20-1305

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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

Claimants-Appellants,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the United States Court of Appeals
for Veterans Claims, Case No. 15-1280
Judge Michael P. Allen, Chief Judge Margaret C. Bartley,
Senior Judge Robert N. Davis, Judge Joseph L. Falvey, Jr.,
Judge William S. Greenberg, Judge Amanda L. Meredith,
Judge Coral Wong Pietsch, Judge Mary J. Schoelen, and
Judge Joseph L. Toth

BRIEF OF *AMICI CURIAE* FORMER GENERAL COUNSELS OF THE VA WILL A. GUNN AND MARY LOU KEENER IN SUPPORT OF CLAIMANTS-APPELLANTS SEEKING REVERSAL

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CERTIFICATE OF INTEREST

Counsel for Amici Curiae Will A. Gunn and Mary Lou Keener certify the following:

1. The full name of every party represented by us is Will A. Gunn and Mary Lou Keener.
2. There are no other real parties of interest.
3. There are no parent corporations or publicly held companies that own ten percent or more of the stock of the party represented by us.
4. The names of all law firms and the partners or associates that appeared for the amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are: Kristyn L. Hansen and Jennifer McTiernan.
5. The following case will directly affect or be directly affected by this Court's decision in the pending appeal: *Monk v. Wilkie*, No. 19-1094 (Fed. Cir.).

Dated: March 30, 2020

By: /s/ Jonathan M. Freiman
Jonathan M. Freiman

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INTEREST OF AMICI CURIAE[1]

Will A. Gunn served as General Counsel of the Department of Veterans Affairs (VA) from May 2009 until July 2014. He has an interest in this case because its outcome will have a significant impact on the men and women who have served in the armed forces, and on the VA, which now must process and adjudicate their claims for benefits. His interest is based on his service as a 25-year veteran of the Air Force and as the VA's senior attorney for five years.

Mary Lou Keener served as General Counsel of the VA from 1993 to 1998. She has an interest in this case because its outcome will have a significant impact on the men and women who have served in the armed forces, and on the VA, which must process and adjudicate their claims for benefits. A retired Colonel, her interest is based on her five years of service as the VA's senior attorney, as well as her 26 years of active and reserve military service in both the Navy and Air Force, including her service as a Navy nurse during the Vietnam War.

[1] No party or counsel for a party authored or paid for this brief in whole or in part, or funded the brief's preparation or submission. No one other than Amici or their counsel made a monetary contribution to the brief. *Amici* file this with the consent of the parties, per Fed. R. App. Proc. 29(a) and Federal Circuit Rule 29(c).

INTRODUCTION

Amici have shared their views with this Court twice before in earlier stages of this case. Each time, *amici* detailed the enormous practical burdens that the VA benefits appeals system places on the shoulders of our nation's veterans. The first time, *amici* urged this Court to recognize the CAVC's power to aggregate claims, Amicus Br. of Former General Counsels of the VA (Dec. 16, 2015), *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017), and this Court ultimately agreed, noting with approval *amici*'s observations on claim aggregation's possible beneficial effects on the VA appeals backlog. *Monk v. Shulkin*, 855 F.3d 1312, 1321 (Fed. Cir. 2017) (*Monk I*). The second time, *amici* urged this Court to recognize that the class action proposed in the case presented an appropriate vehicle to consider the system-wide delay that plagues the handling of veterans' appeals. *See* Amicus Br. of Former General Counsels of the VA, *Monk v. Wilkie*, No. 19-1094 (Dkt. # 31) (filed January 24, 2019) (decision pending).

In both prior appeals, questions regarding the procedural mechanism of claim aggregation arose from the same core grievance: the endemic and inexcusable delay in the resolution of veterans' appeals. This appeal addresses that delay in the cases of four individual veterans who suffered years of inexcusable delay. During those years, there was nothing they could do to receive timely decisions on their appeals. But when they stepped forward to challenge not only

their own adverse decisions but also the rampant delays in the VA system, their appeals were resolved. One need not be a cynic to recognize that the VA acted extraordinarily slowly when these four veterans challenged their individual disability determinations, but then changed course when these same veterans emerged as challengers to the systemic delays themselves.

This Court should reject the VA's efforts to sideline and silence these four veterans. The VA delayed the resolution of their cases time and again; their voluntary cessation of that repeated delay on the eve of the CAVC's review did not moot their petitions for writs of mandamus. Moreover, while claims of delay can take years to ripen, they can be cut down quickly, as they were here, in order to evade review. The four veterans' petitions for writs of mandamus are not moot and should be granted.

In *Monk I*, the CAVC viewed itself as powerless to aggregate claims, resigning itself to a world of rudderless confusion for veterans and the VA alike. *See Monk*, 855 F.3d at 1321. This Court corrected that view, empowering the CAVC to use litigation management tools that federal courts routinely use to clarify law and resolve disputes efficiently and fairly. *Id.* at 1318. Now, the CAVC again views itself as powerless—this time to grant writs of mandamus to veterans who have suffered multi-year delays—merely because the VA resolved those delay claims on the eve of CAVC review. The CAVC should have rejected those efforts

to avoid review of the delay claims, recognizing that it has the same powers as other federal courts to protect itself from strategic mooting by a defendant. Congress gave the CAVC the responsibility to "compel action of the Secretary… unreasonably delayed." 38 U.S.C. § 7261(a)(2). The CAVC shirked that duty, and this Court should remind the CAVC of its power and responsibility to prevent unreasonable delay in the adjudication of veterans' claims.

BACKGROUND

The backlog of veterans claiming service-related benefits has gained national attention. While the VA has made progress in adjudicating veterans' initial claims for disability benefits, veterans in the appeals process must often wait years for a final decision. On average, a veteran waits seven years from filing a notice of disagreement with the VA's initial denial of benefits until a ruling from the Court of Appeals for Veterans Claims (CAVC), ordinarily a veteran's court of last resort. U.S. Department of Veterans Affairs, Comprehensive Plan for Processing Legacy Appeals and Implementing the Modernized Appeals System Public Law 115-55, *Section 3* (Feb. 2018), available at https://benefits.va.gov/benefits/docs/appeals-report-201802.pdf; *see also* Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361, 377 (2009) (reporting that delays a decade ago averaged

five to seven years). Those are years when many veterans face grave illness, old age and indigent circumstances. Some die while waiting for a final ruling. The systemic nature of the delays makes it clear that the administrative machinery has been unable to slay the Hydra of backlogged claims appeals—for every petition that ends in a final disposition, more pop up to take its place.

To be sure, the VA and CAVC have limited resources, and limited resources sometimes cause delay. But delays of five to seven years are not merely the result of limited resources. They are the result of a system of adjudication that needlessly hamstrings itself. The CAVC denied its own ability to aggregate claims until this Court empowered it in *Monk I.* It now denies its ability to address the systemic delays head-on through writs of mandamus. The context of those delays matters greatly. This Background grounds the legal questions of mandamus power and mootness in the practical realities of the VA appellate backlog and the delays suffered by veterans.

I. Structure of the VA benefits appeals process

The VA's mission is "To fulfill President Lincoln's promise 'To care for him who shall have borne the battle, and for his widow, and his orphan' by serving and honoring the men and women who are America's Veterans." *See* Dept. of Veterans Affairs, https://www.va.gov/icare/. The VA's Veterans Benefits Administration plays a critical role in fulfilling that mission, providing benefits to

veterans for "service-connected" disabilities, or injuries suffered during military service that have caused a present disability. 38 U.S.C. § 1110.

To apply for benefits, an injured or disabled veteran files for disability compensation at a VA Regional Office (VARO). *See* 38 U.S.C. § 5101(a)(1); 38 C.F.R. § 3.155. If the VARO denies benefits and she disagrees with the decision, she has one year to appeal by providing a Notice of Disagreement (NOD) at the Agency of Original Jurisdiction (AOJ). *See* 38 C.F.R. §§ 20.201, 20.300, 20.302. Once she has filed the NOD, the veteran will be asked by the AOJ to select an appeals process: (i) de novo review or (2) an internal traditional appeals process (which is the default process, if the veteran does not choose). *See* 38 C.F.R. §§ 19.24, 19.26. If the AOJ cannot grant the benefit after this appeals process, then the AOJ issues a Statement of the Case. *See* 38 C.F.R. §§ 19.29-.31, 20.200.

The veteran may also administratively appeal to the Board of Veterans' Appeals (BVA). *See* 38 C.F.R. §§ 19.31, 19.35, 19.50, 20.202; *see also* 38 U.S.C. § 7104. Proceedings before the BVA are non-adversarial and *ex parte*. *See* 38 C.F.R. § 20.700. Neither veterans nor their lawyers are necessarily present for the BVA's deliberations. *Id.* Moreover, BVA decisions are non-precedential and have no bearing on the outcomes of related cases. *See* 38 C.F.R. § 20.1303. Each BVA

decision, in other words, is a one-off decision. A veteran may appeal a BVA final decision to the CAVC. 38 U.S.C. §§ 7252, 7266.[2]

The CAVC is the first independent forum to hear the veteran's claim. While the VARO and the BVA are part of the VA, the CAVC operates outside of the VA. It is an independent Article I Court. *See* 38 U.S.C. § 7253. It is also the first forum where the proceedings are adversarial: both the veteran and the VA are represented by counsel, and the procedures resemble those of an ordinary federal court. *See* 38 U.S.C. §§ 7263-7265.

II. Statistics on CAVC caseload and waiting times

The CAVC's caseload is enormous. Each year, the Court is confronted with thousands of appeals, petitions for extraordinary relief, claims for attorney's fees under the Equal Access to Justice Act (EAJA), and motions for reconsideration. As of 2017, there were over 470,000 appeals alone pending in the VA system, not counting petitions, EAJA claims or other motions. Appx1044. The number of appeals has risen quickly, as has the waiting time for a final decision. *See* Dep't of Veterans Affairs, Office of Inspector General, Office of Audits and Evaluations, *Veterans Benefits Administration: Review of Timeliness of the Appeals Process* i (March 28, 2018), https://www.va.gov/oig/pubs/VAOIG-16-01750-79.pdf. ("At

[2] This Court has exclusive jurisdiction to review CAVC decisions. 38 U.S.C. § 7292.

the end of FY 2012, VBA [Veterans Benefits Administration] reported having 254,604 appeals pending nationwide and an overall average of 903.1 days [about 2.5 years] to resolve appeals. By the end of FY 2015, VBA reported its pending appeals had increased to 318,532 nationwide, and the overall average days to resolve appeals had risen to 935.9 [about 2.6 years].”). And the VA itself has recognized that its reports severely underestimate the total number of pending claims. *See* Dep’t of Veterans Affairs, Office of Inspector General, *Review of Accuracy of Reported Pending Disability Claims Backlog Statistics* 4-5 (Sept. 10, 2018), https://www.va.gov/oig/pubs/VAOIG-16-02103-265.pdf (finding severe undercounting of claims by VA in its reports).

It is a matter of public record that, on average, a veteran waits nearly six years from filing a Notice of Disagreement with the VA’s initial denial of benefits until a ruling from the Board of Veterans’ Appeals (BVA). *See* Veterans Appeals Improvement and Modernization Act (VAIMA), Pub. L. 115-55, 131 Stat. 1105, 1115. [3] The VA’s website states as much: “When you request a review from a

[3] VAIMA became effective on February 19, 2019, allowing some veterans with backlogged appeals to opt into a new appeals system, but it does not resolve the remaining backlogged “legacy” appeals. *See, e.g.*, Dep’t of Veterans Affairs, *Comprehensive Plan for Processing Legacy Appeals and Implementing the Modernized Appeals System, Public Law 115-55, Section 3, February 2018 Update* 7, https://benefits.va.gov/benefits/docs/appeals-report-201802.pdf. (“Given the complex, non-linear legacy process, it is difficult for VA to project when all legacy appeals will be resolved, or provide timeliness goals for legacy appeals.”).

Veterans Law Judge at the Board of Veterans' Appeals, it could take 5-7 years for you to get a decision." Manage a Legacy VA Appeal, https://www.va.gov/disability/file-an-appeal (last visited March 30, 2020). The years veterans spend waiting for decisions in their appeals are often years of grave illness, old age, and indigent circumstances. About 1 in 14 die while waiting for a ruling. *Id.* at v. To add insult to injury, the VA "count[s] these as resolved appeals." *Id*. at iv. This Court has witnessed that sad result. *See, e.g.*, *Martin v. O'Rourke*, 891 F.3d 1338, 1349 (Fed. Cir. 2018) ("Finally, and regretfully, the parties have informed us that Mr. Myers passed away during the course of this appeal, and the parties agree that his appeal is now moot."). Younger veterans who spend years awaiting appeals (for example, for disability claims related to PTSD) are arguably at no less risk during the lengthy adjudication process. *See, e.g.*, Han K. Kang et al., *Suicide Risk among 1.3 Million Veterans Who Were on Active Duty During the Iraq and Afghanistan Wars*, 25 Annals of Epidemiology 96-100 (2015) (finding risk of suicide for veterans on active duty during the Iraq and Afghanistan Wars to be 41-61 percent higher than that of the general population, regardless of whether they were deployed).

Since *amici* were last before this Court, new information has shed light on "the structural challenges stemming from the volume of cases." Daniel E. Ho., et al., Stanford Institute for Economic Policy Research (SIEPR), Quality Review of

Mass Adjudication: A Randomized Natural Experiment at the Board of Veteran's Appeals, 2003-16 26 (2018) ["Quality Review"]; *see also* David Ames, et al., *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV.1 (2020). The Ames study, led by the former Chief of the Office of Quality Review of the Board of Veterans' Appeals, analyzed data on more than half a million BVA cases from 2002-16, showing that an internal quality review program touted by the VA "generated an all-but-meaningless measure of decisional quality" and "failed to identify errors in decisionmaking in any rigorous way." *Id.* at 7. It served instead as a fig leaf, "hiding dramatic declines in decisional quality." *Id.* This quality review program "had virtually no impact on the likelihood that CAVC would reverse or remand a BVA decision" and out of the "original cases appeal to CAVC, roughly 75% of QR [quality review] cases were vacated and remanded by CAVC, compared to 76% of control cases." *Id.* At 50. Unsurprisingly, increased caseload has led not only to declines in decisional quality but also to more appeals, approximately 11,500 more per quarter in 2016. Quality Review at 10. By 2017, there were over 470,000 appeals pending in the VA system. Appx1044.

III. Inexplicable causes of delay

Many delays appear to lack any explicable cause at all. For example, Judge Moore recently described the process of certification from a Regional Office to the Board of Veterans' Appeals as follows:

> Once the appeal is received, it takes the BVA an average of 773 days to certify the appeal. This is a ministerial process that involves checking that the file is correct and complete and completing a two-page form which could take no more than a few minutes to fill out. . . . As can be seen, the form consists of a total of 13 items to be filled out, each requiring nothing more complicated than the veteran's name, the dates of various prior actions before the VA, and whether or not a hearing was requested. Unsurprisingly, the government has provided no reason why such a simple task takes over two years to complete, and I cannot conceive of any rational explanation.

Martin, 891 F.3d at 1349–50 (Moore, J., concurring). When under oath, VA personnel have not been able to identify the causes of delays at the various stages of appeal. *See, e.g.*, *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 859 (9th Cir. 2011), *opinion vacated on reh'g en banc*, 678 F.3d 1013 (9th Cir. 2012) (in testimony before the trial court, senior VA officials were unable "to provide the court with a sufficient justification for the delays incurred," while the Chairman of the Board of Veterans' Appeals "was unable to explain the lengthy delays inherent in the appeals process before the Board."). As the Ninth Circuit concluded, "[m]uch of the delay appears to arise from gross inefficiency, not resource constraints." *Id*. at 885.[4]

[4] An *en banc* Ninth Circuit vacated *Shinseki* after concluding that only the CAVC and this Court had jurisdiction over the claims at issue. 678 F.3d at 1016 ("As much as we as citizens are concerned with the plight of veterans seeking the prompt provision of the health care and benefits to which they are entitled by law, as judges we may not exceed our jurisdiction.").

This conclusion was echoed recently in an analysis of VBA appeals processing by the VA's own Office of Inspector General. The report "found significant periods of inactivity throughout all phases" of the appeals process. Dep't of Veterans Affairs, Office of Inspector General, Office of Audits and Evaluations, *Veterans Benefits Administration: Review of Timeliness of the Appeals Process* ii (March 28, 2018), https://www.va.gov/oig/pubs/VAOIG-16-01750-79.pdf. While some appeals had multiple periods of inactivity, "[o]n average, a single period of inactivity accounted for approximately 45 to 76 percent of the total processing time in each phase." *Id.* Petitioners have detailed the delay faced by the four veterans here, including unconscionable delays in simple ministerial steps. Pet'rs Br. at 10-14.

IV. Very few CAVC opinions fully affirm the BVA decision, and almost none have precedential affect.

The last step in a veteran's appeal process is the CAVC. In FY 2017 alone, the CAVC disposed of 4,095 appeals. U.S. Court of Appeals for Veterans Claims, Annual Report (Fiscal Year 2017), https://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf. Of those, 1,685 (41 percent) were decided by a single judge. *Id.* Only 21 appeals (one half of one percent) were decided by a multi-judge panel. And only one was decided by the full CAVC. *Id.* (The remainder were resolved through ADR.) Under CAVC rules, only published opinions issued by a panel of three judges or more carry

precedential value. *See Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992). Single-judge dispositions are not binding in another case. *Id*. In sum, one half of one percent of the CAVC's 2017 decisions in appeals created precedent. Similar trends were evident in each of the preceding five years.

The CAVC reverses at an exceptionally high rate. In 2017, only 12 percent of appeals were fully affirmed. U.S. Court of Appeals for Veterans Claims, Annual Report (Fiscal Year 2017), https://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf. In other words, a large majority of appeals brought by veterans are ultimately found to be meritorious. That, in turn, means that many of our most deserving veterans—men and women whose service to this country rendered them unable to participate fully in the life of this country—are the very people forced to wait years for the benefits they were promised. The mandamus petitions in this case give this Court the opportunity to say that our servicemembers should no longer have to wait so long.

ARGUMENT

I. This Court should consider the mandamus petitions on the merits despite the VA's eve-of-review decisions on the four veterans' claims.

Three key lessons emerge from the background above. First, most veterans appealing disability decisions are in the right: when the BVA's decisions are eventually reviewed, very few are fully affirmed. Second, most veterans have to wait an appallingly long time for the correction of those erroneous initial decisions.

Third, as the VA's own Inspector General has found, the VA now seriously underreports the extent of the problem.

The mootness issue should be considered with those lessons in mind, and recognizing that "[c]ase law is replete with…examples" of the VA attempting to moot CAVC appeals to avoid review of the legality of unconscionable delays in benefits appeals. *Monk I*, 855 F.3d at 1321. So too here. The four appealing veterans waited years for their petitions to be resolved. But soon after their mandamus petitions reached the CAVC, the VA voluntarily ended its long delay and ruled on three of the four appealing veterans' underlying petitions; it did the same with the fourth veteran's petition after the appeal was filed in this Court. Those actions—and the broader context of the systemic, unexplained and inexcusable delays in the VA appeals process—make plain that the four mandamus petitions here fall within both the voluntary cessation and "capable of repetition but evading review" exceptions to mootness.

A defendant's "voluntary cessation of a challenged practice does not moot a case unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___,137 S. Ct. 2012, 2019 n.1 (2017) (internal quotation marks, bracket and citation omitted); *see also Friends of the Earth, Inv. v. Laidlaw Envtl. Servs., Inc*., 528 U.S. 167, 189 (2000). A legal challenge to a

practice that a defendant has voluntarily ceased during litigation is not moot unless the defendant meets its " 'heavy burden' of making 'absolutely clear' that it could not revert to its policy." *Trinity Lutheran*, 137 S. Ct. at n.1. (internal citation omitted) The VA comes nowhere near meeting that heavy burden. As this Court has noted, Mr. Monk "filed another NOD challenging the effective date of his disability benefits, and will likely be subject to the same average delay." *Monk I*, 855 F.3d at 1317-18. Nothing has changed since then. As the Background section above explains, delays in the VA appeals process have only gotten worse—and less transparent. *See Martin*, 891 F.3d at 1341-42 (average five-year delay); *Monk I*, 855 F.3d at 1317 (average four-year delay); Manage a Legacy VA Appeal, https://www.va.gov/disability/file-an-appeal (last visited March 30, 2020) ("When you request a review from a Veterans Law Judge at the Board of Veterans' Appeals, it could take 5-7 years for you to get a decision."). It is far from "absolutely clear" that veterans will now have their appeals promptly resolved.

The CAVC found that the voluntary cessation doctrine does not apply because the "VA is not like a defendant in a civil case who has stopped bad behavior and asks a court to trust it going forward." Appx8. It provided no explanation for that assertion other than its belief that "[a]ny additional wrongful conduct by the Secretary would be materially different from what has allegedly transpired in the past." *Id*. That fundamentally misunderstands the issue. The "bad

behavior" here is unreasonable delay, and the question is whether the VA, having voluntarily stopped delaying here after the mandamus petitions were filed, has met its heavy burden of showing that it is absolutely clear that delay will not occur in the future. The CAVC could conclude that any "additional wrongful conduct" by the VA would be "materially different" only by focusing on the wrong thing: the details of the disability petitions, rather than the claim of unreasonable delay. It is beyond dispute that until this Court orders otherwise, the VA will delay the resolution of veterans' appeals again and again. Absent intervention from this Court, the delays will cease only in those cases where veterans file mandamus petitions to the CAVC attacking the unreasonable delays. The VA will otherwise "revert to its policy" of unreasonable and unexplained delays. *Trinity Lutheran*, 137 S. Ct. at n.1. This is a paradigmatic case of voluntary cessation, and the case is not moot.

The "capable of repetition but evading review" exception to mootness applies for similar reasons. That doctrine makes disputes justiciable where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (internal quotation marks and citation omitted).

The CAVC again focused on the wrong thing in its analysis of the first prong. It noted that the BVA rendered decisions on three of the veterans claims after they filed the mandamus petitions challenging the unreasonable delays, *see* Appx7, which raises the "capable of repetition but evading review" exception question but does not answer it. The CAVC thought that delay claims could not "evad[e] review" because they are, by definition, claims that things have gone slowly. *Id.* That analysis has an initial attraction, but it is only skin deep. True, some claims evade review because the challenged situation is fleeting: an election, a pregnancy, or a short criminal sentence. *See e.g.*, *Wis. Right to Life, Inc.*, 551 U.S. at 462. The gravamen of the exception, though, is not the claim's transience but whether it evades review. Some claims are "too short to be fully litigated prior to cessation," *id.*, because the defendant can terminate them before they are fully litigated. Here, the veterans' claims of unreasonable delay take years to mature; that is what makes the delay unreasonable. *See* 38 U.S.C. § 7261(a)(2). But they can be cut down in an instant by the VA in order to evade review. *Cf. Monk I*, 855 F.3d at 1321 ("Case law is replete with…examples" of VA attempting to moot CAVC appeals to avoid review of the legality of unconscionable delays in benefits appeals.).

The CAVC also misapplied the second prong when it concluded that the petitioners would not "be subject to the same action" that evaded review, a

possibility the CAVC dismissed as "speculative." Appx8. It is not speculative. As petitioners point out, it has already happened during this very case to one of them (Mr. Monk), and this Court already found that his delay claim was capable of repetition but evading review. *See* Pet'r Br. 55-56; *see also id.* 54 (detailing two separate unreasonable delays experienced by Mr. Dolphin after filing two NODs, two separate unreasonable delays experienced by Mr. Monk after filing two NODs, and two separate unreasonable delays experienced by Ms. Obie after filing two NODs).

That alone would be enough to satisfy the second prong, but this Court should also bear in mind the broader context explained in the Background above. The nature of the VA disability process means that veterans must frequently file NODs more than once, as the veterans here have. And the lengthy delays in several steps of the appeal process—including simple ministerial steps that inexplicably and inexcusably can delay a veteran's claims by a year—mean that veterans will be forced to bear these unreasonable delays more than once.

The realities of many veterans' lives after they have completed their service to this country makes such repeat exposures to VA delay even more likely. Service-related disabilities can manifest themselves after periods of latency, requiring a veteran to return to the VA to claim an additional disability. Conditions can worsen, prompting a veteran to return to claim a change to the percentage of

their impairment. And advances in science and medicine can alter conventional wisdom on whether conditions are service-related, again necessitating a return to the VA.[5] For many veterans, it is likely, not speculative, that they will experience unreasonable delay more than once.

CONCLUSION

For the reasons above, this Court should find the four veterans' mandamus petitions justiciable. The decision below should be reversed and remanded with instructions to grant the writs of mandamus, fashioning appropriate relief for the unreasonable delays through further proceedings.

[5] *See, e.g. Patricia Kime, Agent Orange decision delay draws criticism,* MILITARY TIMES (Feb. 12, 2020), https://www.militarytimes.com/news/pentagon-congress/2020/02/12/agent-orange-decision-delay-draws-criticism/ (reporting on debates over whether four medical conditions should be added to existing list of Agent Orange-related disabilities); *The Pentagon Has Settled A Lawsuit Over Allegedly Defective Earplugs. Now Veterans Are Suing, Too.*, WUSF PUBLIC MEDIA (Mar. 22, 2019), https://wusfnews.wusf.usf.edu/post/pentagon-has-settled-lawsuit-over-allegedly-defective-earplugs-now-veterans-are-suing-too (reporting on claims of service-related hearing loss after the settlement of product liability claims against manufacturers of allegedly defective military-issued rubber earplugs).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing Brief of *Amici Curiae* in support of Claimants-Appellants complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Circuit Rule 32(a) because it contains 4,665 words as determined by the word-count function of Microsoft Office 365, excluding parts of the motion exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced, 14-point, Times New Roman typeface using Microsoft Office 365.

Dated: March 30, 2020

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CERTIFICATE OF SERVICE

I hereby certify that, on March 30, 2020, the foregoing *Amici Curiae* Brief was filed with the Court 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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