No. 19-1094

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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

v.

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

On 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 Wong Pietsch, Judge Joseph L. Toth, Judge Margaret C. Bartley, Judge Mary J. Schoelen, Judge Michael P. Allen and Judge William S. Greenberg

UNOPPOSED BRIEF OF AMICUS CURIAE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM IN SUPPORT OF APPELLANTS CONLEY MONK, Jr, JAMES BRIGGS, TOM COYNE, WILLIAM DOLPHIN, JIMMIE HUDSON, SAMUEL MERRICK, LYLE OBIE, STANLEY STOKES, and WILLIAM JEROME WOOD, II SUPPORTING REVERSAL

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FORM 9. Certificate of Interest

Form 9
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Conley Monk, Jr., see attached for other parties v. Robert L. Wilkie

Case No. 19-1094

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ■ (amicus) ☐ (name of party)

Angela K. Drake

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
National Law Schools Veterans Clinic Consortium		

4. The names of all law firms and the partners or associates that appeared for the party or 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:

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

Claimants - Appellants

FORM 9. Certificate of Interest **Form 9**
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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Monk v. Wilkie, No. 15 - 1280 United States Court of Appeals for Veterans Claims

2/4/2019
Date

/s/ Angela K. Drake
Signature of counsel

Please Note: All questions must be answered

Angela K. Drake
Printed name of counsel

cc: _____

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IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

The National Law School Veterans Clinic Consortium ("NLSVCC") submits this brief in support of the position of the Appellants, Conley Monk, Jr., James Briggs, Tom Coyne, William Dolphin, Jimmie Hudson, Samuel Merrick, Lyle Obie, Stanley Stokes, and William Jerome Wood, II. The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.[1]

The NLSVCC is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. The Consortium's mission is, working with like-minded stakeholders, to gain support and advance common interests with the VA, U.S. Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country.

The NVLSCC exists to promote the fair treatment of veterans. Members of the NLSVCC work on a daily basis with veterans, advocating their claims in the backlogged VA disability system. Clients in the member clinics have died

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[1] The brief writers are identified in the signature block above. NLSVCC wishes to thank and acknowledge attorney Emmett Logan of Stinson Leonard LLP for his editing assistance. In addition, the following students in the Veterans Advocacy Clinic at Stetson University, College of Law, were instrumental in drafting this brief: Max Yarus, Mavic Francisco, Michelle Moretz, Mary Samarkos and Breanna Hernandez.

while waiting for a VA decision. Therefore, the NLSVCC is highly interested in seeing systemic change occur so that benefits are more quickly paid.

Counsel for Appellants and Counsel for the Secretary of Veterans Affairs have consented to the filing of this brief.

STATEMENTS PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and the Federal Circuit Rule 29(a), the NLSVCC states:

a) No party's counsel has authored this brief in whole or part;

b) No party or party's counsel has contributed money intended to fund the preparation or submission of this brief;

c) No other person has contributed money intended to fund the preparation or submission of this brief.

ARGUMENT

Federal Rule of Civil Procedure 23 governs class actions and is proper where the elements of the Rule are met. The Court of Appeals for Veterans Claims ("the Veterans Court") found that the "commonality" element as required by 23(a)(2) was not met in this case. *Monk v. Wilkie*, 30 Vet. App. 167 (2018) The Veterans Court further found Petitioners did not establish that the Secretary of the Department of Veterans Affairs (VA) refused to act on grounds that generally applied to the class, and therefore Petitioners could not satisfy Rule 23(b)(2). The proper application of the commonality requirement is addressed in the Appellant's brief and will not be repeated at length here.

This amicus brief first focuses on the history and purpose of subsection (b)(2) of Rule 23, which was specifically added in 1966 to facilitate class actions where systemic failures are at issue. Rule 23(b)(2) was designed to apply in actions alleging civil rights violations. As discussed below, the subsection is properly used in cases where plaintiffs allege the deprivation of constitutional and other statutory rights. This case is just such an action, as VA benefits are a constitutionally protected property interest. *Cushman v. Shinseki*, 576 F.3d 1290, 1297-1298 (Fed. Cir. 2009). Unreasonable delay, the gravamen of this case, unequivocally threatens this property interest. See, *Fusari v. Steinberg*, 419 U.S. 379, 388(1975) ["[T]he possible length of wrongful deprivation of [a property interest] is an important

factor in assessing the impact of the official action on the private interests."]

This amicus brief will next address key tenets in federal veterans benefits law, which should inform and guide the fact finder (here, the Veterans Court) in determining whether Rule 23 elements are met. Federal veterans benefits law is designed to be veteran-friendly. Key tenets in the non-adversarial, paternalistic veterans benefits system include the "duty to assist" a veteran in developing his or her claim, and the rule that the "benefit of the doubt" shall be given to the veteran when it comes to fact finding.

Finally, this amicus brief will demonstrate that other procedures, including precedential opinions, do not provide the relief our nation's veterans need and deserve. The Federal Circuit authorized the use of class actions in veterans cases in *Monk I.* Recently, the Federal Circuit recognized the utility of the class action device in cases brought by veterans challenging delay in the VA benefits system. *Ebanks v. Shulkin*, 877 F.3d 1037 (Fed. Cir. 2017) The Veterans Court erred when it failed certify a Rule 23 (b) (2) class here.

Argument

I. The History and Purpose of 23(b)(2) Supports Class Certification in this Case

The Petition raises the question of whether a delay of more than one year in

deciding an appeal of the Veteran Administration's ("VA") denial of a claim for disability benefits is a *per se* violation of veterans' rights (the "Merits Question"). Petitioners' Motion for Class Certification raises the question of whether the answer to the Merits Question is the same for all members of the putative class (the "Class Question"). The plurality opinion below skips the Class Question and instead concludes that the answer to the Merits Question is: "it depends." Even that answer, however, is apparently the same for each veteran. Yet the opinion concluded that a class action is not appropriate. This result is fundamentally inconsistent with the principles on which Rule 23(b)(2) is based.

In construing and applying Rule 23, the Supreme Court looks to "the historical models on which the Rule was based." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011). "'Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture." *Id.* (quoting *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 614 (1997)). The Advisory Committee Notes to the 1966 Amendment to the Rule also make that point. Advisory Committee Notes, 39 F.R.D. 69, 102 (1966). Rule 23(b)(2) is not limited to civil rights cases; it has been invoked in cases involving the vindication of constitutional rights. See, Wright, Miller and Kane, Fed. Prac.& Proc. §1776.1 (collecting cases)

Potts v. Flax, 313 F.2d 284 (5th Cir. 1963) is the first case that the Advisory Committee Notes cite as illustrative of those that provided the foundation for Rule 23(b)(2). *Potts* arose out of efforts to desegregate the Fort Worth public schools. The school board did not contest the named plaintiffs' right to individual relief. It argued, however, that "a class action was not appropriate since each student is admitted, assigned and transferred as an individual." 313 F.2d at 288. The Fifth Circuit rejected the argument in certifying the class, holding:

> Properly construed the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school. The peculiar rights of specific individuals were not in controversy. It was directed at the system-wide policy of racial segregation. It sought obliteration of that policy of system-wide racial discrimination.

Id. at 288-89.

Here, the purpose of Petitioners' action is not to achieve adjudication of specific, individual claims on a timely basis. The case-specific reasons why the adjudication of an individual claim was delayed, therefore, are not in controversy. The action is directed at a system-wide practice under which no claims are resolved on a timely basis. This case seeks the obliteration of system-wide delays that are so pervasive and so protracted that they rise to the level of a denial of the rights of the entire class.

Potts also illustrates why avoiding the Class Question in favor of a case-by-case determination of the Merits Question is harmful to the system and to the

veterans whose appeals drone on. In *Potts*, the school board contended that "the Court ought not to take any action until, as to any individual [African-American] students who might seek admission to formerly all-white schools, it was actually demonstrated that the School authorities would not fulfill their duties." 313 F.2d at 287. The Fifth Circuit rejected this argument, holding that a system-wide, *per se* rule against segregation was required. *Id.* at 288-89. It stated, moreover, that "to require a school system to admit the specific successful plaintiff [African-American] child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the class discrimination." *Id.* at 289.

Similarly, to require adjudication of unreasonable delay claims on an individual basis would contribute actively to a practice by which veteran rights are systematically ignored. Case-by-case relief would "result in no more than line-jumping without resolving the underlying problem of overall delay." *Ebanks v. Shulkin*, 877 F.3d 1037, 1040 (Fed. Cir. 2017). To restore the rights of all veterans, a system-wide, *per se* rule is required. That is what the Petition requests. In deciding the Merits Question without considering the Class Question, the plurality opinion ignores the historical fact that a request for a system-wide, *per se* rule is precisely the type of relief Rule 23(b)(2) was designed to accommodate.

The plurality found that Rule 23(b)(2) was not proper because some delay

may be reasonable, relating to VA's development of evidence for a claim. *Monk*, 30 Vet. App. at 181. The plurality also seized on Petitioner's proposal that the 12-month deadline could be waived if an injunction issued, if a veteran believed additional evidence was needed. The plurality suggested such a waiver undermines the efficacy of Rule 23(b)(2) relief. *Id.*

As Appellants suggest in Section IV of their brief, the plurality opinion impermissibly reached the merits with these observations. With regard to the Rule 23 certification analysis, the observations miss the mark. Every single class member need not be aggrieved by, or desire to challenge the defendant's conduct in order for one or more to seek relief under Rule 23(b)(2). *Hess v. Hughes*, 500 F. Supp. 1054 (D. Md 1980); *Edmondson v. Simon*, 86 F.R.D. 375, 382 (N. D. Ill. 1980). Rule 23(b)(2) requires only that defendant act or refuse to act on grounds that "apply generally" to the class. And, the fact that there is a factual dispute concerning whether the defendant acted on generally applicable grounds will not bar class certification. *Adames v. Mitsubishi* Bank, 133 F.R.D. 82,91 (E.D. N.Y 1985). Petitioners challenge unconscionable delay in the VA benefits system; the question is not "why" there is a delay in the system, but whether one exists that is unlawful and may be remedied by an injunction. Petitioner's request for a court order to issue Board decisions within one year of a Notice of Disagreement is class wide relief contemplated by Rule 23(b)(2).

II. The Unreasonable Delay Faced by Veterans Should be Addressed in the Class Action Context in Light of the High Degree of Solicitude Afforded to Veterans, as Required by Law.

The court should follow the sequence by which class questions are decided under Rule 23. The Rule requires: "At an early practical time after a person sues or is sued as a class representative, the court *must* determine by order whether to certify the action as a class action." F. R. Civ. P. 23(c)(1)(A) (emphasis added). Therefore, "an evaluation of the probable outcome on the merits is not properly part of the certification decision." Advisory Committee Notes to 2003 Amendment to Rule 23. In skipping the Class Question and deciding the Merits Question at the class certification stage, the plurality opinion departed from federal class adjudication practice. This departure runs counter to the pro-veteran nature of the VA's claims process because the statutory scheme requires the VA to assist veterans, giving them the benefit of the doubt. These tenets support class certification as described below.

A. The Pro-Veteran Statutory Scheme Includes the Duty to Assist, and to Give the Benefit of the Doubt to the Veteran

VA's adjudicatory "process is designed to function throughout with a high degree of informality and solicitude for the claimant." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (quoting *Walters v. Nat'l Assn. of Radiation Survivors*, 473 U.S. 305, 311 (1985)). A veteran faces no time limit for

filing a claim, and once a claim is filed, VA's process for adjudicating it at the regional office and the Board is designed to be *ex parte* and nonadversarial. 38 CFR §§ 3.103(a), 20.700(c) (2010). Two of the hallmarks to this pro-veteran system are the "duty to assist" and the "benefit of the doubt" rule.[2]

1. VA Has a Duty to Assist Veterans

VA has a statutory "duty to assist" veterans in developing the evidence necessary to substantiate their claims. 38 U.S.C. § 5103A (2012). Unlike civil litigation or other administrative claims, VA has an *affirmative* duty to help claimants pursue their claims against the federal government. This duty requires VA to help the veteran in developing his or her claim by locating pertinent information, scheduling medical exams, and informing the veteran of information needed to substantiate the claim. *See generally* 38 U.S.C. § 5103A (2012); 38 C.F.R. § 3.159 (2015); *see also Littke v. Derwinski*, 1 Vet. App. 90, 92 (1990); *McLendon v. Nicholson*, 20 Vet. App. 79, 86 (2006).

VA's unreasonable delay in adjudicating veterans claims is systemic as

[2] Other pro veteran features include a one-year time limit to initiate an appeal to the Board, 38 U.S.C. § 7105(b)(1), 38 CFR § 20.302(a), and the ability to reopen a previously-denied claim at any time by presenting "new and material evidence," 38 U.S.C. § 5108. Further, "final" decisions by a regional office or the Board are subject to challenge at any time based on "clear and unmistakable error." 38 U.S.C. §§ 5109A, 7111.

described in the statistics found in the Appellant's brief. VA's failure to timely adjudicate appeals violates - on a system-wide basis - the duty to assist. At its heart, this case demonstrates VA's failure to fulfill its statutory duty to the nation's veterans; not just the named Petitioners. When the average wait for a Board decision is six years, VA's malfeasance is not specific to any single veteran. The entire benefits system is riddled with unconscionable delay and a (b)(2) class is appropriate to address the violation of the duty to assist.

2. Veterans Receive the Benefit of the Doubt

Whenever positive and negative evidence on a material issue is roughly equal, VA must give veterans the "benefit of the doubt." 38 U.S.C. § 5107(b). The Veterans Court, the Federal Circuit, and the Supreme Court have consistently upheld this lower burden of proof for veterans. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 56 (1990) (recognizing that where there is equal amount of positive and negative evidence, the "tie goes to the runner" or in this case the veteran); *Ortiz v. Principi*, 274 F.3d 1361, 1365 (Fed. Cir. 2001) (when all the evidence is in and the decision is "too close to call," then the veteran will prevail); *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (VA system is a pro-claimant system, and when evaluating evidence, "VA must give the veteran the benefit of any doubt").

Evidence subject to the benefit of the doubt standard is not limited. Often, the Veterans Court applies the benefit of the doubt to relevant medical evidence.

Lathan v. Brown, 7 Vet. App. 359, 367–68 (1995) (reasoning that all medical evidence must be considered in order to properly weigh the benefit of the doubt); *see also Wise v. Shinskei*, 26 Vet. App. 517, 532 (2014) (explaining that VA "cannot demand a level of acceptance in the scientific community greater than the level of proof required by the benefit of the doubt rule" in the medical evidence it considers). The Veterans Court also recognizes that the benefit of the doubt doctrine applies to *any* evidence presented by the veteran and obtained by VA when deciding a veteran's claim for benefits. *Gilbert*, 1 Vet. App at 53.

B. The Pro-Veteran Statutory Scheme Requires that A 23(b)(2) Class be Certified Here

As the Supreme Court recognized in *Henderson*, when it found the 120-day appeal deadline was not jurisdictional in veterans cases, decisions must be made recognizing Congress' longstanding solicitude for veterans. There is a "thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Henderson*, 562 U.S. at 429. The policy of placing a "thumb on the scale" in favor of the veteran should have been applied by the fact finder—here the Veterans Court— in performing the Rule 23 analysis, including determining whether the commonality element is met and whether injunctive relief is in order because the VA has refused to act on appeals in a timely manner. Under the benefit of the doubt rule, the element of commonality and the remedy of injunctive relief

for systemic delay should have been decided in favor of class certification.

A survey of the various opinions on whether a class action is appropriate in this case is revealing on this point. A plurality of the Veterans Court believes a class cannot be certified to address unreasonable delay. *Monk v. Wilkie*, 30 Vet. App. 167 (2018). Chief Judge Davis believes 5 – 7 years is an unreasonable time to await a decision. (*Id* at 181-182) Four judges on the Veterans Court believe a class should be certified (*Id* at 184 – 205). The Federal Circuit in *Ebanks, infra,* held mandamus relief on a veteran by veteran basis is not appropriate, stating specifically the "underlying problem of overall delay" seems best addressed in a class action where the court can consider class wide relief. *Ebanks*, 877 F.3d 1037, 1040. Respectfully, in a system where solicitude is not a buzz word; where a duty to assist is incumbent on the agency; and where the benefit of the doubt is extended to the veteran in a close call, the Veterans Court should have found in favor of class certification.

III. Current Procedures Fail to Resolve Systemic Unreasonable Delay and Are Not Adequate Alternatives to Class Certification

This court has recognized that VA's current practices fail to resolve claims of undue delay. *Martin v. O'Rourke*, 891 F.3d 1338, 1349 (Fed. Cir. 2018) (Moore, J., concurring) ("[M]any veterans find themselves trapped for years in a bureaucratic labyrinth, plagued by delays and inaction."). Yet, in denying the Motion for Class Certification, the plurality opinion leaves veterans facing

unreasonable delay with only a mandamus option, which is problematic as described below. The class action device is especially important to veterans because even precedential decisions fail to provide meaningful relief to all veterans impacted by the decision. These procedures are poor alternatives to class action relief and are further discussed below.

A. Individual Adjudications Fail to Resolve Claims of Unreasonable Delay

In denying class certification below, the plurality opinion found persuasive the VA's argument that "certification of a broad class based on allegations of systemic delay . . . is inappropriate." *Monk v. Wilkie*, 30 Vet. App. at 179. This court, however, has already determined that individual adjudications concerning delay are inefficient.

The petitioner in *Ebanks* sought a writ of mandamus after two years of waiting for a hearing to be scheduled before the Board of Veterans' Appeal. *Ebanks, 877 F.3d* at 1038. While the appeal was pending here, the Board scheduled a hearing. The court held that this hearing mooted the petitioner's claim and deprived the court of jurisdiction. *Id.* at 1040. The court acknowledged the fact that "veterans desiring a Board hearing must endure at least a three-year delay in the processing of their claims" and "question[ed] the appropriateness of granting individual relief to veterans who claim unreasonable delays in [the] VA's first-come-first-served queue." *Id.* at 1040–41. Individual relief gives rise to "line-

jumping," "without resolving the underlying problem of overall delay." *Id.* at 1040 (citing *In re Barr Labs., Inc.,* 930 F.2d 72, 75 (D.C. Cir. 1991)). Relief for one veteran through mandamus becomes relief at the expense of another veteran whose claim must be cured through mandamus, which becomes relief at the expense of another veteran whose claim must be cured through mandamus. This cycle perpetuates an already broken system. The answer, as indicated by this court, is to review the issue of unreasonable delay in a class action context. *Id.*

B. Precedential Decisions Are Ineffective because VA Fails to Implement Them

The Court of Appeals for Veterans Claims has the power to issue precedential decisions impacting the rights of all veterans, when three of its judges or the en banc panel issue a decision. Precedential decisions do not help to solve the problem of delay if VA can simply disregard them, or implement them at a snail's pace. This risk is especially acute in light of the risk of a veteran passing away before stepping foot in the Veterans Court.[3]

Even when the Veterans Court decision is precedential (and many are not because they are single judge opinions), VA personnel implement the decisions belatedly, perpetuating aggregate injustice. For instance, in *DeLuca v. Brown*, the

[3] In 2016, approximately 1,600 veterans died before receiving a final decision; of those, about 1,100 sat idly for over one year prior to closure upon death. Office of Inspector Gen., Off. of Audits & Evaluations, *Veterans Benefits Administration Review of Timeliness of the Appeals Process* at v. (Mar. 28, 2018), https://www.va.gov/oig/pubs/VAOIG-16-01750-79.pdf.

Veterans Court found that VA was improperly failing to consider pain and weakness in addition to range of motion when rating certain types of joint-related conditions. 8 Vet. App. 202, 207 (1995). To comply with the Veterans Court's decision, medical examiners were required to consider these factors when evaluating the severity of the disabling condition during compensation and pension examinations. However, an audit found that seven years after the *DeLuca* decision, 61% of C&P examinations done on joints were non-compliant with the Veterans Court's holding. U.S. Gov't Accountability Office, *VA Could Enhance Its Progress in Complying with Court Decision on Disability Criteria* (Oct. 2005), https://www.gao.gov/assets/250/248132.pdf. According to the same report, by 2005, that number dropped to an overall average of 22%. *Id* at p. 12. Despite the improvement, some individual Veterans Health Administration networks remained non-compliant with the *DeLuca* criteria 57% of the time. *Id* at p. 21

Additionally, relief through precedential Veterans Court decisions has little chance of succeeding in the current system, which allows VA to defer its compliance with binding case law. In *Staab v. McDonald*, the Veterans Court took up a Board Decision dated December 6, 2013 and held - on April 8, 2016 – in a three judge precedential decision, that VA's regulation concerning reimbursement for emergency treatment was invalid. 28 Vet. App. 50, 55 (2016). While this decision should have protected other veterans from the harsh impact of the invalid

regulation, the Secretary filed a motion to stay the precedential effect of the decision on July 14, 2016 and appealed to the Federal Circuit on September 16, 2016. *See* CAVC Docket, Case No. 14-957. The VA then withdrew the Federal Circuit appeal close to one year later, on July 17, 2017 and on January 9, 2018 implemented a new regulation governing reimbursement for emergency treatment. *See* 83 FR 974-01, 2018 WL 318544.

In comments in the Federal Register relating to the new regulation, VA explained that it would dispense with normal notice and comment procedures, and create an interim final rule. In choosing this path, VA cited in the Federal Register Senator Rounds' frustration that VA failed to comply with the 2010 Emergency Care Fairness Act, and waited 6 years to receive an adverse Court decision - impacting "elderly veterans, many of whom live on fixed incomes and have limited financial resources to pay medical bills." *Id.* at *978.

DeLuca and *Staab* are not the only instances where VA has failed to act promptly on court directives. An update to the VA Adjudication Manual, the "M21-1," instructed by the Federal Circuit ruling in *Johnson v. Shulkin*, was not officially made by VA until over one year later. *Burton v. Wilkie*, 30 Vet. App. 286, 293 (2018) VA's "unhurried pace" was called out by the Veterans Court when it concluded, "the Secretary's delay of a year and counting in updating VA's materials to comply with a Federal Circuit decision is unacceptable and especially

egregious because it is not the first time that that VA has delayed in implementing a court directive." *Id.* at 292 (citing *Staab*). As cases like these illustrate, the VA system fails at times to implement judicial directives that have been resolved on an individual basis. As a result, veterans still in the queue waiting for claims to be decided have no relief. Class actions, in cases such as this, are the only way to ensure all veterans' rights are properly and timely protected.

Conclusion

For the reasons stated above, NLSVCC respectfully requests the Court to reverse the decision of the Veterans Court, and direct that a class action be certified.

/s/ Angela K. Drake
Angela K. Drake
Supervising Attorney and Instructor
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FORM 30. Certificate of Service

Form 30
Rev. 03/16

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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