No. 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 in case no. 15-1280, en banc

BRIEF OF AMICUS CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM IN SUPPORT OF APPELLANTS AND IN FAVOR OF 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 F. Monk, Jr., et al. **v.** Robert L. Wilkie

Case No. 2019-1094

CERTIFICATE OF INTEREST

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

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 Veterans Legal Services Program	None	None

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:

Covington & Burling LLP: Ranganath Sudarshan, John Niles, Kathryn Cahoy

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

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

1/24/2019
Date

/s/ Benjamin C. Block
Signature of counsel

Please Note: All questions must be answered

Benjamin C. Block
Printed name of counsel

cc: Counsel of Record

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STATEMENT OF INTEREST OF AMICUS CURIAE

National Veterans Legal Services Program is one of the nation's leading organizations advocating for veterans' rights. Founded in 1980, NVLSP is an independent, nonprofit veterans service organization recognized by the Department of Veterans Affairs and dedicated to ensuring that the government honors its commitment to our veterans. NVLSP prepares, presents, and prosecutes veterans' benefits claims before the VA, pursues veterans' rights legislation, and advocates before this and other courts. NVLSP has secured more than $5.2 billion in VA benefits for veterans and their families. NVLSP attorneys have significant experience serving as counsel for certified classes of veteran-plaintiffs.

NVLSP has long argued that the Veterans Court should employ class proceedings when VA action or inaction affects numerous claimants in a similar manner. The issues in this appeal lie at the core of NVLSP's experience and expertise. NVLSP has a strong interest in these issues and is well-positioned to address them.[1]

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[1] All parties to this case have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The Veterans Court's decision relies on erroneous (and insurmountable) interpretations of both the unreasonable delay standard and the commonality requirement for class actions and contravenes important public policies favoring the use of class actions to remedy systemic delay in the VA claims process.

First, the Veterans Court's commonality determination rested on its misinterpretation of the unreasonable delay standard to require the court to examine the VA's reason for the delay. Although the agency's reason might sometimes inform the court's unreasonable delay analysis, the law is clear that delay can be so egregious that it is unreasonable regardless of any explanation offered by the agency.

Second, the Veterans Court misinterpreted the commonality requirement of Federal Rule of Civil Procedure 23(a). Citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Veterans Court held that Appellants' proposed class—VA claimants who have been waiting over 12 months for a decision by the Board of Veterans' Appeals, Appx0002—did not satisfy commonality because Appellants did not show that there was a common reason for the delay they experienced. But commonality

does not require showing a common reason, and neither *Wal-Mart* nor other cases interpreting Rule 23(a) support imposing such a requirement. To the contrary, there is an extensive body of caselaw certifying class actions based on systemic agency delay without regard to the agency's proffered reasons for the delay.

Third, the Veterans Court's decision is contrary to important public policies favoring access to class actions to remedy the VA's systemic delay. Congress has created a "strongly and uniquely pro-claimant" veterans benefits system to care for those who served their country in uniform. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). But the VA's systemic delays, causing veterans to wait more than five years for their appeals to be decided, expose veterans to financial hardship, homelessness, and further physical and emotional harm. This is unacceptable. The best remedy for the extraordinary delays in the veterans benefits system is to empower veterans to bring class actions, which are superior to individual mandamus petitions in terms of efficiency, efficacy, and access to justice. By erecting a high barrier to class actions based on VA delay, the Veterans Court's decision is contrary to these important public policies.

ARGUMENT

I. The Veterans Court Misinterpreted the Unreasonable Delay Standard.

The Veterans Court's misguided commonality determination rested on its erroneous interpretation of the standard for Appellants' underlying unreasonable delay claims. The Veterans Court held that "before this Court may conclude that VA's adjudication of the putative class members' appeals has been unreasonably delayed under [*Telecommunications Research and Action Center v. F.C.C. ("TRAC")*, 750 F.2d 70 (D.C. Cir. 1984)], the Court must examine VA's explanation for the delay and weigh this explanation against other factors." Appx0008. This is incorrect. Although the agency's reason for delay may in some cases inform whether a delay is unreasonable, it need not be part of the analysis in every case. In many cases, courts have found unreasonable delay without regard to the agency's proffered reason for delay. Appellants have argued that this is just such a case.

Appellants' claim is under 38 U.S.C. § 7261(a)(2), which authorizes the Veterans Court to "compel action of the Secretary unlawfully withheld or unreasonably delayed." In *Martin v. O'Rourke*, 891 F.3d 1338 (Fed. Cir. 2018), this Court adopted the standard set out in *TRAC* "as the

appropriate standard for the Veterans Court to use in evaluating mandamus petitions based on alleged unreasonable delay," both under the statute and due process. *Id.* at 1348–49. *TRAC* identified six factors that inform whether agency delay is unreasonable:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Id. at 1344–45 (internal quotation marks omitted) (quoting *TRAC*, 750 F.2d at 80).

The agency's proffered reason for the delay is *not* one of the *TRAC* factors. Although the Veterans Court cited *Martin* for the proposition that the first *TRAC* factor, the "rule of reason," requires the court to consider the agency's reason for the delay, *Martin* does not so hold. *Martin* instructed the Veterans Court to consider the VA's delay in the context of "the particular agency action for which unreasonable delay is alleged[]"

because "more complex and substantive agency actions take longer than purely ministerial ones." *Id.* at 1345–46. For instance, it (should) naturally take longer for the Board to decide an appeal than for the Regional Office to complete the ministerial task of certifying a veteran's appeal to the Board. *Martin* did not hold, however, that the Veterans Court must always consider the VA's reason for the delay in determining whether the delay is unreasonable.

This is consistent with the decisions of other courts indicating that a delay can be so long that no explanation excuses it. For instance, *TRAC*'s companion case, *Air Line Pilots Association, International v. Civil Aeronautics Board*, 750 F.2d 81 (D.C. Cir. 1984), held that the agency had unreasonably delayed in adjudicating the applicants' claims for benefits regardless of its reasons for the delay. At issue was the Civil Aeronautics Board's delay in adjudicating applications for unemployment assistance brought by former airline industry employees. Congress had tasked the agency with resolving whether an applicant was entitled to benefits because she had lost her job primarily due to deregulation. An association representing a group of applicants sued the agency, arguing

that a five-year delay in adjudicating their claims for unemployment assistance constituted unreasonable delay.

Applying the *TRAC* unreasonable delay standard, the D.C. Circuit reasoned that while "[e]ach case will present its own slightly different set of factors to consider," "a five year delay in adjudicating claims for a form of unemployment assistance payments would be difficult under *any* set of circumstances." *Id.* at 86 (emphasis in original). The court consequently held that the agency had unreasonably delayed in adjudicating the applicants' claims for benefits regardless of its justification for the delay.

Similarly, *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980), cited by *TRAC*, held that the FCC's four-year delay between the filing of tariff revisions and its final decision was unreasonable without considering the agency's justification for the delay. *TRAC*, 750 F.2d at 80 (citing *MCI*, 627 F.2d at 324–25).

Indeed, in *TRAC* itself, although the court did not decide whether the FCC's delay warranted mandamus in light of the agency's assurances that it would expeditiously resolve the pending claims, the court's unreasonable delay analysis focused on the fact that the FCC had delayed

"nearly two years" and "almost five years" in resolving petitioners' reimbursement claims. *Id.* at 80–81. The court did not address the agency's justification for these delays.

The cases that this Court cited in *Martin* are to the same effect. To explain the rule of reason, *Martin* relied on *In re A Community Voice*, 878 F.3d 779 (9th Cir. 2017). There, the Ninth Circuit considered a mandamus petition seeking to compel the Environmental Protection Agency to act upon a previously granted rulemaking petition after an eight-year delay. Applying the *TRAC* factors, the court focused on the fact that "EPA's delay here is into its eighth year, and EPA has not offered a 'concrete timetable' for final action, but only speculative dates four and six years in the future when it might take final action." *Id.* at 787. Without weighing any explanation from the EPA regarding the reason for the delay, the court held that "the clear balance of the *TRAC* factors favors issuance of the writ." *Id.*

Furthermore, the Veterans Court itself has recognized that delay can be so long that it is unreasonable regardless of the agency's proffered justification. In *Erspamer v. Derwinski*, 1 Vet. App. 3 (1990), the Veterans Court applied the *TRAC* standard and held that a ten-year delay in

resolving a veteran's claim for benefits was unreasonable. The court found that "[w]hile there is no absolute definition of what is reasonable time, we know that it may encompass 'months, occasionally a year or two, but not several years or a decade.'" *Id.* at 10 (quoting *Cmty. Nutrition Inst. v. Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985) and *MCI*, 627 F.2d at 340); *see also In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (holding that FERC's "six-year-plus delay is nothing less than egregious" because "a reasonable time for agency action is typically counted in weeks or months, not years"); *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 491 (3d Cir. 1980) ("Whatever its internal problems, the Board has the power to implement regulations that would accelerate the agency review process. Four years is totally out of phase with the requirements of fairness."). Regardless of the VA's potential justifications, the extraordinary duration of the delay led the *Erspamer* court to find it unreasonable.

Here, Appellants have alleged that the VA's delay in adjudicating their claims is unreasonable regardless of VA's potential explanations. When it decides Appellants' claims on the merits, the Veterans Court may agree, consistent with the decisions discussed above.

Other class action mandamus petitions further illustrate how delay can be unreasonable without regard to the agency's explanation. In *Godsey v. Shulkin*, Vet. App. No. 17-4361, a putative class of veterans have been waiting for two years or more for Regional Offices to certify their appeals by filing VA Form 8, a simple, two-page document requiring only routine information about their claims. Completion of this form should take no more than a few hours. *VA Manual M21-4*, Appx. B, § III, EP 070 (May 25, 2005)[2]; *see also Martin*, 891 F.2d at 1349–50 (Moore, J., concurring) (noting that certification 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").

At some point, delay "stretche[s] the 'rule of reason' beyond its limits" and is unreasonable regardless of the VA's potential explanations. *In re Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc.*, 798 F.3d 809, 814 (9th Cir. 2015). The decision below, if not reversed, could operate as a barrier to veterans ever obtaining class relief in a delay case.

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[2] https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000011474/Appendix%20B.%20End%20Product%20Codes%20and%20Work-Rate%20Standards%20for%20Quantitative%20Measurements.

II. The Veterans Court Misinterpreted the Rule 23 Commonality Standard.

The Veterans Court also misinterpreted *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and the commonality requirement of Federal Rule of Civil Procedure 23. The Veterans Court believed that Appellants had not presented a "common question for the petitioners' and putative class's cause of delay, the answer to which 'will resolve an issue that is central to the validity of each one of the [class member's] claims,'" because they needed to show not only that they faced a common delay, but also that there was a common reason for that delay. Appx0012 (quoting *Wal-Mart*, 564 U.S. at 350). This is contrary to *Wal-Mart* and other cases interpreting Rule 23(a).

Under Rule 23(a)(2), a party may sue on behalf of all members of a class if "there are questions of law or fact common to the class." Even "a single common question will do." *Wal-Mart*, 564 U.S. at 359 (internal quotation marks and alterations omitted). In *Wal-Mart*, the Supreme Court clarified that this common question must be "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. Commonality, that is, requires "common answers apt

to drive the resolution of the litigation." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009) (emphasis omitted)).

Even after *Wal-Mart*, though, the bar to establish commonality "is not high." *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 397 (3d Cir. 2015). Courts have "acknowledged commonality to be present even when not all members of the plaintiff class suffered an actual injury, when class members did not have identical claims, and, most dramatically, when some members' claims were arguably not even viable." *Id.* (citations omitted). Contrary to the rationale of the decision below, "as long as all putative class members were subjected to the same harmful conduct by the defendant, Rule 23(a) will endure many legal and factual differences among the putative class members." *Id.*

Rule 23(a)'s commonality requirement is distinct from the far more demanding predominance standard required for damages class actions under Rule 23(b)(3) but not for injunctive relief class actions under Rule 23(b)(2). Predominance requires that questions of law or fact common to class members "predominate over any questions affecting only individual members," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997)

(internal quotation marks omitted), and demands "a further inquiry … into whether the common issues can profitably be tried on a classwide basis, or whether they will be overwhelmed by individual issues," *Johnson v. Nextel Commc'ns, Inc.*, 780 F.3d 128, 138 (2d Cir. 2015). Such an inquiry has no place in evaluating commonality, which requires only "a single common question" that is "capable of classwide resolution." *Wal-Mart*, 564 U.S. at 350, 359.

Here, Appellants have identified a common question: Whether there is "any outer bound beyond which the VA's delay in providing decisions on disability benefits appeals" constitutes unreasonable delay under *TRAC* and due process, regardless of the VA's reason for delay. Appellants' Br. 36. This common question is "capable of classwide resolution"—the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350.

The Veterans Court, citing *Wal-Mart*, held that Appellants did not satisfy commonality because they did not identify a common reason for the VA's delay. But *Wal-Mart* does not require this showing. *Wal-Mart* addressed "one of the most expansive class actions ever," consisting of 1.5

million female employees bringing Title VII claims based on discretionary employment decisions by managers in 3,400 Wal-Mart stores across the country. 564 U.S. at 342. The Supreme Court held that the class failed to satisfy commonality because the putative class members did not advance a common contention capable of classwide resolution. Specifically, they lacked "a common answer to the crucial question *why was I disfavored*." *Id.* at 352. Although "the crux of [a Title VII claim] is 'the reason for a particular employment decision,'" the *Wal-Mart* plaintiffs attempted to sue "about literally millions of employment decisions at once[] [w]ithout some glue holding the alleged reasons for all those decisions together." *Id.* In other words, the *Wal-Mart* plaintiffs needed to show a common reason for their adverse employment decisions because discriminatory intent was an element of each class member's Title VII claim.

Here, by contrast, as explained above, a court can find that an agency's delay is unreasonable without regard to the agency's reason for its delay. The unreasonable delay claims here are therefore distinguishable from the Title VII claims in *Wal-Mart*. *See, e.g.*, *DL v. D.C.*, 860 F.3d 713, 725 (D.C. Cir. 2017) ("*Wal-Mart*'s analysis of commonality in the Title VII context [] has limited relevance here.").

Instead of recognizing the common question presented by Appellants, which should have been the end of the inquiry, the Veterans Court proceeded to answer the question on the merits. The Veterans Court found that there is not "any outer bound beyond which the VA's delay in providing decisions on disability benefits appeals" constitutes unreasonable delay, regardless of the VA's reasons, Appellants' Br. 36, because it believed that VA's reason for delay is *always* relevant to whether the delay is unreasonable. This was improper. Although a court's commonality determination "must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim,'" Rule 23 does not grant courts "license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) (quoting *Wal-Mart*, 564 U.S. at 351). "[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision," Fed. R. Civ. P. 23, Advisory Committee's 2003 Note, and a party seeking class certification need not show that the common questions "will be answered, on the merits, in favor of the class," *Amgen*, 568 U.S. at 459. Questions going to the merits of the putative class's claims "may be considered to the extent—but only to the extent—that they are

relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 466.

The Veterans Court's insistence on finding a common reason for delay also led it to focus improperly on the individual differences among class members and to allow these differences to obscure the common question presented by the class. In doing so, it disregarded the commonality standard and instead effectively imported the more demanding (and inapplicable) predominance requirement that "the common issues can profitably be tried on a classwide basis" and will not "be overwhelmed by individual issues." *Johnson*, 780 F.3d at 138. This was error.

The Veterans Court's decision is inconsistent with the extensive body of caselaw recognizing the viability of systemic delay class actions, even post-*Wal-Mart*. As courts across the country have held, a purported class alleging systemic delay can satisfy commonality even without alleging a common reason for the delay. *See, e.g.*:

- *Parsons v. Ryan*, 754 F.3d 657, 665 (9th Cir. 2014) (commonality satisfied based on "extensive and unreasonable delays" in providing medical care to prisoners);

- *Heritage Operations Grp., LLC v. Norwood,* 322 F.R.D. 321, 325 (N.D. Ill. 2017) (commonality satisfied based on the defendant's "failure to timely process applications and provide Medicaid benefits" because "[d]efendant's alleged inaction is at the heart of each claim in the complaint and is common to all class members" (internal quotation marks and alterations omitted));
- *Murphy v. Piper*, 2017 WL 4355970, at *8 (D. Minn. Sept. 29, 2017) (certifying class of plaintiffs who claimed to have been improperly denied government services because "[u]nlike the plaintiffs in *Wal-Mart*, Plaintiffs here do not focus their claims on localized decisionmakers, so the Court does not need to identify evidence of specific policies or practices to support the commonality of the class-wide claims");
- *Exley v. Burwell*, 2015 WL 3649632, at *4 (D. Conn. June 10, 2015) ("There is no debate that the proffered class members share common questions of fact—they are Medicare beneficiaries who were denied benefits and who did not receive a decision from the ALJ within 90 days of requesting one.");

- *Leiting-Hall v. Winterer*, 2015 WL 1470459, at *6 (D. Neb. Mar. 31, 2015) ("Plaintiffs have submitted evidence that all applicants for SNAP benefits are exposed to the same harm—the failure of HHS to process their applications in a timely fashion due to its current procedures and policies.");
- *Scott v. Clarke,* 61 F. Supp. 3d 569, 587 (W.D. Va. 2014) (commonality satisfied where the plaintiffs alleged systemic delay in treating sick inmates based on general policies and practices of prison).

By the same token, courts considering proposed systemic delay class actions have rejected defendants' attempts to defeat a showing of commonality by arguing that the varying reasons for delay require individual determinations. *See, e.g.*:

- *Gonzalez v. Sessions*, 325 F.R.D. 616, 623 (N.D. Cal. 2018) (rejecting argument that individualized determinations were required because "this argument goes to the merits of Plaintiffs' claim, not whether the commonality requirement is met");
- *Koss v. Norwood*, 305 F. Supp. 3d 897, 918 (N.D. Ill. 2018) (rejecting argument that claims required "member-specific inquiries into the

reasons for the delay of each application" because the class "need not show predominance");

- *Abdi v. Duke*, 323 F.R.D. 131, 141 (W.D.N.Y. 2017) (rejecting argument that the class members' claims "require individualized fact determinations" because "[t]he conclusion that the [defendant] is failing to [timely] provide required bond hearings would resolve the claims of those individuals");
- *Reid v. Donelan*, 297 F.R.D. 185, 190 (D. Mass. 2014) (holding that putative class of aliens detained for more than six months without an individualized bond hearing satisfied commonality because the different factual circumstances among putative class members were "irrelevant to the court's ruling on the issue of class certification" and the class presented a common legal issue: whether detention beyond six months was unreasonable);
- *P.V. ex rel. Valentin v. Sch. Dist. of Phila.*, 289 F.R.D. 227, 233–34 (E.D. Pa. 2013) ("Defendants fail to recognize, however, that the central tenet of Plaintiffs' Complaint alleges a systemic failure, not a failure of the policy as applied to each member individually.").

In short, courts throughout the country have certified class actions based on systemic delay even though the reason for the delay faced by each class member might differ. The Veterans Court's commonality determination departs from these consistent decisions and should be reversed.

III. The Veterans Court's Decision Contravenes Important Public Policies Favoring Access to Class Actions to Remedy the VA's Systemic Delay.

The VA's systemic delay harms veterans, and class actions are far superior to individual mandamus petitions as a mechanism to remedy this injury. Public policies—in particular, the Congressional policy in favor of veterans and judicial concerns of efficiency and access to justice—therefore favor making class actions available to veterans to challenge the VA's systemic delay. Because the Veterans Court's commonality determination would make it exceedingly difficult for veterans to form class actions based on the VA's unreasonable delay, it is inconsistent with these important public policies.

A. The VA's systemic delay significantly harms veterans.

Veterans with claims in the appeals process face "[m]assive wait times" that Congress has deemed "unacceptable." 163 Cong. Rec. E716-

05, E717 (2017) (statement of Rep. Smith); 163 Cong. Rec. H4457-01, H4465 (2017) (statement of Rep. Esty). When this case was before this Court in 2017, the Court observed that "veterans face, on average, about four years of delay between filing [a Notice of Disagreement] and receiving a final Board decision," including an average of 330 days to receive a Statement of the Case ("SOC") and 681 days for the VA to certify their appeals to the Board. *Monk v. Shulkin*, 855 F.3d 1312, 1317–18 (Fed. Cir. 2017). The VA's delays have since worsened: When this Court addressed this issue in *Martin v. O'Rourke*, 891 F.3d 1338 (Fed. Cir. 2018), it found that "the average time from the filing of a Notice of Disagreement to issuance of a BVA decision is over five years," including an average of 500 days for veterans to receive the SOC and 773 days for the VA to certify their appeals to the Board. *Id.* at 1341–42 (also noting that it took an average of 321 days for the VA to transfer the certified appeal to the Board for docketing); *see also* U.S. Dep't of Veterans Affairs, Bd. of Veterans' Appeals, Annual Report for Fiscal Year 2017[3] ("For appeals decided in FY 2017, the average length of time between the filing of an

[3]http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2017AR.pdf.

appeal … at the [Regional Office] and the Board's disposition of the appeal was 2,073 days," i.e., 5.7 years.). These delays can be even longer for veterans who exercise their statutory right to request a hearing before the Board: "the average delay just to schedule a hearing is three years." *Ebanks v. Shulkin*, 877 F.3d 1037, 1038 (Fed. Cir. 2017).

According to a VA report issued in January 2016, of the 400,000 veterans with pending appeals, 80,000 have appeals older than 5 years, and 5,000 have appeals older than 10 years. U.S. Dep't of Veterans Affairs Ctr. for Innovation, *Veteran Appeals Experience: Voices of Veterans and their Journey in the Appeals System*, at 5 (Jan. 2016).[4] As Judges Allen and Greenberg stated in their opinions below, these delays are "staggering" and "unconscionable." Appx0018 (Allen, J., concurring in part and dissenting in part); Appx0036 (Greenberg, J., dissenting); *see also* Jacob B. Natwick, Note, *Unreasonable Delay at the VA: Why Federal District Courts Should Intervene and Remedy Five-Year Delays in Veterans' Mental-Health Benefits Appeals*, 95 Iowa L. Rev. 723, 737–44 (2010).

[4] https://www.in.gov/dva/files/Vet_Appeals_Experience_(Voices_of_Veterans)_-_Jan2016.pdf.

The VA's extraordinarily long delays impose substantial injury on veterans. Soon after this country's founding, Chief Justice Jay observed that "many unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one." *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 note (1792). Sadly, the same remains true today: Just last year, this Court noted that "many veterans depend on these disability benefits for basic necessities, such as food, clothing, housing, and medical care." *Martin*, 891 F.3d at 1347.

In her concurrence in *Martin*, Judge Moore explained that "even when veterans win on appeal, they have lost years of their lives living in constant uncertainty, possibly in need of daily necessities such as food and shelter, deprived of the very funds to which they are later found to have been entitled." *Id.* at 1349–50 (Moore, J., concurring) (noting that veterans' benefits are "often life-sustaining funds"). As Judge Greenberg stated in dissent in *Rosinski v. Shulkin*, 29 Vet. App. 183 (2018): "The difference between receiving a lawful decision at the RO and receiving an erroneous decision requiring an appeal is life changing for many veterans. In that waiting period, how are a disabled veteran's bills to be paid?

How are their families going to be cared for?" *Id.* at 196 (Greenberg, J., dissenting). Indeed, the VA itself has found that "[t]he length and labor of the [appeals] process takes a toll on Veterans' lives" and that "[d]elays have a palpable, debilitating effect on Veterans' health and quality of life," manifesting in "symptoms even in the earliest stages of the process." *Veteran Appeals Experience* at 11–12.

The harm veterans suffer due to the VA's delay is exacerbated by their often-vulnerable position. The VA estimated that there were 140,000 homeless veterans in 2010, and in 2012, there were more than 1.4 million veterans living in poverty, and more than one million more at risk of slipping into poverty. U.S. Dep't of Veterans Affairs, National Center for Veterans Analysis and Statistics, *Profile of Sheltered Homeless Veterans for Fiscal Years 2009 and 2010*, at 2 (Sept. 2012)[5]; Legal Servs. Corp., 2012 Annual Report 19–20.[6] In 2017, for the first time in several years, the number of homeless veterans increased. *See* U.S. Dep't of

[5] https://www.va.gov/vetdata/docs/SpecialReports/Homeless_Veterans_2009-2010.pdf.

[6] https://www.lsc.gov/sites/default/files/LSC/lscgov4/AnnualReports/2012%20Annual%20Report_FINAL-WEB_10.1.pdf.

Housing and Urban Dev., Office of Community Planning and Development, *The 2017 Annual Homeless Assessment Report (AHAR) to Congress: Part I: Point-in-Time Estimates of Homelessness* (Dec. 2017).[7] To make vulnerable veterans wait more than five years for a decision on their appeal is inconsistent with constitutional guarantees of due process, and Congress and the VA therefore agree that the "VA's current appeals process is broken." H.R. Rep. No. 115-135, at 5 (2017), 2017 U.S.C.A.N.N. 97, 101; *see Veteran Appeals Experience* at 5.

The amicus briefs before the Veterans Court provided several examples of the extraordinary harm that veterans suffer as a result of the VA's delay. As Judge Allen noted below, "We should never forget the human faces associated with the abstract concept of administrative delay. Such delays for veterans seeking benefits can have profoundly significant real-world implications." Appx0017, n.45 (Allen, J., concurring in part and dissenting in part). The following example illustrates the financial hardship, homelessness, threats to safety, and increased health problems that veterans face while waiting for their appeals to be resolved:

[7] https://www.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf.

> As his eventual 100% disability rating reflects, A.H. was unable to work while he waited approximately two years for the VA to correct errors made when denying his claim for mental health disability benefits. He did not have enough money to cover his basic needs and became homeless and estranged from his family. He feared for his personal safety as he tried to navigate temporary solutions to his homelessness. His financial, housing, and safety concerns also prevented him from caring for and managing pain caused by a back injury that originated in his service. After winning his appeal and accessing his benefits, A.H. was able to obtain housing and briefly care for his father before his father passed away.

Appx1934–1935; *see also* Appx1935 (describing how veteran E.T. "wait[ed] 15 years for the VA to resolve his appeals and grant 100% disability payments," during which his "severe back and leg pain" prevented him from working and caused him to "spen[d] much of the time homeless"); Appx1936–1937 (explaining that veteran C.S. "has waited over eight years for a decision on his claim for disability benefits related to major depressive disorder and PTSD," that "[h]is home is in foreclosure," and that due to the VA's delay in deciding his appeal, he "will likely lose his home").

Another example illustrates veterans' hopelessness and emotional strain from the wrongful denial of benefits and the protracted appellate process:

> While waiting for a decision on his appeal, C.G. pushed himself to look for work he could manage in spite of his PTSD but was turned down repeatedly. Desperate for financial support, C.G. also despaired over clear errors that had been made in evaluating his PTSD—though he had been diagnosed with PTSD and received substantial VA inpatient care for his condition, a C&P examiner reported that C.G. did not have PTSD and did not respond to VA requests for consideration of C.G.'s prior care and diagnosis. As his appeal dragged on, he became suicidal in the face of unrelenting challenges and obstacles and entered emergency inpatient care.

Appx1938; *see also* Appx1939 ("The eight year delay in C.S.'s case has caused him significant psychological harm. He was admitted to the VA psychiatric ward in 2015 and in 2017 in large part due to the stresses caused by his delay, despite having diligently gone to therapy … .").

Finally, the following example shows how the VA's delay hurts veterans' opportunity to receive a fair adjudication of their claims because of outdated evidence, witnesses' fading memories, and the difficulty in looking back several years to make a retrospective rating determination:

> In S.M.'s case, the VA failed to acknowledge or discuss lay and medical evidence presented in 2015, which showed that she experienced severe symptoms of PTSD and substantial social and occupational impairment. S.M.'s appeal of her 50% rating as too low is currently still pending, over two years later, meaning that one of the easiest and most efficient options for fixing her appeal—requesting an addendum [from the VA examiner] to address overlooked evidence and dysfunction—is now well out of reach. This also makes development on remand much more difficult.

Appx1940.

In short, veterans face financial hardship, homelessness, and physical and emotional harm while they wait more than five years for their appeals to be decided. These harms are exacerbated by the fact that veterans are often already in a vulnerable position. Yet these veterans "protected this country and the freedoms we hold dear [and] were disabled in the service of their country; the least we can do is properly resolve their disability claims so that they have the food and shelter necessary for survival." *Martin*, 891 F.3d at 1352 (Moore, J., concurring).

B. Class actions are superior to individual litigation to remedy VA's systemic delay.

Class actions are the best mechanism to remedy the VA's systemic delay in terms of efficiency, efficacy, and access to justice. In contrast, individual mandamus petitions are normally quickly mooted by the VA, and precedential decisions are rare and difficult to enforce. It is therefore imperative that class actions be accessible to veterans to challenge VA's unreasonable delay.

The class action is fundamentally a tool of equity, born of the necessity of providing a procedural device for large groups of claimants with a united interest. *See* Fed. R. Civ. P. 23; *Hansberry v. Lee*, 311 U.S. 32, 42

(1940); Alan Wright et al., *History and Purpose of the Class Action*, 7A Fed. Prac. & Proc. Civ. § 1751 (3d ed. 2018). Class actions offer numerous advantages, including: (i) providing an avenue for claimants to share the costs and burdens of a lawsuit; (ii) deterring misconduct by exposing defendants to the risk of liability, thereby assisting in the enforcement of public policies; (iii) promoting judicial efficiency by eliminating the need for piecemeal adjudication; and (iv) bolstering the legitimacy of the legal system by ensuring consistent outcomes. *See generally* William B. Rubenstein, 1 Newberg on Class Actions §§ 1:7–1:10 (5th ed. 2018); *see also Monk*, 855 F.3d at 1320 (class actions "promot[e] efficiency, consistency, and fairness, and improv[e] access to legal and expert assistance by parties with limited resources").

Injunctive relief class actions are especially effective tools to remedy systemic problems. "The writers of Rule 23 intended that subsection (b)(2) foster institutional reform by facilitating suits that challenge widespread rights violations of people who are individually unable to vindicate their own rights." *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 64 (3d Cir. 1994). As a result, "the proper role of (b)(2) class actions

[is] remedying systemic violations of basic rights of large and often amorphous classes." *Id.*

And class actions are particularly important to remedy injuries to the recipients of government benefits: "The use of the class action device on behalf of recipients of government benefits is a common and necessary means of challenging unfair statutes, regulations and policies where the individual claimant is unlikely to bring suit because of poverty and the inaccessibility of judicial relief as an economic matter." 1 Newberg on Class Actions*, supra*, at § 23:1; *see also* Case Law Developments, 29 Mental & Physical Disability L. Rep. 164, 273 (2005).

It follows that class actions are extremely important to veterans, who are entitled to vital government benefits for service-related injuries, yet often face systemic delays in receiving those benefits. *See supra* § III.A. Veterans' need for the class action mechanism is especially acute because they disproportionately face health and financial instability, and this instability is exacerbated by the VA's unreasonable delay in processing their appeals. This Court has therefore recognized that the delay faced by veterans is "best addressed in the class-action context, where the court could consider class-wide relief." *Ebanks*, 877 F.3d at 1040.

Empowering veterans through class actions is consistent with the "uniquely pro-claimant" veterans benefits system that "reflects the clear congressional intent to create an Agency environment in which VA is actually engaged in a continuing dialog with claimants in a paternalistic, collaborative effort to provide every benefit to which the claimant is entitled." *Evans v. Shinseki*, 25 Vet. App. 7, 16 (2011); *see also Hodge*, 155 F.3d at 1362 ("Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans' benefits.").

This pro-veteran policy is manifest throughout the veterans benefits system. *See, e.g.*, *Harris v. Shinseki*, 704 F.3d 946, 948 (Fed. Cir. 2013) (requiring VA to "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits," including "by determining all potential claims raised by the evidence" (citing *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)). Making class actions accessible to veterans harmed by the VA's unreasonable delay is a natural application of Congress's pro-veteran policy.

Absent class actions, veterans would have no effective mechanism for remedying the VA's systemic delay. Individual mandamus petitions are ineffective because the VA usually moots the petitions by promptly

providing the requested relief. *See, e.g.*, *Monk*, 855 F.3d at 1321 (citing *Young v. Shinseki*, 25 Vet. App. 201, 215 (2012))*; see also Johnson v. Wilkie*, 2018 WL 5279378 at *1 (Vet. App. 2018) (veteran filed mandamus petition in July 2018 to compel the VA to readjudicate claims from 2014, but the case was rendered moot by the VA's action in August 2018). Even if an individual mandamus petition survives and is granted on the merits, moreover, this "may result in no more than line-jumping without resolving the underlying problem of overall delay." *Ebanks*, 877 F.3d at 1039–40.

The availability of precedential decisions is also insufficient to remedy the VA's systemic delay. The Veterans Court issues few precedential decisions each year. *See* James D. Ridgway, Barton F. Stichman & Rory E. Riley, *"Not Reasonably Debatable": The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 Stan. L. & Pol'y Rev. 1, 18 (2016). In the rare event that a precedential decision is issued, the "VA provides little transparency regarding how it is effecting [the Veterans Court's] decisions. The [Veterans] Court is often left to wonder

whether its decisions are actually applied quickly, correctly, and uniformly, which is especially troubling for a system wrought with delay and bureaucracy." *Rosinski*, 29 Vet. App. at 197 (Greenberg, J., dissenting).

Precedential decisions are also deficient because they must be enforced through individual actions. As explained by the Board's former chairman:

> The precedent panel or en banc decisions of the court, announcing important changes in interpretation of the law, affect each of the thousands of cases pending at any given time and may require returning to "square one" with all affected cases. Occasionally, the process must be repeated twice in the same case when the court reverses itself on further review.

Charles Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs' Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 Maine L. Rev. 26, 34 (1994). The many lengthy, expensive, and overlapping individual litigations that would be required to enforce a precedential decision would be far less efficient than a class action and would make it much harder for veterans to reap the benefits of an advantageous decision. *See* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992, 2052 (2012) ("[C]lass litigation to resolve many categories of veterans'

claims before the VA would be more feasible than the current system, which ordinarily requires years of individual litigation over common claims.").

For instance, the Veterans Court's precedential decision in *Colvin v. Derwinski*, 1 Vet. App. 171 (1991), *rev'd on other grounds*, *Hodge v. West*, 155 F.3d 1356 (1998), held that "BVA panels may consider only independent medical evidence to support their findings." *Id.* at 175. This decision sought to end the practice of certain BVA judges, some of whom were physicians, of relying on their own medical knowledge in deciding veterans' appeals. Although *Colvin* attempted to effect systemic change in the VA appeals process, it did not achieve that result because many veterans who might have benefited from its holding were not aware of the decision and thus did not take steps to enforce it in their particular cases. If *Colvin* had been a class action, it would have been far likelier to effect the required systemic change.

CONCLUSION

Systemic agency delay can present a common question capable of resolution on a classwide basis. Class actions are appropriate to remedy such unreasonable delay, yet the decision below threatens to close this door to relief for veterans that this Court opened in *Monk*. The Court should reverse.

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Respectfully submitted,

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