

19-1094

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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

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

SUPPLEMENTAL BRIEF OF PETITIONERS-APPELLANTS

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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; Lyle Obie; Stanley Stokes; and William Jerome Wood II.

2. The name of the real party in interest if the party named in the caption is not the real party in interest is: None.

3. 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.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or 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; Eric Baudry, Jacob Bennett, Jade Ford, Shikha Garg, Jordan Goldberg, Catherine McCarthy, Corey Meyer, Arjun Mody, Madison Needham, Jesse Tripathi, and Casey Smith, Law Student Interns; and Simpson Thacher & Bartlett LLP: Elisa Alcabes, Michael Brasky, Joseph Bruno, Thomas Coghlan, Daniel Cohen, Micah Fielden, Laurel Fresquez, R. Grant Gannon, Melissa Parres, Anthony Piccirillo, and John Ready.

5. 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. 20-1305 (Fed. Cir.).

6. Not Applicable.

Respectfully submitted,

July 6, 2020

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PRELIMINARY STATEMENT

Petitioner-Appellants (“Appellants”) submit this Supplemental Brief in response to the Court’s June 4, 2020 Order directing the parties to address the Veterans Appeals Improvement and Modernization Act of 2017 (the “VAIMA” or “AMA”), “its relation to the requested class action” and “whether this appeal continues to be relevant.” This appeal continues to be relevant because the AMA does not apply to the proposed class, which consists of approximately 200,000 veterans suffering unreasonable delay in the *legacy* appeals system. Thus, the scope of the proposed class and the injury suffered by class members are unaffected by the implementation of the AMA, which operates separately from the legacy system. Because the proposed class definition is limited to legacy appeals – that is, those appeals *not* subject to the AMA – the AMA is necessarily irrelevant to the claims of the 200,000 putative class members.

For years, delays in the Department of Veterans Affairs (VA) legacy system of appeals have devastated Appellants. Opening Br. 15-20; *cf. Heckler v. Chaney*, 470 U.S. 821, 851 (1985) (Marshall, J., concurring in the judgment) (“[G]overnmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action.”). The VA’s implementation of the AMA does not change how appeals are managed for those 200,000 veterans in the legacy system or remedy the egregious statutory and

constitutional harms that veterans continue to endure. Appellants respectfully ask this Court to fulfill its duty to rule on the merits of their appeal by finding that the proposed class satisfies commonality under Rule 23(a)(2) and presents a valid Rule 23(b)(2) class or, alternatively, remand this case with instructions to the Veterans Court to apply the proper legal standard for class certification.

I. This Appeal Is Relevant and Pressing Because the AMA Does Not Apply to the Proposed Class of Veterans in the Legacy Appeals System

The proposed class consists of approximately 200,000 veterans in the legacy appeals system. The implementation of the AMA does not affect this appeal because the claims of the proposed class are not governed by the AMA. The delays in the legacy system remain as relevant and harmful today as they were prior to the AMA.

A. The Proposed Class is Made Up of 200,000 Veterans Who Remain Mired in the Legacy System, to Whom the AMA Does Not Apply

The proposed class comprises veterans who are suffering unreasonable and unconstitutional delay in the legacy appeals system; these veterans are unaffected by the enactment and implementation of the AMA. The AMA was signed into law by President Trump in August 2017 and became fully effective on February 19, 2019. Veterans Appeals Improvement and Modernization Act of 2017, Pub L. No. 115-55, § 2(x)(1), 131 Stat. 1105, 1115-16 (2017); VA Claims and Appeals Modernization, 84 Fed. Reg. 2449 (Feb. 7, 2019). After that date, all *new* appeals

from a regional office decision must go through the AMA system, not the legacy appeals system. During the interim period between the AMA being signed into law and its full implementation, the VA invited, but did not require, certain veterans with pending appeals to voluntarily opt into the new AMA system through the Rapid Appeals Modernization Program (“RAMP”). Appx1645. Those appeals that were not converted under RAMP continued within the legacy appeals system and are not governed by the AMA. Bd. of Veterans’ Appeals, Annual Report: Fiscal Year 2019, U.S. Dep’t Veterans Aff. 10 (2019) (hereinafter BVA Report 2019). The VA has committed to maintaining both the legacy system and the new AMA system simultaneously until all the legacy appeals have been adjudicated.

The putative class members initiated their appeals before the VA implemented the AMA—that is, prior to February 19, 2019—and did not opt into the AMA system. The AMA therefore has no bearing on the proposed class of veterans in the legacy system whose constitutional and statutory rights continue to be violated by unreasonable delay.

The class has always been defined, briefed, and argued to refer to only veterans in the legacy system, excluding any veterans with appeals in the new AMA system. As the Court correctly notes, the proposed class is defined as “individuals who . . . applied for and been denied [VA] disability benefits, in whole or in part; [and] timely filed an NOD upon denial of an original, reopened,

or remanded claim; [where] the VA has failed to render a decision on the pending appeal within twelve (12) months of the date of the NOD.” June 4, 2020 Order, at 3 (citing Appellants’ December 20, 2017 Amended Petition).¹ Appellants also made clear that the class includes only veterans with appeals in the legacy system in briefing before this Court. *See, e.g.*, Reply Br. at 16 (“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.”) (emphasis added); *id.* at 24 (“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*.”) (latter emphasis added).

Furthermore, the Order from which Appellants appealed—the Veterans Court denial of class certification—was entered in 2018 before the AMA took

¹ The proposed class comprises veterans who have “timely filed an NOD,” which at the time of its formulation referred to those filing a VA Form 21-0958 Notice of Disagreement, the legacy appeal form known as an “NOD.” To implement the AMA, the Secretary created a new “Decision Review Request” form starting February 19, 2019. *See* “VA decision reviews and appeals,” <https://www.va.gov/decision-reviews/> (“The legacy VA appeals process has changed to the decision review process. If you disagree with a VA decision dated on or after February 19, 2019, you can choose from 3 decision review options (Supplemental Claim, Higher-Level Review, or Board Appeal) to continue your case”); *see also* VA Form 10182 Decision Review Request: Board Appeal (Notice of Disagreement).

effect in 2019. Appx1. As such, the class Appellants sought to represent as of August 2018 did not and could not include AMA appeals.

Similarly, at oral argument before this Court, Appellants' counsel addressed the AMA and made clear that it does not resolve the claims of class members in the legacy system:

And if I could reference the VAIMA, which is Congress's ostensible solution to the systemic delay issue, which does nothing for the veterans who are waiting in the legacy system. Veterans in the legacy system will still have to wait in the current system, which means they are still going to be subject to multi-year delays. And the VA cannot offer a timetable for when it will resolve the legacy appeals at all.

See Oral Argument at 5:54 - 6:16. The Secretary and members of the Veteran's Court panel also recognized the distinction between the proposed class members' appeals and appeals within the AMA, noting that the processes are separate.²

² In footnote 58 of his dissent, Judge Allen noted that the proposed class relates to veterans with appeals in the legacy system:

[T]he Secretary's response to the request for class certification often does not address the real thrust of the commonality argument. See, e.g., Secretary's Response to Amended Pet. at 14 ("There are countless individual factors that determine the length of time it takes for a claim to work its way through the *legacy appeals system* . . .").

Appx25 (emphasis added). And, when discussing RAMP during oral argument, counsel for the Secretary stated that a veteran would be "opting in to the Appeals Modernization Act system, *which is different than the legacy appeals system.*" Appx2809 (emphasis added).

Because the proposed class consists of veterans in the legacy system, the requested class is unaffected by the AMA.³

B. 200,000 Veterans in the Legacy System Continue to Suffer Unreasonable Delay

As of May 2020, there are 197,075 veterans and 217,918 appeals in the legacy system, which remains separate from the new system created by the AMA.⁴ U.S. Dep't. of Veterans Affairs, May 2020 AMA Report, https://www.benefits.va.gov/REPORTS/AMA/AMA_2020/AMA_05312020.xlsx. Since the VA's official AMA implementation date, February 19, 2019, the AMA appeals and the legacy

³ Appellants have not “declined to limit their proposed class or issues” as stated in the June 4, 2020 Order. Appellants have never moved for class certification. At the Veterans Court, Appellants submitted briefing on remand regarding fourteen questions posed by the Court. Appx347-350. The Veterans Court heard argument and *sua sponte* converted this additional briefing into a motion for class certification and declined to certify Appellants’ proposed class. Appx1-13. In oral argument before the *en banc* Veterans Court, Appellants requested the chance to amend their petition or move for certification of subclasses as necessary, but Appellants were not given the opportunity to do so. *See* Appx2826-2827. Moreover, the Veterans Court has the power to amend the class definition and order subclasses as it sees fit and has evidenced its willingness to do so in recent cases. *See Godsey v. Wilkie*, 31 Vet. App. 207, 221 (2019) (certifying class as modified by the CAVC “to reflect [the court’s] ultimate merit determination,” thus preserving the class action); *Skaar v. Wilkie*, 32 Vet. App. 156, 188-89 (2019) (certifying class as modified by CAVC to exclude two subclasses defined by the CAVC and never proposed by any party).

⁴ The data on the number of appeals and individual claimants remaining in the legacy system was provided to Appellants in an email from VA counsel on June 25, 2020 in response to our request, and we expect they will furnish it to the Court as well.

appeals have run in distinct, parallel systems. *See* Pub. L. No. 115-55, § 2(x), 131 Stat. at 1115 (stating that the AMA is not applicable to legacy appeals and the legacy appeals system remains distinct and separate unless and until a veteran decides to opt into the AMA system). The VA reports that it currently has four dockets and that legacy appeals are distinct: “With AMA implementation, the Board receives legacy and AMA appeals simultaneously and manages four dockets: (1) legacy appeals; (2) AMA direct review; (3) AMA evidence submission; and (4) AMA appeal with a hearing request.” BVA Report 2019, at 23. The proposed class includes only the first docket, legacy appeals.

The pending legacy appeals include appeals at the Board and appeals that the regional offices have not yet certified to the Board. In the 2019 BVA Report, the VA identified that nearly 98,549 legacy appeals remained at the Board-level alone at the end of the VA’s Fiscal Year 2019.⁵ It further estimated that the Board would receive as many as 100,000 legacy cases—all of which were appealed prior to the AMA’s full implementation—from the regional offices in FY 2020. BVA Report 2019, at 29.

⁵ The VA’s report states that it estimates issuing 91,500 Board Decisions in FY 2020, which includes decisions on appeals in both the legacy system and the AMA system. BVA Report 2019, at 21 (explaining that the 91,500 figure reflects both a “focus on . . . the reduction of legacy appeals” and “working all three dockets of AMA cases in a timely manner”).

Moreover, this Court previously recognized that the AMA does not address the delays that plague the legacy system. *Ebanks v. Shulkin*, 877 F.3d 1037, 1040 (Fed. Cir. 2017) (“And as the government acknowledged at oral argument, the reforms recently enacted by Congress [through the AMA], while possibly mitigating delays for future cases, do not appear directly to address the present backlogs and delays at the Board level.”). The members of the proposed class—veterans in the legacy system—continue to face the unreasonable, systemic delays identified in Appellants’ petition.⁶

The United States Government Accountability Office (“GAO”) in December 2018 reported that legacy appeals resolved by the Board of Veterans Appeals took on average seven years to resolve. U.S. Government Accountability Office, GAO-19-272T, VA Disability Benefits: Planning Gaps Could Impede Readiness for Successful Appeals Implementation, 1 (2018). Accordingly, unconscionable delays in adjudicating legacy appeals continue to violate the proposed class members’

⁶ The VA has announced a plan to resolve all legacy appeals by 2022. Press Release, U.S. Dep’t of Veterans Affairs, VA Finalizes Plan to Resolve Legacy Appeals by the End of 2022 (Oct. 29, 2019) <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5345>. There is no reason to believe that all legacy appeals can or will in fact be adjudicated in the next 18 months given the VA’s history of multi-year delays in processing legacy appeals. Moreover, the VA’s promise of future action for the legacy appeals does not eliminate the current harms being suffered by legacy-system veterans who have already waited years for an appellate decision from the Board.

constitutional and statutory rights to timely adjudications of their appeals and timely decisions on their entitlement to benefits.

II. This Court Has a Duty to Adjudicate Appellants' Claims

The Court's June 4, 2020 Order directs the parties to address "whether this appeal continues to be relevant." As demonstrated above, the answer is yes. By definition, the AMA has no effect on the proposed class of approximately 200,000 veterans in the legacy appeals process. Because this appeal remains relevant and pressing for thousands of veterans, this Court should proceed to adjudicate the merits. This appeal turns on whether (1) the Veterans Court misinterpreted *Walmart v. Dukes* by impermissibly prejudging the merits of Appellants' claims, (2) misconstrued Rule 23(a)'s commonality requirement in this case about systematic delay, and (3) applied the wrong legal standard in evaluating the availability of a class-wide remedy under Rule 23(b)(2). The possibility that the AMA may address delays for non-class members in a separate, parallel system has no bearing on this Court's obligation to rule on the issue of class certification for the proposed class of veterans in the legacy system. Approximately 200,000 veterans in the legacy system are suffering injury, and they have a right to a remedy.

This Court has the power and obligation to rule on the case before it as long as there is a justiciable case or controversy. *See Cohens v. Virginia*, 19 U.S. (6

Wheat.) 264, 404 (1821) (“With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us.”). A federal court cannot abstain from exercising the jurisdiction that has been conferred to it. *See New Orleans Pub. Ser., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358 (1989) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” (quoting *Cohens*, 19 U.S. at 264)).

The VA legacy appeals system’s multi-year delays remain a live issue within this Court’s jurisdiction. Opening Br. 2. The creation of the AMA, a separate system applicable to a separate class of appeals, does not erase the VA’s ongoing delays in processing legacy appeals, which continue to this day for tens of thousands of veterans. Therefore, it remains urgent and necessary for this Court to clarify the correct standards for class certification and either certify the proposed class or remand the case for further proceedings consistent with the proper legal framework. Regardless of the AMA, this Court now has the opportunity and duty “to serve as lawgiver and error corrector” of the Veterans Court’s erroneous interpretations of class action law. *Monk v. Shulkin*, 855 F.3d 1312, 1321 (Fed. Cir. 2017).

III. The Right to Opt into the AMA System Came with Costs as the AMA Itself is Hobbled by Delay

The AMA’s limited opt-in options do not change the fact that approximately 200,000 veterans remain in the legacy system today—a system that continues to

violate their constitutional and statutory rights. Veterans in the legacy system had the option, but were not required, to opt into the AMA through RAMP during the opt-in period of November 1, 2017 to February 15, 2019. *See* U.S. Department of Veterans Affairs, Veterans Appeals Improvement and Modernization Act of 2017, <https://benefits.va.gov/benefits/appeals-ramp.asp>. The VA reported that for the first and second quarters of Fiscal Year 2019, RAMP had an opt-in rate of only 19.2%. *See* Department of Veterans Affairs, Agency Priority Goal Action Plan: Appeals Improvement and Modernization Act Implementation, 7 (2019).⁷

For veterans already suffering lengthy delays, opting in to the AMA, an untested and unfamiliar system, risked even further costs and uncertainties.⁸ Evidence suggests that veterans' concerns about continued delay in the AMA system are well-founded. Government reports have already highlighted flaws within the VA's administration of the AMA system that are likely to cause delay.

⁷ Veterans who did not opt in through RAMP may still opt into the AMA if they have a pending legacy appeal, receive a Statement of the Case ("SOC") or Supplemental Statement of the Case ("SSOC"), and elect the AMA process within sixty days from receipt of the SOC or SSOC. Pub. L. No. 115-55, § 2(x)(5), 131 Stat. 1105, 1115 (2017). Those veterans who did not opt in through RAMP or have not elected to move to the AMA system as provided within the AMA, remain in the legacy system and are therefore part of the proposed class.

⁸ Many veterans rely on VA benefits for the necessities of life and cannot afford any more delay than what they already suffered. A further delay could mean never seeing the benefits to which they may be entitled. *See* Opening Br. 10 ("Due to VA delays, many veterans never receive a decision in their lifetime.")

See Gov't Accountability Office, Veterans Affairs: Sustained Leadership Needed to Address High-Risk Issues, 27 (May 22, 2019), <https://www.gao.gov/assets/700/699358.pdf>. Although the VA has recently stated that the AMA “would seem to remove 1,418 days of average processing time.” Appellee’s Br. 21 n.9, *Monk v. Wilkie*, No. 20-1305, this claim concerns AMA appeals, not legacy appeals. Even so, a 1,418-day reduction in the AMA system means veterans will still wait at least three years for a Board decision, as the current wait time is seven years in the legacy system. *See* Pub L. 115-55 at 6; Opening Br. 50, *Monk v. Wilkie*, No. 20-1305.

Regardless there remain over 200,000 veterans in the legacy appeals system who are not part of the AMA system. While the VA’s prospects for success in the AMA system remains an open question, it is indisputable that the AMA will have no effect on the impermissible delay suffered by the proposed class members in this case, whose rights would be vindicated by the class-wide relief Appellants seek.

CONCLUSION

For the reasons set forth above, Appellants respectfully submit that this appeal remains relevant and request that the Court reverse the Veterans Court and hold that Appellants’ proposed class satisfies commonality under Rule 23(a)(2) and presents a quintessential 23(b)(2) class. In the alternative, this Court should

vacate the plurality's holding and remand for the Veterans Court 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 Court's Order of June 4, 2020, because it is no longer than 15 pages, double-spaced.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the tpestyle requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word version 16.19 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2020, Appellants' foregoing Supplemental Briefing 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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