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, 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 No. 15-1280, Chief Judge Robert N. Davis, Judge Mary J. Schoelen, Judge Coral W. Pietsch, Judge Margaret Bartley, Judge William S. Greenberg, Judge Michael P. Allen, Judge Amanda L. Meredith, and Judge Joseph L. Toth.

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CERTIFICATE OF INTEREST

Counsel for Appellants certifies the following:

1. The full names of every party or amicus represented by me are: Conley F. Monk, Jr.; James Briggs; Tom Coyne; William Dolphin; Jimmie Hudson; Samuel Merrick; Lyle Obie; Stanley Stokes; and William Jerome Wood, II.

2. All parent corporations and any publicly held corporations that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None.

3. 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 who are expected to appear in this Court, in addition to the counsel who have already appeared in this appeal, are: Jerome N. Frank Legal Services Organization: Aaron Wenzloff, Supervising Attorney; Madison Needham, Law Student Intern; and Simpson Thacher & Bartlett LLP: Elisa Alcabes and Michael Brasky.

4. The following cases are those 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: *Monk v. Wilkie*, No. 15-1280, United States Court of Appeals for Veterans Claims.

Respectfully submitted,

April 23, 2019

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ARGUMENT

Disabled veterans Conley F. Monk, Jr., James Briggs, Tom Coyne, William Dolphin, Jimmie Hudson, Samuel Merrick, Lyle Obie, Stanley Stokes, and William Jerome Wood, II, brought this class action lawsuit to resolve unconscionable delays by the Department of Veterans Affairs ("VA") in adjudicating the administrative appeals of hundreds of thousands of veterans who have waited more than twelve months for a Board of Veterans Appeals decision after submitting a timely Notice of Disagreement. In a 4-4 decision, the U.S. Court of Appeals for Veterans Claims declined to certify the class by an equally divided *en banc* court.

The Secretary's own concessions demonstrate why—as a matter of law—the plurality below erred in denying class certification. He concedes that the VA appeals process is "broken," Resp. Br. at 4, and agrees that a "malfunctioning or delayed VA appeal process" can be challenged through a class action. Resp. Br. at 46. He acknowledges that "the crux of commonality is determining whether the questions common to the class are capable of a common *answer*." Resp. Br. at 27. These concessions underscore the CAVC's error of law in interpreting the "commonality" requirement of Federal Rule of Civil Procedure 23(a)(2).

This appeal presents three questions of law: (1) whether the questions that the Secretary concedes are common to the proposed class are capable of a common

answer; (2) whether the CAVC plurality misinterpreted the commonality standard under *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and Rule 23(a)(2); and (3) whether the CAVC mistakenly concluded that the class could not be maintained under Rule 23(b)(2). The answer to each is "yes."

First, Appellants' claims present a common question with a common answer: Is there a period of time that is simply too long, as a matter of statutory or constitutional law, for a veteran to wait for a decision on an administrative appeal? Appx26 (Allen, J., concurring in part and dissenting in part). This question is capable of class-wide resolution because the fate of every class member will "rise or fall *together*" depending on the answer to that question. *Id.* at 25. The Secretary's only response is to argue that there is no common answer to the delays faced by veterans in the system, *regardless of how long they have waited*. *See* Resp. Br. at 31-32; *see also* Oral Argument, Mar. 27, 2019, at 35:33-37:04, *Monk v. Wilkie*, Vet. App. No. 15-1280, http://www.uscourts.cavc.gov/documents/Monk15-1280.mp3 (hereinafter "CAVC Oral Argument") (Counsel for VA argued to CAVC, in continued proceedings in the individual mandamus requests in this case, that VA delay of "a hundred years" in adjudicating administrative appeal was not necessarily unreasonable.). This argument fails as a matter of law.

Second, this Court should reverse the CAVC's decision because the plurality incorrectly interpreted the *Wal-Mart* standard by requiring an examination of the

underlying reasons for the VA's delay. Affirming the plurality's interpretation of commonality would contravene binding precedent and effectively foreclose class certification for veterans seeking to challenge system-wide failure by the VA. The *en banc* decision was "seismic" because it pronounced that the CAVC would entertain class action suits, breaking with nearly thirty years of that court's precedent. Appx16 (Davis, C.J., concurring). Nevertheless, if this Court adopts the plurality's interpretation of commonality, that "seismic" decision would not only ring hollow, but also work against veterans.

Finally, because Appellants seek a single remedy—an injunction that the Secretary adjudicate all appeals within one year of an applicant's Notice of Disagreement—this Court should reverse and hold that the putative class presents a quintessential Rule 23(b)(2) class.

I. The CAVC Committed an Error of Law Subject to *De Novo* Review.

The Federal Circuit reviews issues of law *de novo*. *Willsey v. Peake*, 535 F.3d 1368, 1372 (Fed. Cir. 2008). Here, the CAVC plurality decided a pure question of law—the correct standard for commonality, under *Wal-Mart*, in the veterans law context. The Secretary seeks to escape *de novo* review by contending that the CAVC plurality made a factual determination, or applied law to fact, when it denied class certification. Resp. Br. at 22-23. The Secretary misconstrues the plurality's decision. The plurality held, as a matter of law, that commonality was

not satisfied under Rule 23 and *Wal-Mart* because Appellants had not identified a "specific practice or policy by the Secretary that results in unreasonable delays" or the cause of delay. Appx11.

As explained below, each of the plurality's determinations in its denial of class certification consisted of an erroneous interpretation of the permissible legal criteria under Rule 23. Accordingly, this Court should review the plurality's determinations on class certification *de novo*. Even if the Court decides that an abuse of discretion standard is warranted here—though it is not—the plurality's "failure to follow the proper legal standards in certifying a class . . . is an abuse of discretion." *Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997).

II. The *En Banc* Plurality Misinterpreted the Rule 23 Commonality Requirement.

Rule 23(a)(2) conditions class certification upon the presence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Supreme Court in *Wal-Mart* clarified that "[e]ven a single [common] question" meets this requirement, so long as "it is capable of classwide resolution." 564 U.S. at 350, 359. Here, Appellants have presented two such questions. First, is there any outer bound beyond which the VA's delay in rendering decisions on disability benefits appeals "is so egregious as to warrant mandamus" under *Telecomms. Research & Action Center v. FCC (TRAC)*, 750 F.2d 70, 79 (D.C. Cir. 1984). And second, is there any outer bound beyond which VA delays violate class members' due

process rights? The answers to these questions will "resolve an issue that is central to the validity of each one of the [Appellants'] claims in one stroke," and therefore Appellants have satisfied Rule 23(a)(2). *Wal-Mart*, 564 U.S. at 350. As Judge Allen stated in his partial dissent below, "the answers to these questions will make the petitioners' claims rise or fall *together*. The class members will win or lose once we have an answer." Appx25 (Allen, J., concurring in part and dissenting in part).

The plurality concluded that, in addition to raising common contentions capable of "generat[ing] common answers," *Wal-Mart*, 564 U.S. at 350, Appellants also had to "identify the *causes* for the delay" by pointing to specific policies or practices in order to satisfy commonality. Appx11 (emphasis added). This heightened commonality standard finds no support in the text or history of Rule 23(a)(2) or *Wal-Mart*. To the contrary, this standard encroaches too far into the substantive merits underlying Appellants' claims, which is impermissible at the class certification stage. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.").

A. Appellants May Establish Commonality Without Identifying Underlying Reasons for the VA's Systemic Delay.

In construing *Wal-Mart*, federal courts have reiterated that plaintiffs need not identify the underlying reasons for systemic failure in order to satisfy

commonality. *See DL v. District of Columbia (DL II)*, 860 F.3d 713 (D.C. Cir. 2017) (recognizing *Wal-Mart*'s limited reach and affirming certification of a class under the Individuals with Disabilities Education Act ("IDEA")); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 333 (D.D.C. 2018) (granting provisional class certification and finding commonality because "claims rest not on the impetus behind the . . . practices, but, instead, on the very fact that they are no longer following the binding guidance of the [agency's] Parole Directive"); *Garnett v. Zeilinger*, 301 F. Supp. 3d 199 (D.D.C. 2018) (following *DL II* and certifying class under Supplemental Nutrition Assistance Program ("SNAP")).

The Secretary, like the plurality, incorrectly adds nonexistent requirements to *Wal-Mart*'s holding. Respondent's brief is replete with references to the differences in the causes of Appellants' individual delays. According to the Secretary, some potential class members have not received a Board decision because it "is not yet due" and "[o]ther claimants' decisions have been delayed by their own choices and actions; or a third-party's actions; or the time it has taken VA to comply with its statutory duties, regulations, and policies for that appeal." Resp. Br. at 21.

The Secretary's list of potential causes of delay is a red herring. A nearly identical argument was proffered in *DL II*, where the District of Columbia argued that there were "many different reasons it might have denied a particular child a

[Free Appropriate Public Education].” *DL II*, 860 F.3d at 725. The D.C. Circuit rejected this argument, holding that the plaintiffs need only show that “the District in fact failed to identify [children with disabilities], failed to provide them with timely eligibility determinations, or failed to ensure a smooth transition to preschool.” *Id.* As in *DL II*, the relevant factor for commonality in this case is the systemic failure, not the individual circumstances surrounding each class member’s encounter with that failure.

The Secretary fails to recognize the critical similarities between Appellants and the *DL II* plaintiffs, both of whom challenged governmental compliance with affirmative obligations. In *DL II*, IDEA required affirmative steps by the government to comply with certain obligations. Here, *TRAC* and the Due Process Clause do the same. That is, IDEA requires the government to provide each child a free and appropriate education; *TRAC*, as applied to the veterans context, mandates that the VA provide veterans with disability decisions in a reasonable amount of time; and constitutional due process principles likewise require that the Secretary implement procedures to ensure he does not deprive veterans of their property interest in disability benefits through unreasonable delay.

The plurality’s heightened commonality standard is rooted in a legal misinterpretation of *Wal-Mart*. The Supreme Court’s focus on the “alleged [underlying] *reasons*” for the challenged employment decisions in *Wal-Mart* was

directly tied to the Title VII inquiry. *Wal-Mart*, 564 U.S. at 352; *see* App. Br. at 26-28. Accordingly, *Wal-Mart's* focus on the *causes* of the employment actions pertains to legal claims that are not at issue in this case.[1] 564 U.S. at 342-43, 352.

The instant action is more like *DL II* and its progeny, *Garnett.* These cases concerned statutory schemes mandating speedy provision of benefits, as opposed to a Title VII action in which the defendant's intent is an element of the underlying claim. For example, in *Garnett*, the district court explained that determining whether a statutory violation occurred did "not hinge on the *reason* for any particular failure to adhere to statutory guidelines." *Garnett*, 301 F. Supp. 3d at 207 (emphasis added). Here, Appellants challenge the Secretary's failure to comply with a statutory right to timely provision of benefits and maintain a constitutionally protected property interest in these benefits. *See Cushman v. Shinseki*, 576 F.3d 1290, 1297-98 (Fed. Cir. 2009) (holding entitlement to veterans benefits is a property interest protected by the Fifth Amendment Due Process Clause); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419-20 (D.C. Cir. 2004). Appellants are not challenging a specific policy or practice causing delay, but rather the totality of the process that makes veterans wait an average of six years

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[1] Title VII prohibits discriminatory conduct that is motivated by certain reasons. *See* 42 U.S.C. § 2000e-2(a). In contrast, *TRAC* and the Due Process Clause provide legal means to ensure compliance with affirmative responsibilities regardless of the government's motivation. *See* App. Br. at 29.

for an appeal decision. *See* App. Br. at 6 (citing Appx1580). It is Appellants' right to frame their legal claims as a challenge to the overall duration of delay being unconstitutional and a *TRAC* violation—and these claims can be analyzed on an aggregate basis without delving into the reasons for the delay in each appeal.

B. Neither *TRAC* nor Due Process Require Appellants to Specify the Underlying Reasons for Unreasonable Delay.

TRAC does not require Appellants to demonstrate why they are suffering unreasonable delay at the hands of the VA; the Secretary is therefore wrong to assert that the underlying reasons for each Appellant's delay defeat commonality. To the contrary, well-settled precedent indicates that there must be some point beyond which delay becomes conclusively or presumptively unreasonable under *TRAC*, regardless of the purported reasons for the delay. In *MCI Telecomms. Corp. v. FCC*, the foundational case for *TRAC*'s "rule of reason," the D.C. Circuit held that "there must be *some* limit to the time" the FCC may take to complete final ratemaking under the "rule of reason." 627 F.2d 322, 325, 340 (D.C. Cir. 1980) (emphasis added); *see also Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983) (finding a three-year delay in promulgating a final rule on exposure to certain toxins "simply too long"). Thus, Appellants' contention that a greater than twelve month delay in adjudication of their appeals is "simply too long" under *TRAC*, *Auchter*, 702 F.2d at 1157, presents a common question the "truth or falsity" or which 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. Appellants therefore satisfy commonality without needing to "identify the *causes* for the delay." Appx11 (emphasis added).

Moreover, *TRAC* places the obligation on the Secretary to demonstrate that the challenged delay is governed by a "rule of reason." *TRAC*, 750 F.2d at 80. For example, in *Sai v. Department of Homeland Security*, the D.C. District Court conducted a *TRAC* analysis to assess the delay experienced by a disabled plaintiff who challenged the failure of the Department of Homeland Security ("DHS") to respond to administrative complaints he filed pursuant to certain regulations. 149 F. Supp. 3d 99, 106 (D.D.C. 2015). Applying the *TRAC* factors, the court recognized that the plaintiff's sole contention was that the nearly three-year delay in responding to his complaints was "*prima facie* unreasonable." *Id.* at 120. The court granted partial summary judgment and ordered DHS to respond to the complaint within thirty-nine days. *Id.* at 121. Similarly, Appellants can establish under *TRAC* that there is a time at which agency delay becomes unreasonable, regardless of whether they identify specific reasons for the delay.

Likewise, Appellants' due process claim does not require Appellants to offer reasons behind the VA's delay in adjudicating their benefits appeals. This is confirmed by court decisions imposing numeric limits under the Due Process Clause in various contexts. For example, in *Zadvydas v. Davis*, the Supreme Court

held that detention of immigrants with final orders of deportation in excess of six months was presumptively unreasonable under the Due Process Clause. 533 U.S. 678, 701 (2001). Like Appellants, the *Zadvydas* plaintiffs sought to use a numeric time limit, regardless of any underlying reasons, as the sole means of determining unconstitutional delay and deprivation. *Id.*; *cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (imposing numeric limit because award of punitive damages in excess of 10:1 ratio with compensatory damages was found presumptively unreasonable under Due Process Clause); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56-58 (1991) (holding detention after warrantless arrest in excess of 48 hours without review by neutral magistrate presumptively unreasonable under the Fourth Amendment).

The Secretary's position that Appellants must challenge the reasons behind the VA's delays would effectively preclude almost any class action on the basis of delay. Such an outcome is in direct conflict with this Court's decision in *Monk v. Shulkin*, 855 F.3d 1312, 1321 (Fed. Cir. 2017) (noting that "a claim aggregation procedure may help the [CAVC] achieve the goal of reviewing the VA's delay in adjudicating appeals"). Other courts have expressly rejected the same type of individualized-inquiry arguments the Secretary asserts here. *See Whitney v. Khan*, No. 18-C-4475, 2019 WL 1112276, at *4 (N.D. Ill. Mar. 11, 2018) (rejecting the "argu[ment] that the need for individualized inquiries into the reasonableness of

the delay with respect to particular inmates undermines commonality"); *see also* *Shepard v. Rhea*, No. 12-CV-7220 (RLE), 2014 WL 5801415, at *3 (S.D.N.Y. Nov. 7, 2014) ("Courts in the Second Circuit have consistently upheld class actions as 'an appropriate method of obtaining relief in benefits cases' where the class seeks relief from unreasonable delay and/or withholding of government benefits.").

The Secretary offers *Crosby v. Social Security Administration*, 796 F.2d 576 (1st Cir. 1986), to assert that "where the circumstances differ in a relevant way across the proposed class, the context-driven due-process analysis is unlikely to generate a common answer for the entire class." Resp. Br. at 41. *Crosby* is easily distinguished because that court's focus was on factors distinct from commonality—most notably, whether the class could be ascertained. 796 F.3d at 580.

By contrast, in *Barnett v. Bowen*, the Second Circuit held that class-wide relief was available to claimants challenging the Social Security Administration's delay in reviewing appeals. 794 F.2d 17, 19 (2d Cir. 1986). In doing so, the Second Circuit expressly rejected arguments similar to those set forth by the Secretary. Critically, the Second Circuit found that it was "appropriate to define a class to include all applicants who may experience unreasonable delays . . . despite the fact that the point at which delays become unreasonable may vary with the facts and circumstances of individual cases." *Id.* at 23.

C. Rule 23 Also Does Not Require Appellants to Challenge a Specific Policy or Practice.

This Court should reject the Secretary's argument that Appellants must challenge a particular policy or practice as a prerequisite to class certification. The Secretary relies heavily on *Wal-Mart*, but *Wal-Mart* is distinguishable here. In *Wal-Mart*, the Supreme Court found that a Title VII "plaintiff must begin by identifying the specific employment practice that is challenged" and, to make out a claim for disparate impact, identify a "common mode of exercising discretion that pervades the entire company." *Wal-Mart*, 564 U.S. at 356-57. Neither the Secretary, nor the plurality, however, have provided authority supporting the proposition that *TRAC* or the Due Process Clause are bound by a similar inquiry. Nor can they. *Wal-Mart*'s "reasons" inquiry was conducted because plaintiffs filed suit under Title VII alleging that Wal-Mart "engage[d] in a *pattern* or *practice* of discrimination." *Id.* at 352. Discriminatory intent is an element of a Title VII claim, and thus that inquiry necessarily included an analysis of Wal-Mart's policies and practices. *See* App. Br. at 26-27. But there is no intent element in Appellants' delay claim here.

Similarly, the Secretary incorrectly argues that an earlier decision in the *DL* case (*DL I*) requires Appellants to identify a specific policy or practice under *Wal-Mart*. *See* Resp. Br. at 44-46 (citing *DL v. District of Columbia (DL I)*, 713 F.3d 120, 124-26 (D.C. Cir. 2013)). Importantly, the putative *Monk* class is

distinguishable from the class that was denied certification in *DL I*, which was an overly broad class that lacked commonality. Appellants propose a class limited in scope—to appeals delayed for more than one year—and that targets a discrete segment of delay associated with VA benefits appeals, the delay from NOD to Board decision.

D. The Secretary's Attempts to Distinguish *Parsons* Are Unavailing.

Even under the plurality's erroneous interpretation of *Wal-Mart*, Appellants satisfy commonality. The Secretary has failed to distinguish *Parsons v. Ryan* from this case. 754 F.3d 657 (9th Cir. 2014). He argues that while ten Arizona Department of Corrections (ADC) policies or practices were challenged by the class in *Parsons*, those policies did not include "lengthy and dangerous delays," even as he admits that delays in health care treatment constituted three of those policies. Resp. Br. at 48 n.16. Indeed, the Ninth Circuit acknowledged that "lengthy and dangerous delays" *were* a policy or practice. *Parsons*, 754 F.3d at 664. Moreover, the Secretary's attempt to distinguish the health and dental care and emergency treatment at issue in *Parsons* from disability benefits in *Monk* are unavailing. Resp. Br. at 48 n.16. Timely access to these basic health necessities is no different than timely access to disability benefits critical for the health and survival of countless injured veterans.

The Secretary concedes that "a challenge to a specific policy or practice can be the 'glue' that holds" the class together. Resp. Br. at 49. The Secretary readily acknowledges that "some district courts . . . have certified classes where the practice or policy challenged is less clearly identified." *Id*. In fact, many courts recognize that the absence of a formal policy can constitute a de facto policy. For example, in *Shaw v. AMN Healthcare, Inc.*, the court certified a class alleging that their employer's failure to provide a policy on meal and rest breaks "result[ed] in missed . . . breaks." 326 F.R.D. 247, 271 (N.D. Cal. 2018). There, the absence of a policy for identifying and approving overtime work and procedures for traveling nurses enabled the court to conclude Plaintiffs raised common issues "that predominate over individualized inquiries." *Id.* at 271; *see also id.* at 261 (recognizing that "[s]uch a 'policy not to have a policy' generates common questions"); *Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 609 (N.D. Cal. 2014) (holding that the employer's lack of a policy was "susceptible to common proof" under the more demanding predominance requirement under Rule 23(b)(3)).

Here, in contrast to the Title VII inquiry which necessarily focuses on the "reason for a particular employment decision," *Wal-Mart*, 564 U.S. at 352, Appellants "need not show why their rights were denied to establish that they were." *DL II*, 860 F.3d at 725. Indeed, subsequent to *Wal-Mart*, class actions have been used to challenge system-wide delay in a wide variety of government and

administrative contexts. Such challenges "do not involve any analysis of independent facts attributable only to individual plaintiffs." *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 615 (S.D.N.Y. 2018). The questions common to the class, and the hundreds of thousands of veterans with pending legacy appeals, should rightly be focused on the VA's conduct and its inability to adjudicate claims in a timely manner. Instead, the Secretary aims to prevent certification by focusing on the minutia of each veteran's appeal. As in *Parsons*, Appellants constitute a class because the validity of their legal claims can be determined in a single stroke. Each class member has suffered a similar injury originating from the same government mode of conduct that regularly and systematically violates Appellants' rights.

For instance, in *Saravia v. Sessions*, a case on which the Secretary relies, the court provisionally certified a class of undocumented minors who were challenging their arrests by the Office of Refugee Resettlement. *See* Resp. Br. at 49. The court avoided the merits of each class member's claim but identified a "basic question . . . common to all class members"—"whether [government agency] policies violate class members' rights in a systematic way." 280 F. Supp. 3d 1168, 1204 (N.D. Cal. 2017); *see also Garnett*, 301 F. Supp. 3d at 207-08 (recognizing that question of delay does not turn on individual circumstances of individual class members and holding that unlawful delays in provision of SNAP benefits can be answered on classwide basis); *DL II*, 860 F.3d at 713; *Parsons*, 754 F.3d at 657.

Similarly, here, the putative *Monk* class is not asking the Federal Circuit or CAVC to decide whether each member is individually entitled to certain benefits. Rather, Appellants seek a determination concerning the legality of the systematic delay each has suffered. The plurality below was therefore wrong to conclude that commonality was not satisfied.

III. The *En Banc* Plurality's *TRAC* and Due Process Clause Analysis Prematurely Focused on the Merits.

The plurality improperly delved into the underlying merits of Appellants' claims in requiring Appellants to identify the causes for the VA's delay in adjudicating their benefits appeals. In doing so, the plurality "turn[ed] the class certification proceedings into a dress rehearsal for the trial on the merits." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012); *see also Amgen*, 568 U.S. at 466 ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."). Appellants' argument is that a one-year delay is conclusively or presumptively unreasonable under *TRAC* and the Due Process Clause; it does not require an analysis of the potential reasons for delay in every veteran's appeal. As Judge Allen noted, "the plurality does not accept [Appellants'] legal theory, leading the plurality to focus on the various reasons why a claim may be delayed." Appx22 n.53 (Allen, J., concurring in part and dissenting in part). The Secretary commits the same error in his brief. Resp. Br. at 51-53.

Prejudging commonality by examining the merits of Appellants' claims is not appropriate at the class certification stage. Indeed, "[m]erits questions 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." *Amgen*, 568 U.S. at 466; *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.").

A. Appellants' *TRAC* Claim Satisfies Commonality Under a Proper Analysis at the Class Certification Stage.

Applying *TRAC* to the particular facts and circumstances of challenged agency delay—including any examination of the agency's "attempts to rationalize its delay"—is an analysis appropriate for the merits stage, not class certification. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). The Secretary relies on *Martin v. O'Rourke*, 891 F.3d 1338 (Fed. Cir. 2018), to support its argument to the contrary, Resp. Br. at 35-40, but *Martin* is not a class certification decision. *Martin* focuses on the merits of an unreasonable delay claim under *TRAC*, not whether a court should apply *TRAC* at the class certification stage. It should not.

The Secretary further contends that, in *In re American Rivers & Idaho Rivers United*, the court did not mention the reasons for the agency's delay "only

because the agency argued that it was under no duty to act and thus made no 'attempt[] to demonstrate the reasonableness' of its delay." Resp. Br. at 39 (alteration in original) (quoting 372 F.3d at 418). By contrast, here, according to the Secretary, the "VA acknowledges its duty to issue board decisions, and has attempted to explain the numerous factors contributing to delays—which is properly for consideration in a *TRAC* analysis." *Id.* Yet, a defendant's defense to a claim should have no bearing on commonality and is fundamentally a merits inquiry inappropriate at the class certification stage.

B. Appellants' Due Process Claim Satisfies Commonality.

At the very least, commonality is satisfied as to Appellants' due process claim. Appellants have a "common contention . . . of such a nature that it is 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." *Wal-Mart*, 564 U.S. at 350.

Indeed, the parties agree on all the underlying parts of the commonality requirement. The Secretary agrees that the relevant question is whether one common answer can be provided for all of the class members' allegations of constitutional violation. Resp. Br. at 42. He also agrees that "[a]t some point, a delay . . . would become a constitutional violation." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985); *see* Resp. Br. at 42. And he concedes that it

is "legally possible" that some of the 470,000 proposed class members have experienced delays that "have reached that point of constitutional violation." Resp. Br. at 42. As Judge Allen noted, Appellants' theory of the case "is that there is a period of time that is simply too long for a claimant to wait for a decision," and "such a theory finds some support in existing law, at least tangentially." Appx26 (citing *Loudermill*); *see also Wal-Mart*, 564 U.S. at 356 (commonality requires that plaintiffs' "theory can be proved on a classwide basis"). This Court should therefore hold that the CAVC erred as a matter of law because Appellants' due process claim satisfies commonality.

IV. Appellants' Proposed Class Satisfies Rule 23(b)(2).

Appellants bring a paradigmatic Rule 23(b)(2) action because "a single injunction or declaratory judgment [ordering the Secretary to act on long-delayed appeals] would provide relief to each member of the class." *Wal-Mart*, 564 U.S. at 360; *Braggs v. Dunn*, 317 F.R.D. 634, 667 (M.D. Ala. 2016) (noting that Rule 23's "requirements are almost automatically satisfied in actions primarily seeking injunctive relief"). While the Secretary argues that the class fails to meet the requirements of Rule 23, the Secretary does not contest that Rule 23(b)(2): (1) should be liberally applied in the area of civil rights; (2) has a unique history and framework for affording injunctive relief to vulnerable populations; and (3) is

a well-established vehicle for remedying delays in providing individualized benefits.

The Secretary's Rule 23(b)(2) analysis is misguided—like the *en banc* plurality at the CAVC, the Secretary incorrectly concluded that Appellants' factual dissimilarities foreclosed aggregate relief. To the contrary, the delay in appeals adjudication constitutes "a refusal to act on grounds that apply generally to the class," Fed. R. Civ. P. 23(b)(2), and a declaration that delay in excess of one year from the filing of an NOD to a Board decision is unlawful would compel the Secretary's action "as to all of the class members." *Wal-Mart*, 564 U.S. at 360. This remedy requires nothing more than comparison of each Appellant's delay against the period beyond which further delay is found conclusively or presumptively violative of Appellants' rights.

The Secretary raises *DL I*, this time averring that the case provides an instructive "trajectory." Resp. Br. at 45. In *DL I*, the D.C. Circuit reversed certification of a class that challenged the D.C. public schools' "systemic failures" because the class lacked commonality. *DL I*, 713 F.3d at 126. However, the lower court's subsequent certification of the sub-classes under Rule 23(b)(2) was in fact affirmed by the D.C. Circuit in *DL II*. *DL II*, 860 F.3d 713.

Furthermore, the VA argues that Appellants' systemic challenge should fail because of the individualized "grounds" accompanying each Appellant's delay.

See Resp. Br. at 24, 58-59. However, the Ninth Circuit has explicitly rejected the same argument made by the Secretary that factual dissimilarities in the underlying reasons for delay suffered by Appellants would preclude certification under Rule 23(b)(2) by "imped[ing] the generation of common answers" under *Wal-Mart*. *Parsons*, 754 F.3d at 675 (quoting *Wal-Mart*, 564 U.S. at 350); *Brown v. Giuliani*, 158 F.R.D. 251, 268 (E.D.N.Y. 1994) (holding that the "existence of factual variations in the types of irreparable injury suffered or in the length of the delay does not preclude class certification" under Rule 23(b)).

A. A Putative Class Alleging Systemic Problems Fits Squarely Within Rule 23(b)(2).

A Rule 23(b)(2) class is an appropriate vehicle for alleging systemic problems, and in doing so Appellants need not challenge specific policies or practices. The Secretary contends that Appellants "refused to target a specific VA practice or policy." Resp. Br. at 43. But if Appellants were to accept the VA's position and prevail in a suit that was confined to a discrete segment of the years-long appeals process, that lawsuit would result in nothing more than a Pyrrhic victory. Success would lack substance because the Secretary can and indeed has unilaterally reallocated agency assets to decrease delay in specific components of the benefits appeals process without actually or meaningfully improving the speed of appeals adjudication in its entirety. The March 28, 2018 VA Office of Inspector General ("VA OIG") report confirms as much—VA leadership "did not assign

enough staff to process appeals and diverted appeals staff to compensation claims processing, which VBA considered a higher priority." Appx2836. That VA OIG report found a "disproportionate[]" dedication of resources "to process the claims backlog;" this intentional, unilateral reallocation of agency assets by the VA had a "negative[] [e]ffect [on] appeals processing timeliness." Appx2841.

Courts have repeatedly certified Rule 23(b)(2) classes to remedy systemic failures and specifically administrative delays. For example, the proposed *Monk* class is similar to the Rule 23(b)(2) class of children that challenged systemic failures within New York City's child welfare system. *Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997). In *Marisol A.*, the defendants challenged the proposed class as improper under Rule 23(b)(2) because plaintiffs' "unique circumstances" and "differing harms" would not be remedied by a class-wide injunction. *Id.* at 378. Neither the district court nor the Second Circuit were convinced. Instead, certification of the *Marisol A.* class was affirmed on the grounds that it presented common questions of law and fact and the plaintiffs alleged injury stemming "from a unitary course of conduct by a single system." *Id.* at 377. The same is true here.

B. Certification Under Rule 23(b)(2) Would Benefit Veterans.

The VA objects to certification of a Rule 23(b)(2) class because judicial intervention would establish a "perverse structure" with an "anti-claimant result which cannot be squared with [38 U.S.C.] section 5103A." Resp. Br. at 58.

However, proper interpretation of the Rule 23(b)(2) framework and the purpose of the duty to assist indicate otherwise. Most critically for veterans, judicial intervention would finally compel *results*—the very relief sought by hundreds of thousands of veterans that are trapped in the legacy appeals system.

Particularly troubling is that the VA wields its duty to assist as a sword and shield. The *current* broken appeals system is anti-claimant, and timely processing of appeals would not only be a marked improvement but also better align with Congress's pro-veteran intent in creating the duty to assist. In particular, the option to waive the VA's duty to assist can hardly be considered "perverse" or "anti-claimant," as the Secretary argues, especially in recognition of Congress's implementation of this very system in both the Rapid Appeals Modernization Program, *see* Appx1647-1648 (explaining that the "VA cannot assist you in developing additional evidence" if a claimant chooses to proceed through the Higher-Level Review Lane), and the recently implemented Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105, *see* Appx1066.

The Secretary fundamentally misunderstands the severe harm inflicted on Appellants and other veterans by the VA's perpetual delays. The Secretary provides "context" for the irreparable harm suffered by Appellants with a misguided assertion that the consequences of delay are somehow less severe or

"dire" for Appellants Dolphin and Monk as compared to other veterans. Resp. Br. at 38 n.14. These improper value-judgments are unsupported and factually incorrect. Mr. Dolphin has waited more than *four years* for adjudication of an earlier effective date, and recently, at oral argument on his individual mandamus petition, the Secretary conceded he is still months or years from a decision. *See* CAVC Oral Argument at 40:14-41:20.[2] The stakes for Mr. Dolphin are high. If he prevails, Mr. Dolphin would receive a life-altering payment of approximately $150,000. *See* Appx1692-1693; *see also* CAVC Oral Argument at 1:03:35-1:04:35; *VA Individual Unemployability (Veterans Who Can't Work Due to a Disability)*, U.S. DEP'T OF VETERANS AFFAIRS, https://www.va.gov/disability/eligibility/special-claims/unemployability/ (last visited Apr. 23, 2019) (discussing total disability due to individual unemployability). The Federal Circuit should reverse the CAVC's misinterpretation of Rule 23(b)(2) and class action law. The Rule 23(b)(2) class is an ideal mechanism for providing uniform relief and remedying the severe injuries suffered by Appellants and putative class members alike.

[2] Since the filing of Appellants' opening brief, counsel has become aware that Appellant Obie received a decision on November 16, 2018 that recognized her daughter as a dependent schoolchild for a period of time. Appx2974-2975.

CONCLUSION

For these reasons, Appellants respectfully request that the Court reverse the *en banc* plurality and hold that Appellants' proposed class satisfies commonality under Rule 23(a)(2) and presents a valid Rule 23(b)(2) class. Alternatively, this Court should vacate the plurality's holding and remand for the CAVC to apply the proper standard for commonality under Rule 23(a) and the correct approach to Rule 23(b)(2) classes in the veterans context.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Federal Circuit Rule 32(a). This brief contains 6,017 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word version 16.0 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2019, Appellants' foregoing Reply Brief was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

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