Court of Appeals for Veterans Claims (Veterans Court) compel the Department of Veterans Affairs (VA) to immediately adjudicate certain benefits appeals that had been pending 12 months or more since the filing of a notice of disagreement (NOD). Appx66. In December 2017, Mr. Monk—now joined by additional petitioners—amended the petition to specifically request (1) class certification of veterans who had not received a Board of Veterans' Appeals (board) decision on their appeals within 12 months of filing an NOD, and (2) a judicial order

[1] The pre-AMA appeals process, which governs claims that received an initial decision prior to February 19, 2019, is referred to herein as the "legacy" system. *See* 38 C.F.R. § 19.2.

compelling VA to render board decisions on pending appeals within one year of receipt of a timely NOD. Appx483; *see* Appx2713.

The basis of both the original and amended petition was Appellants' frustration with the legacy appeals process. Appellants described a multi-step "journey through the appeals system" that required the issuance of a Statement of the Case (SOC), the filing of a substantive appeal (VA Form 9), and appeal certification and transfer, before the board could review and decide an appeal—a process that took, on average, "nearly five years to complete." Appx466; *see* Appx54; *see also* 38 U.S.C. § 7105(d) (2016); 38 C.F.R. §§ 19.35, 19.36 (2016).

II. The AMA Was Specifically Structured To Avoid The Sources Of Delay In The Legacy System—And The Data Reflects That It Has

In 2016, VA described the legacy system as "broken," advocated for comprehensive legislative reform, and worked with veterans service organizations (VSOs) and other stakeholders to strike the compromises that ultimately formed the basis of the AMA. H.R. REP. NO. 115-135, at 5 (2017); *Pending Legislation: Hearing Before the S. Comm. On Vet. Affairs*, 114th Cong. 12 (2016). The AMA was signed into law in August 2017 and took full effect in February 2019. Pub. L. 115-55, § 2(x); 38 C.F.R. § 19.2(a). Rather than forcing all claimants through one long queue, the AMA allows claimants to choose an appellate path—(1) higher-

level review, (2) supplemental claim, (3) board review with a hearing and opportunity to submit additional evidence, (4) board review without a hearing, but with an opportunity to submit additional evidence, or (5) board review without a hearing or additional evidence—in accord with their priorities for their particular appeal. *See* 38 U.S.C. §§ 5104C(a)(1), 7105(b)(3).

The AMA was specifically structured to avoid the sources of delay in the legacy system—chiefly by eliminating redundant reviews and disentangling claim development from appellate consideration. For instance, instead of the legacy system's continual open record and continual duty to assist—which cause the board to reintroduce thousands of cases reaching the end of the appeals process back into the appellate queue for additional development every year[2]—the AMA provides discrete periods for assistance and evidence submission, with effective date protections for the claimant. *Compare* 38 U.S.C. §§ 5103A, 7105(e) (2016), *with* 38 U.S.C. §§ 5103A(e), 5104B(d), 5110(a)(2), 7113 (2020). Moreover, instead of waiting for development or review in advance of an SOC, and then the

[2] *See Veterans' Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. on Disability Assistance & Memorial Affairs of the H. Comm. on Veterans' Affairs*, 114th Cong. 6, 8 (2015) (the board remanded approximately 25,000 appeals in fiscal year 2014, and "about two-thirds of [remands] are due to additional evidence received after [an appeal has] been certified to the [b]oard").

preparation and issuance of that SOC, and then having to file a substantive appeal that must be certified and transferred to the board, AMA claimants can file NODs directly with the board. *Compare* 38 U.S.C. § 7105(d) (2016) *and* 38 C.F.R. §§ 19.35, 19.36 (2016), *with* 38 U.S.C. § 7105(b)(2)(C) (2020). Given that the SOC, certification, and board docketing stages for legacy appeals take 1,077 days on average to complete,[3] the AMA's authorization for direct NOD filings with the board has the potential to remove up to 1,077 days of processing time for the average claimant.

This careful structuring of the AMA system has, at least so far, vastly improved appeal processing times. As of May 31, 2020, AMA claimants who appeal to the board are receiving decisions, on average, in 229 days. *See* Appeals Modernization Act Reporting, May 2020 Monthly Report, Part 1 – AMA (E, G, J), row 7, column C, https://www.benefits.va.gov/REPORTS/ama/ [hereinafter "May 2020 Monthly Report"]. For those claimants who choose to pursue higher-level review or a supplemental claim (instead of board review), decisions on those

[3] Board of Veterans' Appeals, ANNUAL REPORT FISCAL YEAR (FY) 2019, at 25 https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2019AR.pdf [hereinafter "Board 2019 Report"].

filings are being issued, on average, in 67 and 76 days, respectively. *Id.* at Part 1 – AMA (A-D), rows 4-5, column X.

III. Virtually Every Putative Class Member Has Received An Opportunity To Opt-In To The Streamlined AMA System

Though the AMA does not apply to legacy appeals, Congress included test-period and opt-in provisions in the AMA, Pub. L. 115-55, §§ 2(x)(5), 4(a), and VA has exercised these authorities to make the AMA system available (to the extent permitted by law) to legacy appellants. First, beginning in November 2017, VA began inviting certain legacy appellants into the AMA system through its Rapid Appeals Modernization Program (RAMP).[4] Then, between April 2018 and February 2019, VA opened up RAMP to almost every legacy appellant—the only restriction being those with "activated" appeals, i.e., appeals actively before a board member for decision. *See id.*[5] And since February 2019, when the AMA

[4] *See* 38 C.F.R. § 3.2400(c)(1); Rapid Appeals Modernization Program (RAMP), https://benefits.va.gov/benefits/appeals-ramp.asp; Rapid Appeals Modernization Program Fact Sheet, https://benefits.va.gov/BENEFITS/docs/appeals-RAMP-Opt-in-letter.pdf [hereinafter "RAMP Fact Sheet"] (both last visited July 6, 2020).

[5] Those that had an activated appeal during this time have, almost certainly by now, received a board decision and therefore are no longer putative class members. And to the extent their appeals were remanded by the board for further development or adjudication, their cases are no longer subject to ordinary legacy appeal processing times, but to expedited treatment. 38 U.S.C. § 7112.

became fully effective and the period for test programs like RAMP expired, legacy appellants can still opt-in to the AMA system following issuance of an SOC or supplemental SOC. Pub. L. 115-55, § 2(x)(5); 38 C.F.R. § 19.2(d)(2).[6]

In sum, virtually every single putative class member has had an opportunity to leave the broken legacy appeals system and enter an AMA system that "expedite[s] VA's appeals process" while also "protecting veterans' due process rights." H.R. REP. 115-135, at 2. Some have declined that opportunity, and that is their right.[7] But those that have opted into the AMA likely have received either a supplemental claim, higher-level review, or board decision within 76, 67, or 229 days, respectively, of their opt-in. May 2020 Monthly Report, Part 1 – AMA (A-D), rows 4-5, column X, and Part 1 – AMA (E, G, J), row 7, column C.

[6] Under the AMA opt-in, a claimant can directly opt-in to board review. *See id.* That was not the case under RAMP, which offered board review only after a supplemental claim or higher-level review decision. *See* RAMP Fact Sheet.

[7] To the extent there was concern or uncertainty about opting into a test program like RAMP, claimants were advised that their effective date would be protected and that VA's goal was to issue supplemental claim and higher-level review decisions within an average of 125 days. *See* RAMP Fact Sheet.

IV. As Congress Has Provided A Legislative Remedy, An Additional Judicial Mandate Is Unwarranted And Inappropriate

As noted above, Mr. Monk filed his petition in 2015, when a claimant's only path to a board decision was the backlogged and overburdened legacy appeals process. Even when Mr. Monk amended his petition in December 2017, the AMA was not yet effective and RAMP was not widely available.

But, at this point, Congress has meticulously devised a comprehensive legislative remedy to address delays and fundamentally transform the appeals process; the AMA has been fully operational for 17 months; and, between RAMP and the AMA's opt-in, virtually every putative class member has had an opportunity to take advantage of Congress's chosen remedy. When Congress has acted, the imposition of an additional judicial remedy is not appropriate. *See Bush v. Lucas*, 462 U.S. 367, 388 (1983) (rejecting the "creation of a new judicial remedy" when Congress has constructed an "elaborate" system "step by step, with careful attention to conflicting policy considerations"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58-59 (1973) (respecting "separation of powers by staying our hand" with regard to the "consideration and initiation of fundamental reforms . . . reserved for the legislative processes," where "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who

elect them"); *Cumberland Cnty. Hosp. Sys., Inc. v. Burwell*, 816 F.3d 48, 56 (4th Cir. 2016) (questioning whether judicial intervention would improve backlogs, noting that Congress was attempting to resolve the issue, and concluding that "the political branches are best-suited to alleviate" delays).

In our original brief, we explained that judicial imposition of a mandatory or presumptive one-year deadline on VA appeal processing, as requested by Appellants in their petition, would seem to either *decrease* system efficiency, deprive claimants of their statutory right to assistance, or both:

> [I]t is hard to imagine *any* claimant preferring that VA forward their appeal to the board to comply with a one-year judicial mandate, only to have the board remand the case back to the [agency of original jurisdiction] for fulfillment of statutory or regulatory mandates. But that would be the result, unless the one-year judicial mandate includes a proviso that any outstanding legal requirements, to include 38 U.S.C. § 5103A, are automatically obviated absent a claimant's specific request otherwise. Indeed, Appellants' suggestion that claimants could simply waive any judicially-imposed deadline to the extent they want to submit further evidence or desire VA to complete its assistance obligations envisions a perverse structure. Essentially, claimants would have to affirmatively request that VA complete its statutory duty to assist. This is an anti-claimant result which cannot be squared with section 5103A.

Government's Brief at 58 (citations omitted).[8]

[8] *See generally Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 476 (D.C. Cir. 1998) (though "frustration" with delays is "understandable . . . , we have no

This concern remains generally. But on top of that, a judicially-created one-year deadline would conflict with Congress's carefully-considered decision that the best way to resolve extant delays was through implementing—and allowing legacy appellants to opt into—a new system that would provide a variety of appellate options for claimants, eliminate redundant reviews, and reduce the appellate churn generated by the continual duty to assist and continual open record. With all possible reforms on the table, including timelines for legacy appeal processing, Congress declined to implement a timeline and instead chose to provide a pathway to the AMA for legacy appellants. Pub. L. 115-55, § 2(x)(5).[9] This Court should

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idea what the unintended consequences" of imposing the requested remedy might be); *Wright v. Califano*, 587 F.2d 345, 356 (7th Cir. 1978) (rejecting judicial intervention for delays where "[n]either the Congress nor the agency has been unmindful of this complex problem" and a judicially-imposed solution could create "more injustice to claimants than justice").

[9] To the extent Appellants argue that Congress was not attempting in the AMA to provide a remedy for legacy appeals, the plain text of the AMA belies such an argument. Congress explicitly (1) provided for legacy appeal opt-in, (2) prohibited the AMA from taking effect until VA guaranteed that "legacy claims" would be "timely address[ed]," (3) ordered VA to provide it with continual updates on legacy appeal processing, including resource and staffing levels, productivity and timeline projections, and information regarding opt-ins, and (4) ordered VA to publish periodically on the Internet data regarding legacy appeal timelines and opt-ins. Pub. L. 115-55, §§ 2(x)(1)(B)(i)(III), (x)(5), 3(a)(1), (b)(1)-(2), (12), (16)-(17), 5(2)-(3). Congress's only apparent reason for not fully opening the AMA to

not impose through judicial fiat a remedy that Congress has consciously declined. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms . . . , we have not created additional [ ] remedies."); *Sugrue v. Derwinski*, 26 F.3d 8, 12-13 (2d Cir. 1994) (given that Congress has "carefully crafted . . . a comprehensive remedial structure" for the veterans benefits system and "has accorded frequent attention" to the issue, "we will not create [appellant's requested] remedy when Congress has chosen not to do so").

It must be noted that, even before Congress acted, it was unclear that mandamus was an appropriate vehicle for the programmatic change Appellants requested. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891 (1990) (petitioner

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all legacy appellants was its intent "[t]o avoid overwhelming the new system." H.R. REP. 115-135, at 3.

Moreover, to the extent Appellants argue that a *pathway* to the AMA is insufficient for putative class members, the Supreme Court has instructed that, even where a legislative remedy does not provide complete relief, "[s]o long as the plaintiff ha[s] an avenue for some redress, bedrock principles of separation of powers foreclose[ ] judicial imposition of a new," additional remedy. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001); *see Volk v. Hobson*, 866 F.2d 1398, 1402 (Fed. Cir. 1989) ("The lesson of *Bush* is not that courts should assess the efficacy of existing remedies, but that they should abstain completely from inventing other remedies when Congress has set up a complete, integrated statutory scheme."); *Spagnola v. Mathis*, 859 F.2d 223, 227 (D.C. Cir. 1988) (en banc) (same).

"cannot seek wholesale improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made"); *Martin v. O'Rourke*, 891 F.3d 1338, 1348 (Fed. Cir. 2018) (mandamus is "limited to 'discrete agency action' and precludes a 'broad programmatic attack'" (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004))); *id.* at 1351 (Moore, J., concurring) ("Under separation of powers, we do not have the authority" to fix "fundamental problems with the system"). But now that Congress *has* acted, mandamus is unwarranted for an additional reason: virtually every single putative class member has had an opportunity to leave the legacy system, i.e., has been afforded a Congressionally-created adequate alternative pathway to a prompt board decision. *See Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004) (mandamus requires, inter alia, petitioner to demonstrate no other adequate means to attain the desired relief).

V. The AMA Alters The Appeal Landscape, But Does Not Resolve The Proposed Class's Continued Lack Of Commonality

The question Appellants presented in this appeal (Fed. Cir. No. 19-1904) is whether the Veterans Court committed legal error in declining certification of Appellants' proposed class. The AMA does not change the fact that Appellants intentionally proposed certification of a broad and diverse class of all veterans who

have not received a board decision within 12 months of filing an NOD. Appx483. The proposed class includes claimants whose appeals have been stalled by their failure to attend a scheduled examination; or their request that the board travel to their local regional office for an in-person hearing; or their request for a stay to submit additional evidence; or their request, late in the appellate process, for VA to secure additional evidence; or a third-party's failure to promptly furnish necessary records. It includes claimants who have not received a board decision within 12 months because VA must comply with a host of statutory and regulatory duties for each legacy appeal—and there are 217,918[10] such appeals in its backlogged and overburdened legacy system. It even includes claimants who have not received a

[10] While the original briefs in this case referred to 470,000 pending appeals, the latest available data reflects that 217,918 legacy appeals remain pending: 141,783 appeals that have not yet received a board decision and 76,135 appeals remanded by the board. May 2020 Monthly Report, Part 2 (A-H), column C, rows 6-12. VA's hiring of 605 additional appeal adjudicators in FY 2019—as well as RAMP, AMA opt-ins, and other strategies noted in VA's PERIODIC PROGRESS REPORT ON APPEALS 4-5 (Feb. 2020 Update), https://benefits.va.gov/benefits/docs/appeals-report-202002.pdf–have helped reduce the legacy backlog substantially. *See also id.* at 27 (noting that 88,000 legacy appeals opted into RAMP). Moreover, the board's hiring of 250 new employees, aggressive use of voluntary paid overtime, and other strategies resulted in the board issuing a record 95,089 decisions in FY 2019 (over 30,000 more than its FY 2017 total). Board 2019 Report, at 11. Based on current projections, all legacy appeals will receive a board decision by December 2022. *Id.* at 29.

board decision within 12 months because they failed to submit a substantive appeal, and therefore are not entitled to a board decision. *See* 38 U.S.C. § 7105(a), (d)(3) (2016).

Per *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-52 (2011), the rule of commonality requires that a proposed class show that their common question is capable of a "common answer," i.e., that an issue central to each claim can be resolved for the entire class "in one stroke." Here, given the various appellate experiences of the (up to) 141,783[11] putative class members, their common question—Have we experienced unreasonable or unconstitutional delay?—is not susceptible to one common answer. Rather, an "unreasonable delay" determination depends upon the details and context of each putative class member's appellate journey. *Martin*, 891 F.3d at 1345-47 ("unreasonable delay" inquiry must examine, inter alia, the context of the delay, the particular agency action at issue, and the effect of delay on a particular veteran).

[11] The Veterans Benefits Administration informed both parties here that the 217,918 pending legacy appeals involve 197,075 distinct claimants. Nevertheless, the number of legacy appeals that have not yet received a board decision is 141,783, *see supra* at n.10, and thus (per the proposed class definition) there would seem to be less than 141,783 putative class members.

Like *Wal-Mart*, which held that a lawsuit challenging millions of individual employment decisions was not capable of generating a common answer where the crucial legal inquiry required examination of the *reasons* for the *particular* employment decision, Appellants' question here requires an individualized inquiry of the *reasons* for a *particular* delay and cannot be resolved for all 141,783 putative class members "in one stroke." *Wal-Mart*, 564 U.S. at 350-52; *see Martin*, 891 F.3d at 1346 (there is no "hard and fast rule" with respect to "unreasonable" delay in the veterans benefits system). For similar reasons, it is not the case that the processing times associated with putative class members' various appeals can be "declared un[reasonable] only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360 (addressing FED. R. CIV. P. 23(b)(2)). Accordingly, as demonstrated in our original brief, the Veterans Court was correct to deny class certification here. *See* Appx6-13.

The AMA would seem to have no impact on this analysis, or—if anything—would push the proposed class even further from the *Wal-Mart* requirements. For instance, some putative class members have not received a board decision within 12 months of their NOD because they opted into the AMA system and chose not to pursue board review (or chose to pursue other appellate options before board review). When considering these putative class members, who are choosing their

own appellate path and are governed by an entirely different set of statutes and regulations than other members, any argument that the "unreasonable delay" question for the entire class can be resolved with one common answer simply does not compute. Similarly, because the putative class members are no longer all in the same appeals system, it is definitively not the case that their appellate experiences can be "declared un[reasonable] only as to all of the class members or as to none of them." *Id.*

Because Appellants have not demonstrated Veterans Court legal error, and the AMA does not change that fact, this Court should dismiss the appeal or affirm the Veterans Court's decision denying class certification.

CONCLUSION

For these reasons and the reasons stated in our briefs, we respectfully request that the Court dismiss the appeal or affirm the Veterans Court's decision.

Respectfully submitted,

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July 6, 2020

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 6th day of July, 2020, a copy of the foregoing Supplemental Brief of Respondent-Appellee was filed electronically.

☑ This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/ Martin F. Hockey, Jr.

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