20-1305

IN THE 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 L. WILKIE,
Secretary of Veterans Affairs,

Respondent-Appellee.

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

OPENING BRIEF OF APPELLANTS

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CERTIFICATE OF INTEREST

Counsel for Appellants certifies the following:

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

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

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

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or who are expected to appear in this Court, in addition to the counsel who have already appeared in this appeal, are: Jerome N. Frank Legal Services Organization: Aaron Wenzloff, Supervising Attorney; Eric Baudry, Jade Ford, Shikha Garg, Jordan Goldberg, Catherine McCarthy, Corey Meyer, Arjun Mody, Madison Needham, Jesse Tripathi, and Casey Smith, Law Student Interns; and Simpson Thacher & Bartlett LLP: Elisa Alcabes, Michael Brasky, Joseph Bruno, Thomas Coghlan, Daniel Cohen, Laurel Fresquez, Kerry Fulham, R. Grant Gannon, Anthony Piccirillo, and John Ready.

5. The following cases are those known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal: *Monk v. Wilkie*, No. 19-1094 (Fed. Cir.).

Respectfully submitted,

March 20, 2020

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF RELATED CASES

This Court first heard an appeal in this matter in *Monk v. Shulkin*, Nos. 15-7092, 15-7106. The date of decision was April 26, 2017; Judges Dyk, Newman, and Reyna sat on the panel. The opinion is at 855 F.3d 1312.

This Court subsequently heard oral argument in another appeal in the matter, *Monk v. Wilkie*, No. 19-1094. Oral argument was held on December 2, 2019; Judges Newman, Lourie, and Reyna sat on the panel. A decision is pending.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for Veterans Claims ("CAVC") had jurisdiction to review Appellants' requests for writs of mandamus pursuant to 38 U.S.C. § 7261(a)(2). *See Cox v. West*, 149 F.3d 1360, 1363 (Fed. Cir. 1998). The CAVC entered a final judgment on Appellants' Petitions on November 14, 2019. Appx1310. Appellants filed a timely Notice of Appeal on November 22, 2019. Appx1311; *see* 38 U.S.C. § 7292(a). This Court has jurisdiction to review the CAVC's final judgment denying the writs pursuant to 38 U.S.C. § 7292.

STATEMENT OF ISSUES

1. Did the CAVC misinterpret 38 U.S.C. § 7261(a)(2) in holding that a five-year delay in deciding a disabled veteran's administrative appeal does not amount to an unreasonable delay;
2. Did the CAVC misinterpret and misapply the Fifth Amendment Due Process Clause in holding that such a five-year delay does not violate the veteran's due process rights; and
3. Did the CAVC misinterpret the mootness standard in dismissing certain Appellants' claims.

PRELIMINARY STATEMENT

Appellants are veterans who sustained life-altering injuries while serving this country. Each applied for disability benefits and filed an administrative appeal of an initial denial under the legacy appeals system. Then, they waited. Appellants Conley F. Monk, Jr. and William Dolphin each waited over five years for the Appellee Robert Wilkie, Secretary of Veterans Affairs ("Secretary" or "VA"), to decide their administrative appeals, and Appellants Lyle Obie and Jimmie Hudson each waited over three years. These waits deprived them of funds they urgently needed for daily necessities. Mr. Monk, for example, suffered temporary

homelessness during the VA's delay in awarding disability benefits that the VA later agreed he deserved.

Appellants' cases are far from outliers. In a system that the VA itself admits is "broken," hundreds of thousands of disabled veterans wait an average of seven years for a decision from the VA. As the years go by, these veterans are forced to live in constant uncertainty—often without access to basic resources. Many suffer from deteriorating health while they wait; one in fourteen veterans dies waiting for a decision on his or her administrative appeal.

In *Martin v. O'Rourke*, this Court made clear that veterans must be able to obtain meaningful relief from the VA's unreasonable delays on a mandamus petition to the U.S. Court of Appeals for Veterans Claims. 891 F.3d 1338 (Fed. Cir. 2018) (overturning restrictive mandamus standard long applied by CAVC and holding less restrictive rule applies). But the CAVC has misinterpreted *Martin*, including in the cases of Appellants. Since *Martin*, the CAVC has denied every single mandamus petition except one and almost always in single-judge, unpublished decisions. In the instant case, the *en banc* CAVC misconstrued *Martin* to hold that it was not unreasonable for Mr. Dolphin to wait more than five years for the VA to resolve his appeal. During oral argument below, counsel for the Secretary insisted that even a delay of 100 years was not necessarily unreasonable.

By misinterpreting *Martin*, the CAVC allowed the VA to proceed unchecked, disregarding Appellants' statutory rights to timely resolution of their appeals. The CAVC has also failed to recognize that waiting years on end for a decision—sometimes without access to food, shelter, or medical care—is a constitutional harm. Appellants have a constitutional right to be free from unreasonable delay in the resolution of their appeals. The CAVC summarily ignored this right. If this Court does not intervene to correct the CAVC's misinterpretation of the relevant standard, the VA will continue to evade accountability for these constitutional and statutory harms.

STATEMENT OF THE CASE

Appellants are veterans who applied for disability benefits.[1] Appellee Robert Wilkie, Secretary of the VA, is responsible for the administration of veterans' benefits. In the CAVC, Appellants alleged that they are each entitled to a writ of mandamus compelling adjudication of their claims. Appellants further alleged the Secretary's delay in adjudicating their claims for disability compensation benefits violates their statutory and due process rights under the Fifth Amendment to the

[1] Appellants Merrick, Coyne, and Stokes are no longer pursuing their individual mandamus petitions, Appx230, but reserved their rights to represent the class, Appx6-7, whose certification denial is currently on appeal before this Court in No. 19-1094. The CAVC acknowledged that the class representative issue "is currently before the Federal Circuit" and concluded that it "may not weigh in on this issue"; however, the CAVC nevertheless erroneously dismissed Mr. Coyne, Mr. Merrick, and Mr. Stokes's petitions. Appx7.

United States Constitution. In addition, Appellants requested relief on behalf of themselves and others similarly situated, following this Court's holding earlier in this case that the CAVC may aggregate petitions for writs of mandamus. The CAVC denied class certification and Appellants filed an appeal now pending before this Court. Appx37.

In the case at hand, the CAVC first held that that the claims of all Appellants except Mr. Dolphin were moot, failing to apply obvious exceptions to the mootness doctrine including "voluntary cessation" and "capable of repetition, but evading review."[2] Appx6-9.

On the merits, the *en banc* CAVC examined Mr. Dolphin's statutory claim for unreasonable delay under the so-called *TRAC* factors. *See Martin*, 891 F.3d at 1343-44. Notwithstanding Mr. Dolphin's five-year delay and approximately $150,000 in delayed compensation at stake, the majority found only one *TRAC* factor favoring Mr. Dolphin—human health and welfare. Appx10-16. With respect to *TRAC*'s key "rule of reason" factor, the majority found the VA's delay to be "regretful" but "not unreasonable." Appx14. The majority declined to conduct an independent analysis of Mr. Dolphin's due process claim, stating that the test "is not appreciably different from the *TRAC* balancing test." Appx17.

[2] Eight of nine members of the CAVC joined the mootness ruling. Judge Pietsch concluded that the CAVC lacked jurisdiction over the merits of the individual petitions and thus did not reach the mootness or delay issues. Appx24-26.

Judges Allen and Greenberg issued a sharp dissent, criticizing the majority for rendering "illusory the right a veteran has to seek judicial intervention when VA delays in adjudicating his or her claim." Appx24. The dissent recognized that the CAVC's rule erroneously requires Appellants to show "total inaction" by the VA in order to obtain relief. Appx24.

This Court should therefore reverse the CAVC's decision and find that the Secretary's delay in adjudicating appeals by Mr. Dolphin and the other Appellants is unreasonable under both the statutory *TRAC* analysis and the constitutional due process analysis.

STATEMENT OF FACTS

A. The VA Appeals Process Subjects Veterans to Unconscionable Delay

Hundreds of thousands of disabled veterans with pending appeals will wait, on average, seven years for a decision on their appeal. Comprehensive Plan for Processing Legacy Appeals and Implementing the Modernized Appeals System Public Law 115-55, Section 3, U.S. Department of Veterans Affairs 6 (Feb. 2018) ("Pub. L. 115-55"), https://benefits.va.gov/benefits/docs/appeals-report-201802.pdf.

The VA itself admits the grave toll these delays take on veterans. Appx84. In a report on its appeals system, the VA wrote of veterans, "[w]hen they [appeal]—whether they know it or not—they will enter into a process that takes years,

sometimes decades, to complete. . . . Everyone will have to . . . learn to live with waiting." Appx83. And, according to the VA's own statistics for Fiscal Year ("FY") 2016, over 75% of the veterans waiting in the appeals system eventually received a favorable ruling or remand. Appx135-136. In other words, while veterans "learn to live with waiting," they are denied crucial benefits to which most are entitled. Appx83.

Veterans can initiate an appeal by filing a Notice of Disagreement ("NOD") after receiving a denial of benefits.[3] Appx178. Veterans then wait for the Secretary to issue a Statement of the Case ("SOC")—a document which explains the VA's reasons for the initial denial. Appx178. In FY 2017, veterans waited 500 days on average to receive their SOCs after filing NODs. *Martin*, 891 F.3d at 1349.

Following an SOC, a veteran may continue the appeal by submitting a VA Form 9. Appx178. After submitting this form, the veteran enters into the longest period of delay: certification from the VA Regional Office ("VARO") to the Board of Veterans' Appeals ("Board"). Appx178. Certification 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." *Martin*, 891

[3] When filing an NOD, veterans can opt to proceed directly through the standard appellate track to Board review or request *de novo* review at the Regional Office level by a Decision Review Officer, followed by Board review if necessary. Appx178.

F.3d at 1349-50 (Moore, J., concurring). However, in FY 2017, it took on average 773 days—over two years—for the VA to certify an appeal to the Board after receiving the Form 9. *Id.* at 1349. Following certification, veterans then wait another 321 days, on average, for files to be transferred to the Board. *Id.* at 1346 n.9. These delays are "inexplicable." *Id.*

Across the entire appeals process, the VA Office of Inspector General has found that unnecessary inaction by the Veterans Benefits Administration staff accounts for 45% to 76% of the total time for each phase in the appeals process it analyzed. Appx595. Applying these estimates to today's wait times, as many as five of the seven years that veterans must wait for a decision result from VA inaction.

The pervasive delays in the appeals system come at a great cost to veterans. As one court found, "many veterans perish, after living in want" while their appeals are adjudicated by the VA. *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 884-85 (9th Cir. 2011), *rev'd on reh'g en banc*, 678 F.3d 1013 (2012) (reversing based on jurisdiction). It is not uncommon for veterans to experience extreme financial hardship, homelessness, and further deterioration of their health as they wait for the VA to process and adjudicate their appeals.[4] Appx124.

[4] Veterans rely on VA benefits for the necessities of life. Many of the more than 3.4 million veterans receiving benefits are totally or primarily dependent on

B. The CAVC Enables the VA to Evade Meaningful Judicial Review of Delays in the Appeals System.

Congress has charged that the CAVC "shall . . . compel action of the Secretary . . . unreasonably delayed." 38 U.S.C. § 7261(a)(2). Yet the CAVC continues to turn a blind eye to VA delay, despite evidence of pervasive inefficiency and inaction and ever-increasing delay in the appeals process. From FY 2015 to 2017, the CAVC granted only one petition for mandamus each year. Annual Report, U.S. Ct. of App. for Vets. Claims 2 (2017), https://www.uscourts.cavc.gov-/documents/FY2017AnnualReport.pdf; Annual Report, U.S. Ct. of App. for Vets. Claims 2 (2016), https://www.uscourts.cavc.gov-/documents/FY2016AnnualReport.pdf; Annual Report, U.S. Ct. of App. for Vets. Claims 2 (2015), https://www.uscourts.cavc.gov-/documents/FY2015AnnualReport.pdf. And during that same time period, the CAVC dismissed or denied over one thousand petitions for extraordinary relief. Since this Court's decision in *Martin*, the CAVC has granted one petition and denied the rest, more than one hundred in all.

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them. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d. 1049, 1070 (N.D. Cal. 2008). Many veterans are homeless or live in poverty, making any VA benefits to which they may be entitled even more crucial. Appx123.

C. Appellant Dolphin

Mr. Dolphin is a decorated Army infantry veteran who fought in Vietnam, including during the Tet Offensive in 1968. Appx86. He received a Purple Heart for his service. Appx86. While under heavy fire, he was thrown from a tree by a mortar explosion. Appx86. He sustained extensive wounds, including knee injuries, PTSD, and TBI, from which he continues to suffer. *See* Appx425-426. Mr. Dolphin waited over five years for a Board decision after a denial of benefits, finally receiving it during the pendency of this appeal. Appx1313-1320.

Mr. Dolphin first applied for benefits in 2009, but the VA denied his application based on his discharge status. Appx372; Appx447-449. Mr. Dolphin filed an NOD in response to that decision, and two years later, obtained a discharge upgrade from the Board. Appx374.

In October 2013, Mr. Dolphin submitted a new application for benefits. Appx375. On August 20, 2014, the VA rated Mr. Dolphin as 90% disabled and directed monthly payments retroactive to February 2014. Appx460. On October 31, 2014, Mr. Dolphin again timely filed an NOD, challenging the rating and the effective date of his monthly payments. Appx478-479. Nearly four years later, in January 2018, Mr. Dolphin received his SOC and a Decision Review Officer ("DRO") Decision from the VARO that awarded Mr. Dolphin a Total Disability

rating based upon Individual Unemployability but assigned an incorrect effective date. Appx423-424.

In February 2018, he submitted a Form 9 appealing the erroneous effective date for his service-connected disabilities and Individual Unemployability. Appx481. The VA notified Mr. Dolphin that his appeal was certified to the Board on February 7, 2019. Appx1037-1038. Mr. Dolphin and his wife attended oral argument before the CAVC panel on his mandamus petition in March 2019. Later that summer, his wife passed away. On August 7, 2019, the Board notified Mr. Dolphin it had "formally placed [his] appeal on the Board's docket." Appx1309.

On February 4, 2020, during the briefing of this appeal, the Board issued a decision granting Mr. Dolphin's claim for the earlier effective date he had sought: November 9, 2009. Appx1313-1320. This modification is dramatic. During the over five years in which Mr. Dolphin waited for the VA to correct the effective date for his retroactive disability compensation payments, the VA deprived him of *four years* (from 2009 to 2013) of retroactive benefits to which he was entitled.[5]

D. Appellant Monk

Mr. Monk is a Marine Corps combat veteran who served in Vietnam. Appx272. He has been diagnosed with PTSD, major depressive disorder, diabetes

[5] The Board denied his claim for a rating higher than 10% for tinnitus. Appx1313. The decision also remanded on a number of other claims for higher ratings and service connection for two other injuries. Appx1313-1314.

mellitus, peripheral neuropathy, and hypertension. Appx263-264. Mr. Monk has also suffered a number of strokes, resulting in legal blindness, short-term memory loss, and chronic pain. Appx46, Appx264. Mr. Monk spent almost five-and-a-half years waiting for Board decisions on his appeals—over two years waiting for a decision on his first NOD and, prior to December 20, 2018, more than three years to receive a decision on his second NOD.

In February 2012, Mr. Monk applied for VA benefits. Appx284; Appx286. In August 2012, the VA denied Mr. Monk's claim. Appx288. However, Mr. Monk waited eight months, until April or May 2013, to receive notice of this denial. Appx294. On July 16, 2013, Mr. Monk timely filed an NOD and requested a DRO hearing. Appx293. The local VARO held a DRO hearing in February 2014. Appx298.

On April 6, 2015, having received no decision from the VARO, Mr. Monk filed a petition for extraordinary relief in the CAVC on behalf of himself and others similarly situated. Appx41. The CAVC denied Mr. Monk's petition. Appx64.

On September 11, 2015, the VARO notified Mr. Monk of a September 1, 2015 decision that awarded him service-connected disability compensation for his PTSD, with a 100% disability rating. Appx272. However, the VARO applied an incorrect effective date to Mr. Monk's award. Appx272-273. On December 7,

2015, Mr. Monk filed an NOD to correct the effective date. Appx301-302. On September 28, 2016, the VA sent Mr. Monk an SOC. Appx307. On November 21, 2016, Mr. Monk submitted a Form 9. Appx349. In January 2017, the VA issued a notice that it had certified his appeal to the Board. Appx352. On December 20, 2018, more than three years after Mr. Monk filed his NOD, the Board issued a decision denying Mr. Monk's appeal requesting an earlier effective date. Appx357. On January 10, 2019, he filed a notice of appeal to the CAVC, which is still pending. Appx368.

E. Appellant Hudson

Mr. Hudson served as a Lance Corporal in the Marine Corps in the Vietnam War. Appx526. For his service, he received the Vietnam Service Medal, the Vietnam Cross of Gallantry, the Vietnam Campaign Medal, and the National Defense Service Medal. Appx526. He waited nearly six years for a Board decision.

On November 18, 2010, Mr. Hudson filed a claim for service-connected benefits for hypertension, which was denied. Appx528-529. In January 2013, Mr. Hudson filed an NOD. Appx532. The VA issued an SOC after three-and-a-half years, in June 2016, and Mr. Hudson promptly filed a Form 9 in July 2016.[6]

[6] The Board found that, in November 2014, Mr. Hudson submitted a statement indicating that he wanted to withdraw his appeal of his denial for service-connection for hypertension. Appx536. However, the Board determined that because the VARO continued to list the issue as under appeal, the issue remained in appellate status.

Appx536. In November 2018, nearly six years after he filed his NOD, Mr. Hudson received a Board decision remanding for further factual development. Appx535, Appx538. This evidence had been in the Secretary's possession since only one month after Mr. Hudson submitted his NOD; it was nearly three years old by the time Mr. Hudson received his SOC.[7] Appx538. Mr. Hudson's appeal is still proceeding on remand—all due to the Secretary's failure to timely consider evidence.

F. Appellant Obie

Ms. Obie served as a medical assistant in the Air Force during the Vietnam War.[8] Appx483. She waited over three years for a Board decision on her appeal. In July 2011, Ms. Obie filed for benefits for PTSD, gastroesophageal reflux disease, degenerative disc disease, and blood clots. Appx494. In July 2013, the VARO notified Ms. Obie that she was being paid as a single veteran only and that her husband and children would not be covered. Appx522. In 2015, the Pension Management Center granted dependent benefits for her husband and son, wrongly omitting her daughter from the award. Appx523.

[7] The Board also found that Mr. Hudson's evidence may suffice to re-open a denial of service connection for hypertension that is over a decade old. Appx537-538.
[8] Ms. Obie sought mandamus relief only in connection with the appeal of her claim for dependent benefits. She has retained counsel to pursue her other appeals before the Secretary.

In July 2015, Ms. Obie filed an NOD to correct the denial of dependent benefits for her daughter. Appx486. On November 16, 2018, the VA reversed its March 22, 2018 denial of benefits for Ms. Obie's dependent daughter. Appx853. In the November 16, 2018 decision, the VA recognized Brittaney Obie as a dependent schoolchild effective August 1, 2011 continuing until January 1, 2013. Appx854. In sum, Ms. Obie waited over three years for the VA to reverse its erroneous decision.

The table below summarizes the delay suffered by the Appellants.

Appellant	***NOD Filing Date***	***Approximate Wait Time for Board Decision***
Mr. Dolphin	Oct. 2014	5 years, 4 months
Mr. Monk	Dec. 2015	3 years
Mr. Hudson	Jan. 2013	5 years, 11 months
Ms. Obie	July 2015	3 years, 3 months

SUMMARY OF ARGUMENT

William Dolphin, a disabled Vietnam veteran and Purple Heart recipient, waited over five years for the Secretary to adjudicate his disability benefits appeal. During these five years, the VA wrongly denied him full access to life-changing benefits to which he was entitled all along, including approximately $150,000 in delayed compensation. His journey through the byzantine appeals process—and the experiences of the other Appellants—is not an anomaly; hundreds of thousands of disabled veterans suffer multi-year delays while the Secretary processes their appeals. Even the VA itself admits this system is "broken." Appx702. Nevertheless, the CAVC found that the Secretary's actions were neither statutorily unreasonable nor a violation of Mr. Dolphin's constitutional due process rights. This decision is erroneous and must be reversed.

First, the *en banc* CAVC misinterpreted the standard that governs Mr. Dolphin's statutory right to be free from unreasonable delay. The opinion below re-adopted "sub silencio the legal rule that total [agency] inaction is required" to show unreasonable delay. Appx24 (Allen, J., concurring in part and dissenting in part) [hereinafter "Allen, J., opinion"]. Yet two years ago, this Court struck down that very standard because it established too high a bar for obtaining relief. *Martin*, 891 F.3d 1338 (overruling CAVC's prior *Costanza* standard). The *Martin* Court held that the CAVC must use the six-factor test from *Telecommunications*

Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*") and that egregious delay is not excused simply because the VA has taken *any* intermediate actions in a veteran's case. 891 F.3d at 1345. Rather, under *TRAC* the CAVC must evaluate whether the overall delay for a final Board decision is reasonable.

Since *Martin*, however, the CAVC has merely gestured at the new standard and then denied every single petition by long-waiting veterans, save one. The "total inaction" standard reflects a fundamental misunderstanding of both *Martin* and *TRAC*. In ruling against Mr. Dolphin, the CAVC improperly resurrected *Costanza*, fundamentally misconstrued *TRAC*, and ignored pro-veteran rules of statutory construction and congressional intent.

Second, the CAVC failed to independently analyze Mr. Dolphin's constitutional due process claim, an issue this Court is mandated to review. 38 U.S.C. § 7292(d)(2). Under the three-prong test that governs due process claims challenging agency delay, *see FDIC v. Mallen*, 486 U.S. 230 (1988), the five-year delay in Mr. Dolphin's case violated the Fifth Amendment. Mr. Dolphin's private stake in receiving a decision on his appeal is substantial: he is elderly, disabled, and wholly dependent on VA benefits. The VA failed to justify the extreme length of the delay. There was a significant risk of erroneous deprivation given the Board's high reversal rate; its decision confirmed that Mr. Dolphin was in fact

deprived of benefits to which he was entitled. This Court should hold that the Secretary violated his constitutional rights.

Third, the claims of Mr. Dolphin and the other Appellants are not moot. On the contrary, they fall within two exceptions to the mootness doctrine.

ARGUMENT

I. Standard of Review

The Federal Circuit reviews legal determinations of the CAVC *de novo*. *Willsey v. Peake*, 535 F.3d 1368, 1372 (Fed. Cir. 2008). Where constitutional issues are raised, this Court has jurisdiction over questions of fact, as well as law applied to fact. *See, e.g.*, *Edwards v. Shinseki*, 582 F.3d 1351, 1354 (Fed. Cir. 2009) ("[38 U.S.C. § 7292] authorize[s] this court to review [constitutional issues] as to factual matters.") (quoting *In re Bailey*, 182 F.3d 860, 868-70 (Fed. Cir. 1999)).

II. The CAVC Misinterpreted "Unreasonable Delay" in the Veterans Disability Benefits Context.

38 U.S.C. § 7261(a)(2) requires the CAVC to "compel action of the Secretary unlawfully withheld or unreasonably delayed." This Court's holding in *Martin* is clear: writs of mandamus challenging systemic delay in the veterans' benefits appeal process must be attainable—not just in theory, but in practice. 891 F.3d at 1345. That is why this Court rejected the CAVC's "insurmountable" standard from *Costanza v. West*, 12 Vet. App. 133 (1999), and established *TRAC*

as the appropriate test. *Id.* at 1345, 1348. *Martin*'s holding accords with Congress's intent to create a pro-veteran scheme free from "unreasonabl[e] delay[]." 38 U.S.C. § 7261(a)(2). However, since *Martin*, the CAVC has rejected all but one writ of mandamus challenging unreasonable delay. The CAVC's interpretation of *TRAC* in the *en banc* decision below, and in numerous other cases, ignored both *Martin* and Congress's express mandate. This Court should reverse the CAVC's decision and clarify the proper interpretation of *TRAC*.

A. In *Martin*, this Court rejected the CAVC's prior standard because it was "insurmountable."

In *Martin*, this Court overturned the CAVC's prior standard in order to realize the statutory promise that veterans be free from unreasonable delay in the benefits appeals process. 891 F.3d at 1338; 38 U.S.C. § 7261(a)(2). Under the CAVC's old rule, veterans had to demonstrate "that the delay amount[ed] to an arbitrary refusal to act" by the VA and was not simply "the product of a burdened system." *Costanza*, 12 Vet. App. at 134.

Costanza effectively foreclosed relief for veterans seeking to attain writs of mandamus challenging unreasonable delay. In the nearly twenty years since *Costanza*, the CAVC consistently rejected such writs, even when veterans suffered multi-year delays for decisions in their cases. *See, e.g.*, *Section-Sims v. McDonald*, No. 16-1345, 2016 WL 2789726, at *1 (Vet. App. May 12, 2016) (rejecting writ of mandamus for six-year delay); *Wilson v. McDonald*, No. 15-4286, 2015 WL

7776624, at *1 (Vet. App. Dec. 1, 2015) (six-year delay); *Bonner v. Shinseki*, No. 12-0874, 2012 WL 1130267, at *1 (Vet. App. Apr. 5, 2012) (seven-year delay).

The CAVC's application of *Costanza* thwarted Congress's pro-veteran statutory mandate and imposed immense hardship on hundreds of thousands of disabled veterans. As members of this Court noted in *Martin*, even in that case alone, "three of the veterans died while their cases were pending before the VA or [the Federal Circuit]." *Martin*, 891 F.3d at 1350 (Moore, J., concurring). These veterans' deaths reflect a larger pattern. Nearly one in fourteen veterans dies while waiting for a decision on their benefits appeal. Appx612.

In order to give real meaning to veterans' statutory right to be free from unreasonable delay, this Court overruled *Costanza* and adopted *TRAC* as the appropriate standard to "provide[] a more balanced approach." *Martin*, 891 F.3d at 1345, 1349. Under *TRAC*, interpreted properly, "veterans should have a much easier time forcing VA action through . . . mandamus." *Id.* at 1351-52 (Moore, J., concurring).

Applying *TRAC*, courts examine six factors to determine "whether the agency's delay is so egregious as to warrant mandamus":

> (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 court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
>
> (5) the court should also take into account 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 1344-45 (quoting *TRAC*, 750 F.2d at 79-80). Although the *en banc* court in this case cited *Martin* and ostensibly applied the six *TRAC* factors, its interpretation of *TRAC* re-imposed the unlawful and impossibly high *Costanza* standard in everything but name.

B. The CAVC's interpretation violates *Martin*.

Contrary to *Martin*, the CAVC's interpretation of *TRAC* could excuse nearly any length of delay. First, the CAVC misconstrued the relevant time period for the inquiry under *TRAC*. The majority below measured the delay in terms of the time that had elapsed since the VA's last action, rather than since the start of the appeal. Appx13-14. Thus, according to the majority, the relevant time period here was eight months rather than the five years that Mr. Dolphin actually waited for a decision. Appx13-14.

The first *TRAC* factor states that the relevant time period for delay is "the time agencies take *to make decisions*." 750 F.2d at 80 (emphasis added). The *TRAC* court therefore calculated the relevant delay as the total time the petitioner had waited for the FCC's rating decision. *See id.* at 80-81. Other courts applying *TRAC* have consistently measured the delay as the total time the petitioner had to wait for "a decision," regardless of intermediate agency action. *See, e.g.*, *In re a Cmty. Voice*, 878 F.3d 779, 786-87 (9th Cir. 2017) (measuring agency delay as total time petitioners had to wait until "final [agency] action"); *Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1142-44 (D. Ariz. 2008) (measuring the agency "delay in adjudicating [the petitioner's] application" as the full "six years" the petitioner had to wait since submitting the application). Isolating the latest step in the decisionmaking process and examining the delay at that individual stage, as the CAVC did below, is not the same as examining the total time "agencies take to make decisions." *TRAC*, 750 F.2d at 80.

The CAVC "slic[ed] and dic[ed]" each veteran's delay into multiple procedural steps, rather than examining the entirety of the delay from the petitioner's perspective. Appx22 (Allen, J., opinion). This approach "makes it almost impossible to conceive of delay that would be unreasonable," contrary to *Martin*. Appx22 (Allen, J., opinion); *see Martin*, 891 F.3d 1338. Indeed, under such an approach, "a delay of even 100 years" could be considered reasonable, as

the VA insisted during oral argument below. Appx21 (Allen, J., opinion) (recounting the Secretary's representations during argument, Oral Arg. at 34:40-37:30, http://www.uscourts.cavc.gov/documents/Monk15-1280.mp3). Any approach that can justify a one-hundred-year delay is irreconcilable with Congress's statutory prohibition of "unreasonabl[e] delay[]," 38 U.S.C. § 7261(a)(2), as well as this Court's decision to eliminate the "insurmountable" barrier created by the *Costanza* standard, *Martin*, 891 F.3d at 1345.

Second, the majority's "slicing and dicing" approach effectively eliminates any remedy for systemic delay. Appx22 (Allen, J., opinion). If a veteran can challenge only one stage of the appeals process at a time on mandamus, any successful challenge will simply lead the VA to shift resources to that stage, while increasing delays across the other stages. The result is similar to squeezing a balloon: press at one place, and air will simply bulge out elsewhere. If the CAVC mandates more timely dispositions at one stage, delay will merely increase elsewhere. Any interpretation of *TRAC* that enables the agency to evade accountability for systemic, multi-year delays by shifting delay from one stage to another is incompatible with *Martin*.

Finally, by measuring delay from the VA's perspective, rather than the veteran's, the CAVC recreated one of the very problems that this Court identified in *Martin*. As this Court acknowledged, a core defect of the *Costanza* standard was

that it "focuse[d] solely on the VA's interests at the expense of the veterans' interests." *Martin*, 891 F.3d at 1345. Reducing an individual veteran's delay to the time since the VA's last action fails to adequately take into account the "veteran['s] interests" and the harm caused by the entire duration of the delay. *Id.* at 1345. This Court should make clear that the relevant time period for delay under *TRAC* is the entire time the VA has made the veteran wait for a decision on his or her appeal.

C. The CAVC's interpretation is incompatible with rules of statutory construction and congressional intent.

In light of pro-veteran rules of construction and congressional intent, the CAVC was wrong to set a heightened *TRAC* standard in the veterans' benefits context. Under the pro-veteran canon of statutory construction, any statutory ambiguity as to what constitutes "unreasonable delay" in 38 U.S.C. § 7261 must be "resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994). The legislative history for acts governing the veterans' benefits appeals system is also replete with statements of explicit intent to create a pro-veteran system. *See, e.g.*, Committee Report from the Committee on Veterans' Affairs, Veterans Judicial Review Act, H.R. Rep. No. 100-963, at 13 (1988) ("Congress has designed and fully intends to maintain a beneficial non-adversarial system of

veterans benefits.");[9] Committee Report from the Committee on Veterans' Affairs, Veterans Claims Assistance Act of 2000, H.R. Rep. No. 106-781, at 5 (2000) ("[The VA] system for deciding benefits claims is unlike any other adjudicative process. It is specifically designed to be claimant friendly.").

Given this canon of statutory construction, as well as Congress's express intent to create a pro-veteran scheme, if anything, the CAVC should have interpreted *TRAC* to set a ***lower*** threshold for "unreasonable delay" in the veterans' benefits context than in other agency delay contexts.[10] But the *en banc* CAVC did just the opposite in this case.

Outside of the veterans' benefits context, courts have found similar, multi-year delays unreasonable. For example, in *Public Citizen Health Research Group v. Auchter*, the D.C. Circuit Court of Appeals concluded that a three-year delay in rulemaking was "simply too long," especially given that the "purpose of the governing Act [was] to protect . . . lives." 702 F.2d 1150, 1157-58 (D.C. Cir. 1983). Similarly, in *MCI Telecommunications Corp. v. FCC*, the case from which the *TRAC* court derived part of the six-factor test, the D.C. Circuit concluded the four-year delay in telecommunications ratemaking was unreasonable, even after

[9] The Veterans Judicial Review Act of 1988 established the CAVC. Pub. L. No. 100-687, 102 Stat. 4105 (1988).

[10] Under the *TRAC* standard, "[t]he court must . . . estimate the extent to which delay may be undermining the statutory scheme"—for example, by "frustrating the statutory goal." *Cutler v. Hayes*, 818 F.2d 879, 897-98 (D.C. Cir. 1987).

acknowledging that the agency action was "enormous[ly] complex[]." 627 F.2d 322, 338 (D.C. Cir. 1980); *In re American Rivers*, 372 F.3d 413, 419 (D.C. Cir. 2004) ("[A] reasonable time for agency action is typically counted in *weeks or months, not years*." (emphasis added)); *Afghan and Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the U.S. v. Pompeo*, No. 18-CV-01388, 2019 WL 4575565, at *6 (D.D.C. Sept. 20, 2019) (finding five-year average delay across visa processing program unreasonable despite acknowledging the "complex nature of the adjudication of the applications").

These cases demonstrate the CAVC's flawed interpretation of *TRAC*. If courts routinely conclude delays outside of the veterans' benefits context—many of which involved more complex agency action and shorter periods of delay—are "unreasonable," but an individual veteran's five-year delay is not, it is clear that the CAVC has erroneously interpreted *TRAC*.

D. The CAVC misinterpreted the *TRAC* factors.

In *Martin*, this Court directed the CAVC to consider the six *TRAC* factors in assessing the reasonableness of VA delay in adjudicating claims. 891 F.3d at 1348. In Mr. Dolphin's case, the CAVC misinterpreted each one. Together, these errors of law foreclosed relief for Appellants and the hundreds of thousands of veterans like them who remain mired in the VA's broken appeals process. This Court

should reverse the CAVC's holding and establish the proper interpretation of the *TRAC* factors in the veterans' benefits context.

Factor One: The Rule of Reason. The CAVC's interpretation of the first *TRAC* factor violated settled precedent and this Court's ruling in Martin. Indeed, the CAVC's repeated violations of Martin have generally resulted from its misinterpretation of this first *TRAC* factor. *See, e.g.*, *Gonzalez v. Wilkie*, No. 18-5179, 2018 WL 5255167, at *2 (Vet. App. Oct. 22, 2018) (excusing delay based on the duty to assist); *Adamson v. Wilkie*, No. 18-2537, 2018 WL 3689498, at *2 (Vet. App. Aug. 1, 2018) (excusing delay based on complexity and a lack of "complete inaction by the VA"); *Green v. O'Rourke*, No. 18-2219, 2018 WL 3005944, at *2 (Vet. App. June 15, 2018) (same).

The first *TRAC* factor requires that "the time agencies take to make decisions must be governed by a rule of reason." *TRAC*, 750 F.2d at 80 (internal quotation marks omitted). Here, the CAVC erroneously imposed a "total inaction" requirement. Appx24 (Allen, J., opinion). The CAVC held that because Mr. Dolphin could not demonstrate there was "no action whatsoever on the part of VA," his delay did not violate the rule of reason. Appx14 (quoting *Godsey*, 31 Vet. App. at 228). This reasoning "implicitly adopts the erroneous legal rule that any action is sufficient to defend against a claim of unreasonable agency delay." Appx21 (Allen, J., opinion).

A violation of the rule of reason should not require a showing of "complete inaction"; it is simply a factor that a court "may also consider." *Martin*, 891 F.3d at 1345-46. By implicitly requiring the veteran to demonstrate that there has been "no action whatsoever on the part of VA," the CAVC effectively reinstates *Costanza*'s "refusal to act" test, 12 Vet. App. at 134, which this Court repudiated in *Martin*, 891 F.3d at 1348.

The CAVC's complete inaction rule also conflicts with well-established interpretations of *TRAC* in other administrative law settings. In *MCI*, the case from which the first *TRAC* factor was drawn, the D.C. Circuit did not require the petitioners to show complete agency inaction. 627 F.2d at 340-42. Rather, it acknowledged that the agency had made continuous efforts to resolve the challenged delays, but concluded that a four-year delay nevertheless violated the rule of reason. *Id.*; *Auchter*, 702 F.2d at 1157 (three-year delay in rulemaking proceeding was unreasonable despite evidence that agency had taken steps in the interim).

The CAVC also erred in its interpretation of the first *TRAC* factor by holding that the VA's egregious delays are justified whenever a veteran's case is complicated. Appx13-14 (analyzing Mr. Dolphin's case). But "administrative complexity, in and of [itself]" does not "justify extensive delay." *Cobell v. Norton*, 240 F.3d 1081, 1097 (D.C. Cir. 2001). Complexity as a reason for delay also

"become[s] less persuasive as [the] delay progresses." *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987). And where a single veteran's benefits appeal takes over five years, "there must be some limit to the time" the VA has to act. *MCI*, 627 F.2d at 325.

Compounding this error, the CAVC's interpretation of the rule of reason also enables the VA to deploy its own inefficiency and inaction as excuses for unreasonable delay. On average, veterans must wait seven years for the VA to adjudicate their appeals. Pub. L. 115-55 at 6. As months turn into years, many veterans must submit additional medical information or files simply to keep their appeal up to date. Many also develop new medical complications as they continue to wait. *See, e.g.*, Appx124-132. According to the CAVC, these new developments—caused by the VA's own delay—are valid justifications for even further delay. Appx12-13.

However, courts of appeals have consistently rejected excuses from agencies that delay begets further delay. "There is a point when the court must 'let the agency know, in no uncertain terms, that enough is enough,'" *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (quoting *Pub. Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987)); *see id.* (noting if the court permitted further delay, "some new impediment will be pleaded five months hence").

The CAVC's interpretation of the first *TRAC* factor also mistakenly treats the VA's statutory duty to assist as a blanket excuse for unreasonable delay. According to the CAVC, the VA's completion of certain statutorily required actions during the five-year delay in Mr. Dolphin's case excused other delays resulting from inefficiency or lack of attention. Appx12-14. Courts have consistently rejected similar agency claims that statutory requirements justify an unreasonable delay. *See, e.g.*, *In re Int'l Chem. Workers Union*, 958 F.2d at 1150 (rejecting agency claims that the delay was due to "deadlines imposed by Congress" and the statutory "need to respond to additional comments").

This Court has never held that the statutory duty to assist at one stage of an appeal excuses inexplicable delay at other stages. Yet the CAVC disregarded more than three years of delay in Mr. Dolphin's case simply because the VA was legally required to take certain actions during that time. Appx13-14. The CAVC also excused "10 months" of apparently "ministerial" delay for which "[t]he Secretary ha[d] not offered any explanation" because at other points the VA was "complying with its legal duties." Appx13. At the same time, the VA itself has recognized that "ineffective procedure," "inattention to detail," and "ineffective oversight" create widespread delays in its appeals process, and that "significant periods of inactivity throughout all phases" of a VA appeal account for, on average, 45-76% of total processing time in each phase. *See* Appx595-597.

In sum, the statutory duty to assist is not a talisman for the VA to ward off claims of unreasonable delay. Rather, its "goal is . . . to assist veterans in . . . receiving benefits for which they are eligible." H.R. Rep. No. 106-781, at 8. The CAVC's improper reliance on the duty to assist to excuse the VA's egregious delays constitutes legal error.

Factor Two: Congressional Timetables. According to the CAVC, "the lack of congressional deadlines" in the VA appeals context weighs in the government's favor under the second factor. Appx14. Not so. *TRAC* makes clear that "a congressional 'timetable *or other indication* of the speed with which [Congress] expects the agency to proceed' may 'supply content' for the rule of reason." *Martin*, 891 F.3d. at 1345 (quoting *TRAC*, 750 F.2d at 80) (emphasis added).

Other courts of appeals have interpreted the second *TRAC* factor to incorporate indicia of congressional intent beyond mandatory timetables. For example, where there is evidence that Congress intended for applications to be handled "expeditiously," the second *TRAC* factor weighs in the petitioner's favor. *In re a Cmty. Voice*, 878 F.3d at 787; *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 39 (D.D.C. 2000).

Here, the CAVC failed to account for congressional intent to create a statutory scheme that would provide veterans with a decision in a timely manner. *See, e.g.*, S. Rep. No. 100-439, at 13 (1988) ("A timely decision is at the core of a

just and fair determination."). And delays are undermining this pro-veteran statutory scheme.[11] Contrary to the CAVC's interpretation, that Congress has mandated measures to address delays should weigh in favor of relief.[12] *See Kashkool*, 553 F. Supp. 2d at 1144-45 (lack of statutory deadline does not allow agency to "take an infinite amount of time" where Congress has directed agency to address delays).

Finally, the CAVC should have recognized that the VA's long history of delay weighs in favor of the veteran under the second *TRAC* factor. Where "the [G]overnment has delayed fulfilling its . . . obligations for many years" and where there is "a background of agency delay dating back many years," it is "particularly true" that "the lack of a timetable does not give government officials carte blanche to ignore their legal obligations." *Cobell*, 240 F.3d at 1096-97. As in *Cobell*, there is a long history of agency delays across the VA appeals process, which the government itself has recognized. *See* Appx594-595. Given this background and ample indicia of congressional intent to create a pro-veteran system, this Court should weigh the second *TRAC* factor in Mr. Dolphin's favor.

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[11] When evaluating delays, a court must also "estimate the extent to which delay may be undermining the statutory scheme, either by frustrating the statutory goal or by creating a situation in which the agency is losing its ability to effectively regulate at all." *Cutler*, 818 F.2d at 897-98; *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 190 (D.C. Cir. 2016).

[12] The Appeals Modernization Act demonstrates that the "VA had not been acting fast enough." Appx21 (Allen, J., opinion).

Factors Three and Five: Human Health and Welfare and Prejudice to Individual Veterans. The CAVC found that the third factor weighed in favor of Mr. Dolphin, but accorded it less weight since he was already receiving some of the benefits to which he is entitled. Appx15. The CAVC ruled that the fifth factor was not in Mr. Dolphin's favor because he failed to demonstrate that he is "wholly dependent" on benefits. Appx15. For both factors, the CAVC misstated the standard articulated in *Martin*.

The third factor always weighs in favor of the veteran because "[v]eterans' disability claims always involve human health and welfare." *Martin*, 891 F.3d at 1346. There are no grounds on which the third factor's weight may be "lessened," as the CAVC suggested. *See* Appx15. The third factor is a categorical rather than individualized inquiry, which asks only what type of agency action is at stake. This factor is therefore distinct from the fifth factor, which looks to the "effect of the delay on the *individual* veteran." Appx15 (citing *Martin*, 891 F.3d at 1347) (emphasis added). By treating the third *TRAC* factor as an individualized inquiry, the CAVC committed legal error.

The CAVC also failed to recognize that the fifth factor's inquiry into the "interests prejudiced by the delay" extends beyond the petitioner's interests. *TRAC*, 750 F.2d at 80. Courts have construed this factor much more broadly. *See, e.g.*, *Potomac Elec. Power Co. v. Interstate Commerce Comm'n*, 702 F.2d 1026, 1034

(D.C. Cir. 1983) ("*PEPCO*") (recognizing "excessive delay [also] saps the public confidence in an agency's ability to discharge its responsibilities"). In fact, the CAVC itself has recognized these broader interests prejudiced by delay. *See Erspamer v. Derwinski*, 1 Vet. App. 3, 10 (1990).

Courts recognize "uncertainty" as a distinct interest under the fifth factor. *See Geneme v. Holder*, 935 F. Supp. 2d 184, 194 (D.D.C. 2013) (recognizing uncertainty has "a . . . substantially negative impact" on "welfare and peace of mind" when weighing fifth factor in favor of relief); *PEPCO*, 702 F.2d at 1035 ("[U]ncertainty may affect PEPCO's ability to make future plans."). Given the VA's "anarchic" system and its inability to provide any meaningful timeline to veterans, the CAVC should have recognized that the fifth factor weighs in favor of the veteran. Appx21 (Allen, J., opinion).

The uncertainty of waiting, coupled with the human health and welfare at stake, underscore the prejudice to Appellants, which is not "offset" merely because they have received favorable decisions. *Erspamer*, 1 Vet. App. at 10. It is well-settled that "retroactive payment" can "never serve as full compensation" for a veteran who has suffered egregious delay. *Id.*

Factor Four: Effect on Other Agency Activities. The fourth *TRAC* factor considers "the effect of expediting delayed action on agency activities of a higher or competing priority." *Martin*, 891 F.3d at 1347. The CAVC concluded that the

fourth factor weighed in the VA's favor largely on the basis that granting a writ would "shift resources away from . . . other veterans." Appx15. This conclusory analysis is insufficient as a matter of law.

Courts recognize limits on an agency's resources do not, in and of themselves, excuse unreasonable delay; otherwise, every government office would be immune to unreasonable delay claims. *See, e.g.*, *Cobell,* 240 F.3d at 1097 ("a lack of sufficient funds" does not "justify extensive delay"); *Loudner v. U.S*, 108 F.3d 896, 903 n.7 (8th Cir. 1997) ("[T]he United States may not evade the law simply by failing to appropriate enough money to comply.").

The burden is on the agency to demonstrate what its "other duties" are, or its "effort[s] to prioritize them." *Doe v. Risch*, 398 F. Supp. 3d 647, 658 (N.D. Cal. 2019). In the context of adjudicating a benefits application, an agency must also show the "extent of . . . potential impact on the processing of other applications." *Liu v. Novak*, 509 F. Supp. 2d 1, 10 (D.C. Cir. 2007). The CAVC's interpretation, which ensures that the fourth factor always favors the VA, is thus contrary to law.

Moreover, even where an agency has competing priorities, those priorities can be outweighed by egregious delay. As the D.C. Circuit held when evaluating a six-year delay with respect to rulemaking, despite the agency's "need to 'juggle competing rulemaking demands on its limited . . . staff,'" "enough is enough." *In re Int'l Chem. Workers Union*, 958 F.2d at 1150 (quoting *Brock*, 823 F.2d at 627).

Finally, the CAVC's insistence that injustice would occur due to "line-jumping" has put individual veterans in an impossible position. In *Ebanks*, this Court recognized that "class-wide relief" is the appropriate remedy in such circumstances, 877 F.3d 1037, 1040 (Fed. Cir. 2017), yet the CAVC has denied class certification in this very case. *See Monk v. Wilkie*, 30 Vet. App. 167 (2018). The majority cannot "have it both ways." Appx23 (Allen, J., opinion).

Factor Six: Centering the Veteran's Experience. The sixth factor states that the court "need not find any impropriety lurking behind" the agency delay. *Martin*, 891 F.3d at 1345. This factor provides context for the other factors. Under *Costanza*'s repudiated "refusal to act standard," the inquiry focused on the "VA's interests at the expense of the veterans' interests." *See id.* In adopting *TRAC*, the *Martin* court thus rejected that the VA's "intentional[ity] or affirmative refusal to act" should govern. *Id.* at 1347. Instead, objective factors—and notably the *veteran's experience*, embodied in the third and fifth factors—play a more salient role in the analysis. Yet the CAVC—which simply noted that there were no allegations of bad faith, Appx16—undermined the sixth factor by essentially holding that the VA's good faith efforts justify its delay.

If this Court does not correct the CAVC's interpretation of *TRAC*, veterans will be trapped in an endless cycle of delay where the VA will always have some form of excuse. Such an interpretation of *TRAC* contravenes Congress's mandate

for the CAVC to "compel action by the Secretary . . . unreasonably delayed," 38 U.S.C.§ 7261(a)(2), and this Court's decision to eliminate the "insurmountable" barriers to attaining a writ, *Martin*, 891 F.3d 1338. This Court should reverse the CAVC's holding below and establish the proper interpretation of *TRAC*.

III. The VA's Egregious Delay in Adjudicating Appellants' Disability Benefits Appeals Violated Due Process.

The Secretary's delay not only infringed Appellants' statutory rights, but also violated the Fifth Amendment's Due Process Clause. The CAVC committed an error of law when it failed to consider Mr. Dolphin's due process claim independent of his *TRAC* claim. The two claims are materially different, consider different factors, and cannot be conflated.[13]

A. This Court must conduct an independent due process analysis of Mr. Dolphin's claim.

For constitutional claims, this Court has broad jurisdiction over both "challenge[s] to a factual determination" and "challenge[s] to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2). This jurisdictional grant requires this Court to determine, for itself and independent of

[13] While this Court may only consider the CAVC's *TRAC* decision as a pure question of law, it must consider Mr. Dolphin's due process claim in its entirety. *Edwards*, 582. F.3d at 1354 (recognizing that this Court reviews factual determinations "to the extent necessary to ensure compliance with due process").

TRAC, whether the five years Mr. Dolphin waited for a Board decision violated his due process rights.

Moreover, Mr. Dolphin and his fellow Appellants have a personal interest in seeing their constitutional rights vindicated. By bringing his due process claim before this Court, Mr. Dolphin asks this Court to ensure that the VA's process itself accords with the standards of due process, a determination that affects thousands of other veterans.

B. The Secretary's delay in adjudicating Mr. Dolphin's benefits appeal violated the Due Process Clause.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). If the Board issues a decision multiple years after the appeal begins, then the Secretary has denied that veteran the opportunity to be heard "at a meaningful time." *Id.* In a system where ailing and elderly veterans are overwhelmingly expected to be their own lawyer, record keeper, and advocate, the importance of protecting each veteran's constitutional right to be heard "at a meaningful time" cannot be overstated. *Id.*

A veteran's entitlement to disability benefits is "a property interest protected by the Due Process Clause." *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009). When examining agency delay, this Court must weigh (1) "the importance

of the private interest and the harm to this interest occasioned by delay," (2) "the justification offered by the [g]overnment 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; *City of Los Angeles v. David*, 538 U.S. 715, 717-19 (2003).

The CAVC's cursory due process analysis misinterpreted and misapplied the *Mallen* standard. The CAVC stated that, even if it were to conduct a full due process inquiry, "Mr. Dolphin ha[d] failed to sustain his burden to prove certain elements under the test." Appx17. According to the CAVC, Mr. Dolphin "d[id] not provide the Court with information to show how he ha[d] been harmed by the delay," and did not "show the likelihood of mistake in the RO's determination that he is not entitled to an earlier effective date." *Id.*

As a threshold matter, the CAVC's two-sentence explanation ignored extensive briefing demonstrating both the harm Mr. Dolphin has suffered and the likelihood of VA error.

First Prong: Private Interest. The CAVC also erred in applying *Mallen*. Under the first *Mallen* prong, Mr. Dolphin's private interest in receiving the benefits he is owed in a timely manner is of paramount importance. It is undeniable that Mr. Dolphin's monthly disability benefits, for which he first applied in 2009, *see* Appx1315, provide Mr. Dolphin with the "very means by which to live,"

Goldberg v. Kelly, 397 U.S. 254, 264 (1970). Mr. Dolphin has not been able to work since 2008, when he lost his job due to medical disability. Appx1005. Mr. Dolphin continues to suffer from "panic attacks, sweating, seizures, shaking, blackouts, . . . [he is] in constant pain all over [his] body and cannot sit for very long, or stand for very long, or move around for very long." Appx1005. Moreover, "[his] doctors . . . have all determined that [he is] completely unemployable because of epilepsy, cognitive impairments and pain and immobility resulting from [his] war injuries." Appx1005.

Given his complete unemployability, VA benefits are Mr. Dolphin's sole means for procuring "food, clothing, housing, and medical care." *Martin*, 891 F.3d at 1347. Mr. Dolphin received only a portion of what he was owed while waiting over five years for the Board's decision; the VA cannot excuse its egregious delay just because it gave Mr. Dolphin *some* of the benefits on which he relies. Further, the recent VA's rectification of one mistake—granting Mr. Dolphin the proper effective date years too late—does not absolve the Secretary of the harms Mr. Dolphin suffered by not receiving his benefits in a timely manner. This Court should conclude Mr. Dolphin's "private interest and the harm to this interest occasioned by delay" are substantial. *Mallen*, 486 U.S. at 242.

The amount Mr. Dolphin was owed is large: approximately $150,000. Oral Arg. at 1:03:35-03:53 ("Oral Arg."),

http://www.uscourts.cavc.gov/documents/Monk15-1280.mp3 (Ms. Neuner). For the last five years, Mr. Dolphin should have had access to these funds, while he was unemployable and suffering from worsening conditions related to his service. He was also unable to share these funds with his family, as he had hoped. His wife, Patricia Dolphin, passed away in June 2019—six months before the Secretary finally decided Mr. Dolphin's administrative appeal and awarded this retroactive benefit.

Courts have also found less substantial financial harms than Mr. Dolphin's to weigh heavily in the petitioner's favor. For example, in *Cleveland Board of Education v. Loudermill*, the Supreme Court "recognized the severity of depriving a person of the means of livelihood," noting that "[w]hile a fired worker may find employment elsewhere, doing so will take some time." 470 U.S. 532, 543 (1985). Similarly, in *Jones v. City of Modesto*, the court found that the deprivation of a business license which "resulted in [the] [p]laintiff not having any income for close to sixty days" amounted to "hardship." 408 F. Supp. 2d 935, 955 (E.D. Cal. 2005). Applying *Mallen*, the court determined that "the private interest at stake in not having a . . . hearing earlier was great." *Id.*

Moreover, a showing of financial need is not even necessary to warrant Fifth Amendment protection. *See, e.g.*, *Isaacs v. Bowen*, 865 F.2d 468, 477 (2d Cir. 1989) ("[D]elay can be so unreasonable as to deny due process, such as when it is

inordinately long *or* when a recipient demonstrates immediate financial need.") (emphasis added). Thus, the VA cannot downplay the harms Mr. Dolphin suffered while waiting to receive the overdue benefits simply because "benefits are not typically based on financial need." Appx251.

At a certain point, "delay must ripen into deprivation, because otherwise a suit alleging deprivation would be forever premature." *Schroeder v. City of Chicago*, 927 F.2d 957, 960 (7th Cir. 1991). As members of this Court have recognized, "living in constant uncertainty," without the ability to make concrete financial plans or order one's life affairs, is a grave harm in and of itself. *Martin*, 891 F.3d at 1350 (Moore, J., concurring). Mr. Dolphin's private interest in these benefits and the "harm to this interest occasioned by delay" is therefore unmistakable: for over five years, he was forced to operate in uncertainty, never knowing if he would receive the benefits to which he was entitled. *Mallen*, 486 U.S. at 242.

Second Prong: Government Justification for Delay. Under the second due process prong, this Court must consider "the justification offered by the [g]overnment for delay and its relation to the underlying governmental interest." *Mallen*, 486 U.S. at 242. The VA does not offer a satisfactory justification for the delay in Mr. Dolphin's case. Even if it did, such a justification could not outweigh the competing governmental interest in timely decisions.

The VA relies on the complexity and multi-step nature of the process to justify the five-year delay in adjudicating Mr. Dolphin's appeal. *See* Appx1066 ("[T]he legacy appeals process . . . is not one agency action, but it is instead a series of agency and claimant actions"); Appx12 ("[I]t is reasonable that more complex and substantive agency actions take longer than purely ministerial ones." (quoting *Martin*, 891 F.3d at 1345-46)). But, these excuses cannot adequately explain the egregious delays here. Even if Mr. Dolphin's case were particularly complex, the suggestion that it should take the Board five years to sort out such a case strains credulity. Other courts have acknowledged that complexity cannot justify delays of this sort. *See, e.g.*, *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 491 (3d Cir. 1980). As this Court should find here, "[w]hatever its internal problems, the Board has the power to implement regulations that would accelerate the agency review process." *Id.*

Courts have also consistently rejected government justifications based on resource limitations. In *Kuck v. Danaher*, for example, the Second Circuit rejected the argument that "prolonged" delay was "simply a function of . . . caseload and backlog." 600 F.3d 159, 166 (2d Cir. 2010); *Kelly,* 625 F.2d at 491 (holding that "[f]our years is totally out of phase with the requirements of fairness" despite "the backlog of cases and limited resources"); *Kraebel v. New York City Dept. of Housing Preservation and Dev.*, 959 F.2d 395, 405 (2d Cir. 1992) (acknowledging

that "delay is a natural concomitant of our administrative bureaucracy," but refusing to find delays reasonable without further justification). This Court must also reject the VA's argument that the duty to assist veterans in developing their claims explains its delay. Appx1067.

Finally, the VA argues that it "has finite resources and is working at capacity," so forcing it to expedite the appeal of any individual petition "would necessarily cause delays in competing aspects of the VA adjudication process." Appx1077-1078. But finite agency resources are not dispositive under due process. *See Brown v. Plata*, 563 U.S. 493, 531 (2011) (noting otherwise proper remedy to a due process violation is not invalidated by "collateral effects"); *Mathews*, 424 U.S. at 348 ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard."). Furthermore, the VA does not contend that Mr. Dolphin's claim was delayed because it was prioritized behind veterans with more immediate needs; it acknowledges, for instance, that claims with higher priority are remands from the CAVC and appeals that have returned to the Board. Appx1077. As such, the fact that other veterans might also face due process violations cannot excuse the VA.

Each of the VA's stated justifications are irrelevant to the inquiry under *Mallen*'s second prong, as they are not "relat[ed] to the underlying governmental interest" at stake here. *Mallen*, 486 U.S. at 242. In fact, the VA has an interest in

the "uninterrupted provision" of benefits to those eligible. *Goldberg*, 397 U.S. at 265; *Spinelli v. City of New York*, 579 F.3d 160, 173 (2d Cir. 2009) (timely hearing and "prompt remediation" is "in the public interest"); *Lamb v. Hamblin*, 57 F.R.D. 58, 64 (D. Minn. 1972).

This interest is particularly strong in the pro-claimant veterans benefits appeals system. *See Noah v. McDonald*, 28 Vet. App. 120, 130 (2016) (veterans benefits system is "imbued with special beneficence from a grateful sovereign") (quoting *Sneed v. Shinseki*, 737 F.3d 719, 728 (Fed. Cir. 2013)); 38 U.S.C. § 5107(b) ("The Secretary shall give the benefit of the doubt to the claimant."); *Kirkendall v. Dep't of Army*, 479 F.3d 830, 843-44 (Fed. Cir. 2007) (discussing "the canon that veterans' benefits statutes should be construed in the veteran's favor"). Moreover, Congress demonstrated the importance it places on addressing delays by enacting the Appeals Modernization Act. Pub. L. No. 115-55, 131 Stat. 1105 (codified in scattered sections of 38 U.S.C.).

Third Prong: Likelihood of Mistaken Interim Decision. The final due process prong, "the likelihood that the interim decision may have been mistaken," *Mallen*, 486 U.S. at 242, weighs heavily in Mr. Dolphin's favor. According to the CAVC, Mr. Dolphin "d[id] not show the likelihood of mistake in the RO's determination that he is not entitled to an earlier effective date." Appx17. But Mr. Dolphin should not have been required to prove the merits of his individual appeal before the

Board, only that he has a due process right to receive such a decision "at a meaningful time." *Mathews*, 424 U.S. at 333. And there is now unequivocal evidence that the interim decision in Mr. Dolphin's case was in fact mistaken. In its recent decision, the Board granted the majority of Mr. Dolphin's claims and acknowledged that the VA's prior decision was erroneous. Appx1314-1316. Moreover, even at the time the CAVC heard the issue, there was sufficient evidence to demonstrate the Board's interim decision was likely mistaken. Nearly 80% of RO decisions were not fully affirmed in Fiscal Year 2018. Appx672.

Furthermore, the CAVC failed to recognize that delay itself increases the likelihood of error. Delay places the burden on veterans to continue fighting for their own interests, all while lacking the resources they need to do so. *Cf. Brown v. Bathke*, 566 F.2d 588, 592 (8th Cir. 1977) (noting that years-long delay in a teacher receiving salary "substantially handicapped" her ability to protect her own interests). Delays also undermine the ability of the agency to make the correct decision by increasing the likelihood that a relevant document will be misplaced or destroyed, or that relevant details will be forgotten. *See, e.g.*, *Dupuy v. Samuels*, 397 F.3d 493, 509 (7th Cir. 2005) (recognizing that high reversal rate was partially due to "inexcusably long delays, which allow memories to fade"). Finally, delay threatens to deny veterans and their loved ones their benefits altogether, as many veterans die while they await a decision. Appx612.

Mr. Dolphin's private interest in the benefit is large, and there is a substantial risk that he faces erroneous deprivation. Given the government's interest in avoiding situations exactly like this, there is no adequate justification that can justify a five-year delay in determining the accurate date of his benefits claim.

C. The CAVC erred in conflating Mr. Dolphin's *TRAC* and due process claims.

The *TRAC* and due process analyses are materially different, yet the CAVC erroneously concluded that the "test is not appreciably different from the *TRAC* balancing test." Appx17. For example, *TRAC* requires courts to "consider the effect of expediting delayed action on agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80. In contrast, under due process, an "otherwise proper remedy" for unconstitutional delay cannot be invalid "simply because it will have collateral effects." *Plata*, 563 U.S. at 531; *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977) (stating that a constitutional remedy "does not exceed the violation if the remedy is tailored to cure the condition that offends the Constitution" (internal quotation marks omitted)). Additionally, unlike *TRAC*, the due process analysis weighs "the likelihood that [an] interim decision may have been mistaken" among its factors. *Mallen*, 486 U.S. at 242. By conflating *TRAC* with due process, the CAVC denied Appellants consideration of a potential factor in their favor in the distinct due process framework. Thus, ensuring that neither a constitutional nor

statutory violation has occurred necessitates separate analysis of *TRAC* and due process delay claims.

Moreover, this Court preserved the option for courts to conduct a due process analysis in addition to a *TRAC* inquiry. *See Martin*, 891 F.3d at 1348 (stating that the CAVC "need not," rather than cannot, analyze due process claims based on the same delay as a previously analyzed *TRAC* claim); *Monk*, 30 Vet. App. at 192 n.57 (Allen, J., concurring in part and dissenting in part) (noting that the *Martin* Court "declined to address" the petitioners' due process claims and did not hold that CAVC is prohibited from addressing them).

Finally, by holding that the CAVC erred by conflating the *TRAC* and due process inquiries, this Court will prevent the CAVC from repeating its mistake on remand. Appellants suffered *both* statutory and constitutional violations. This Court should reverse the CAVC, find a due process violation, and hold that the due process and *TRAC* analyses cannot be assessed jointly.

IV. Appellants' Individual Mandamus Petitions Are Justiciable Under Well-Established Exceptions to Mootness.

Mootness is a question of law that the Federal Circuit reviews *de novo*. *See Ford Motor Co. v. United States*, 688 F.3d 1319, 1329 (Fed. Cir. 2012). Moreover, "the traditional exceptions to mootness . . . apply to mandamus proceedings." *In re United States*, 791 F.3d 945, 952 (9th Cir. 2015). The mandamus petitions before this Court fall squarely within the "capable of repetition but evading review" and

"voluntary cessation" exceptions to mootness. The CAVC erred in failing to apply these exceptions. The CAVC also erred in determining that no relief was available for Appellants' allegedly mooted claims.[14]

A. Appellants' petitions satisfy the "voluntary cessation" exception to mootness.

The CAVC erred in its interpretation of the voluntary cessation exception. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *Cardona v. Shinseki*, 26 Vet. App. 472, 475-76 (2014). When a defendant voluntarily ceases the offending conduct that would otherwise moot a claim, the claims are mooted only if the defendant meets its "heavy burden" of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)).

[14] When the CAVC ruled on Mr. Dolphin's petition, it was not moot. During the pendency of this appeal, the Board issued a decision in his case. Mr. Dolphin elected to continue his appeal based on statutory and unconstitutional delay. While the CAVC did not address the issue of mootness as applied to Mr. Dolphin's claims, the same exceptions apply to his individual petition.

Here, the Secretary cannot reasonably or even possibly foreclose the likelihood of recurring delay for the thousands of legacy claimants that remain. The only thing "absolutely clear" about the legacy appeals system is that unreasonable delay is inevitable and will recur. *Friends of the Earth*, 528 U.S. at 170. This is true regardless of whether the Court looks at it from the perspective of the Appellants or any other veteran. As to Mr. Monk himself, for example, this Court has already observed that he "filed another NOD challenging the effective date of his disability benefits, and will likely be subject to the same average delay." *Monk*, 855 F.3d at 1317-18.

As to any other veteran among the hundreds of thousands with pending appeals in the legacy system, the delay worsens day by day. *Compare Monk*, 855 F.3d at 1317 ("**four years**" on average of delay), *with Martin*, 891 F.3d at 1341-42 ("**five years**" on average of delay). When the decision in this case is announced, the delay will be at least **seven years**. *See* Pub. L. 115-55 at 6. Yet while the Secretary has "been told over and over again to get with the program . . . they continue to ignore" these commands. Oral Arg. at 14:36-47 (Judge Greenberg).

The VA cannot credibly contend that the delays experienced by veterans in the legacy appeals system will grow shorter. By all accounts, these delays will continue, and the same veterans will be subjected to multiple delays, like the Appellants before the Court. "[M]any unfortunate and meritorious [veterans],

whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one." *Staab v. McDonald*, 28 Vet. App. 50, 55 (2016) (quoting *Hayburn's Case*, 2 U.S. 408, 410 n.* (1792)). This Court should apply the voluntary cessation exception to the mootness doctrine and address the merits of the petitions brought by Mr. Monk, Mr. Hudson, and Ms. Obie.

B. Appellants' petitions fall within the "capable of repetition but evading review" exception to mootness.

A claim or petition falls within the capable-of-repetition-but-evading-review mootness exception 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.'" *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). The CAVC misapplied these two prongs with respect to Mr. Monk, Mr. Hudson, and Ms. Obie's petitions. Appx7-8.

While there is no bright-line test for the first prong, the Supreme Court has held that a challenged action can take *years* and still fall within the capable-of-repetition exception. *See*, *e.g.*, *Kingdomware Techs.,* 136 S. Ct. at 1976 (challenged action took nearly two years); *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (same). Contrary to this precedent, the

CAVC concluded that "the concept of a wrong being too short to rush to court does not fit comfortably with delay claims." Appx7-8. The CAVC's conclusion is unsupportable.

In cases of significant agency delay, there is necessarily a risk that the agency resolves the delay before a court can properly litigate the issue. *Cf. Wilson v. Gordon*, 822 F.3d 934, 945 (6th Cir. 2016) (noting that delay claims are not moot when "the duration of any plaintiff's claim is uncertain" because the government could "process a delayed application soon after litigation begins"). Petitioners to the CAVC will have already waited years by the time they begin litigation. And delay can be challenged in court only *after* an unreasonable length of time has already passed. See 38 U.S.C. § 7261(a)(2). Thus, the VA may resolve a veteran's appeal soon after the veteran initiates litigation, but prior to a court ruling, and yet the delay may still be unreasonable in total length.

The petitions of Mr. Monk, Mr. Hudson, Mr. Dolphin, and Ms. Obie present perfect examples. In each instance, after years of delay, the Secretary resolved the underlying claims before the reviewing court could rule on their petitions challenging the delay. Mr. Hudson received his Board decision on November 7, 2018, Appx534, just a month after the CAVC's October 3, 2018 order directing each Appellant to affirm his or her desire to proceed on their underlying petitions, Appx37. The Board issued a decision denying Mr. Monk's appeal on December

20, 2018, Appx356, just a month after the CAVC issued its November 14, 2018 order directing supplemental briefing on the petitions below, Appx37. Ms. Obie received her Board decision mere days before oral argument at the CAVC on March 27, 2019. Appx38, Appx849-850. Most telling of all, Mr. Dolphin received his decision from the Board on February 4, 2020, after this appeal was filed but before its resolution. Appx1313.

Indeed, "[c]ase law is replete with . . . examples" of the Secretary manipulating court proceedings to moot claims before the CAVC can rule on the petitioner's unreasonable delay claim. *Monk*, 855 F.3d at 1321. As Judge Lance aptly stated: "[T]he great majority of the time the Secretary responds [to the CAVC's orders] by correcting the problem within the short time allotted for a response, and the petition is dismissed as moot." *Young v. Shinseki*, 25 Vet. App. 201, 215 (2012) (en banc) (Lance & Hagel, JJ., dissenting). Judge Allen similarly remarked: "[T]here's no question that the squeaky wheel gets the grease." Oral Arg. at 55:15-18. At oral argument below, the Secretary's counsel even admitted that the VA rules in response to petitions: the "VA does make mistakes sometimes that do get corrected if they are called to someone's attention via writ." *Id.* at 58:17-24.

Appellants also satisfy the second prong of the capable-of-repetition exception; each has a "reasonable expectation" that the VA will again subject him

or her to unreasonable delay. *Kingdomware Techs.*, 136 S. Ct. at 1976. The threat of repeated delays is not merely "speculative" as the CAVC posited. Appx8. It is a "demonstrated probability." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). As this Court predicted, "Mr. Monk himself has filed another NOD challenging the effective date of his disability benefits," and has again been "subject to the same average delay." *Monk*, 855 F.3d at 1318.

Here, Appellants have faced delay throughout the VA appeals process. Mr. Dolphin waited two years for a decision after filing his first NOD, Appx374, and more than five years for a decision after his second NOD, Appx1313-1320. Mr. Monk spent over two years waiting for a decision on his first NOD, Appx284, Appx272, and more than three years on his second NOD, Appx301-302, Appx357. Mr. Hudson waited nearly six years after filing his NOD for a Board decision, which then remanded his claims for further factual development. Appx532, Appx535, Appx538. And Ms. Obie experienced at least eleven months of delay for her 2018 NOD after having already waited more than three years following her 2015 NOD. Appx486, Appx853.[15]

[15] The *Ebanks* petitioner challenged the two-year delay in his hearing, 877 F.3d at 1039, but had no reasonable expectation of facing the same delay because there were too many "contingencies" before he could request a hearing before the Board again. *Id.* Appellants here challenge delay across the VA appeals process, which they are likely to experience again.

As each Appellant has already faced delay multiple times, there is a reasonable expectation that they will face that same harm again in pending or future appeals. *See In re United States*, 791 F.3d at 952 (finding that it was "reasonably likely" that writs would be improperly denied again when the judge had denied other writs "at least once more" after the underlying denial at issue). Under these circumstances, the second prong of the capable-of-repetition exception is satisfied.

Under the CAVC's erroneous interpretation of these exceptions to mootness, the Secretary will continue to evade responsibility for ever-increasing delays, and Appellants will inevitably face unreasonable delay again. This Court should reverse the CAVC and hold that Appellants' claims are not moot.

C. This Court's prior finding that Mr. Monk's delay claim was "capable of repetition but evading review" applies here.

Three years ago, this Court held that the delay Mr. Monk and veterans like him, such as the other Appellants herein, face is "capable of repetition, yet evad[es] review." *Monk*, 855 F.3d at 1318. Because such a finding was "necessary" in the previous iteration of *Monk*, this holding is now the law of the case. *DBN Holding, Inc. v. Int'l Trade Comm.*, 755 F. Appx. 993, 997 (Fed. Cir. 2018). Under the law of the case doctrine, courts generally "refus[e] to reconsider issues already decided" in earlier stages of the same case. *Id.*; *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). This Court only departs from

the law of the case in "extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Christianson*, 486 U.S. at 817 (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)).

As part of its landmark ruling in the prior *Monk* opinion, this Court explained that Mr. Monk's class action claim was still live, *because* his individual claim itself was "capable of repetition, evad[ing] review."[16] 855 F.3d at 1318. Among other things, the Court found that Mr. Monk, individually, "will likely be subject to the same average delay" because he filed a subsequent NOD—a prediction that sadly came true. *Id.* This Court has already determined that Mr. Monk's individual petition itself is not moot. That individual petition, among other similar ones, is before this Court now on its own and remains just as capable of repetition. The Court should reach the same determination here, not only with respect to Mr. Monk's petition, but also with respect to the others.[17]

[16] The *Monk* Court chose to apply the capable-of-repetition exception, which targets individual claims, rather than the "inherently transitory" exception, which focuses on class actions. *Compare Pitts v. Terrible Herbst, Inc*., 653 F.3d 1081, 1090 (9th Cir. 2011) (inherently transitory), *with Kingdomware Techs., Inc.,* 136 S. Ct. at 1976 (capable-of-repetition).

[17] Mr. Dolphin's recent Board decision remanded several claims for reconsideration. Appx1313-Appx1315. There is a reasonable likelihood that he will file an NOD for one or more of these claims, restarting the lengthy appeals process.

D. The CAVC misinterpreted the relief it could grant.

In addressing the mootness exceptions, the CAVC raised practical concerns: "it is not at all clear what the [CAVC] would order the Secretary to do under these petitioners' theory that their claims are not moot." Appx9. The CAVC's remarks ring hollow. "[W]here broad institutional problems impede constitutional rights, courts have stepped in to command broad remedies." *Monk*, 30 Vet. App. at 204 (Greenberg, J., dissenting) (citing *Plata*, 563 U.S. at 502); *Milliken*, 433 U.S. at 281-82. Moreover, this Court has previously affirmed that the CAVC has authority to "issue all writs necessary or appropriate in aid of [its] respective jurisdiction[]," including its jurisdiction to "compel action of the Secretary . . . unreasonably delayed." *Monk*, 855 F.3d at 1318 (quoting 28 U.S.C. § 1651(a); 38 U.S.C. § 7261(a)(2)). This power is grounded in three independent sources: the CAVC's "authority under the All Writs Act, other statutory authority, and [its] inherent powers." *Id.* The Secretary has skirted its constitutional and statutory obligations to the Appellants, who remain mired in the legacy appeals system. A remedy is essential.

CONCLUSION

Appellants respectfully request that the Court (1) hold that Appellants' claims are not moot; (2) hold that the CAVC has misinterpreted the *TRAC* standard; (3) reverse the CAVC's decision with regard to Mr. Dolphin's claim under the Due Process Clause; and (4) remand for further proceedings consistent with these rulings.

Respectfully submitted,

March 20, 2020

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Federal Circuit Rule 32(a). This brief contains 14,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2020, Appellants' foregoing Opening Brief was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

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