No. 19-1094

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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

v.

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

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

CORRECTED BRIEF FOR RESPONDENT-APPELLEE

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, respondent-appellee's counsel states that a related appeal was previously before this Court. *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017). Respondent-appellee's counsel is aware of one case that may directly affect or be affected by the Court's decision in this appeal: *Monk v. Wilkie*, Vet. App. No. 15-1280 (oral argument on the merits scheduled for March 27, 2019).

No. 19-1094

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Petitioners-Appellants,

v.

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

CORRECTED BRIEF FOR RESPONDENT-APPELLEE

STATEMENT OF THE ISSUE

Whether the U.S. Court of Appeals for Veterans Claims (Veterans Court) committed an error of law in declining certification of the class proposed by Petitioner-Appellants (Appellants) for not meeting the standard for commonality adopted by the U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

STATEMENT OF THE CASE SETTING OUT RELEVANT FACTS

Appellants appeal an August 23, 2018 Veterans Court order denying their motion for class certification. Appx1-13. Appellants' proposed class includes eight named Department of Veterans Affairs (VA) benefits claimants, as well as all claimants who filed a notice of disagreement (NOD) with an initial VA benefits

decision and did not receive a Board of Veterans' Appeals (board) decision in the ensuing 12 months. Appx471. The Veterans Court found that Appellants' proposed class lacked "commonality," a requirement for certification under Federal Rule of Civil Procedure 23(a). Appx6-12.

I. The VA Administrative Appeal Process

In its order, the Veterans Court described the stages of the VA appeal process in detail. Appx3-5.[1] We will not repeat the full description here, but it is worth highlighting two critical features of that process.

First, per Congressional mandate, it is *not* the case that a claimant's NOD with an initial VA benefits decision can simply be forwarded to the board for appellate adjudication. 38 U.S.C. § 7105(a), (d)(1). Rather, significant additional claim development and consideration occurs at the regional office before an NOD reaches the board. Upon receipt of an NOD, VA must "take such development or review action as it deems proper" and then "prepare a statement of the case" (SOC)—a second, more in-depth agency of original jurisdiction (AOJ) decision. 38 U.S.C. § 7105(d)(1)(A)-(C) (describing the requirements for an SOC). Then,

[1] The Veterans Court's discussion, and all statutory and regulatory citations below, pertain to the VA appeal process for claims that were initially decided by VA prior to February 19, 2019. A new appeal process established by the Veterans Appeals Improvement and Modernization Act of 2017 governs claims decided thereafter. *See* Public Law No. 115-55 (2017); VA Claims and Appeals Modernization, 84 Fed. Reg. 138 (2019).

the burden is on the *claimant* to file a "substantive appeal" to reach the board, 38 U.S.C. § 7105(a), (d)(3), where an opportunity for a hearing must be provided before any board adjudication takes place, 38 U.S.C. § 7107(b).

Second, Congress and the Veterans Court have been clear that VA must continue to accept new evidence and fulfill its "duty to assist" (which includes requesting additional records and scheduling additional medical examinations, *see* 38 U.S.C. § 5103A) throughout the entire appeal process. *See* 38 U.S.C. § 7105(e)(1) (requiring the review of evidence submitted after a substantive appeal); *Murincsak v. Derwinski*, 2 Vet. App. 363, 373 (1992) ("The duty to assist the veteran does not end with the rating decision . . . , but continues while the claim is pending before the [board]."). Accordingly, VA's regulations and subregulatory policies strive to ensure that all relevant arguments and evidence are reviewed before a board decision is rendered. *See*, *e.g.*, 38 C.F.R. §§ 3.2600 (offering review by a Decision Review Officer (DRO)), 19.31 (providing for Supplemental Statements of the Case (SSOCs) upon receipt of new evidence), 19.35 (providing for AOJ certification to the board[2]), 20.1304(a) (providing a 90-day period at the

[2] Because this Court has previously questioned the time it takes to certify an appeal, *Martin v. O'Rourke*, 891 F.3d 1338, 1341 (Fed. Cir. 2018), it is important to clarify here that the certification process involves an additional substantive review of the case to ensure that the appeal is ripe for board adjudication; and that review can result in additional development actions. *See* M21-1, I.5.E.2, I.5.F.3.

board for the submission of additional evidence); VA Adjudication Procedures Manual (M21-1), I.4.1.a, I.5.C.5 (offering AOJ and DRO hearings), I.5.E.2 (providing for further evidentiary development if substantive appeal indicates it necessary), I.5.F.2 (offering representatives an opportunity for pre-certification argument).[3]

This emphasis on continual development, assistance, and review is consistent with Congress's vision of a paternalistic VA claims system and gives veterans multiple opportunities to substantiate their claims. *See Hodge v. West*, 155 F.3d 1356, 1362-63 (Fed. Cir. 1998) (citing H.R. REP. 100-963, at 13 (1988)). But this cycle of "continuous evidence gathering and repeated re-adjudication" has taken a severe toll on appellate processing time. Appx1044. Given the structure of the system, the increase in the volume and complexity of claims and appeals filed this century, and VA's resource limitations, VA acknowledged in 2016 that the appeal process was broken and only comprehensive legislative reform could fix it. Appx760-761; *see* Appx685-686; Appx1044.

After a year of collaboration between VA and interested stakeholders, the President signed the Veterans Appeals Improvement and Modernization Act of

[3] The entire M21-1 is publicly available at https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/topic/554400000004049/M21-1-Adjudication-Procedures-Manual.

2017 (AMA) into law on August 23, 2017. *See* Pub. L. 115-55; Appx1044. The AMA implements a new appeal process for claims initially decided by VA on or after February 19, 2019. 84 Fed. Reg. at 138. Through February 18, 2019, however, claimants with pending appeals—like Appellants here—were offered the opportunity to opt-in to the AMA process via VA's Rapid Appeals Modernization Program. *See, e.g.*, Appx1645-1650. Now, they can still opt-in to the AMA process upon receipt of an SOC or SSOC. *See* Pub. L. 115-55, § 2(x)(5).

II. The Named Appellants' Factual Circumstances

A. Conley F. Monk, Jr.

In July 2013, Mr. Monk filed an NOD with VA's initial denial of his benefits claim. Appx323. That month, VA offered Mr. Monk the opportunity for review by a DRO. *Id.* In November 2013, he requested a DRO hearing, which VA scheduled for January 2014, but Mr. Monk's representative requested that it be postponed. *Id.* In February 2014, Mr. Monk attended the rescheduled hearing and presented additional evidence. Appx306. Also that month, VA requested pertinent records from the National Personnel Records Center (NPRC). Appx323. VA issued a second NPRC request in April 2014, and a third request in March 2015, but all the requests garnered a response that the records were currently checked out by the Board for Correction of Naval Records (BCNR). Appx323-324.

In June 2015, VA received the pertinent records and notice that the BCNR had upgraded Mr. Monk's discharge (rendering him eligible for VA benefits), and VA scheduled two medical examinations for Mr. Monk. Appx324. In September 2015, VA awarded an overall 100% disability rating for Mr. Monk's service-connected disabilities, effective July 20, 2012. Appx2274.

In December 2015, Mr. Monk filed an NOD, arguing that the effective date should be February 15, 2012. Appx2287. In September 2016, VA issued an SOC affirming the effective date assigned. Appx2296. In November 2016, Mr. Monk filed a substantive appeal to the board, which the VA certified to the board in January 2017. Appx2299; Appx2271. (VA also awarded Mr. Monk service connection for additional disabilities in 2017. *See* Appx2315-2319.)

In a December 2018 decision, the board denied an earlier effective date. Appx2936-2938. In January 2019, Mr. Monk appealed to the Veterans Court. Appx2947.

B. Tom Coyne

In January 2011, Mr. Coyne filed an NOD with VA's initial decisions that awarded him benefits for post-traumatic stress disorder (PTSD), but denied service connection for seven other disabilities. Appx2344-2345; Appx2351-2352. In June 2011, VA offered Mr. Coyne the opportunity for review by a DRO. Appx2330. In July 2011, Mr. Coyne's representative requested an opportunity to review the

claims file prior to any DRO action. *Id.* In December 2011, Mr. Coyne was scheduled to review the claims file and also requested a DRO hearing. *Id*.

In December 2013, Mr. Coyne attended the hearing, where the DRO and Mr. Coyne agreed to attempt to obtain relevant records for the claim and schedule a VA medical examination thereafter. Appx2330-2331. In February and March 2014, VA requested relevant records. Appx2331. In April 2014, VA scheduled Mr. Coyne's medical examination and, in June 2014, VA received the doctor's opinion. *Id.* Also that month, in a rating decision and SOC, VA granted Mr. Coyne certain benefits—resolving part of his appeal—but continued the denial of other benefits. Appx2362; Appx2370-2371.

In August 2014, Mr. Coyne's representative submitted a substantive appeal to the board, as well as additional evidence. Appx2376-2378. That month, VA certified his appeal to the board. Appx2332. In September 2016, the board conducted a hearing and granted the request of Mr. Coyne's representative that the record be held open for 60 days for additional evidence. Appx2333.

In an April 2018 decision, the board granted one of Mr. Coyne's claims on appeal and denied the other. Appx2883.

C. William Dolphin

In November 2014, Mr. Dolphin filed an NOD with VA decisions that awarded an overall 90% disability rating for his six service-connected disabilities,

but denied service connection for four other disabilities and a total disability rating based on individual unemployability (TDIU). Appx2385. In December 2014, VA offered Mr. Dolphin review by a DRO. *Id.* In January 2015, Mr. Dolphin requested a DRO hearing, which VA scheduled for February 2015. *Id.* In February 2015, Mr. Dolphin requested to postpone that hearing, which was ultimately held in March 2015. Appx2385-2386.

In June and September 2015, VA granted Mr. Dolphin service connection for three additional disabilities, resulting in an overall 100% disability rating with special monthly compensation (SMC). Appx2386. In March 2016, VA scheduled medical examinations for Mr. Dolphin, which were conducted in June 2016. *Id.* (VA also issued two rating decisions on Mr. Dolphin's other claims in 2016. *Id.*) In a January 2018 rating decision and SOC, VA granted TDIU, service connection for two additional disabilities, and an earlier effective date for four of Mr. Dolphin's service-connected disabilities. *Id.* In February 2018, Mr. Dolphin filed a substantive appeal to the board and requested a board hearing. Appx2928. In February 2019, VA certified the appeal to the board. Appx3018-3019.

D. Jimmie Hudson

In January 2013, Mr. Hudson filed an NOD with VA's initial denial of his request for TDIU and service connection for PTSD and hypertension. Appx2402. In March 2013, VA offered Mr. Hudson review by a DRO. Appx2390. Between

April 2013 and February 2014, VA received relevant records for the claim, including Mr. Hudson's formal application for TDIU. *Id.* (In February 2014, VA issued a rating decision on another of Mr. Hudson's claims. Appx2390-2391.) In May 2014, a DRO noted the request of Mr. Hudson's representative for an informal teleconference. Appx2391. In November 2014, VA received an additional statement on PTSD from Mr. Hudson. *Id.* Also in November 2014, VA scheduled a medical examination for Mr. Hudson's PTSD, which was conducted in June 2016. Appx2391-2392.

In June 2016, VA issued a partially-favorable rating decision and SOC on the appeal. Appx2404; Appx2409. In July 2016, Mr. Hudson filed a substantive appeal to the board, which VA certified to the board in August 2016. Appx2412; Appx2392. (In 2017, VA issued a rating decision on another claim. Appx2393.)

In November 2018, the board issued its decision. Appx2967-2973. (In 2019, on another claim, VA granted Mr. Hudson an overall 100% rating with SMC. Appx3020-3021.).

E. Samuel Merrick

In December 2009, Mr. Merrick filed an NOD with a VA decision continuing his benefits for two service-connected disabilities and denying service connection for 16 additional disabilities. Appx2421-2422. Between January and April 2010, Mr. Merrick submitted evidence in support of his claim. Appx2422.

In October 2010, VA issued an SOC continuing its prior decision. *Id.* In December 2010, Mr. Merrick filed a substantive appeal to the board and requested a hearing. *Id.* In April 2011, Mr. Merrick submitted additional evidence, prompting a September 2012 SSOC. Appx2422-2423. In May 2013, VA issued another SSOC. Appx2423. In September 2013, VA provided Mr. Merrick a medical examination, and thereafter issued another SSOC. *Id.* In December 2013, VA certified his appeal to the board. *Id.*

In a December 2014 decision, the board issued its decision. *Id.*

F. *Lyle Obie*

In August 2015, Ms. Obie filed an NOD with VA's award of additional benefits on the basis of two dependents. Appx2427. She argued that she had a third dependent, but did not provide the requisite information on a VA Form 21-674, as required. *Id.*; *see* 38 U.S.C. § 5101(a)(1)(A). Over the next two years, she filed dozens of submissions, but not VA Form 21-674—even though VA apprised her in October 2016 and August 2017 that submission of the form was necessary. Appx2427-2428. (In 2017, VA scheduled a medical examination and issued a rating decision on another of Ms. Obie's claims. Appx2427.)

In January 2018, VA reiterated to Ms. Obie's attorney that a VA Form 21-674 was necessary, and her attorney submitted that form. Appx2428. In March 2018, VA denied benefits for Ms. Obie's third alleged dependent. Appx2884. In

April 2018, she filed an NOD with the denial. Appx2885. In November 2018, VA granted benefits for Ms. Obie's third dependent. Appx2974-2976. (In 2018, VA also issued an SOC for Ms. Obie's other claims and certified that appeal to the board. Appx2977-3014; Appx3015-3016. In 2019, Ms. Obie's attorney requested a 90-day extension to file additional evidence. Appx3017.)

G. Stanley Stokes

In December 2011, Mr. Stokes filed an NOD with VA decisions assigning a 30% disability rating for his depression, but denying TDIU, increased ratings for five of his other service-connected disabilities, and service connection for three other disabilities. Appx2455-2456; Appx2461-2462; Appx2464. Also that month, VA offered Mr. Stokes review by a DRO. Appx2438. In March 2013, Mr. Stokes's representative informed VA that he had requested and would submit relevant records. Appx2439. In July 2013, VA scheduled medical examinations for Mr. Stokes. *Id.* In August 2013, VA obtained additional medical records. *Id.*

In October 2013, Mr. Stokes filed an NOD involving a separate claim that had been awarded in an August 2013 VA decision and had raised his overall disability rating to 80%. Appx2468-2470; Appx2477. In June 2014, Mr. Stokes's representative submitted additional evidence in support of TDIU. Appx2440. In July 2014, VA issued a partially-favorable rating decision and SOC on the appeal. Appx2484; Appx2488; Appx2492; Appx2494. In September 2014, Mr. Stokes's

representative requested an extension of the substantive-appeal deadline. Appx2440.

Later in September 2014, Mr. Stokes's representative filed substantive appeals to the board, submitted additional evidence on TDIU, and requested a board hearing. Appx2440-2441; Appx2497-2499; Appx2510-2519. In October 2014, VA certified the appeal to the board. Appx2441. In November 2014 and May 2015, Mr. Stokes's representative submitted additional evidence and argument. Appx2441. In November 2017, Mr. Stokes attended a board hearing. Appx2522. In May 2018, the board issued its decision. Appx2885.

H. William Jerome Wood II

In February 2009, Mr. Wood filed an NOD with a VA decision denying, inter alia, increased benefits for his service-connected disability. Appx2524-2525. In April 2009, VA offered Mr. Wood a review by DRO. Appx2525. In March 2010, VA issued an SOC, requested pertinent records, and scheduled two medical examinations for Mr. Wood, which were conducted in April 2010. Appx2525-2526. In May 2010, VA received additional relevant records. Appx2526. In June 2010, VA increased Mr. Woods' benefits, though later that month Mr. Woods requested an additional increase. *Id*. In August 2010, Mr. Woods submitted additional evidence. *Id.* In October 2010, Mr. Wood requested additional time to submit evidence. Appx2527.

In October 2012, VA issued an SOC that noted, inter alia, the necessity of another medical examination. Appx2527-2528. That examination was scheduled in January 2013 and conducted in February 2013. Appx2528. In June 2014, VA issued an SSOC. *Id.* In August 2014, Mr. Wood filed a substantive appeal to the board and additional evidence, and VA certified his appeal to the board. *Id.* In March 2016, Mr. Wood obtained a new representative, who requested the claims file, but there was confusion over the next six months regarding whether she was authorized to access the file. Appx2529.

In an October 2017 decision, the board increased Mr. Wood's benefits, granted TDIU, and remanded another issue. Appx2529-2530.

I. James Briggs

In June 2013, Mr. Briggs filed an NOD with a VA decision assigning a 10% disability rating for his hypertension, but denying service connection for four other disabilities (including PTSD and arthritis). Appx2321. In November 2013, Mr. Briggs declined DRO review and submitted additional claims for benefits, which were addressed in a March 2015 decision. Appx2322. Between March and August 2015, Mr. Briggs submitted additional evidence (including statements on PTSD), notified VA of potentially relevant treatment records, and submitted additional claims, which were addressed in June and October 2015 decisions. Appx2322-2323. Between January and June 2016, Mr. Briggs submitted

additional claims and additional evidence (including statements on PTSD). Appx2323-2324. In June and October 2016, VA scheduled Mr. Briggs for medical examinations, which were conducted in June and October 2016 (the latter involving hypertension). Appx2324-2325.

In November 2016, VA issued a rating decision on arthritis. *Id.* In December 2016, Mr. Briggs submitted additional evidence on hypertension and arthritis. *Id.* (In July 2017, VA issued a rating decision on a separate claim. Appx2326.) In October 2017, VA requested additional records. *Id*. In December 2017, VA scheduled a PTSD examination, which was conducted that month. Appx2327. In January 2018, VA issued a partially-favorable rating decision and SOC (granting the PTSD claim and assigning a 70% rating). *Id.*

Mr. Briggs did not timely file a substantive appeal to the board. Appx2883.

J. *Mootness*

Appellants concede that Mr. Coyne, Mr. Merrick, Mr. Stokes, Mr. Wood, and Mr. Briggs have received board decisions and no longer have a stake in this litigation. Appx2926. (Mr. Wood and Mr. Briggs also do not intend to continue participating as parties in the underlying petition. Appx2929.) Should all the named appellants receive a board decision (or forfeit their right to receive one, *see* 38 U.S.C. § 7105(a), (d)(3)) while this case is still pending, we reserve the right to argue that this appeal has become moot.

III. Appellants' Petition

In April 2015, Mr. Monk filed at the Veterans Court a petition for extraordinary relief in the nature of a writ of mandamus, alleging unreasonable and unconstitutional delay and requesting class certification. Appx47. The proposed class included all veterans who filed an NOD with an initial denial of their VA benefits claim, had not received "a decision" within 12 months, and could demonstrate medical or financial hardship. Appx56.

The Veterans Court denied the request for class certification in May 2015—asserting a lack of authority to entertain it—and denied the petition in July 2015. Appx310-312; Appx340-343. Mr. Monk appealed to this Court, which reversed and remanded the matter. *Monk v. Shulkin*, 855 F.3d 1312, 1321-22 (Fed. Cir. 2017). The Court held that the Veterans Court has the authority to certify a class action, but declined to address whether "certification of a class would be appropriate here." *Id.*

In December 2017, Mr. Monk filed a motion with the Veterans Court to amend his petition and join additional petitioners to his case. Appx407. The amended petition broadened the proposed class to all VA benefits claimants who have filed an NOD with an initial denial of their VA benefits claim[4] and who have

[4] Contrary to Appellants' assertion that "many veterans never receive a decision in their lifetime," *all* the veterans in the proposed class have received a VA benefits decision in their lifetime. Appellants' Brief (App. Br.) at 10. Many have also

not received a board decision[5] within 12 months. Appx471. The Veterans Court granted the motion, ordered supplemental briefing, and conducted oral argument. Appx41-45.

IV. The Veterans Court's Decision On Appeal

On August 23, 2018, an equally-divided *en banc* Veterans Court denied the petitioners' motion for class certification. Appx1. At the outset, the court[6] acknowledged its authority to entertain class actions and to conduct limited factfinding in furtherance of class-certification determinations. Appx2-3. The court stated that it would "use Rule 23 of the Federal Rules of Civil Procedure as a guide for" class-certification determinations, and that the party seeking certification bears the burden of proving the Rule 23 requirements. Appx6 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997)). The court noted that *all* of Rule 23(a)'s requirements—numerosity, commonality, typicality, and

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received a second decision providing de novo adjudication of their claim (an SOC—which 38 U.S.C. § 7105(d)(1) describes as a "decision"), and additional appellate decisions (SSOCs).

[5] Appellants clarified at oral argument before the Veterans Court that they desired a *board* decision, not an SOC, within 12 months. Appx2713-2714.

[6] The initial holdings described in the plurality opinion regarding the use of Rule 23 by the Veterans Court and addressed in this paragraph of our brief were joined by Judges Allen, Bartley and Toth, making those the holdings of the court. *See* Appx16; Appx21-22. In the following paragraph of our brief discussing commonality, we refer to the opinion's holdings as those of the plurality.

adequacy—and at least *one* of Rule 23(b)'s requirements must be established for a class certification. Appx6 (citing FED. R. CIV. P. 23(a)-(b)).

In addressing commonality, the plurality noted that the U.S. Supreme Court in *Wal-Mart* rejected the notion that commonality is established simply where proposed class members allege a violation of the same provision of law or articulate a common question. Appx6-7 (citing 564 U.S. at 350). Rather, the contention presented must be capable of providing a common answer across the class "in one stroke." Appx7 (quoting 564 U.S. at 350). The plurality noted that *Wal-Mart* rejected a class certification where the proposed class alleged Wal-Mart's discrimination in employment decisions, but there was no "glue holding the alleged *reasons* for all those decisions together," i.e., the class members' claims would not "produce a common answer to the crucial question *why was I disfavored*." *Id.* (quoting 564 U.S. at 352).

Turning to the instant petition, the plurality recognized the petitioners' contention that their lack of receipt of a board decision within one year of their NOD filing constitutes unreasonable delay under 38 U.S.C. § 7261(a)(2) and a violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution. Appx1; Appx7. Nevertheless, the plurality found, their contention was not susceptible to a common answer "in one stroke." Appx7-11. The plurality

explained that the *TRAC* standard[7] for unreasonable delay under section 7261(a)(2) and the *Mathews/Mallen* standard[8] for due-process violations involves an examination of multiple factors, including the Secretary's explanation for the delay, the reasonableness of the delay, and the claimant's prejudice from the delay. Appx8 & n.12, 13, 15. Since "the reasonableness or unreasonableness of VA's delay is a key element" in a *TRAC* or due-process analysis, and "reasonableness and unreasonableness are relative concepts" particular to the type of agency action at issue and individualized circumstances, the plurality held that the petitioners' allegations of unreasonable delay were not susceptible to one common answer across the entire class. Appx8-11 (citing *Martin*, 891 F.3d at 1345-46). The plurality also cited multiple cases reflecting the judiciary's general reluctance to certify classes involving due-process allegations, given the flexible, fact-specific nature of a due-process inquiry. Appx10 n.21.

Further, the plurality found the petitioners' choice not to "certify a class based on a specific practice or policy by the Secretary" detrimental to their pursuit of certification, since embracing a broad swath of claimants with different reasons

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[7] *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984); *see Martin*, 891 F.3d at 1348 (adopting the *TRAC* standard for unreasonable-delay allegations against the VA appeal process).

[8] *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 242-43 (1988); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

for their appeal-processing times (including one petitioner whose claim was delayed because she failed to submit a necessary form to VA) weakened the capacity for a common answer for the entire class on the question of unreasonable delay. Appx11 & n.24. The plurality clarified that it was not requiring the petitioners to "identify the causes for the delay to prevail," but that commonality was most often found for more circumscribed classes challenging one specific agency policy. Appx9-12. The plurality also emphasized that it was not resolving the merits of the petitioners' claims, though a commonality analysis necessarily "involves considerations that are enmeshed in the factual and legal issues comprising . . . the cause of action." Appx6 (quoting *Wal-Mart*, 564 U.S. at 351); Appx10.

Addressing Judge Allen's separate opinion, the plurality noted that Judge Allen had "reframed" the question actually pled by the petitioners. Appx9 & n.16. More specifically, although Judge Allen reframed the common question as "[whether] there is a period of time . . . that is simply too long for a claimant to wait for a decision," the plurality noted that the petitioners were very clear that their common contention was the unreasonableness (and unconstitutionality of) a *one-year* processing time between NOD and board decision. *Id.*

As to Rule 23(b), the plurality noted the petitioners' argument that Rule 23(b)(2) (requiring that "the party opposing the class has acted or refused to act on

grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole") applied here. Appx6. Citing *Wal-Mart*'s instruction that "the key to the (b)(2) class is the indivisible nature of the [relief]," and noting that some VA benefits claimants in the class might want to opt-out of an injunction that board decisions be issued within one year of an NOD, the plurality found that the relief warranted for any statutory or constitutional violation here would have to be tailored to the needs of the individual veteran and would not "truly be classwide." Appx13 (quoting *Wal-Mart*, 564 U.S. at 360).

Chief Judge Davis joined the plurality's opinion in full, but also filed a concurring opinion. Appx13-15. He stressed that the court "would certify a class when presented with the appropriate facts," and noted that "portions" of the VA appeal process "may very well" be ripe for aggregate remedies. Appx15. But the petitioners here, he stated, presented "extremely broad assertions" about the entire VA appellate process, which involves "many stages that impose many obligations on both VA and the claimant." *Id.*

Judge Allen filed a separate opinion, joined by Judges Bartley and Toth, that concurred with the plurality's holdings regarding its authority to entertain class actions and the use of Rule 23 as a guide. Appx16. He dissented, however, with the plurality's holdings that the proposed class did not establish commonality or

satisfy Rule 23(b)(2). Appx16-33. Judge Greenberg dissented entirely. Appx33-37.

On October 3, 2018, the petitioners appealed the class-certification determination to this Court. Appx45. The merits of the petition is currently pending before the Veterans Court; oral argument is scheduled for March 27, 2019. Appx46.

SUMMARY OF THE ARGUMENT

Appellants intentionally proposed certification of a broad and diverse class: all VA benefits claimants who have not received a board decision within one year of the filing of their NOD. The proposed class includes up to 470,000 claimants with as many different appellate experiences. Some have not received a board decision within one year because one is not yet due. *See* 38 U.S.C. § 7105(a), (d)(3). Other 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, in a backlogged and overburdened system with 470,000 other appeals requiring similar compliance.

As the Veterans Court found, the question of the reasonableness or constitutionality of the appeal-processing time for all these different claimants—at different stages of the appeal process, with different impediments to their receipt of a board decision within one year —is not susceptible to one "common answer"

across the entire class. Appx10-12. Thus, pursuant to *Wal-Mart*, the proposed class does not meet the standard for commonality.

Appellants provide several arguments on appeal, but none of them demonstrates that the Veterans Court abused its discretion in its application of the *Wal-Mart* standard. This case is not about whether the VA appeal system predating the AMA is broken (it is), or whether the Veterans Court has the authority to entertain class actions (it does). The sole issue on appeal is whether the Veterans Court faithfully applied *Wal-Mart* here. It did. And because all the plurality did was apply *Wal-Mart*, this Court should dismiss the appeal pursuant to 38 U.S.C. § 7292(d)(2)(B).

ARGUMENT

I. Jurisdiction And Standard Of Review

This Court's jurisdiction to review Veterans Court decisions is limited by statute. *Wanless v. Shinseki*, 618 F.3d 1333, 1336 (Fed. Cir. 2010). The Court may review the validity of a Veterans Court decision "on a rule of law or of any statute or regulation" or any interpretation thereof "that was relied on by the [Veterans] Court in making the decision." 38 U.S.C. § 7292(a). Absent a constitutional issue, however, the Court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2).

This limited jurisdiction would apply to the Court's review of Veterans Court orders denying class certification. *Cf. Beasley v. Shinseki*, 709 F.3d 1154, 1158 (Fed. Cir. 2013) (this Court may review a "a non-frivolous legal question" under 38 U.S.C. § 7292(a), but cannot "interfere with the Veterans Court's role as the final appellate arbiter of the facts underlying a veteran's claim or the application of veterans' benefits law to the particular facts of a veteran's case.").

In non-VA contexts, this Court has reviewed a denial of class certification for abuse of discretion. *Certain Former CSA Emps. v. Dep't of Health & Human Servs.*, 762 F.2d 978, 986 (Fed. Cir. 1985); *see Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *Former Emps. of IBM Corp. v. Chao*, 292 F. App'x 902, 906 (Fed. Cir. 2008) (nonprecedential).

II. The Veterans Court Properly Applied The Law In Declining To Certify A Proposed Class Not Susceptible To A Common Answer Across The Entire Class

Appellants intentionally proposed certification of a broad and diverse class: all VA benefits claimants who have not received a board decision within one year of the filing of their NOD. Appx471. This includes claimants whose own actions or choices contributed to delay: for example, (1) missing a scheduled examination; (2) requesting a regional office or board hearing; (3) requesting that such a hearing be postponed, Appx323 (Mr. Monk); Appx2385 (Mr. Dolphin); (4) requesting a stay or additional time, Appx2333 (Mr. Coyne); Appx2440 (Mr. Stokes);

Appx2527 (Mr. Wood); Appx3017 (Ms. Obie); (5) failing to submit requested or necessary forms, Appx2427-2428 (Ms. Obie); or (6) requesting that VA secure or review additional evidence late in the appellate process, Appx2422-2423 (Mr. Merrick); Appx2441 (Mr. Stokes).

It includes claimants whose appeals were delayed in-part by third-party actions: for example, a records center or private hospital not promptly furnishing records, Appx323-324, or furnishing records that then reflect the existence of additional relevant records that must be obtained under VA's duty to assist, 38 U.S.C. § 5103A. It even includes claimants who did not receive a board decision within one year because they are not yet entitled to one. *See* 38 U.S.C. § 7105(a), (d)(3) (requiring a substantive appeal to "complete" appellate review). And it includes claimants who did not receive a board decision within one year because VA had to comply with statutory duties, regulations, and subregulatory policies for that appeal, *and* 470,000 other appeals in a backlogged and overburdened system.

As the Veterans Court found, the question of the reasonableness or constitutionality of the appeal-processing time for all these different claimants—at different stages of the multi-step appeal process, with different impediments to their receipt of a board decision within one year—is not susceptible to one "common answer" across the entire class. Appx6-12. Thus, pursuant to *Wal-Mart*, the proposed class lacks commonality. Despite Appellants' various purported legal

challenges to the plurality's analysis, in the end, as we establish, the court properly applied the relevant law to the facts of the proposed class. As such, the plurality's holding regarding certification, notwithstanding the underlying due process contention, falls outside the jurisdiction of this Court to review. 38 U.S.C. § 7292(d)(2)(B).

A. Commonality Under *Wal-Mart* Requires A Common Answer For All Class Members In One Stroke

There is no dispute that the Supreme Court's *Wal-Mart* decision provides the governing standard for assessing commonality. In *Wal-Mart*, the Court explained that the test for commonality is not whether there is a question "common to the class," since "[a]ny competently crafted class complaint" can raise such a question. 564 U.S. at 349 (citations omitted). Moreover, it is insufficient for a class to merely allege "that they have all suffered a violation of the same provision of law." *Id.* at 350. Rather, their allegations must depend on 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." *Id.*

Thus, the Court instructed, commonality is not about common "questions" as much as "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (citation omitted). "Dissimilarities

within the proposed class," the Court noted, "have the potential to impede the generation of common answers." *Id.* (citation omitted).

Turning to whether the *Wal-Mart* proposed class's discrimination claim under Title VII of the Civil Rights Act of 1964 was capable of resolution in one stroke, the Court noted that "the crux of [a Title VII] inquiry is the reason for a particular employment decision." *Id.* at 352. While the plaintiffs wished "to sue about literally millions of employment decisions at once," the Court found that, "[w]ithout some glue holding the alleged *reasons* for all those decisions together, it will be impossible to . . . produce a common answer to the crucial question *why was I disfavored*." *Id.* Ultimately, the Court found no such glue: The plaintiffs had not identified a "specific employment practice . . . that ties all their 1.5 million claims together," nor proffered significant proof of a "general policy of discrimination"; and "[m]erely showing . . . an overall sex-based disparity does not suffice." *Id.* at 353, 357-58.

Wal-Mart's holding is directly applicable here. Appellants' proposed class involves 470,000 VA benefits claimants with different impediments to their receipt of a board decision within one year. For some, the primary impediment was the time it took VA to compose a Statement of the Case (38 U.S.C. § 7105(d)(1)); others' primary wait was for VA to certify their appeal (38 C.F.R. § 19.35) or schedule their board hearing (38 U.S.C. § 7107(b)). Some endured a third party's

sluggish response to VA's request for records pursuant to its duty to assist (38 U.S.C. § 5103A); others intentionally requested that VA postpone its processing (Appx323, Appx2333; Appx2385; Appx2440; Appx2527).

There are common questions that can be raised about this proposed class and Appellants are alleging the same violations of law: 38 U.S.C. § 7261(a)(2) and the Fifth Amendment. But the crux of commonality is determining whether the questions common to the class are capable of a common *answer*, i.e., whether the truth or falsity of their common contention will resolve their claims "in one stroke." *Id.* at 349. To evaluate that issue, as noted above, the Supreme Court identified the nature of the substantive law regarding the underlying claim. *Id.* at 352.

Here, that substantive law is 38 U.S.C. § 7261(a)(2)[9] and the Fifth Amendment. As further discussed below, a section 7261(a)(2) ("unreasonable delay") inquiry requires application of the six-factor *TRAC* balancing test that considers the "particular agency action" at issue, the limited resources and priorities of the agency, "the effect of a delay on a particular veteran," and a "rule of reason" that is not subject to bright-line treatment. *Martin*, 891 F.3d at 1345-47

[9] To be precise, section 7261 ("Scope of review") does not bestow any substantive rights to claimants. But it does authorize the Veterans Court to "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. § 7261(a)(2).

(finding "no reason to articulate a hard and fast rule" as to when delay in the VA appeal process becomes unreasonable). Moreover, although there is no need for a separate due-process analysis when a *TRAC* analysis is conducted, *id.* at 1348-49, a Fifth Amendment due-process inquiry is a "flexible" analysis dependent on "time, place, and circumstances," and the competing interests involved. *Mathews*, 424 U.S. at 334.

Thus, just as a Title VII inquiry examines "the reason for a particular employment decision"—asking "*why was I disfavored*"—an unreasonable-delay (or unconstitutional-delay) inquiry examines the reason and context of a particular delay. *Wal-Mart*, 564 U.S. at 352. With such a context-driven analysis, absent some "glue" holding 470,000 different appellate experiences together, "it will be impossible to . . . produce a common answer to the crucial question *why was I* [*delayed*]." *Id.*

Otherwise stated, given the nature of an unreasonable-delay inquiry, and the broad and diverse nature of the class Appellants proposed, the answer to the question of "Have they experienced unreasonable delay?" necessarily will be "It depends." Some claimants may have experienced unreasonable delay; others have not; a common answer on unreasonable delay cannot be provided for all class members "in one stroke." *Id.* at 349. The Veterans Court correctly concluded that

Appellants' proposed class did not meet the standard for commonality under *Wal-Mart*. Appx8-12.

B. The Veterans Court Applied The *Wal-Mart* Standard—Nothing More

On appeal, Appellants articulate a common contention that "VA delays in adjudicating disability benefits appeals violate their statutory right to be free from 'unreasonably delayed' agency action under *TRAC*." Appellant's Brief (App. Br.) 37. They assert that this "common contention[ ] challenging systemic failure by the VA alone is sufficient to meet" commonality. App. Br. 24. They argue that the Veterans Court "misinterpreted Rule 23" and imposed a "heightened commonality requirement." App. Br. 24, 33.

To the contrary, the Veterans Court applied the *Wal-Mart* standard—nothing more. And *Wal-Mart* was exceedingly clear that presenting a common contention alone is *not* sufficient for commonality. *See* 564 U.S. at 350 ("What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers*."). Rather, the contention must be susceptible to a *common answer* capable of resolving the class's allegations "in one stroke." *Id.*

Here, Appellants' common contention—that VA has violated their statutory right to be free from unreasonably-delayed agency action—is simply an allegation that they "have all suffered a violation of the same provision of law," which the

Supreme Court explicitly found an insufficient basis for commonality. 564 U.S. at 350. Moreover, as the Veterans Court explained, given the nature of an unreasonable-delay (*TRAC*) analysis, their contention is not susceptible to one "yes" or "no" answer across the entire class. Appx8-11 (recognizing that the reasonableness of a delay depends on the complexity of the particular agency action at issue, the explanation for the delay, and other factors (citing *Martin*, 891 F.3d at 1345-47)). Thus, it is *not* the case that the entire class will "rise or fall" together in an evaluation of their unreasonable-delay claims. *Contra* App. Br. 22.

Although Appellants argue that "dissimilarities in the underlying reasons" for the delays experienced across the proposed class should not impede commonality, App. Br. 28 (quoting *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014)); *see also* App. Br. 38, *Wal-Mart* has instructed that "[d]issimilarities within the proposed class [ ] have the potential to impede the generation of common answers." 564 U.S. at 350.

Of course, that does not mean that any dissimilarity across class members dooms commonality. But a court must consider those dissimilarities to determine whether the common contention is "capable of classwide resolution," and a plaintiff's choice to challenge millions of individual employment decisions governed by different regional policies (or a petitioner's choice to amalgamate 470,000 individual appellate experiences impacted by multiple parties' actions)

will naturally impact the likelihood of finding commonality. *Id.* (suggesting that a contention of "discriminatory bias on the part of the same supervisor" was more likely to generate a common answer than a challenge to 1.5 million employment decisions across 3,400 stores).

As noted above, this broad class covers claimants whose appeals have been stalled by the queue for board hearings, or VA's search for pertinent records, or their own request for additional time to submit evidence, or VA's adjudication of other pending appeals—and every possible combination of these impediments. Whether these dissimilarities impede commonality depends on the "crux of the inquiry" at issue. *Wal-Mart*, 564 U.S. at 352. And here, the crux of an "unreasonable delay" inquiry is the context of the delay, including the complexity of the "particular agency action" at issue, the limited resources and priorities of the agency, and "the effect of a delay on a particular veteran." *Martin*, 891 F.3d at 1345-47; *compare Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 US. 455, 467 (2013) (underlying legal inquiry for class's claim was "objective" and could "be proved through evidence common to the class").

As such, the fact that the proposed class covers a wide swath of different contexts undermines the potential for one common answer on the entire class's allegations of "unreasonable delay." While Appellants may "seek" a common answer across the class, App. Br. 51, the Veterans Court correctly found that their

unreasonable-delay allegations cannot be resolved "in one stroke" if they have different experiences informing "the crucial question *why was I [delayed]*." 564 U.S. at 350, 352; Appx11.

C. The Veterans Court Did Not Engage In A Free-Range Merits Analysis

Appellants also accuse the Veterans Court of impermissibly reaching the merits of their claims at the class-certification stage. App. Br. 25, 34. They charge the Veterans Court with "evaluating Appellants' claims under the substantive *TRAC* factors." App. Br. 39. But these arguments miss a key distinction: While the Veterans Court *identified* the substantive law underlying Appellants' claims in order to understand whether their claims would be susceptible to a common answer, that identification is decidedly *not* a merits analysis. Rather, it is the exact process followed by the Supreme Court in *Wal-Mart*.

The "rigorous analysis" required to evaluate commonality will frequently "entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Wal-Mart*, 564 U.S. at 351. This is because a class determination "involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* Thus, in *Wal-Mart*, the Supreme Court considered the "crux of the inquiry" for a Title VII claim (the reason for a particular employment decision) to determine whether the proposed class's Title VII claims were susceptible to a common answer. *Id.* at 352.

Similarly, in *Amgen*, 568 US. at 466 (internal quotation marks omitted),[10] the Supreme Court noted that "free-ranging merits inquiries at the certification stage" are impermissible, but that "[m]erits questions may be considered to the extent . . . that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." The Supreme Court then considered the "essential predicate" for plaintiffs' fraud-on-the-market legal theory—which required proof of materiality—and observed that "[t]he question of materiality . . . is an objective one . . . prov[able] through evidence common to the class," such that the class was proper. *Id.* at 466-67.

The Veterans Court followed the exact process of *Wal-Mart* and *Amgen.* The court identified the "essential predicate" or "crux" of an unreasonable-delay inquiry, and assessed whether that type of inquiry was susceptible to a common answer. 568 U.S. at 466; 564 U.S. at 352; *see* Appx8-12. More specifically, it recognized that an unreasonable-delay (*TRAC*) inquiry examines the particular context surrounding a given delay, *Martin*, 891 F.3d at 1345-47; and then found that such an inquiry for this class—like the individualized inquiry in *Wal-Mart*, unlike the objective inquiry in *Amgen*—was not susceptible to a common answer.

[10] Commonality was conceded in *Amgen*—the question at issue was whether the proposed class met the requirements of Rule 23(b)(3). *Id.* at 459.

Appx8. To be clear, the court examined what a *TRAC* analysis *entails*, but never *performed* a *TRAC* analysis.

There should be no question that this identification of the legal standard for the underlying claim is part of a commonality analysis and not an impermissible encroachment on the merits. *See Parsons*, 754 F.3d at 676 ("commonality cannot be determined without a precise understanding of the nature of the underlying claims" and without "identify[ing] the elements of the class members's case-in-chief" (internal quotation marks omitted)); *M.D. v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012) (certification determination requires "understand[ing of] the claims, defenses, relevant facts, and applicable substantive law" (internal quotation marks omitted)); *see also Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1166 (9th Cir. 2014) ("Whether a question will drive the resolution of the litigation necessarily depends on the nature of the underlying legal claims that the class members have raised."); Appx10 (citing cases).

Here, the Veterans Court explicitly noted that its discussion of *TRAC*, the applicable substantive law, was "to see whether commonality exists," not to "resolve the merits of the claim." Appx10. The Veterans Court certainly did not decide the merits of the claims—whether the delay experienced by Appellants is or is not a violation of section 7261(a)(2) or the Fifth Amendment. Also, contrary to Appellants' suggestions, it did not force Appellants to prove unreasonable delay at

the class-certification stage. *Contra* App. Br. 39, 49. And nothing in its decision "forecloses an open and fully-briefed debate on the merits at the appropriate time." App. Br. 36.

D. The Veterans Court Correctly Recognized That A *TRAC* Analysis Considers The Particular Context Of A Given Delay

Appellants next take issue with the Veterans Court's recognition that an unreasonable-delay analysis requires consideration of the particular context of a given delay—including VA's reasons for that delay. *See* App. Br. 40-46. More specifically, Appellants contend that "the reasons for VA's delay do not necessarily matter to the substantive *TRAC* analysis." App. Br. 46. The law is clearly otherwise.

1. Per *Martin*, Context Matters In An Unreasonable Delay Analysis

In *Martin*, this Court adopted the six-factor *TRAC* standard for unreasonable or unconstitutional[11] delay allegations, and expounded upon the nature of a *TRAC* analysis. 891 F.3d at 1348. This Court explained that, under factor one ("the rule of reason"), a court must "look at the particular agency action for which

[11] The Court found no meaningful difference between an unreasonable-delay inquiry and an unconstitutional-delay inquiry, and held that—if the *TRAC* standard is applied to an unreasonable-delay claim—there is no need for a separate "due process" analysis. 891 F.3d at 1348-49. Thus, Appellants' assertion that the Veterans Court erred in stating that "delay cannot constitute a constitutional due process violation unless the delay is unreasonable" is clearly incorrect. App. Br. 50 (quoting Appx9).

unreasonable delay is alleged," noting that it is reasonable for complex and substantive agency actions to take longer than purely ministerial ones, and that delays due to VA performing its statutory duties are more reasonable than delays due to VA "inaction."[12] 891 F.3d at 1345-46. This Court emphasized that there was no "hard and fast rule with respect to the point in time at which a delay becomes unreasonable": "a two-year delay may be unreasonable in one case, and it may not be in another." *Id.* at 1346; *see Cmty. Nutrition Inst. v. Novitch*, 773 F.2d 1356, 1362 (D.C. Cir. 1985) (noting that "there is no absolute definition of what is a reasonable time" for agency processing); *see also Jones v. City of Gary*, 57 F.3d

[12] Given this term employed in *Martin*, it is important to note that VA does not have the resources to act on all appeals simultaneously; when VA employees are not acting on one appeal, it is because they are acting on other claims or appeals. For that reason, Appellants' charge that VA "could, but does not, act" 76% of the time an appeal is pending—i.e., that VA deliberately chooses not to act—is misleading. App. Br. 7. There is always at least some room for increased efficiency, but even the report providing that 76% statistic explicitly acknowledges that periods of inactivity are generally the result of VA's limited resources and resource-allocation choices. Appx2845.

We vehemently dispute any notion that VA deliberately allows preventable delays to fester, or that VA can simply will itself to adjudicate appeals faster. In 2016, VA added 200 additional full-time employees to appellate processing, allocated $10.5 million in overtime funds to support appellate workload, and issued 30,000 more SOCs, resolved 16% more appeals, and certified 26% more appeals than in 2015. Appx2576. The passage of the AMA constitutes recognition from Congress and the President that the statutory structure of the appeals system, not VA efforts or resources, was the primary inhibitor of timely appeal processing. *See* H. RPT. 115-135, at 4-5 (2017).

1435, 1445 (7th Cir. 1995) (recognizing that wait times in a system can be impacted by claimant actions). Such a bright-line rule was particularly inappropriate where Congress had declined to provide a timetable for adjudicating VA benefits claims, a factor two consideration. *Martin*, 891 F.3d at 1345-46.[13]

As to factor four, this Court explained, a court must take into account the limited resources and priorities of the agency. *Martin*, 891 F.3d at 1347; *see also Silverman v. Barry*, 845 F.2d 1072, 1084 (D.C. Cir. 1988) (evaluation of delay must consider "the practical constraints that operate on" an agency, including those that arise from its being "particularly overburdened" even if "statutory rights" are lost during the period of delay); *Wright v. Califano*, 587 F.2d 345, 356 (7th Cir. 1978) ("the magnitude of the administrative burden" cannot be ignored in an evaluation of delay).

Under factor five, a court must examine "the effect of a delay on a particular veteran." *Martin*, 891 F.3d at 1347. This is because certain veterans are "wholly dependent on the requested disability benefits," while others have "a sustainable

[13] In their discussion of *TRAC* factor two, Appellants state that "[r]ecent legislation shows Congress expects the VA to act quickly." App. Br. 44. There certainly is an expectation for speedier processing under recent legislation, the AMA. But the reason for the AMA in the first place was the universal acceptance that the pre-AMA statutory system was broken, prioritizing process over speed, unable to handle the increase in claims and appeals, and generating the delays that are at issue here. *See* H. RPT. 115-135, at 4-5; Appx760-761; Appx1044.

source of income outside of the VA benefits system." *Id.*[14] Overall, a *TRAC* analysis should be based on each case's "unique circumstances." *Id.* at 1345 (quoting *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016)), 1346 n.10 (*TRAC* analysis "should be based on the facts of that particular case").

Given *Martin*, there can be no doubt that the Veterans Court was correct in recognizing that an unreasonable-delay analysis requires consideration of the particular context of a given delay—including VA's reasons for that delay. Appx8-12; *see also* Appx8 n.15 (citing examples of courts considering agency delay in a *TRAC* analysis). Appellants' allegation that a *TRAC* analysis does not require an examination of VA's explanation for a particular delay is flatly wrong. App. Br. 38; *see Martin*, 891 F.3d at 1345-47.

Appellants also purport that courts "unanimously" exclude "the *causes* of the delay" from *TRAC* factor one's "rule of reason." App. Br. 41. But this Court in *Martin* very much engaged with the causes and reasons for a particular delay in expounding factor one. *See* 891 F.3d 1345-46. In any event, the reasons for a

[14] Mr. Monk and Mr. Dolphin, for instance, are in receipt of 100% disability ratings and are pursuing appeals with regard to retroactive compensation. Appx2274; Appx2386. What constitutes a dire or unreasonable delay for them is very different from proposed class members who are appealing a denial of service connection and are trying to secure their first dollar of disability compensation. Of the proposed class members, 12% are in Mr. Monk's and Mr. Dolphin's position (with a 100% disability rating), and 74% are receiving some level of VA compensation. Appx685.

given delay, if not appropriate as part of factor one, would certainly be appropriate in factor four (agency resources and priorities); the *TRAC* factors are not "ironclad" and can intersect. *Id.* at 1345 (quoting 750 F.2d at 80).

In support of their argument, Appellants cite a variety of D.C. Circuit decisions, but none of them stands for the proposition that a *TRAC* analysis requires blinders as to the reasons for a delay. In fact, *Mashpee Wampanoag Tribal Council, Inc. v. Norton* explicitly states otherwise:

> [T]he rule of reason . . . cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful but will depend in large part, as we have said, upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency.

336 F.3d 1094, 1102 (D.C. Cir. 2003) (cited at App. Br. 42). *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd*. explicitly considered whether any "relevant considerations in this case adequately excuse the agency" of its delay. 750 F.2d 81, 86 (D.C. Cir. 1984) (cited at App. Br. 41). And *In re Am. Rivers & Idaho Rivers United* made "no mention of . . . the reasons for the agency's delay" (App. Br. 42-43) 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. 372 F.3d 413, 418 (D.C. Cir. 2004). Here, in contrast, 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.

Appellants emphasize that the *length* of delay matters in a *TRAC* analysis, App. Br. 41, and that is certainly a proper factor for consideration. But a focus solely on length or reliance on averages across the entire multi-step VA appeal system distracts from the pertinent question in this appeal:[15] given the context-driven nature of a *TRAC* analysis, are the unreasonable-delay allegations of 470,000 class members with vastly different appellate experiences susceptible to resolution via one common answer? *Martin* instructs that the answer is no.

2. Context Matters In A Due Process Analysis

Although *Martin* made clear that a separate due-process analysis is not required when *TRAC* is applied, 891 F.3d at 1348-49, Appellants believe that their due-process challenge "is particularly apt for class certification because it raises legal questions of general application." App. Br. 47. To the contrary, Appellants' argument—that the constitutionality of 470,000 different appellate experiences can be resolved with a common answer—is exactly the type of "sweeping and categorical" approach to due process decried by the Supreme Court. *Gilbert v. Homar*, 520 U.S. 924, 931 (1997).

[15] For instance, Mr. Merrick's appeal may have been pending for five years, but he received five appellate decisions (an SOC, SSOCs, and finally a board decision) during that time. Appx2421-2423; *see also Martin*, 891 F.3d at 1346 n.10 (relying on statistics regarding "average" delays is speculative; each *TRAC* analysis "should be based on the facts of that particular case").

Rather, the Supreme Court has consistently stressed an approach to due-process analysis that is "flexible" and dependent on "time, place, and circumstances." *Mathews*, 424 U.S. at 334; *see Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (constitutional sufficiency of a process "varies with the circumstances"); *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972) (due-process analysis recognizes that "not all situations . . . call for the same kind of" conclusions); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (openly questioning the suitability of class certification for plaintiffs' due-process claim, given the flexible nature of due process).

To be sure, there is no lack of cases where individuals have alleged a due-process violation and formed a class. But 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. In *Crosby v. Social Sec. Admin.*, 796 F.2d 576, 579 (1st Cir. 1986), for instance, a proposed class affected by delays in the Social Security disability hearing process alleged a due-process violation, but the First Circuit found that "a delay of any particular period of time may be quite reasonable in one case and extremely unreasonable in another," impeding the capacity of the litigation to generate common answers. *Id.* at 579. *See also Dale v. Hahn*, 440 F.2d 633, 640 (2d Cir. 1971) (declining class certification where, given the varying fact-patterns, statute may be

"unconstitutional as applied to certain members of the purported class and yet . . . constitutional as applied to others").

Appellants note the Supreme Court's recognition that "[a]t some point, a delay" in a hearing "would become a constitutional violation." App. Br. 51 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985)). But that statement—from a case involving two plaintiffs, not a proposed class—does not grapple with the commonality question at issue here. There is no dispute that it is legally possible for some of the 470,000 proposed class members' appellate experiences to have reached that point of constitutional violation; but the relevant question here is whether one common answer can be provided for *all* 470,000 proposed class members' allegations of constitutional violation. *Wal-Mart*, 564 U.S. at 350. The Supreme Court's flexible approach to due process weakens the likelihood of a common answer across this diverse class.

In sum, certification of Appellants' proposed class would effectively force the Veterans Court "into the uncomfortable position of relying upon the 'sweeping and categorical' approach to the Due Process Clause rejected by the Supreme Court." *Lightfoot v. District of Columbia*, 273 F.R.D. 314, 325-26 (D.D.C. 2011) (quoting *Gilbert*, 520 U.S. at 931). The Veterans Court would have to declare a due-process violation for all of Appellants' class or none of the class—in

contravention of well-established precedent that a due-process analysis must be context-driven rather than categorical.

E. The Veterans Court Did Not Err in Considering The Petitioner's Failure To Challenge A Particular Agency Policy Or Procedure

Appellants further assert that the Veterans Court impermissibly required that they "identify specific policies or practices underlying systemic delay" to establish commonality. App. Br. 21. But the Veterans Court required only what the Supreme Court in *Wal-Mart* required: that the proposed class provide some "glue" holding together the class members' different appellate experiences, such that their unreasonable-delay allegations might be susceptible to a common answer. Appx7 (quoting 564 U.S. at 352).

In *Wal-Mart,* the Supreme Court considered whether the plaintiffs had identified a "specific employment practice" or proffered significant proof of a "general policy of discrimination" as the glue that could "tie[ ] all their 1.5 million claims together." 564 U.S. at 357-58. Here, Appellants have refused to target a specific VA practice or policy that could provide the necessary "glue" for commonality. Instead, they have insisted on challenging average delays across a multi-faceted system governed by many different statutes, regulations, and judicial precedents. *See* App. Br. 57.

1. Commonality Requires More Than The Shared Contention That Rights Were Denied "At Some Point" In An Agency Process

In their brief, Appellants discuss *DL v. D.C.*, 860 F.3d 713 (D.C. Cir. 2017). App. Br. 27. The *DL* litigation is indeed very instructive here—but the journey to the D.C. Circuit's affirmance of the certified class in 2017 began with the rejection of a broader class in 2013. In 2011, the district court certified a class that all "suffered the same injury: denial of their statutory right to a free appropriate public education." *DL v. District of Columbia*, 713 F.3d 120, 124 (D.C. Cir. 2013). Although class members were not receiving that education for a variety of disparate reasons, the district court reasoned that the "glue" binding together their claims was the "systemic failures" of Washington D.C.'s education system. *Id.* at 125-26.

The D.C. Circuit reversed for lack of commonality under Rule 23(a). *Id.* at 129. The court noted that *Wal-Mart* had changed the legal landscape on commonality, as recognized by virtually all the Federal appellate courts. *Id.* at 126-27 (citing cases). Post-*Wal-Mart*, the court stated, '"violation of the same provision of law' . . . is insufficient to establish commonality given that the same provision of law 'can be violated in many different ways.'" *Id.* at 126 (quoting 564 U.S. at 349). The court found that "the harms alleged . . . by the plaintiffs here involve different policies and practices at different stages of the [special education] process; the district court identified no single or uniform policy or practice that

bridges all their claims." *Id.* at 127. "In the absence of identification of a policy or practice that affects all members of the class in the manner *Wal-Mart* requires, the district court's analysis" was erroneous. *Id.* at 126.

Nevertheless, the D.C. Circuit assured that it was not "suggest[ing] that a class can never be certified in this kind of case"; rather, a narrower class—or sub-classes—with "a common harm suffered as a result of a policy or practice that affects each class member" would suffice. *Id.* at 128. The D.C. Circuit remanded to the district court so that the lower court could entertain a pending motion to consider sub-classes. *Id.* at 128-129.

On remand, the district court established sub-classes: "each defined by reference to a uniform policy or practice governing a specific stage of the special education process." *DL*, 860 F.3d at 724. The D.C. Circuit subsequently found these sub-classes "far more precise" than the previous class, whose only shared contention was the denial of their rights "at some point in their experiences with" the special education process. *Id.* at 725.

The trajectory of the *DL* litigation is directly applicable here. Appellants here stand where the *DL* plaintiffs stood in 2011. They are alleging a violation of the same laws (38 U.S.C. § 7261(a)(2) and the Fifth Amendment), and claiming that "systemic failures" at VA are the glue holding their claims together, but "the harms alleged . . . involve different policies and practices at different stages of the

[VA appeals] process; [they have] identified no single or uniform policy or practice that bridges all their claims." 713 F.3d at 127.

To be sure, this does not mean that a malfunctioning or delayed VA appeal process cannot be challenged through a class action; and the Veterans Court did not hold otherwise. Appx11-12. But class members' shared contention cannot simply be, as it is here, a denial of rights "at some point in their experiences with" the VA appeal process; it must be with "a common harm suffered as a result of a policy or practice that affects each class member." 860 F.3d at 725; 713 F.3d at 128.

2. An Agency Practice Or Policy Can Be The "Glue" Holding Together A Class

Alongside *DL* stands a host of post-*Wal-Mart* Federal appellate decisions distinguishing between (1) challenges to a specific policy or practice affecting each proposed class member and (2) challenges alleging a "systemic" violation of law based on the amalgamation of proposed class members' different experiences. *See DL*, 713 F.3d at 127; *see also Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 557-58 (7th Cir. 2016) (rejecting commonality where proposed class presented "a series of individual claims of deliberate indifference," rather than identifying "a policy or practice which rises to the level of systemic indifference"); *M.D.*, 675 F.3d at 842-44 (*Wal-Mart* requires "a discrete question of law" central to all class members' claims, rather than an allegation of "systemic deficiencies" or an "amorphous

claim of systemic or widespread misconduct"); *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 498 (7th Cir. 2012) (noting that "an illegal *policy* might provide the 'glue' necessary to litigate otherwise highly individualized claims as a class," but an allegation of "systemic" violation of the law is insufficient).

It is undeniable that, pre-*Wal-Mart*, some classes alleging "systemic" failure were certified despite disparate experiences across a class. But the understanding of commonality has changed since *Wal-Mart*, *see DL*, 713 F.3d at 126 (citing cases), and—critically—no exposition of pre-*Wal-Mart* cases can demonstrate that the Veterans Court erred in its application of the *Wal-Mart* standard.

As such, the focus of this Court's inquiry must be *Wal-Mart* and its progeny. As noted above, *Wal-Mart* indicated that the challenge of a "specific [ ] practice" could serve as the glue that holds a class together, and that is what successful post-*Wal-Mart* classes have done. 564 U.S. at 357; *see Yates v. Collier*, 868 F.3d 354, 362 (5th Cir. 2017) (plaintiffs challenged prison temperature); *Cole v. City of Memphis*, 839 F.3d 530, 540 (6th Cir. 2016) (plaintiffs challenged practice of removing pedestrians from Beale street); *Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of Chi.*, 797 F.3d 426, 440 (7th Cir. 2015) (plaintiffs challenged uniform criteria underlying school-evaluation decisions); *In re Johnson*, 760 F.3d 66, 73 (D.C. Cir. 2014) (plaintiffs challenged uniform criteria and numerical system

underlying promotion decisions); *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 797 (8th Cir. 2014) (plaintiffs challenged specific company policy).

In *Parsons,* 754 F.3d at 678-79, for instance, which was discussed by the Veterans Court, Appx12, the Ninth Circuit found it "crucial[ ]" that the district court "identified 10 policies and practices to which all members of the certified class are exposed," and held that "[t]hese policies and procedures are the 'glue' that holds together the putative class."[16] Given this proffer of a "particular and sufficiently well-defined set of allegedly illegal policies and practices," the Ninth Circuit found that the class's contention could "be answered in a single stroke[:] either each of the policies and practices is unlawful as to every inmate or it is not." 754 F.3d at 678-79.

Even the post-*Wal-Mart* district court cases cited by Appellants involved classes challenging specific policies, unlike Appellants here. App. Br. 30, 52; *see Braggs v. Dunn,* 317 F.R.D. 634, 655-56 (M.D. Ala. 2016) ("[P]laintiffs have identified eight different specific policies or practices . . . . These policies and practices are the 'glue' that holds together the putative class." (citation omitted));

[16] Contrary to Appellants' assertion, "lengthy and dangerous delays" was not one of the 10 practices certified by the district court. App. Br. 30; *see Parsons v. Ryan*, 289 F.R.D. 513, 522-23 (D. Ariz. 2013). And while the failure to provide timely access to health care, dental treatment, and emergency treatment were three of the identified practices, this was based on specific testimony that those practices were "embedded into [the prison's] health care policy and philosophy." *Id.* at 518, 522-23.

Saravia v. Sessions, 280 F. Supp. 3d 1168, 1203-04 (N.D. Cal. 2017) (regardless of individual circumstances, the class all experienced—and challenged—the agency's tactic of re-arrest and transfer). While some district courts may have certified classes where the practice or policy challenged is less clearly identified, that is a natural function of the discretion accorded to district courts in this arena—a discretion to which the Veterans Court is also entitled. *Califano*, 442 U.S. at 703.

The import of all these decisions—in accordance with the Veterans Court's discussion of the matter—is that a challenge to a specific policy or practice can be the "glue" that holds a class together. *Wal-Mart*, 564 U.S. at 357; *Parsons*, 754 F.3d at 678-79; Appx12. And Appellants here have intentionally provided no glue for their class; their focus on average delay across a multi-faceted system "does not suffice." 564 U.S. at 357.[17]

F. Appellants' Attempts To Distinguish *Wal-Mart* Are Unavailing

In ostensible recognition that *Wal-Mart* hampers a commonality finding for the diverse class they proposed, Appellants attempt to distinguish *Wal-Mart* in two ways. App. Br. 27-29. First, they note the D.C. Circuit's statement in *DL* that,

[17] The law professors' amicus brief argues that commonality can be satisfied where a challenge turns on systemic government practices. ECF No. 28, at 3-4. That is the precise piece—an identified government practice—that is missing here, as Appellants insist on challenging the entirety of a multi-step process impacted by dozens of different government practices (compelled by either statute, regulation, or judicial precedent).

‘“[u]nlike Title VII liability, [Individuals with Disabilities Education Act (IDEA)] liability does not depend on the reason for a defendant’s failure and plaintiffs need not show why their rights were denied to establish that they were.’” App. Br. 27 (quoting 860 F.3d at 725).

This is not an IDEA case; it is an unreasonable-delay case, which—as discussed above, *supra* at Argument.II.D—*does* require engagement with the particular reason a board decision has not been issued in a given appeal. *See Martin*, 891 F.3d at 1345-47. Like a Title VII inquiry, the *TRAC* analysis involves a particularized inquiry that examines “the reasons for a particular [delay]”—asking “*why was I” delayed*. *Wal-Mart*, 564 U.S. at 352. It is definitively *not* the case that the unreasonable-delay standard is “akin to strict liability” where the reason for the delay does not matter: section 7261(a)(2) authorizes the Veterans Court to compel “unreasonably delayed” action, not “any delayed” action. *Contra* Appx2735-2736 (Appellants analogizing to strict liability); *compare Garnett v. Zeilinger*, 301 F. Supp. 3d 199, 207-08 (D.D.C. 2018) (finding that the reasons for delay in administering the Supplemental Nutrition Assistance Program do not matter because the relevant “statute speaks in terms of absolute deadlines without any caveats or limitations”).

Second, while Appellants note their constitutionally-protected property interest in the receipt of VA benefits, that does not distinguish *Wal-Mart*. App. Br.

29. The plaintiffs in *Wal-Mart* had a statutorily-protected interest in freedom from discrimination in employment. *See* 42 U.S.C. § 2000e-1 *et seq.* Both proposed classes alleged violation of a legal right, and are entitled to remedy if there indeed was a violation, but that has nothing to do with a commonality determination.

G. Judge Allen's Reframed Question Does Not Resolve The Litigation In One Stroke

In his separate opinion, Judge Allen asserted that he had discovered a common question that satisfied commonality. Appx26 (Allen, J., separate opinion). On appeal, Appellants embrace Judge Allen's question: "is there any outer bound beyond which the VA's delay" automatically violates due process or warrants mandamus? App. Br. 24.

As the Veterans Court recognized, that was not the question pled by Appellants. Appx9 n.16; *compare* Appx480; Appx1583. Moreover, although Judge Allen "replaced the very specific 1-year period selected by the petitioners with a broad, unspecified period" in an apparent attempt to secure a common question for the class where "the reasons for the delay [do] not matter," his reframed question still does not meet the requirements for commonality. Appx9 n.16; Appx2793.

This is because his question as to whether there is some unspecified outer bound of delay that, regardless of context, would automatically constitute unreasonable or unconstitutional delay is wholly theoretical and would not

"resolve an issue that is central to the validity of each claim." *Wal-Mart*, 564 U.S. at 349. Otherwise stated, a declaration that "yes, there is" or "no, there is not" some outer bound for the VA appeals process—without a delineation of what that outer bound is—does nothing to advance the resolution of the class members' allegations that their actual experiences constituted unreasonable delay. *See id.* (common answer must "drive the resolution of the litigation"); *Sprague v. GMC*, 133 F.3d 388, 397 (6th Cir. 1998) ("[A]t a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation.").

Judge Allen supplemented his question with a more concrete follow-up: is one-year that outer bound of delay? Appx26; App. Br. 49. But this follow-up also fails the *Wal-Mart* test. If, hypothetically, the common answer is "no," that answer will not drive the resolution of the class members' claims, because—even if one-year is not a bright-line outer bound for delay—whether each class member experienced unreasonable delay on the facts of his or her case would still have to be resolved. *Wal-Mart*, 564 U.S. at 349. And the common answer cannot be "yes" because this Court has already held otherwise. *Martin*, 891 F.3d at 1345-46 (noting that "no congressional timetable for handling these benefits claims currently exists," there is "no reason to articulate a hard and fast rule with respect

to the point in time at which a delay becomes unreasonable," and that "a two-year delay may be unreasonable in one case, and it may not be in another"). In sum, while Judge Allen has sought out potential common questions where "the reasons for the delay [do] not matter," Appx2793, *Martin* has already held that they do matter. 891 F.3d at 1345-46.

H. Appellants' Arguments Regarding Rule 23(b) Do Not Demonstrate Error In The Veterans Court's Rule 23(a) Analysis

Appellants argue that the Veterans Court's ruling on commonality "inappropriately reflects the 'more demanding criteria of Rule 23(b)(3)." App. Br. 33 (quoting *Wal-Mart*, 564 U.S. at 375 (Ginsburg, J., dissenting)). While Appellants may believe that the *Wal-Mart* standard is too demanding or too much like a Rule 23(b)(3) predominance inquiry, a majority of the Supreme Court disagreed. *Wal-Mart*, 564 U.S. at 349. Appellants' recycling of an argument rejected by the Supreme Court is not persuasive; and the Veterans Court's application of the standard accepted by the Supreme Court is not legal error.

Appellants argue that the Veterans Court's ruling on commonality under Rule 23(a) "ignores the text, history, and purpose of Rule 23(b)(2)"; but where the Supreme Court has set out the standard for Rule 23(a), it is unclear why the Veterans Court should have circumvented that binding standard to engage with the purpose and history of a different provision. App. Br. 31. Moreover, while Appellants argue that "civil rights cases . . . are prime examples" of Rule 23(b)(2)

classes, the requirements of Rule 23(a) nevertheless must be fulfilled to establish such a class. App. Br. 31 (citation omitted); *see Wal-Mart*, 564 U.S. at 349 (proposed class alleging Civil Rights Act violation did not meet commonality).

Accordingly, as the above analysis in section II of our brief demonstrates, Appellants' various suggestions of error in the plurality's application of *Wal-Mart* are without merit. Rather, the plurality correctly applied the Supreme Court's instructions to the facts of the case. The unique limitations imposed upon this Court regarding a review of the Veterans Court's application of law to the facts of a case require this Court to dismiss this appeal. 38 U.S.C. § 7292(d)(2)(B). However, even were the Court to find jurisdiction, it should affirm.

III. Appellants' New Requests For Pre-Certification Discovery And A Formal Motion Are Not Well Taken

Appellants also argue that the Veterans Court should not have decided their request for certification without providing an opportunity for pre-certification discovery or the filing of a formal motion for class certification. App. Br. 25, 35, 52-56. But Appellants explicitly told the Veterans Court they were not seeking discovery in this case. Appx2751 (Judge Schoelen: "Are you seeking any discovery?" Appellants' counsel: "We are not. We think that you can make the class certification decision here based on the papers."); *see also* Appx1607 (Appellants stating that "no pre-certification discovery is necessary in this case").

Even so, Appellants fail to illuminate what pre-certification discovery was necessary. VA's regulations and subregulatory policies are publicly available. The statistics cited and exhibits included with Appellants' various filings reflect Appellants' access to a wealth of reports on the VA appeal system from the board, VA's Office of Inspector General, the Government Accountability Office, as well as Congressional testimony from VA officials. *See* Appx220; Appx906; Appx1252; Appx2834. Appellants' failure to target a specific VA policy or practice before the Veterans Court was not due to a lack of information, but was the result of their selected litigation strategy. *See* Appx12; Appx2729-2730; Appx2747-2749; *see also* Appx349 (providing Appellants an opportunity to identify "specific VA laws, regulations, or policies" that support their petition).

Moreover, it is difficult to understand what type of "formal" motion for class certification appellants were precluded from submitting. App. Br. 25. In June 2015, Mr. Monk filed a petition for extraordinary and "collective relief," which proposed a class and argued that such class met the requirements of Rule 23. Appx47; Appx56-62. In November 2017, Mr. Monk filed a motion for leave to file an amended petition for extraordinary and collective relief, which was granted. Appx351; Appx464. The amended petition joined additional appellants to this case, proposed a new class, and argued that the new class met the requirements of Rule 23. Appx471; Appx479-482. In January 2018, Appellants filed a lengthy

brief with the Veterans Court arguing, among other things, that their class met the requirements of Rule 23. Appx1579-1596. At oral argument, Appellants did not request an opportunity for the filing of any "formal" motion for class certification. Appx2705-2831.

Appellants had opportunities to request discovery, formally move for class certification, change the class, and provide argument about Rule 23 and *Wal-Mart*. It is disingenuous for Appellants to now claim that they "could not have known" that the *Wal-Mart* standard would be imposed—when they requested a Rule 23 framework for class actions and argued *Wal-Mart* in their brief and at oral argument, *see, e.g.*, Appx1573; Appx1581-1582; Appx2733—or to now claim that they were surprised by a "*sua sponte*" Veterans Court denial of class certification—after a full year of briefing and argument on class issues. App. Br. 54-55. And the time has passed for Appellants to identify specific VA policies or practices that could be the basis of sub-classes, at least as part of this action. *See In re Watts*, 354 F.3d 1362, 1368 (Fed. Cir. 2004) (failure to raise an argument below generally constitutes waiver); *see also Singleton v. Shinseki*¸ 659 F.3d 1332, 1334 n.2 (Fed. Cir. 2011).

IV. The Veterans Court Did Not Abuse Its Discretion In Denying Class Certification Under Rule 23(b)(2)

The Veterans Court also determined that the proposed class did not meet the requirements of Rule 23(b)(2). Appx13. Citing *Wal-Mart*'s instruction that "the

key to the (b)(2) class is the indivisible nature" of the remedy warranted, and noting that some claimants—in order to pursue further development of their claims—might want to opt-out of Appellants' requested declaratory judgment that VA issue board decisions within one year of an NOD (Appx483), the court found that the relief warranted for any statutory or constitutional violation here would have to be "tailored to the needs of the individual veteran" and would not "truly be classwide." Appx13 (quoting *Wal-Mart*, 564 U.S. at 360).

Appellants demonstrate no error in this analysis. While they "seek a single remedy" that "would apply to all class members," App. Br. 23, the remedy they *seek* is not the appropriate question here. The question is whether the "remedy warranted" would be indivisible—whether "the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360. As demonstrated above, given the nature of a *TRAC* analysis, a declaratory judgment may be warranted for some proposed class members, but not others—a divisible remedy. Thus, contrary to Appellants' belief that "some of the VA's delays may be reasonable in individual cases is irrelevant to the Rule 23(b)(2) analysis," App. Br. 61, it is relevant because a remedy will only be indivisible if VA acted unlawfully to all of the class members.

Moreover, a class certified under Rule 23(b)(2) provides no opportunity for opt-out, and does not even oblige a court to afford notice to class members. 564

U.S. at 362. As the Veterans Court noted, however, some claimants may prefer that VA take the time to secure relevant evidence, rather than issuing a board decision without relevant evidence. Appx13 & n.26. And it is hard to imagine *any* claimant preferring that VA forward their appeal to the board to comply with a one-year judicial mandate, only to have the board remand the case back to the AOJ for fulfillment of statutory or regulatory mandates. But that would be the result, unless the one-year judicial mandate includes a proviso that any outstanding legal requirements, to include 38 U.S.C. § 5103A, are automatically obviated absent a claimant's specific request otherwise. *See Wright v. Califano*, 587 F.2d 345, 356 (7th Cir. 1978) (noting that even a well-intentioned, judicially-imposed solution to delays could create "more injustice to claimants than justice").

Indeed, Appellants' suggestion that claimants could simply waive any judicially-imposed deadline to the extent they want to submit further evidence or desire VA to complete its assistance obligations envisions a perverse structure. App. Br. 58. Essentially, claimants would have to affirmatively request that VA complete its statutory duty to assist. This is an anti-claimant result which cannot be squared with section 5103A.

Finally, it is *not* the case that VA has "refused to act on grounds that apply generally to the class." FED. R. CIV. P. 23(b)(2). As demonstrated above, the

"grounds" for each proposed class member not receiving a board decision within one year of the NOD are different for each class member.

V. The Veterans Court's Decision In No Way Forecloses Class Actions

As a final note, Appellants' characterization of the Veterans Court opinion as "effectively foreclos[ing] joint action to seek relief" is not supported by the opinion. App. Br. 6. Appellants could move for the Veterans Court to certify a narrower, but still numerous, class tomorrow. *See* Appx11-12 (discussing narrower challenge); Appx15 (Davis, J., concurring) ("I am confident that the [c]ourt would certify a class when presented with the appropriate facts."); Appx20 (Allen, J., separate opinion) (noting that a majority of the court has "unequivocally embrace[d] its power to use the class action device"). As discussed above, there are a number of statutes, regulations, and subregulatory policies that extend the time between an NOD and a board decision that could be targeted by a narrower class affected by that particular policy. *E.g.*, 38 U.S.C. § 7105(d)(1); 38 C.F.R. §§ 19.31(a), 20.1304(a); M21-1, I.5.E.2. One such proposed class is already pending before the Veterans Court with regards to VA's certification procedure. *See Godsey v. Wilkie*, Vet. App. No. 17-4361 (argument held February 21, 2019).

Nothing in the Veterans Court's order undermines this Court's past statements that appropriate class actions "could" be used to "compel correction of systemic error" or provide "class-wide relief" for delays. *Ebanks v. Shulkin*, 877

F.3d 1037, 1040 (Fed. Cir. 2017); *Monk*, 855 F.3d at 1321. Whether this class action—or class actions generally—would be manageable for or beneficial to the system, or superior to a precedential decision, was not addressed by the Veterans Court and is not at issue in this appeal. Appx3 n.5. What the Veterans Court addressed was commonality for *this* proposed class, and, to the extent reached, this Court should find no abuse of discretion in that commonality finding.

CONCLUSION

We respectfully request that the Court dismiss the appeal or affirm the Veterans Court's decision.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B), I certify that the forgoing brief contains 13,933 words, excluding the parts of the brief exempted by the rule. The brief complies with the typeface requirements and type style requirements of FRAP 32(a)(5) and has been prepared using Times New Roman 14 point font, proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 22nd day of March, 2019, a copy of the foregoing

Corrected Brief For Respondent-Appellee

was filed electronically.

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

/s/ Martin F. Hockey, Jr.

☐ A copy of this filing was served via:

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