2020-1305

United States Court of Appeals for the Federal Circuit

CONLEY F. MONK, JR., TOM COYNE, WILLIAM DOLPHIN, JIMMIE HUDSON, SAMUEL MERRICK, LYLE OBIE, STANLEY STOKES,

Claimants – Appellants,

v.

ROBERT WILKIE, Secretary of Veterans Affairs,

Respondent – Appellee.

Appeal from the United States Court of Appeals for Veterans Claims (en banc) in Case No. 15-1280

CORRECTED AMICI CURIAE BRIEF AND ADDENDUM OF CONNECTICUT VETERANS LEGAL CENTER AND SWORDS TO PLOWSHARES IN SUPPORT OF APPELLANTS

March 26, 2020

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CERTIFICATE OF INTEREST

Counsel for amici curiae certifies the following:

1. The full name of all amici curiae represented by me are:

Connecticut Veterans Legal Center and Swords to Plowshares.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies 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 and associates that appeared for the parties or amici now represented by me in the lower tribunal or are expected to appear for the parties in this Court and who are not already listed on the docket are:

Mario O. Gazzola and Joshua Riley of Boies Schiller Flexner LLP appeared for amici in the lower tribunal.

5. The title and number of any case known to counsel to be pending in this or any other court of agency that will directly affect or be directly affected by this court's decision in the pending appeal are:

***Monk v. Wilkie*, Case No. 19-1094 (Fed. Cir.).**

Dated: March 26, 2020

Respectfully submitted,

/s/ Kai Yi Xie

Kai Yi Xie

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AUTHORITY TO FILE AND AUTHORSHIP

Pursuant to Fed. R. App. P. 29(a)(4)(D) and Fed. Cir. R. 29(c), all parties to this litigation have consented to the filing of this amicus brief.

Pursuant to Fed. R. App. P. 29(a)(4)(E), no counsel for any party in this appeal authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of this brief; and no person—other than amici curiae, its members, and its counsel—contributed money that was intended to fund preparing or submitting the brief. For the avoidance of doubt, amici's counsel, Corey Meyer, served as a law student intern on behalf of the Appellants; however, he ceased serving in that role in May 2019.

IDENTITY OF AMICI CURIAE

Amici are community organizations dedicated to serving veterans in a variety of capacities, including through representation before the Department of Veterans Affairs ("VA"). They come to this Court with their grave concern that the Court of Appeals for Veterans Claims' decision *sub judice*, if left undisturbed, significantly prejudices veterans' rights and lives as a result of the VA's consistently error-ridden and protracted adjudicatory processes.

Swords to Plowshares ("Swords") is a community-based not-for-profit organization providing needs assessment and case management, employment and training, housing, and legal assistance to thousands of veterans in the San

Francisco Bay Area each year. Swords seeks to heal the wounds of war, to restore dignity, hope, and self-sufficiency to all veterans in need, and to prevent and end homelessness and poverty among veterans.

Connecticut Veterans Legal Center ("CVLC") helps veterans recovering from homelessness and mental illnesses overcome legal barriers to housing, healthcare, and income. Founded in 2009, CVLC was the first program in the United States to integrate legal services on-site at VA mental health facilities. Through CVLC, hundreds of volunteer attorneys across Connecticut have donated millions of dollars' worth of pro bono assistance and helped veterans achieve stability and rebuild their lives.

ARGUMENT

The Court of Appeals for Veterans Claims' ("Veterans Court") decision to deny Appellants access to mandamus relief must be reversed for the sake of all veterans. The decision is yet another example of the Veterans Court's systemic disregard for the statutory and constitutional rights of veterans to timely receive benefits. For decades, the Veterans Court applied the *Costanza* test for evaluating the legality of the delay experienced by veterans, *see generally Costanza v. West*, 12 Vet. App. 133 (1999), which this Court emphatically rejected for its failure to give weight to veterans' interests, *Martin v. O'Rourke*, 891 F.3d 1338, 1345 (Fed. Cir. 2018). Instead, this Court instructed the Veterans Court to use the "*TRAC* factors," which, when correctly applied, provide a more balanced approach to analyzing the availability of mandamus in view of unreasonable delay. *See generally Telecomms. Res. & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*").

But old habits die hard. In spite of this Court's unmistakable concern for veterans' interests, the Veterans Court nonetheless applied the *TRAC* factors to lessen or eliminate consideration of veterans' interests. To leave the Veterans Court's *en banc* decision intact invites not just the Veterans Court, but the VA as well, to allow veterans to languish without recourse during years-long waits for their claims and appeals to be adjudicated.

Here, amici are uniquely positioned to contextualize the impact of the Veterans Court's decision. Amici are front-line nonprofit organizations that directly work with veterans. Amici witness firsthand the extensive health and financial harms veterans suffer as a result of the VA's delays in adjudicating claims and appeals. Amici appreciate and can demonstrate the importance of mandamus relief through the experiences of representative veterans among the thousands of veterans for whom amici advocate.

The Veterans Court's decision suffers from substantial flaws that undervalue veterans' interests in timely adjudicated appeals. First, the Veterans Court's decision misunderstands and misapplies this Court's mandate that the Veterans Court use the *TRAC* factors to achieve a holistic approach in determining when mandamus relief is available. Second, the Veterans Court erroneously holds that analysis of the *TRAC* factors permits the Court to eschew due process analysis. The *TRAC* factor analysis diverges from the due process analysis, which requires courts to analyze a factor absent from *TRAC*: the likelihood the agency (here, the VA) committed an error in its initial decision. This factor is crucial given the VA's extraordinarily high error rate of nearly 80 percent. *See infra* Part III.B.

I. MANDAMUS PLAYS A VITAL ROLE IN VETERANS' CLAIMS AND APPEALS

To affirm the Veterans Court's decision would condone the continued non-existence—for all practical purposes—of the writ of mandamus, the sole method by which veterans can assert their timely entitlement to benefits. Congress passed the Veterans' Judicial Review Act to ensure veterans are "treated fairly" and "all veterans entitled to benefits received them." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). With those goals in mind, Congress established the Veterans Court.

The Veterans Court's importance as a guardian of veterans' rights through its authority to grant mandamus is unmistakably necessary even upon first glance at the VA's labyrinthine claims and appeals process. Judge Moore has noted that "[i]n total the [VA] appeals process takes over **five and a half years** on average," 1094 days of which consist of "ministerial acts of certifying the appeal (2 page sheet []) and docketing the appeal." *Martin*, 891 F.3d at 1350 (emphasis in original) (Moore, J. concurring). As a result of the extreme delays due to the VA's inaction, many thousands of veterans suffer enormous personal hardships and tragedies. As illustrated below, veterans need the Veterans Court and its power of mandamus to ensure the VA properly adjudicates benefits or processes appeals. Though the experiences of the veterans described below are in some ways unique

to each veteran, "the interests resulting from delay here transcend those of just the petitioner." *Erspamer v. Derwinski*, 1 Vet. App. 3, 10 (1990).

The experiences of one of amicus Swords' clients, U.P.,[1] illustrates the grave hardships caused by the VA's delays and the critical need for a robust mandamus remedy. Add002. During his service in the Army, U.P. witnessed horrific scenes such as mutilated and dismembered corpses. *Id.* Traumatized and struggling to cope with the aftermath of this experience, U.P. developed relational and medical issues so severe that he developed suicidal ideations. *Id.* U.P. was diagnosed by the VA's own physicians as suffering from PTSD, but the VA rejected U.P.'s claim for benefits, concluding that witnessing dismembered corpses and a man impaled were not sufficient stressors for PTSD. *Id.* U.P. timely filed a Notice of Disagreement ("NOD") in October 2016, but his hearing date before the Board of Veterans' Appeals ("Board" or "BVA") was not until *three and a half years* later, in February 2020. U.P. died the day before his hearing. *Id.*

Not only do the VA's enormous delays threaten to leave veterans and their families without remedy, but they also often result in a downward spiral in veterans' lives. For example, C.S. sought to service-connect his major depressive

[1] To protect the privacy of the veterans, who have disclosed immensely personal information, the veterans are represented by randomized initials.

disorder and PTSD in 2009, but was denied by the VA. Add010-011. With amicus CVLC's assistance in 2012, C.S. sought to reopen his claim with new and material evidence, but was twice rebuffed despite independent medical analysis symptoms were service-connected. *Id.* C.S. appealed, but his mental state had drastically declined such that the appeal hearing had to be rescheduled. *Id.* While awaiting the decision from his appeal, C.S.'s house was foreclosed upon, rendering C.S. homeless, despite pleas to the VA for timely adjudication of C.S.'s appeal in view of his impending homelessness. *Id.* The VA's decision on C.S.'s appeal came two years after the hearing, and contained significant legal errors. *Id.* C.S. has now appealed to the Board, but suffered a stroke as he awaits his Board appeal to be docketed. *Id.*

Moreover, C.G. was sexually assaulted during his time in the Marine Corps, and suffered from substance abuse as a result. Add006-007. C.G. first filed a claim for VA benefits for the PTSD caused by military sexual trauma ("MST") in 2003, which the VA denied. *Id.* During the course of the next decade, C.G. filed three more claims, the last of which was in 2015. *Id.* Despite the overwhelming record containing his medical history, the VA's own records linking the MST to his PTSD, and lay observations, C.G.'s 2015 claim was still denied. *Id.* In January 2016, C.G. filed an NOD to appeal from the unfavorable VA claim adjudication with the help of amicus Swords' attorneys. *Id.* During the pendency of the NOD,

C.G. was in vocational rehabilitation as his PTSD greatly inhibited his ability to work; C.G.'s vocational rehabilitation counselor informed the VA that without action on C.G.'s appeal and assistance from veterans' benefits, C.G. would become homeless, like C.S., after the rehabilitation program ended because C.G.'s PTSD was crippling. *Id.* The VA's silence was deafening. *Id.* Indeed, just as predicted, C.G. was rendered homeless, in debt from prior in-patient psychiatric care because the VA had not service-connected his PTSD, and despite his symptoms, pushed himself to find work to no avail. *Id.* The delay in adjudicating C.G.'s appeal was so intolerable that C.G. became suicidal to the point that he had to receive emergency inpatient care. *Id.* C.G. was still homeless when the Board granted C.G. benefits in January 2018. *Id.*

U.P.'s, C.S.'s, and C.G.'s experiences are just three examples, among countless others, of the personal tragedies resulting from the VA's delays that make access to mandamus critical to the preservation of veterans' lives and well-being. U.P. is just one of thousands of veterans who die each year while waiting for their appeals to be resolved. *See* VA Office of Inspector Gen., *Veterans Benefits Administration: Review of Timeliness of the Appeals Process*, at v (March 28, 2018) (noting that approximately 1,600 appeals were closed due to the appellant's death in one quarter of FY 2016). C.S. and C.G. are among the 40,000 homeless veterans in the United States. *See* Dep't of Veterans Affairs, *2019*

National Veteran Suicide Prevention Annual Report, at 6 (Sept. 2019), *available at* https://www.mentalhealth.va.gov/docs/data-sheets/2019/2019_National_Veteran_Suicide_Prevention_Annual_Report_508.pdf (last accessed March 15, 2020). And while C.G. was able to receive emergency inpatient mental health treatment, many other veterans are unable to secure sufficient mental health treatment—in 2017, 6,139 veterans committed suicide. *Id.* at 5. The suicide rate for veterans is 1.5 times the rate for non-veteran adults. *Id.* at 3. And last year, the age- and sex- adjusted rate of veterans suicide was the highest it has been since the VA began tracking such data in 2005. *Id.* at 10.

II. THE VETERANS COURT HAS ERRONEOUSLY FORECLOSED VETERANS' ACCESS TO MANDAMUS

This Court has recognized the importance of mandamus in providing an avenue of relief for veterans who are suffering at the hands of VA errors and inordinate delays. But the Veterans Court continues to render mandamus relief virtually non-existent as a practical matter. Until a few years ago, the Veterans Court applied the *Costanza* standard as a framework for measuring the reasonableness of VA's delay. *See Costanza*, 12 Vet. App. at 134 (holding that the veteran must prove the "delay he complains of is so extraordinary, given the demands and resources of the Secretary [of Veterans Affairs], that the delay

amounts to an arbitrary refusal to act, and not the product of a burdened system"); *see also Stratford v. Peake*, 22 Vet. App. 313, 314 (2008) (applying *Costanza*).

However, in *Martin*, this Court soundly rejected the Veterans Court's use of *Costanza*. *Martin*, 891 F.3d at 1345. *Costanza's* flaws were manifest and manifold. For instance, this Court described *Costanza* as erecting an "insurmountable" threshold to mandamus relief. *Id.* Moreover, *Costanza* was criticized as being far too focused on the "VA's interests at the expense of the veterans' interests." *Id.* To replace *Costanza*, this Court instructed the Veterans Court to adjudicate mandamus petitions based on unreasonable delay by using the *TRAC* factors, a more balanced approach that encompasses "consideration of the veterans' interests."[2] *Id.*

Of the six *TRAC* factors, amici provide unique insight into *TRAC* factors three and five. Although some courts note that factors three and five may overlap,

[2] The factors are: "(1) the time agencies take to make decisions must be governed by a 'rule of reason'; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) . . . the effect of expediting delayed action on agency activities of a higher or competing priority; (5) . . . the nature and extent of the interests prejudiced by delay; and (6) the court need not find any 'impropriety lurking behind agency lassitude' in order to hold that agency action is unreasonably delayed." *Martin*, 891 F.3d at 1344-1345.

In re Barr Labs., Inc., 930 F.2d 72, 75 (D.C. Cir. 1991) ("*TRAC*'s third factor (which overlaps with the fifth [factor], at least in this context) . . . ."), amici address them separately. Below, amici first address *TRAC* factor three, then factor five.

A. *TRAC* Factor Three

TRAC factor three states that "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake . . . ." *Martin*, 891 F.3d at 1344-1345. The *Martin* Court unambiguously specified: "Veterans' disability claims always involve human health and welfare." *Id.* at 1346.

Here, the Veterans Court's decision noted that because the veteran was "receiving the highest (100%) level of disability compensation" and only sought retroactive compensation, it "lessened" the degree to which factor three weighed in the veteran's favor. *Monk v. Wilkie*, 32 Vet. App. 87, 106 (2019). However, this Court's decision in *Martin* foreclosed such an approach. In *Martin*, a veteran-appellant was receiving full compensation and only sought retroactive compensation. 891 F.3d at 1349. Admittedly, that veteran's claim was mooted because she received that which she sought. Yet, *Martin* made no mention of lessening the weight of factor three with regard to all the veteran-appellants given

that at least one of the veterans sought retroactive compensation. Instead, *Martin* characterized *all* the veteran-appellants as having "substantially identical" mandamus petitions to be adjudicated under the *TRAC* framework. *Id.* at 1342. Thus, the Veterans Court here incorrectly concluded that so long as a veteran's *current* benefits are correct, *TRAC* factor three weighed less heavily in the veteran's favor. The Veterans Court ignored the fact that compensating a veteran for past due benefits remains critical to a veteran's current and future health and welfare.

M.F.'s experiences demonstrate how retroactive benefits can be critical to a veteran's *current* health and wellbeing. M.F. served this country after voluntarily enlisting for the Vietnam War, where he experienced the unimaginable horrors of the conflict, served with honor, and was awarded medals for his service. Add013-014. But, having lived with such horrors, M.F. developed PTSD and, as a consequence, went AWOL to avoid a second deployment. *Id.* M.F. was undesirably discharged. *Id.* Through the help of amicus CVLC, the VA service-connected M.F.'s PTSD, and thus granted him limited benefits, though none monetary. *Id.* M.F. filed an NOD in 2018 seeking full benefits because he went AWOL because of his PTSD, but to date, the NOD has not even been processed by the VA. *Id.* Without financial benefits, M.F. cannot move to be near his family and grandchildren given that he is in very poor health and living in poverty. *Id.*

M.F.'s application for retroactive benefits is no less critical than an application for current benefits, and in failing to grasp this fundamental fact common to so many veterans, the Veterans Court has misapplied the *TRAC* factors in a way that fails to recognize and do justice to the suffering of our nation's veterans. *See, e.g.*, *Barrett*, 466 F.3d at 1044 (noting that Congress seeks to ensure that "all veterans entitled to benefits [shall] receive them" because "the system of awarding compensation [to veterans] is so uniquely pro-claimant"). At bottom, regardless of whether the benefits sought are retroactive or not, these are "nondiscretionary, statutorily mandated benefits," *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009), and issues relating to such are resolved "by giving the [veteran] the benefit of any reasonable doubt," *Hodge v. West*, 155 F.3d 1356, 1362-1363 (Fed. Cir. 1998) (quoting H.R. Rep. No. 100-963, at 13 (1988), 1988 U.S.C.C.A.N. 5782, 5794-5795).

B. *TRAC* Factor Five

TRAC factor five states: "the court should also take into account the nature and extent of the interests prejudiced by delay." *Martin*, 891 F.3d at 1344-1345. There may be overlap between factors three and five. *Id.* at 1346-1347. However, factor five also "incorporates an analysis of the effect of a delay on a particular veteran." *Id.* at 1347. For instance, the Veterans Court may find that it more

strongly favors a finding of unreasonable delay where it is "evident that a particular veteran is wholly dependent on the requested benefits." *Id.*

The Veterans Court's application of factor five is wrong on the law and wrong on the realities experienced by veterans awaiting the VA's action.

First, the Veterans Court erroneously gave short shrift to factor five. The Veterans Court wrote: "[the veteran] Mr. Dolphin does not assert that he is 'wholly dependent' on [VA] benefits that would flow from the retroactive grant of his effective date award to meet his basic needs (such as food, clothing, housing, medical care) . . . and because he does not otherwise provide any information about his own financial circumstances, he has not satisfied his burden to show that he has been prejudiced by the delay." *Monk*, 32 Vet. App. at 106. The Veterans Court overstates and misrepresents *Martin*. *Martin* held that if a veteran shows total reliance on benefits for basic needs like housing and medical care, then it "more strongly favors a finding of unreasonable delay." 891 F.3d at 1338. But the Veterans Court erred by concluding that if a veteran does not fully depend on benefits to provide for basic life needs, then factor five weighs *against* the veteran. Not so.

This Court stated that assuming the veteran "has a sustainable source of income outside of the VA benefits system," the consequence is that factor five

"does not weigh heavily toward a finding of unreasonable delay." *Martin*, 891 F.3d at 1347. That factor five does not weigh "heavily" toward a finding of unreasonable delay does not mean that factor five weighs against a finding of unreasonableness.

Second, veterans' stories shed light on the incredible breadth of the harms that befall veterans waiting years for the VA to act. Many veterans described above, and many more that amici have served, became destitute and homeless, languished without proper medical assistance, and passed away while waiting for the VA to act. Noted above but worth reiterating, many veterans have diagnosed illnesses associated with their service (thus establishing a service connection for VA disability benefits eligibility), including those as a result of MST (military sexual trauma). But the incredibly slow pace at which such claims or appeals are decided means that veterans who suffer a service-connected disorder have more limited means of seeking and maintaining treatment for their illnesses.

For example, A.H. developed extensive psychiatric and physical issues from trauma as a result of MST. Add003-004. A.H., while homeless, filed a disability claim in 2012; although homeless veterans were entitled to priority processing, A.H. waited two years for the VA to deny his claim. *Id.* A.H. appealed in January 2015, and he remained homeless. *Id.* In fact, the VA's delay greatly exacerbated

A.H.'s mental and physical disabilities because, as the VA's own treatment notes indicate, A.H. would obsess over his appeal and the delay to such an extent that it stymied his day-to-day functioning. *Id.* But, A.H. won his appeal when the VA service-connected his disabilities. *Id.* Astonishingly, despite the VA's extensive records of A.H.'s paranoia, delusional thinking, *suicidal thoughts* and even *suicidal attempts*, the VA, without conducting any health examination, assigned A.H. a 0% disability rating. *Id.* Apparently, the VA thought suicidality and delusions did not impact A.H.'s daily life. *Id.* At this point, A.H. sought amicus Swords' assistance, and after negotiations and a VA examination, A.H. was given a 100% disability rating. *Id.*

Moreover, J.H. is a Vietnam War veteran who was diagnosed with schizophrenia within a year of separation, and thus, J.H. is entitled to a year of separation, and thus, J.H. is presumptively disability compensation. Add008. J.H. began the process of seeking benefits in May 1981. *Id.* More recently, in 2017, J.H. provided undisputable evidentiary proof of his diagnosis and its connection to his time in service. *Id.* Yet, the VA arbitrarily denied his claim. J.H. filed an NOD, which was also rejected. *Id.* He made an appeal to the Board, which has been pending since 2018 for a hearing date. *Id.* In the meantime, J.H. is reliant on social security benefits, which pay him roughly a third of the income he is entitled to from the VA. *Id.*

Other veterans are faced with difficult personal choices while waiting on the VA to properly decide their claims. T.K. was forced to work while undergoing chemotherapy for breast cancer because the VA erroneously withheld her benefits. Add003. The VA cut T.K.'s benefits because they received notice in September 2015 that T.K. was incarcerated. *Id.* However, the VA's records show that they called the relevant prison authorities in January 2017 and received notice that T.K. was no longer incarcerated. *Id.* Nonetheless, the VA first reduced her benefits in August 2017. *Id.* T.K. requested reinstatement of benefits in April 2018 and submitted paperwork from her parole officer proving she was not incarcerated. *Id.* She also attended a mental health exam scheduled by the VA in 2019 at a medical facility not located in a prison. *Id.* Nonetheless, it was not until January 2020 when the VA reinstated her benefits and released a $47,000 retroactive payment. *Id.* Because the VA erroneously withheld her benefits, T.K. was at times homeless and forced to work to avoid destitution while undergoing chemotherapy for breast cancer. *Id.*

D.A. had to make the difficult choice to drop out of school while waiting on the V.A. to resolve his claim for benefits. Add007. D.A. filed a claim in March 2014 for service-connected disability compensation for PTSD. *Id.* While a combat medical technician in the Air Force, he was exposed to the carnage of wounded and killed service members. *Id.* Since March 2014, the VA denied his

initial claim, his re-filed claim, and his NOD. *Id.* D.A. filed his appeal to the Board in July 2018. *Id.* There has been no movement on his case since that time. *Id.* Meanwhile, he has to scrape by on his compensation as a veterinary technician, earning $1,000 per month in San Francisco. *Id.*

In sum, the Veterans Court has applied *TRAC* factors three and five in a manner counter to that which this Court has mandated, and counter to the pro-veteran benefits scheme established by Congress that guides the VA and the judiciary. As evidenced by the experiences of amici's clients, there are serious and fundamental life needs that are compromised in denying veterans what they are owed for their service. Intervention through mandamus may be necessary to save a veteran from the worsening of a medical condition or living in poor health and poverty without means to be near family.

III. THE VETERANS COURT ERRED BY NOT CONSIDERING THE *MALLEN* DUE PROCESS FACTORS

A. The *TRAC* Factors are Insufficient for a Proper Due Process Analysis

Here, the Veterans Court held that the consideration of due process "is not appreciably different from the *TRAC* balancing test," *Monk*, 32 Vet. App. at 108, and consequently, ignored the due process issues at play. The Veterans Court erred.

The *Mallen* test is used to determine whether delay following an administrative decision violates due process. *See generally FDIC v. Mallen*, 486 U.S. 230 (1988). By disregarding the *Mallen* test under the premise that the *TRAC* factors are an adequate substitute, the Veterans Court failed to meet its congressionally-mandated obligation to hear and decide the legal questions presented before it. The Veterans Court's blunder is particularly glaring given that a veteran could theoretically receive mandamus relief under the *Mallen* test but not the *TRAC* analysis, and vice versa. Thus, for the following three reasons, the *TRAC* factors are not interchangeable with the *Mallen* due process test.

First, the *TRAC* and *Mallen* tests differ in a key way. The Supreme Court reviews three factors to determine whether due process has been afforded in cases of administrative delay following an initial government decision: (1) "the importance of the private interest and the harm to this interest occasioned by delay"; (2) "the justification offered by the Government for delay and its relation to the underlying governmental interest"; and (3) "the likelihood that the interim decision may have been mistaken." *Mallen*, 486 U.S. at 242 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982); *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976)). The six *TRAC* factors generally account for consideration

of the private interest and the justification offered by the government,[3] but the *TRAC* factors do not account for the likelihood that an interim decision is erroneous. *See TRAC*, 750 F.2d at 80. Because of the extremely high error rate of the VA (nearly 80 percent), *see infra* Part III.B, this difference is extremely important and the *TRAC* analysis is an inadequate substitute for the *Mallen* due process test.

Second, the context of the *TRAC* factors' development reveals the inadequacy of *TRAC* as a substitute for due process analysis in the veterans appeals context. In *TRAC*, not-for-profit corporations and public interest groups petitioned the court to compel the FCC "to decide certain *unresolved* matters now pending before the agency." *TRAC*, 750 F.2d at 72 (emphasis added). There was no initial agency decision on appeal. The same can be said for *TRAC*'s predecessors cited by the D.C. Circuit—there was no substantive agency decision on appeal. *See Potomac Elec. Power Co. v. Interstate Commerce Comm'n*, 702 F.2d 1026, 1027-1030 (D.C. Cir. 1983) (addressing agency's delay in adjudicating an issue unresolved by prior agency decisions in the case); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 324-325 (D.C. Cir. 1980) (addressing agency's delay in providing an appropriate rate for wide area telecommunication service); *Pub. Citizen Health*

[3] *TRAC* factor five concerns the private interest prejudiced by the delay and *TRAC* factor four considers the government's competing priorities, which may justify the delay. *See TRAC*, 750 F.2d at 80.

Research Grp. v. Commissioner, FDA, 740 F.2d 21, 23 (D.C. Cir. 1984) (addressing agency's delay in deciding whether to promulgate a rule); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1151-1152 (D.C. Cir. 1983) (addressing agency's delay in issuing an emergency temporary standard). And, the D.C. Circuit has since noted that *TRAC* and most of the Circuit's unreasonable delay cases involve "delay by agencies in concluding their own rulemakings or in responding to requests by private parties to take administrative action," not delay in revisiting previous action. *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855-856 (D.C. Cir. 2008).

On the other hand, the *Mallen* due process factors consider the delay in offering a new decision *after* the government has already made a decision. In *Mallen*, the Supreme Court evaluated the reasonableness of delay experienced by a bank president who awaited a hearing after the FDIC suspended him. 486 U.S. at 236-237. Similarly, in subsequent cases employing the *Mallen* factors, courts consider government delay in revisiting their initial decision. *See, e.g.*, *Dupuy v. Samuels*, 397 F.3d 493, 509 (7th Cir. 2005) (applying *Mallen* to the consideration of the delay in hearing challenges to an initial decision of a state agency).

The tests' contexts reveal that the tests have similar but slightly divergent goals. *TRAC* emerged in, and is applied in, the realm of complete agency inaction, often in the rulemaking context. See *TRAC*, 750 F.2d at 72; *In re Core Commc'n*,

531 F.3d at 855-856. Meanwhile, *Mallen* and its progeny address situations where a government entity has acted and a private individual seeks an opportunity to challenge that action as mistaken.

Third, both the D.C. Circuit in *TRAC* itself and this Court have noted the *TRAC* factors are guidelines. In *TRAC*, the D.C. Circuit noted that the six factors are not "ironclad" and are intended to provide "useful guidance in assessing claims of agency delay." 750 F.2d at 80. In *Martin*, this Court emphasized that the Veterans Court should view the *TRAC* factors as "a useful starting point" and "guidance." 891 F.3d at 1345, 1349.

Because of the appreciable differences between the *TRAC* factors and *Mallen* factors, conflating the *TRAC* analysis and the *Mallen* due process test is equivalent to a failure to consider due process altogether, thus foreclosing a method with which veterans can seek mandamus relief. And, a court errs where it fails to hear a claim properly raised before it. *See Lewis v. Clark*, 577 Fed. App'x 786, 802-803 (10th Cir. 2014) (holding that the district court erred because it failed to address claims raised by the plaintiff); *Sola v. Lafayette Coll.*, 804 F.2d 40, 45 (3d Cir. 1986) (finding a district court erred where it failed to consider a claim).

Congress also mandates that the Veterans Court, "when presented, *shall* (1) decide all relevant questions of law." 38 U.S.C. § 7261(a) (emphasis added). Congress's mandate that the Veterans Court shall review questions of law

presented before it is all the more important because Congress has vested the Veterans Court with exclusive jurisdiction to review such claims when they are related to the provision of benefits. *See Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1021-22 (9th Cir. 2012). By erroneously substituting the *TRAC* test for the *Mallen* due process test, the Veterans Court abdicated its exclusive jurisdictional mandate to decide questions of law related to the provision of veterans' benefits.

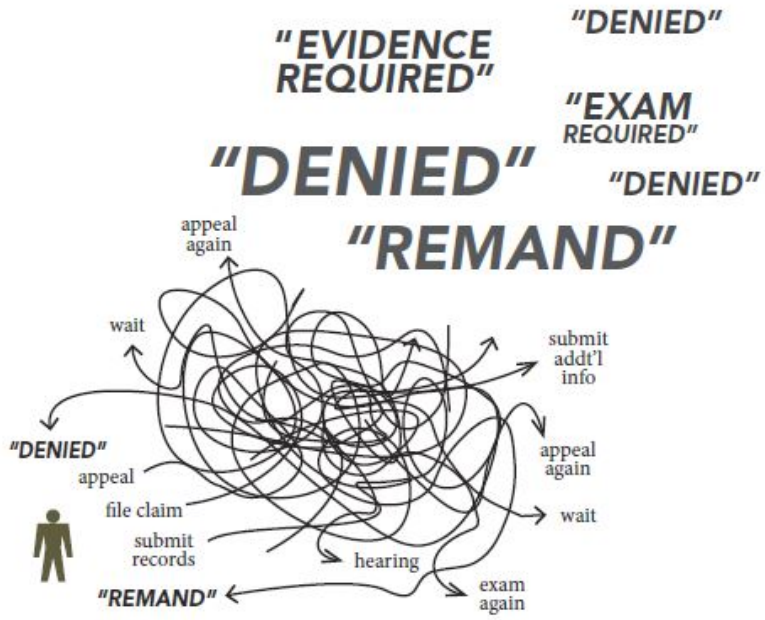
Thus, by grafting the *TRAC* factors wholesale from the rulemaking context to the veterans appeals context, and holding that the *TRAC* factors adequately substitute for the *Mallen* factors, the Veterans Court failed to uphold its duty and foreclosed the opportunity for veterans to be heard on their due process delay claims. The Veterans Court's error is not merely theoretical because consideration of the third *Mallen* factor will almost always weigh in favor of a veteran, as shown below.

B. Veterans Will Continue to Face Significant Consequences if the VA Continues To Evade Accountability under the Due Process Clause

The third *Mallen* factor will almost always work in a veteran's favor because of the VA's abysmal track record in determining benefits eligibility in the first instance. In fact, the VA gets it wrong nearly 80 percent of the time. Bd. of Veterans' Appeals, Dep't of Veterans Affairs, *Annual Report Fiscal Year (FY) 2019*, at 32 (showing only 20.76 percent of Board appeals are denied). And where

a veteran is represented by an attorney, the VA gets it wrong nearly 87 percent of the time. *Id.* (showing only 13.03 percent of BVA appeals are denied when a claimant is represented by an attorney).

In light of this high likelihood of erroneous deprivation, it is important to consider the consequences of the VA's mistakes. Not only do veterans experience delay, delay, and more delay in the adjudication of their appeals, veterans frequently suffer health and financial crises while waiting for the VA to do its job correctly. Even the VA recognizes this; the VA produced this graphic visualizing the impact of delay on veterans:



Ctr. for Innovation, Dep't of Veterans Affairs, *Veterans Appeals Experience*, at 8 (Jan. 2016). The VA went on to write, "the length and labor of the process takes a toll on Veterans' lives." *Id.* at 11.

Through their experience working with veterans, amici see firsthand the weighty toll that veterans experience from the lack of due process during "the length and labor" of the appeals process.

Amici witness how the VA's innumerable errors lead veterans to homelessness, just as the delays led to homelessness for C.S., mentioned above. For example, W.F., an Operation Enduring Freedom combat veteran, faces homelessness after the VA *lost the transcript of the hearing in his case*. Add012-013. While in service, W.F. was diagnosed with PTSD, and was discharged in 2012 for misconduct incident to his PTSD. *Id.* He sought and received treatment from the VA from 2012 to 2015. *Id.* In 2015 the VA abruptly terminated his care, telling him his discharge status made him ineligible. *Id.* W.F. retained CVLC, and in 2018 the VA resumed provision of mental health services for W.F. but denied him compensation benefits and treatment for other conditions. *Id.* W.F. appealed the VA's denial and requested a hearing on his appeal. *Id.* After the hearing in early 2019, the VA did not upload a transcript because the VA could not find it. *Id.* In the meantime, W.F. remains in limbo without compensation and only limited

healthcare services. *Id.* W.F. lost his job in October 2019 and currently faces eviction that will likely render him homeless. *Id.*

W.F. is not the only veteran facing delay because of nonsensical flaws in the VA appeals process. Sometimes, the VA arbitrarily decides to not even adjudicate a claim at all. K.R.'s story is illustrative. K.R. served over a decade in the Army. Add011-012. He developed service-connected schizophrenia and the VA provided him treatment for over 10 years. *Id.* In 2004, the VA abruptly terminated his care, erroneously telling him he was ineligible for healthcare. *Id.* In 2016, K.R. sought reinstatement of his healthcare benefit and compensation benefits with the assistance of CVLC. *Id.* Three years later, the VA found K.R. eligible for service-connected health benefits. *Id.* But, the VA refused to adjudicate K.R.'s claim for compensation. *Id.* K.R. is now stuck in a bureaucratic limbo. *Id.* Because the VA failed to adjudicate K.R.'s claim in the first instance, K.R. cannot appeal that which does not exist. *See, e.g.*, *Hamilton v. Brown*, 39 F.3d 1574, 1584 (Fed. Cir. 1994).

Not all VA errors are as absurd as the VA delaying a case because they lost a hearing transcript. Instead, the more routine VA errors, like ignoring critical medical evidence, take a costly toll on veterans. For example, A.G. has suffered extensively because of VA error. Add005. A.G is a Purple Heart recipient who deployed to Iraq three times although he was hit with shrapnel and medevacked for

live-saving treatment on his first deployment. *Id.* Not only did he wait nine years from applying for benefits until he actually received service-connected compensation, but he also suffered from PTSD so severe that he attempted suicide and was unable to maintain fulltime employment. *Id.* Meanwhile, the VA barred him from VA psychiatric care and disability compensation. *Id.* When A.G. challenged the V.A.'s denial, the Decision Review Officer who reviewed his case ignored both evidence of his combat PTSD and testimony of his treating psychologist in denying his claim. *Id.* This error, ignoring evidence, led to significant delay in resolving A.G.'s claim and significant suffering, including a suicide attempt, without access to VA care. *Id.*

A report of the VA Inspector General highlights many of the VA's routine errors that lead to delay. The report revealed that the VA erroneously closed appeals in thousands of cases during a three month period, amounting to 17 percent of the cases in one phase of the appeals process. *See* VA Office of Inspector Gen., *Veterans Benefits Administration: Review of Timeliness of the Appeals Process*, at iii, v (March 28, 2018) (noting that approximately 1,600 appeals were closed due to the death of the appellant in one quarter of FY 2016). And, in another phase of the process, the VA did not properly follow the Board's remand instructions in 13 percent of the cases. *Id.* at iii. The Inspector General found "appeals processing errors resulted in [the Veterans Benefits Administration] losing control of some

appeals, misrepresented VA's reported statistics, and caused unnecessary delays in resolving appeals." *Id.* at 3.

As the VA's senseless errors and abysmal error record show, consideration of the third *Mallen* factor will weigh in a veteran's favor almost all of the time. By holding that the Veterans Court need only consider the *TRAC* factors, thus excluding the consideration of the VA's likelihood of error, the Veterans Court committed a significant error that uniformly weighs against veterans. It is incumbent upon this Court to rectify the error and permit the VA to be held to task not only for its delays, but also for its disastrous error rate.

CONCLUSION

Without proper consideration of the *TRAC* factors and due process, veterans will continue to suffer at the hands of the VA's erroneous decision-making and lengthy delays. The VA's delays have stark consequences for veterans, among which are homelessness, lack of healthcare, and poverty. Overturning the Veterans Court's opinion below would provide veterans the recourse to challenge the VA's delays. We respectfully urge this Court to do so.

March 26, 2020

Respectfully submitted,

/s/ Kai Yi Xie

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ADDENDUM

Declaration of Maureen Siedor

1. I am the Legal Director of Swords to Plowshares (Swords) in San Francisco, California. Founded in 1974, Swords is a community-based not-for-profit organization that provides needs assessment and case management, employment and training, housing, and legal assistance to veterans in the San Francisco Bay Area. We promote and protect the rights of veterans through advocacy, public education, and partnerships with local, state, and national entities.

2. The Legal Department at Swords serves homeless and other low-income veterans who seek assistance with disability benefits from the Department of Veterans Affairs (VA), Character of Discharge determinations for VA eligibility, and Discharge Upgrade applications before the Department of Defense military boards. In 2019, we provided free legal services to over 500 veterans in the initial and appellate stages of their claims.

3. Many of our clients are unable to work because of their service-connected disabilities, and they often lack the basic necessities of life – adequate food, clothing, and shelter – while they wait for the benefits to which they are entitled. Delays in receiving their benefits also cause or exacerbate medical and mental health problems, with some veterans dying before their claims are resolved while others, who feel hopeless and overwhelmed by the process, attempt or think about suicide. This declaration attempts to provide a glimpse at how these delays harm veterans.

4. We see additional and devastating delays in the cases of veterans who are seeking health care and/or disability compensation after they have received less-than-honorable discharges. Veterans who need Character of Discharge determinations bear the extra burden of being barred from comprehensive VA healthcare while awaiting resolution of their eligibility applications. They are also more likely to face barriers to employment, be homeless, and are at higher risk of suicide.[1] The oftentimes minor misconduct that led to their less than honorable discharge was related to their struggles with Post-Traumatic Stress Disorder (PTSD), for

[1] For a detailed discussion of the heighten risks and poor outcomes these veterans face, see the report spearheaded by Swords and the National Veterans Legal Services Program and prepared by the Harvard Law School Veterans Legal Clinic, *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper*, available at https://www.swords-to-plowshares.org/2016/03/30/underserved/.

example self-medicating their PTSD symptoms with drugs or alcohol. This leads to offenses in their military record that bar them from receiving the mental health treatment they need from the VA. While they wait for the VA to process their eligibility appeals, these veterans are excluded from life sustaining mental health treatment, medical care, and shelter that the VA affords those who have been found eligible.

5. The case excerpts that follow are just a handful of examples that illustrate the issues we regularly see veterans experiencing when they are in need of VA benefits that exist to ensure their health and wellbeing, and yet must wait an extended period of time to resolve errors in their claims before accessing their benefits.

Veterans Experiencing Delays in their VA Appeals

6. **Example # 1,** U.P. died while waiting over three years for a BVA hearing. While stationed at Ft. Sill, Oklahoma, an incredibly destructive tornado touched down and devastated local communities. As part of his duties in the Army, U.P. was called to conduct search and rescue efforts throughout the effected communities. For three days U.P. drove up and down streets stopping to search through debris for survivors. During this search U.P. personally saw a dead body that had been impaled by debris, and the bottom half of another body that had been buried under the debris. He also came across multiple injured people and a significant number of dead animals.

7. U.P. thought about these events on an almost daily basis and struggled to cope with the memory of this traumatizing event. Among many other symptoms, U.P. experienced chronic sleep issues, had difficulty establishing and maintaining relationships, and suffered from suicidal ideation.

8. U.P. eventually sought treatment and was diagnosed with PTSD by VA clinicians. Through the help of Swords to Plowshares, U.P. submitted a claim for service connection of his PTSD. The VA denied U.P.'s claim alleging that witnessing a man impaled and witnessing half of a dead body were insufficient stressors for a PTSD diagnosis. U.P. submitted his Notice of Disagreement to the VA in October of 2016 but was not scheduled for a BVA hearing until February 2020. U.P. passed away the day before his hearing.

9. **Example #2,** T.K. is an Air Force veteran who served for 13 years and is service connected for PTSD which she developed after a stranger broke into her home and robbed her at gunpoint. Unfortunately, upon leaving the military T.K. struggled to cope with her symptoms and became dependent on drugs and alcohol.

10. From February 2015 to July 2016, she was incarcerated on charges related to her substance use. During her incarceration, the VA continued to pay T.K. the full benefits amount despite her only being entitled to a portion of them. In September 2015, the VA received notice from a correctional facility in California that she was currently incarcerated there.

11. It is documented in T.K's VA Claims File that in January 2017 the VA phoned the prison to request they complete a VA form and the prison employee told the VA on that call that T.K. was no longer incarcerated and was now in a re-entry program. The next month, the VA sent T.K. a letter saying they had evidence that she had been incarcerated and proposed to reduce her benefits. In August 2017, the VA reduced her benefits to the rate for incarcerated veterans even though she had been out of prison for over a year and they issued a benefits overpayment.

12. In April 2018, T.K. requested her benefits be fully reinstated and submitted paperwork from her parole officer proving that she was no longer incarcerated. And, in August 2018, she filed a Notice of Disagreement contesting the overpayment. A year later, T.K. attended a mental health exam scheduled by the VA which took place at a medical office, not in prison. Despite the phone call from the prison employee in 2017, the parole paperwork in 2018, and the results of the exam showing she is not in prison in 2019, the VA did not reinstate her benefits until January 2020. At which point, the VA also released a $47,000 retroactive payment she was entitled to for a PTSD rating increase. During the pendency of the appeal, T.K. was at times homeless, and was forced to work to avoid destitution despite being undergoing chemotherapy at the time for breast cancer.

13. **Example #3,** A.H. is a Navy veteran who developed significant mental health problems after experiencing military sexual trauma (MST). In October 2012, he filed a claim for disability compensation for mental health conditions and back injuries related to his assault and other stressors during his service. As a homeless veteran, he was entitled to priority processing. A.H.'s claim was denied in September 2014, and he appealed in January 2015. As recognized by

his ultimate benefit award in 2017, A.H. is not able to work because of his service-connected disability.

14. While waiting for the resolution of his appeal, A.H. did not have enough money to cover his basic needs and was homeless and estranged from his family. He feared for his personal safety as he tried to navigate temporary solutions to his homelessness and worried about his ability to feed and clothe himself. Treatment records in his claims file show that the VA's errors and appellate delay were additional sources of distress: while his claim was pending, A.H. perseverated on the claims process, and on thoughts that the government was intentionally trying to harm him, to such an extent that he had difficulty engaging in day-to-day activities. In addition to exacerbating his mental health condition, A.H.'s financial and housing problems also made it difficult to care for and manage pain from his back injury, which caused him additional distress.

15. After finally winning his claim and receiving benefits, A.H. was able to focus on other life goals instead of on minimal economic survival, safety, and the stress of having his injuries and experiences denied. He followed through on VA-assisted housing opportunities, moved into an apartment, and reported briefly being able to spend time caring for his father, a Vietnam veteran, before his father passed away.

16. Grave errors during the VA examination to rate A.H.'s disability added to the delay and distress A.H. endured. At the time the BVA granted A.H. service connection, VA treatment records in his claims file documented years of his paranoid and delusional thinking, chronic suicidal thoughts and prior suicide attempts, and chronically low functioning. Inexplicably, without conducting an examination, and without considering or referencing this clinical history, the VA assigned A.H. a 0% disability rating in August 2016. The result was crushing for A.H., and unlawful.

17. Normally, another round of appeals would have ensued. However, because A.H. obtained Swords representation at this stage, his legal counsel requested reconsideration and detailed his treatment history, which led to an adequately informed in-person VA examination, and a corrected 100% disability rating in April 2017. Because of the VA errors, A.H. had to wait nearly nine months after winning his appeal at the BVA for the financial relief of compensation and the mental relief of vindication.

18. **Example #4,** A.G., a Purple Heart recipient, waited 8 months for an appeal hearing and got a denial that ignored critical medical evidence. A.G. enlisted in the Marines in the wake of the September 11th attacks, eager to do his part to prevent future losses of American lives. A.G. deployed to Iraq three times and experienced numerous combat traumas. During his first tour, he was hit in the leg by shrapnel and medevacked for life-saving treatment. At A.G.'s insistence, he returned to the frontline soon after, refusing to leave his fellow service-members behind. In recognition of his valor, A.G. received a Purple Heart. Over the course of A.G.'s service, IEDs hit his tank more than a dozen times. During his second tour, an IED attack killed four of A.G.'s Marine buddies. During A.G.'s third tour, an IED also killed his Commanding Officer. These tragic deaths and threats to A.G.'s life had a profound effect on him. As his service progressed and his traumas multiplied, A.G. turned to substance use to manage his increasingly severe symptoms of PTSD. Failing to recognize the medical basis of A.G.'s substance use, the Marines discharged him.

19. Because of A.G.'s discharge status, he was unable to access the VA healthcare and benefits he so urgently needs: despite symptoms of Traumatic Brain Injury (TBI), he could not get evaluated for TBI, let alone treatment; despite still carrying shrapnel in his leg, VA physical therapy was out of reach; and despite PTSD so severe that A.G. attempted suicide and was unable to maintain fulltime employment, he was barred from VA psychiatric care and disability compensation.

20. A.G. filed a request that the VA recognize his eligibility and his right to benefits in 2010 without the assistance of counsel, and received a denial years later. With the assistance of a Swords attorney, he filed a timely Notice of Disagreement (NOD) in 2017. In spite of policies that require claims to be expedited when a veteran was seriously injured in service and is not yet receiving benefits, A.G. waited approximately eight months after filing his NOD to receive an appeal hearing. A.G.'s Swords attorney has pressed every step of the way for speedier resolution of his claim; without such assistance, his wait for an appellate review likely would have been longer. Nevertheless, the Decision Review Officer (DRO) denied A.G.'s request, ignoring evidence of his severe combat PTSD on display in his military records and the lengthy testimony and medical opinion of his treating psychologist. Finally, in November 2018, the VA concluded that A.G.'s service should be deemed honorable for VA purposes, and he began receiving service-connected compensation for his disabilities in March 2019.

21. **Example #5**, C.G. waited two years for the BVA to grant his claim, even after advancing on the docket due to his financial hardship. During his service in the Marine Corps, C.G. was sexually assaulted and received treatment for alcohol dependence that arose from his trauma. He filed his first claim for compensation for PTSD caused by MST in December 2003, which the VA denied, along with two subsequent claims. In April 2015, C.G. filed his fourth claim for PTSD, which the VA again denied. C.G. filed an NOD in January 2016, waived a hearing, and with the assistance of a Swords attorney, filed a motion to advance on the BVA's docket, which was granted.

22. While his 2016 appeal was pending, C.G. participated in vocational rehabilitation but his PTSD made it very difficult for him to work. In a letter to the VA, his vocational rehab counselor detailed his difficulties, significant distress, and noted that without assistance he would become homeless when his vocational rehab support ended. This is what happened in April 2017. C.G. could not find work or afford a safe and stable place to live and he became homeless. In addition to these problems, because he was not service-connected, C.G. owed significant payments on his prior inpatient treatment for PTSD. C.G. pushed himself to continue seeking work that he could manage in spite of his PTSD but was turned down repeatedly. By September 2017, C.G. had become suicidal and entered emergency inpatient care. He remained extremely vulnerable while he continued to await his disability rating and commencement of desperately-needed benefits. C.G. was still homeless in January 2018, when the BVA granted his appeal and C.G. finally received a 70% disability rating.

23. The root of error in C.G.'s case added to his distress because a blatantly inadequate C&P exam ignored and discounted his experience and treatment. Before filing his claim in 2015, C.G. had been in inpatient treatment for substance use and for MST for nearly a year. He supported his application for disability compensation for PTSD with his own statements, the statements of a friend and family member to whom he reported his MST, and the extended VA treatment record diagnosing his PTSD and confirming his MST. Without mentioning or addressing the lay and medical evidence supporting his claim, a C&P exam found no evidence of MST and no diagnosis of PTSD.

24. Although the VA explicitly requested an addendum from the examiner to address overlooked evidence of MST and prior diagnoses and treatment for PTSD, the C&P examiner did not do so, and did not justify his conclusions that ignored the array of evidence C.G.

provided. The VA then simply affirmed the exam result, also without commenting on the contrary evidence and the examiner's failure to address prior VA questions.

25. **Example #6,** D.A. was honorably discharged from the Air Force in 2005. As a combat medical technician, he was exposed to the carnage of wounded and killed service members. He has documented anxiety symptoms in both his military record and his VA medical records, and he is currently taking prescription medication from the VA to manage his symptoms.

26. D.A. filed a claim in March 2014 for service-connected disability compensation for PTSD, which was denied. He re-filed the claim in 2016 and was again denied. A Notice of Disagreement was filed in March 2017, which was also denied, and the Form 9 appeal to the BVA was submitted in July 2018.

27. Since July 2018, there has been no movement on the case and we are still awaiting the BVA hearing. The veteran is low-income, living in San Francisco on $1000/month from his job as a veterinary technician. Given the financial strain, he has recently had to drop out of school.

28. **Example #7**, L.S. waited four years for a BVA hearing. She is an Air Force Veteran who suffered significant trauma during her time in service. The beginning of her active duty was relatively uneventful, however, things rapidly declined for L.S. once she started working as a pharmacy technician. In that position she was harassed by a physician who pressured her to get an intrauterine device (IUD) and the raped her after this procedure. L.S then developed mental health issues and had an onset of bi-polar disorder. L.S.'s service treatment records and military personnel file provided corroboration of this onset.

29. Although L.S. had no performance issues prior to the assault, after she was sexually assaulted L.S. had increased performance problems and her records noted that she was in a state of confusion most of the time and her thoughts were not on the task at hand. Her service treatment records also noted that she was having "nervous trouble" with the Air Force.

30. After L.S. left the service she continued to experience significant mental health concerns and eventually sought treatment. L.S. filed a claim for service connection of mental health concerns, including bipolar disorder in February 2014. Although L.S. had significant

evidence of in-service treatment, a diagnosis, and a statement from her treating psychologist that her current mental health concerns were related to her service, the VA denied her claim.

31. L.S. filed a Notice of Disagreement in April 2015. The VA did not schedule L.S. for a BVA hearing until August of 2019. The BVA eventually found in favor of L.S., and she is now 50% service connected for mental health.

32. **Example #8,** J.H. served in the Army during Vietnam. He began experiencing symptoms of schizophrenia in service and was officially diagnosed with the condition within a year of service. Per 38 CFR 3.309(a), a veteran diagnosed with schizophrenia within one year of service is presumed to have developed that condition in service and is entitled to service-connected disability compensation. He first applied for service connection for mental health in May 1981, and his fight continues today.

33. Most recently, in July 2017, he applied for service-connection for schizophrenia and included with his application a statement detailing his diagnosis within a year of service and provided the 1974 medical records proving as such. This document is titled in his claims file: "Report of hospitalization dated 1/10/1974 dx MHC, within a year of discharge," indicating that the VA has cataloged the record and understands that his diagnosis falls within the presumptive period in order to prove service-connection.

34. In December 2017, his claim was erroneously denied due to lack of in-service diagnosis with no mentioned of the applicable presumption. He filed a Notice of Disagreement and in June 2018, the VA again denied his claim. He immediately filed an appeal to the BVA and has been waiting since June 2018 for a hearing. Currently, J.H. lives off Social Security Administration disability benefits for his mental health condition, indicating that he is likely entitled to a 100% disability rating from the VA. Yet, despite having clear-cut entitlement to service-connection for schizophrenia, J.H has waited years with nothing from the VA.

* * *

35. These harms are not unique to veterans represented by Swords to Plowshares. Veteran legal service providers across the country expend their legal expertise and scarce resources to fight lengthy wait times and remand errors and complications that delay justice and in the process, compromise their clients' wellbeing. In Swords' mission statement, we recognize

that "War causes wounds and suffering that last beyond the battlefield." Over the decades, we have seen the healing powers of VA benefits to many of the thousands of veterans we have represented. But we also see an ever-increasing number of veterans trapped in VA delays that prolong and aggravate their suffering. The VA can and must do better.

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: March 13, 2020

/s/ Maureen Siedor

Maureen Siedor

Legal Director

Swords to Plowshares

Declaration of Margaret Kuzma

1. I am the Director of Discharge Upgrade Practice at Connecticut Veterans Legal Center (CVLC) in West Haven, Connecticut. Founded in 2009, CVLC is the first program in the United States to integrate legal services on-site at VA mental health facilities. We help veterans recovering from homelessness and mental illness overcome legal barriers to housing, healthcare and income.

2. In addition to other civil legal needs, CVLC attorneys and pro bono volunteer attorneys serve homeless and other low-income veterans with Department of Veterans Affairs (VA) disability benefits claims and Character of Discharge determinations (COD). To date, CVLC has assisted over 2,500 veterans with over 4,000 legal issues.

3. Through my affidavit, I aim to illustrate the gravity of harms VA delays inflict on our veteran clients. These examples are only a few of the hundreds of cases we see in which veterans in poverty or living at the margins of poverty are impacted by the VA's failure to timely adjudicate their claims.

The Harms of Common VA Delays and Errors

4. **Example #1. C. S. has waited over eight years for his decision.** C.S. is a Vietnam-era Army veteran who suffered severe and pervasive racial discrimination and racially motivated assaults during his time of service. As a result, while serving, he began to suffer from symptoms which were later diagnosed as major depressive disorder (MDD) and post-traumatic stress disorder (PTSD).

5. C.S. first filed for MDD and PTSD disability benefits pro se on June 26, 2009. The VA denied his claims in February 2010. In October of 2012, C.S., with CVLC's help, filed a request to re-open based on new and material evidence. Between 2012 and 2016, he received two denials, both confusing the MDD and PTSD standard, and despite having an independent medical evaluation that confirmed his diagnoses and their connection to his active duty service.

6. In May 2016, he timely filed an appeal and request for a Discharge Review Officer (DRO) hearing. The hearing was scheduled for January 2017.

7. By the time the hearing date approached, C.S.'s health had declined precipitously. He was in in-patient care for extreme depression at the VA for almost a month from January to

February 2017. During that time, the VA resorted to a more intensive treatment plan including 12 rounds of electro convulsive therapy (ECT). Because of his fragile health, the VA had to postpone the hearing until April 2017.

8. The re-scheduled hearing took place on April 24, 2017. By that time, C.S.'s mental state had eroded to the point that he could no longer attend the hearing.

9. Two months into waiting for the hearing decision, his bank began foreclosure proceedings on his house. CVLC helped him obtain pro bono counsel to assist with the foreclosure. On June 12, 2017, almost two months after the DRO hearing, C.S.'s pro bono counsel wrote the VA pleading for expedited review due to his imminent homelessness. C.S. received no response to the request. On July 24, 2017, the pro bono wrote to the VA again requesting an expedited decision due to the foreclosure. Again, the VA did not answer. C.S. lost his home.

10. C.S. waited almost two years for the hearing decision. In December 2018, the VA denied his claim, again making the same legal mistakes confusing the MDD and PTSD standards.

11. C.S., timely filed a Board of Veterans Appeals (BVA) appeal in February 2019. That same month, he suffered a stroke and once again had to be hospitalized. Over a year later, he is once again waiting.

12. **Example #2.** K.R. served in the Army for 12 years with honor and distinction. In the last few years of his service, he began showing symptoms of schizophrenia. His deteriorating mental state lead to behaviors resulting in an other than honorable (OTH) characterization of service for his last term of service.

13. Veterans are eligible for VA services based on any active duty term of service characterized as honorable or general under honorable. A service member's characterization of service is listed on his or her Certificate of Release or Discharge from Active Duty, commonly known as a "DD-214". The VA uses the DD-214 to assess eligibility.

14. Veterans serving consecutive enlistments often receive only one DD-214, with a characterization pertaining to only the last enlistment. Veterans must have an honorable or general under honorable characterization of service to re-enlist and serve consecutive terms

without a waiver. Because no enlistment is 15-years long, and K.R.'s 15 years of active duty service was clearly reflected on his DD-214, his eligibility for VA services was clearly apparent on the face of his discharge paperwork.

15. Nevertheless, in 2004, after treating him for schizophrenia for over 10 years, the VA abruptly – and without due process – terminated his care, erroneously telling him his OTH made him ineligible for services.

16. K.R. came to CVLC in 2016, to seek desperately needed care and VA disability compensation. From 2016 to 2019, he fought with the VA over whether, despite his 12 years of honorable service, he was eligible for healthcare.

17. Finally, in August 2019, the VA found that he was eligible for services and that his entire term of service was honorable. However, the VA has still failed to adjudicate the original claim filed in 2016 for service connected schizophrenia. Despite the overwhelming evidence that his schizophrenia began in service, the VA has refused to adjudicate the original claim and compensate him for his schizophrenia.

18. K.R. has faced homeless multiple times in the last 3 years as he is passed from family member to family member in the hopes that one day he will be able to obtain a stable income. Presently, K.R. is homeless and living in shelters waiting for a stable income so he can stabilize his housing. His is 100% disabled due to his service connected schizophrenia but not compensated for it as he waits for the VA to give attention to his claim.

19. **Example #3.** W.F. served in the Marines from 2008 to 2012, and is an Operation Enduring Freedom (OEF) combat veteran. He returned from combat exhibiting symptoms of post-traumatic stress disorder. After asking for help, he was diagnosed in-service with PTSD.

20. In 2012, he received an OTH discharge for misconduct incident to his PTSD. Post discharge, he sought services for his PTSD and diligently engaged in treatment at the VA from 2012 to 2015.

21. In 2015, the VA abruptly – and without due process – terminated his care, telling him his OTH status made him ineligible. Without treatment, W.F.'s health declined precipitously, and he was incarcerated for two years due to incidents related to his mental health condition.

22. In 2018, after he was released from incarceration, he came to CVLC for assistance obtaining access to the VA and VA disability compensation benefits for his combat-related PTSD. On March 18, 2018, CVLC filed for service connection disability benefits and a characterization of discharge (COD) so he could get back into much-needed treatment and receive compensation for his combat related PTSD and accompanying migraines.

23. On April 25, 2018, the VA acknowledged his PTSD service connection, but found him "dishonorable for VA purposes," only granting chapter 17 medical access. Chapter 17 access allows access to treatment only for service connected disabilities, no other conditions. It also denies veterans compensation for the service connected disabilities.

24. W.F. timely filed an appeal September 2018 regarding the dishonorable finding and corresponding denial of service connected compensation. Six months later, the VA granted him a hearing. After the hearing, the VA never uploaded hearing transcript. *The VA still cannot find the transcript, and W.F. remains in limbo with no compensation and limited access to care.*

25. In October 2019, W.F. lost his job and could only pay half of his monthly rent. In November 2019, he sold his car, but was still unable to catch up on rent. Without a car and with access to only limited treatment, he has been unable to find a new job. He is currently facing eviction and will likely end up homeless.

26. **Example #4.** M.F. did not wait for the draft. Instead, in 1968, at the age of 19, he enlisted in the Marines. He deployed to Vietnam and served with distinction throughout several campaigns, one of which earned him the Cross of Gallantry with Frame and Palm.

27. His willingness to serve came at a steep cost: he vividly remembers the Viet Cong soldiers he killed, and the women and children he witnessed being killed—including seeing a group of women who were raped and disemboweled and their children who were killed and cut into pieces, as well as a young girl who was tied up and forced to hold a grenade with the pin displaced until she grew too weak to hold it and it detonated, killing her.

28. Despite the unimaginable horrors he witnessed—and the combat he took part in—he was able to maintain a sterling record in the Marines with no misconduct. However, when he received orders to deploy again, he snapped. Struggling with what is now known to be PTSD, he

went absent without leave (AWOL) to escape deploying a second time, and was unceremoniously discharged with an undesirable (now an OTH) discharge.

29. For decades, this discharge prevented him from receiving desperately needed mental health care. He struggled to keep a job and was chronically homeless for years.

30. On December 13, 2017, CVLC successfully service connected his PTSD. Unfortunately, because of his AWOL, the VA granted him only chapter 17 benefits – meaning he has only limited access to care and is ineligible for service-connected disability compensation.

31. M.F. timely filed a Notice of Disagreement (NOD) in December 2018 regarding his eligibility for full healthcare and compensation. He is still waiting on a decision. *VA records reflect that as of February 25, 2020, the VA had not yet even processed the NOD, although the VA acknowledges its receipt in December 2018.*

32. M.F. is elderly and not in good health; he still experiences PTSD symptoms as well as the effects of decades of alcoholism. He lives in supportive housing in CT, where he requires full-time home health aide assistance in order to maintain basic hygiene and self-care. M.F. has no family in CT but does have family in Maine—including grandchildren. He desperate wants to move to Maine so that he can spend his final years near his grandchildren. He lives in poverty and cannot afford to make this move unless the VA actually processes his benefits appeal and changes his eligibility status allowing him to begin receiving service-connection benefits.

* * *

33. CVLC represents a small fraction of the veterans needing representation in Connecticut. Over 250 veterans came to CVLC for help with their VA benefit claims in 2019. Due to the resource intensive and protracted timeframe of VA benefit appeals, CVLC could only represent 43 percent of the veterans who needed assistance – focusing on the highest need clients with the most complex claims.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Margaret Kuzma

Connecticut Veterans Legal Center

CERTIFICATE OF SERVICE

I certify that on March 26, 2020, the foregoing Corrected Amici Curiae Brief and Addendum of Connecticut Veterans Legal Center and Swords to Plowshares in Support of Appellants was filed electronically using the CM/ECF system and served upon registered counsel by operation of the Court's CM/ECF system.

Dated: March 26, 2020

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b), because it contains 6,233 words (calculated by Microsoft Word 2016).

2. The brief complies with the typeface and type style requirements of FRAP 32(a)(5) and (6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: March 26, 2020

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