20-1305

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CONLEY F. MONK, JR., TOM COYNE, WILLIAM DOLPHIN, JIMMIE HUDSON, 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.

REPLY BRIEF OF APPELLANTS

Michael J. Wishnie, Supervising Attorney
Renée Burbank, Supervising Attorney
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800

Lynn K. Neuner
Simpson Thacher & Bartlett LLP
425 Lexington Ave.
New York, NY 10017
(212) 455-2000

Counsel for Appellants

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; 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, Melissa Parres, 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,

June 4, 2020

/s/ Michael J. Wishnie
Michael J. Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
Tel: (203) 432-4800
michael.wishnie@ylsclinics.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

Disabled United States veterans contesting a denial of benefits under the legacy appeals system must wait on average *seven years* for a decision. The human cost of these delays is extraordinary—one in fourteen veterans dies waiting for such a decision. In *Martin v. O'Rourke*, this Court announced a new mandamus standard, under which "veterans should have a much easier time" receiving relief for the Department of Veterans Affairs' ("VA") egregious delays. 891 F.3d 1338, 1351 (Fed. Cir. 2018) (Moore, J., concurring). Yet in the two years since that decision, VA delays in legacy appeals have worsened and the U.S. Court of Appeals for Veterans Claims ("CAVC") has issued only one writ in over a hundred mandamus cases. That only a single writ has issued in a system that even the VA agrees "is overburdened, complex, non-linear, and broken," Appellee's Br. 13, 51, starkly demonstrates that the CAVC has not followed *Martin*'s instruction.

Nevertheless, the VA insists that Appellants' arguments are "much ado about nothing," Appellee's Br. 36, largely because the recently enacted Veterans Appeals Improvement and Modernization Act ("AMA") means that the Court should ignore continuing systemic delay in the legacy system. *See* Appellee's Br. 13. To the contrary, the AMA has no bearing on Appellants' experiences, the legal errors committed below, or the hundreds of thousands of veterans in the legacy system whose rights are continuously violated.

The VA would leave no role for this Court to play in remedying Appellants' harms and correcting the legal errors below. However, based on this Court's prior opinions, the CAVC's organic statute requiring it to compel action unreasonably delayed, and separation of powers principles, this Court can and should resolve these important legal issues in Appellants' favor.

First, this Court possesses jurisdiction to review the CAVC's legal errors and should reject the VA's attempts to shield its egregious failings from this Court's review. The CAVC, moreover, misinterpreted the exceptions to mootness that govern this case.

Second, the CAVC misconstrued the *TRAC* "unreasonable delay" standard in contravention of *Martin* and other circuit case law. *Telecomms. Research & Action Ctr. v. FEC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). Under the CAVC's interpretation, a five-year agency delay in Mr. Dolphin's appeal is reasonable, despite the significant human health and welfare interests at stake. The Secretary insisted at oral argument before the CAVC that even a one-hundred-year delay could be justified. These conclusions are incorrect as a matter of law.

Third, this Court must reach the significant constitutional issue presented by Appellants—whether a five-year delay in receiving a Board of Veterans' Appeals ("Board") decision violates the Fifth Amendment's Due Process Clause. That claim raises distinct issues from the statutory delay claim for two reasons: (1) this

Court's jurisdiction is broader for constitutional issues than statutory issues, and (2) the factors that a court must consider in deciding a delay claim under *TRAC* and due process are distinct. This Court should reach the constitutional issue presented by this case and conclude that Mr. Dolphin's due process rights were violated after the VA made him wait five years for a decision. This is an appropriate—and required—exercise of this Court's adjudicative duties in the mandamus context.

Appellants respectfully request this Court correct the legal errors committed below and hold the VA accountable for the statutory and constitutional harms to which it has subjected Appellants.

I. This Court Has Jurisdiction to Decide This Appeal.

This Court has jurisdiction to review CAVC decisions for legal error, including the CAVC's application of law to fact in an appeal that "presents a constitutional issue." 38 U.S.C. §§ 7292(a), (d)(2). Thus, it is undisputed that this Court has jurisdiction over Appellants' due process claims. *See* Appellee's Br. 15.

The VA wrongly contests this Court's jurisdiction over Appellants' statutory delay claims as well as the mootness issues presented in this appeal. *See* Appellee's Br. 16, 18, 30. To support this argument, the VA relies heavily on *Beasley v. Shinseki*, 709 F.3d 1154 (Fed. Cir. 2013). In *Beasley*, this Court held that it "may determine whether the petitioner has satisfied the legal standard for issuing the writ [of mandamus]." *Id.* at 1158. "[T]he scope of the legal obligation"

imposed on the VA by a statute "is a legal issue" over which the Court "ha[s] jurisdiction to decide under section 7292(d)(1)." *Id.* at 1157. Here, this appeal addresses whether the CAVC correctly interpreted the mootness standard and *TRAC*'s unreasonable delay standard (as set forth in *Martin* and decades of case law), not whether the CAVC correctly applied those standards to Appellants' circumstances. This Court has jurisdiction over all questions raised.

The VA's argument implies that as long as the CAVC correctly recites the *TRAC* test, the CAVC's decision is immune from this Court's review. Under such a narrow view of this Court's jurisdiction, however, "it is not clear when [this Court] could ever review the CAVC's determination not to issue a writ of mandamus" in a case challenging delay. *Id.* at 1158. That is not the law.

Last, this Court has jurisdiction where "the adoption of a particular legal standard would dictate the outcome." *Bailey v. Principi*, 351 F.3d 1381, 1384 (Fed. Cir. 2003); *see also Conley v. Peake*, 543 F.3d 1301, 1304 (Fed. Cir. 2008) (treating "the application of law to undisputed fact as a question of law" where "material facts are not in dispute and the adoption of a particular legal standard would dictate the outcome of a veteran's claim"). Where, as here, the details of each Appellant's claims are not in dispute, this Court has jurisdiction because its adoption of the correct unreasonable delay and mootness standards would govern the outcome of this appeal.

II. The CAVC Misinterpreted the Mootness Exceptions that Apply to Appellants' Individual Mandamus Petitions.

The CAVC misinterpreted both the "voluntary cessation" and "capable-of-repetition-but-evading-review" exceptions to mootness. In addition, the CAVC failed to respect the law of the case and misinterpreted its own power to grant relief.

A. The CAVC Misinterpreted the Voluntary Cessation Exception, Which Imposes a "Heavy Burden" on the Secretary to Show Harmful Behavior Will Not Recur.

The CAVC erred by failing to require the Secretary to show that the egregious delays suffered by Appellants would not reasonably recur. It is well-settled that when a defendant voluntarily ceases offending conduct, the claims are mooted only if the defendant meets the "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)); *accord City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *Cardona v. Shinseki*, 26 Vet. App. 472, 475-76 (2014). Here, the CAVC did not hold the Secretary to his burden and, thus, committed legal error. *See* Appx8 (failing to cite or address the controlling standard established by *Friends of the Earth*, 528 U.S. at 189).

The Secretary did not and cannot show it is "absolutely clear" that the VA will not subject Appellants to unlawful delays on their disability benefits appeals in the future. To the contrary, Appellants are almost certain to face delays again. *See* Opening Br. 6-8 (summarizing statistics related to delays in veterans' appeals which demonstrate that "[h]undreds of thousands of disabled veterans with pending appeals will wait, on average, seven years for a decision on their appeal"). For instance, Conley Monk, the original Petitioner in this matter, recently won a remand from the CAVC because the VA erred in addressing the effective date for his claim. He now awaits—again—an adjudication by the Board. *Monk v. Wilkie*, 2020 WL 2461722 (Vet. App. May 13, 2020).

In fact, the Secretary effectively concedes that Appellants may suffer the same ordeal again where the VA renders a decision on the eve of an adverse ruling from the CAVC. He openly admits that when a "preventable delay or ministerial error gets called to the VA's attention through a petition, VA sometimes has attempted to correct the error or jumpstart processing." Appellee's Br. 24 n.11. That the VA sometimes corrects its errors once a veteran has *already* been forced to go to court does not immunize it from judicial review. Rather, this scenario, in which veterans are subject to the same legal wrong over and over again, is precisely what the voluntary cessation mootness exception seeks to address. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (but for voluntary

cessation exception, defendant would be "free to return to his old ways" and would have "a powerful weapon against public law enforcement").[1]

Instead of meeting his burden to show that Appellants are not reasonably likely to suffer delays again, the Secretary improperly attempts to shift the burden to Appellants by arguing that it would be "entirely speculative" to conclude that Appellants will again be subject to delays. *See* Appellee's Br. 24. This burden-shifting lacks any legal authority and relies entirely on the AMA, which neither negates nor satisfies the Secretary's burden. *See Friends of the Earth*, 528 U.S. at 189. The Secretary hypothesizes that the AMA will improve the timeliness of VA appeals decisions. *See* Appellee's Br. 19-20. But the Secretary's hopes for the AMA do not come close to establishing that it is "absolutely clear that the allegedly wrongful behavior [*i.e.*, the unreasonable delays] could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189 (quoting *Concentrated Phosphate*, 393 U.S. at 203).

[1] The Secretary's reliance on *DeFunis v. Odegaard*, 416 U.S. 312 (1974), is misplaced. *See* Appellee's Br. 23. There, the Supreme Court determined that the voluntary cessation mootness exception did not apply because the claim was not the result of "a unilateral change in the admissions procedures that were the target of this litigation." *Id.* at 318. Here, the Secretary changed its practice of delay with respect to Appellants. *See* Opening Br. 52-53; Appellee's Br. 24 n.11. This is exactly the type of "unilateral change in [] procedures" that falls into the voluntary cessation exception. *DeFunis*, 416 U.S. at 318.

Moreover, government reports have identified flaws in AMA implementation that are likely to cause delay in the new system. *See, e.g.*, U.S. Gov't Accountability Office, *Veterans Affairs: Sustained Leadership Needed to Address High-Risk Issues* 27 (May 22, 2019) ("VA's appeals plan does not provide reasonable assurance that it will have the capacity to implement the new process and manage risks."), https://www.gao.gov/assets/700/699358.pdf. Even as of April 20, 2020—nearly three months into the implementation of AMA—the U.S. Government Accountability Office found that the Secretary had failed to "develop and document risk mitigation strategies . . . [to avoid] subject[ing] veterans to longer wait times." U.S. Gov't Accountability Office, *Priority Open Recommendations: Department of Veterans Affairs* 17 (Apr. 20, 2020), https://www.gao.gov/assets/710/706403.pdf. The VA's insistence that the AMA has remedied systemic delay does not hold up to scrutiny.

Finally, the Secretary's pattern of strategically resolving the delays of veterans who file mandamus petitions counsels against finding the Appellants' claims moot. *See Cardona v. Shinseki*, 26 Vet. App. 472, 475-76 (2014). CAVC judges acknowledge that "the 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). The Secretary deflects,

again, by contending that Appellants must make an accusation of "bad faith" against the VA. *See* Appellee's Br. 24-25. But Appellants do not bear the burden to show bad faith, *see Friends of the Earth*, 528 U.S. at 189, and the Secretary fails to cite any authority to the contrary.

B. The CAVC Misinterpreted the "Capable-of-Repetition-but-Evading-Review" Exception to Mootness.

The CAVC also misinterpreted both prongs of the capable-of-repetition-but-evading-review mootness exception. That exception applies 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).

As to the first requirement, the CAVC misconstrued "duration" to mean that the capable-of-repetition exception categorically "does not fit comfortably with delay-based claims." Appx7-8. The Secretary contends that "there is an inherent contradiction in Appellants' argument that their appeals are proceeding too slowly, *and yet*, are of such short duration that they evade judicial review." Appellee's Br. 19. That argument is unsupported by case law and logically flawed. Courts have repeatedly applied the capable-of-repetition exception in cases even where the challenged action has taken multiple years. *See, e.g.*, *Kingdomware Techs*., 136 S. Ct. at 1976 (challenged action took nearly two years and was still "too short to

complete judicial review of the lawfulness"); *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (same); *U.S. Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Intl. Union AFL-CIO-CLC v. Govt. of Virgin Islands*, 842 F.3d 201, 208 (3d Cir. 2016) (same); *see also Granato v. Bane*, 74 F.3d 406, 411 (2d Cir. 1996) (holding case not moot and noting "[i]t is also telling that . . . the State was willing to reinstate [benefits] as soon as [plaintiffs] filed suit").

The CAVC's misinterpretation of "duration" categorically excludes unreasonable delay claims from this mootness exception, even when the "ending" action by the Secretary occurs shortly after the veteran files a petition. A petitioner can challenge the delay in court only after an unreasonable amount of time has elapsed. *See* 38 U.S.C. § 7261(a)(2). That is, in most cases, a petitioner may not bring a claim until the challenged action has already taken years. It is therefore logically unsound to look at the time pre-filing. Rather, the issue is whether the *remaining time since filing* an unreasonable delay claim is "too short to be fully litigated prior to cessation." *Kingdomware Techs.*, 136 S. Ct. at 1976. This is especially true where, as here, the defendant controls whether the claims evade review post-filing. The VA holds all the power to grant, terminate, or remand the veteran's claim before it can be properly litigated.

The CAVC also misinterpreted the second prong of the capable-of-repetition exception (*i.e.*, a reasonable expectation that the same complaining party will be subject to the same action again) by subjecting Appellants to a higher burden than is required. Appx8. Appellants need only make a "reasonable showing" that they will be again subjected to the alleged illegality of unreasonable delay. *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Instead, the CAVC dismissed Appellants' demonstrated experience of repeated delays within the VA as "speculative" without further explanation or discussion. Appx8.

Contrary to the Secretary's assertions, the capable-of-repetition exception does not require Appellants to show that the exact same harm will occur again. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976) (plaintiff's claims were not moot where the initial restrictive order was lifted but "another," separate restrictive order could be issued). Moreover, courts routinely apply this mootness exception even where the re-occurrence of the circumstance in the future cannot be established with certainty. *See Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988) (the analysis is "whether the controversy was *capable* of repetition and not . . . whether the claimant had demonstrated that a recurrence of the dispute was more probable than not" (emphasis in original)).

Here, Appellants have suffered from VA delay more than once, and it is reasonably likely that they will suffer from delay again. *See* Opening Br. 52-53.

For the CAVC to ignore this reality demonstrates its misunderstanding of the legal standard that governs a reasonable expectation of repeated delay. *Cf. Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007) (to require "repetition of every 'legally relevant' characteristic . . . down to the last detail of [the challenged] action would effectively . . . [make] this exception unavailable for virtually all . . . challenges").

The Secretary's reliance on *Ebanks* is also to no avail, *see* Appellee's Br. 19-22; that case is readily distinguishable. Mr. Ebanks faced only a single instance of delay when requesting a Board hearing, and it was uncertain whether he would re-attempt the process. Appellants here, by contrast, have faced repeated delays throughout the VA system. Opening Br. 54. Mr. Dolphin will also continue to face unreasonable delay because, when the Board granted him an earlier effective date, it remanded other issues for further review. Appx1313-1322. Mr. Monk currently awaits a decision from the Board, now that the CAVC has remanded his effective date claim. *See Monk v. Wilkie*, 2020 WL 2461722 (Vet. App. May 13, 2020). Repeated delay is not just a "theoretical possibility," as the Secretary attempts to frame it: it is a "demonstrated probability." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

Further, simply asserting that the AMA will solve the problems of delay is not enough. Appellee's Br. 21. Bald-faced assertions do not suffice to avoid

judicial review, especially when the GAO has determined the exact opposite: Appellants likely will continue to face repeated delays despite the AMA. *See* U.S. Gov't Accountability Office, *Veterans Affairs: Sustained Leadership Needed to Address High-Risk Issues* 27 (May 22, 2019). Courts have rejected similar claims that intervening agency reforms render the capable-of-repetition exception inapplicable to delay claims. *See, e.g.*, *Amin v. Colvin*, 301 F. Supp. 3d 392, 400 (E.D.N.Y. 2018); *cf. Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329-30 (9th Cir. 1992) (holding capable-of-repetition exception applied, even though challenged regulation was no longer in effect). Therefore, the CAVC's interpretation of the second prong of the capable-of-repetition exception is a legal error. Under the correct standard, Appellants need only show a "reasonable expectation" of repeated delays within the VA system. *Kingdomware Techs*., 136 S. Ct. at 1976.

C. The AMA Does Not Change the Law of the Case.

In response to Appellants' point that this Court's mootness holding in *Monk* is the law of the case, the Secretary's only response is that the AMA constitutes an intervening change in law. *See* Appellee's Br. 25. This argument is unavailing. The AMA's impact on future delays is too speculative to override this Court's previous holding that Mr. Monk's claim is "capable of repetition." *Monk*, 855 F.3d at 1318. The Secretary fails to carry his burden because he fails to analyze the "[t]hree

conditions [that] must be satisfied to reopen a previous decision under the change of law exception for . . . law of the case." *Dow Chem. Co. v. Nova Chems. Corp. (Can.)*, 803 F.3d 620, 629 (Fed. Cir. 2015). Under the third condition, "the change in law *must* compel a different result." *Id.* (emphasis added).

The Secretary has not and cannot represent that the AMA "*must* compel a different result" with respect to Appellants' delay. *Id.* (emphasis added). Rather, the crux of the Secretary's argument is the untested assertion that the AMA has "fundamentally change[d] expectations" for delay in the VA appellate system. *See* Appellee's Br. 25.

The Secretary's argument regarding the ability of the AMA to remedy the Secretary's delay is grounded in speculation. *See* Appellee's Br. 25. Moreover, its projections undermine the Secretary's argument because they suggest that unreasonable delay will likely *continue*, not abate. First, even taking the projections at face value, the AMA "would seem to remove 1,418 days of average processing time." *See* Appellee's Br. 21 n.9. Even if this projected improvement materializes, veterans in the AMA system can still expect at least three years delay under the Secretary's own projections. *See* Opening Br. 50. Second, the projections assume that the VA can meet its own proposed implementation schedules. But the "VA often struggles to meet its own internal goals to the detriment of veterans." Pending Legislation: Hearing Before the S. Comm. on Veterans' Affairs, 114th

Cong. 2 (written testimony of Diane Rauber, Exec. Dir. National Organization of Veterans Advocates) (May 24, 2016), https://www.veterans.senate.gov/imo/media/doc/NOVA%20Rauber%20Testimony%205.24.16.pdf. Last, the AMA offers no relief to "the present backlogs and delays at the Board level"—*i.e.*, legacy appeals. *Ebanks*, 877 F.3d at 1040. The AMA changes the appeals procedure going forward. It has no effect on the impermissible delay suffered by legacy claimants, who remain mired in the legacy system.[2]

D. This Court Can and Should Require the VA to Comply with its Obligation to Resolve Appeals in a Timely Manner.

Contrary to the Secretary's assertions, this Court has, and should exercise, the power to impose the necessary legal accountability upon the VA and ensure veterans receive a timely review on appeals. Enactment of the AMA does not divest this Court of the power to hold the agency to its statutory and constitutional obligations.

The Federal Circuit has the power to issue declaratory relief under the Declaratory Judgment Act. 28 U.S.C. § 2201. This Court should exercise that

[2] The Secretary makes a hollow promise that all legacy appeals will receive a board decision by 2022. *See* Appellee's Br. at 45 n.22. Even if true, it means two-and-a-half *more* years of waiting for veterans who have already waited years. This is not a "fix" that satisfies either the Constitution or statute, and the VA's wishful speculation is no basis to close the courthouse doors to disabled veterans who have waited years already.

power to declare when the Secretary's unreasonable delay has violated statutory and constitutional bounds, as other courts have repeatedly done. *See* Opening Br. 25-26, 43 (collecting cases). Suggesting that this Court cannot set an outer bound for what constitutes unreasonable delay within the veteran's appeals process is erroneous. *Id.*

The remedy that Appellants seek is clear, contrary to the Secretary's claims. *See* Appellee's Br. 26; *see also* Appx9. If this Court reverses and remands, Appellants would seek declaratory relief from the CAVC that the Secretary violated their statutory and constitutional rights, which the CAVC can grant under its All Writs Act authority.[3] The All Writs Act gives the CAVC authority to issue forms of relief "appropriate to aid" its statutory mandate to "compel action of the Secretary . . . unreasonably delayed." *Monk*, 855 F.3d at 1318-19 (quoting 28 U.S.C. § 1651(a); 28 U.S.C. § 7261(a)(2)). Thus, both this Court and the CAVC have the power to issue the relief that Appellants seek.

[3] The CAVC is not a "court of the United States" for the purposes of the Declaratory Judgment Act, *see Matter of Wick*, 40 F.3d 367, 372-73 (Fed. Cir. 1994), and its authority to issue declaratory judgments is instead derived from the All Writs Act. The Veterans Judicial Review Act also expanded, rather than contracted, the rights of veterans, and there is no indication that Congress intended the Act to foreclose declaratory relief for veterans before the CAVC. *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 432 (2011); *cf. Monk*, 855 F.3d at 1319-20 (coming to the same conclusion with respect to class action procedures).

III. The CAVC Erred in Construing *TRAC* to Require Abdication of its Statutory Duty to Compel VA Action Unreasonably Delayed.

The VA does not contest that the CAVC must "compel action of the Secretary . . . unreasonably delayed." 38 U.S.C. § 7261(a)(2). Under the VA's interpretation of unreasonable delay, that mandate is meaningless.

The CAVC accepted the Secretary's argument that five years of delay in a single veteran's disability benefits appeal is "reasonable." Appellee's Br. 29-33. The Secretary takes it even further, and believes that a hundred years of delay could be "reasonable."[4] This interpretation is incompatible with the plain text of 38 U.S.C. § 7261(a)(2), this Court's precedent, and decades of *TRAC* case law. This Court should reject the CAVC's impermissibly restrictive view of its mandate to compel VA action unreasonably delayed and correct the CAVC's misinterpretation of *TRAC*.

A. *Martin* and *TRAC* Precedent Preclude the CAVC's Interpretation of Unreasonable Delay.

The Secretary fails to reconcile the CAVC's interpretation of *TRAC* with *Martin* and well-established *TRAC* precedent. The Secretary repeatedly insists that "the court examined all six *TRAC* factors," Appellee's Br. 42, and therefore

[4] Oral Arg. at 34:40-37:30, http://www.uscourts.cavc.gov/documents/Monk15-1280.mp3; *see also* Appx21 (Allen, J., opinion) (recounting the Secretary's representations during argument). The Secretary has neither recanted nor qualified that statement in briefing.

complied with *Martin*. But it does not follow that by simply identifying the six *TRAC* factors, the CAVC correctly interpreted those factors. Rather, this Court must look to the actual content of the CAVC's *TRAC* interpretation to determine if it comports with both *Martin* and broader *TRAC* precedent. Reviewed in this way, the CAVC's legal errors are clear.

First, the VA offers no good explanation for the CAVC's decision to "slic[e] and dic[e]" Mr. Dolphin's five-year delay into a series of months-long segments in interpreting *TRAC*. That is because there is none. *See* Opening Br. 21-24. According to the Secretary, "a fair reading shows the court's analysis evaluated the *total* processing time of the appeal, within the context of the nature of the appeal and the agency's actions during that time." Appellee's Br. 33. This reading ignores the CAVC's own clear language that it did *not* decide based on the total time. Rather, it held "that here, the *8 months* that Mr. Dolphin has been waiting for a Board decision is not too long." Appx13-14 (emphasis added).

As detailed in Appellants' opening brief, and as Judge Allen recognized, the CAVC's decision to break Mr. Dolphin's five-year delay into a series of months-long segments is legal error. Opening Br. 21-24. Under *TRAC*, the relevant time period at issue in Mr. Dolphin's case is the five years the VA took "to make [a] decision," not the eight months since the agency's last action. *TRAC*, 750 F.2d at 80; *see* Opening Br. 21-22 (collecting other *TRAC* cases). The Secretary offers no

response. Instead, he insists the CAVC did not do what it says it did. Appellee's Br. 33. This Court should correct the CAVC's legal error.

Second, the *Martin* court did not write on a blank slate. Numerous *TRAC* cases have concluded that shorter delays than Mr. Dolphin's five-year wait were unreasonable. Opening Br. 25-26, 28-29. Rather than address precedent, the Secretary tries to divert this Court's attention by stating that "Appellants cannot rely on decisions finding that three years of delay is 'too long' in a certain context" because "the length of delay . . . cannot be assessed in a vacuum." Appellee's Br. 46-47.

The *TRAC* balancing test is contextual, but the context only reinforces Appellants' point that the CAVC misinterpreted decades of *TRAC* precedent that were incorporated by *Martin*. *See* 891 F.3d at 1344-48 (citing *TRAC*, 750 F.2d at 80, and other precedent applying *TRAC* from the First, Ninth and D.C. Circuits); *see id.* at 1347 (incorporating what "other circuits" have observed in interpreting and applying *TRAC* in "other agency contexts"). Those cases held delays shorter than Mr. Dolphin's unreasonable, and they involved more complex agency actions that did not implicate human health and welfare. *See* Opening Br. 25-26, 28-29. To hold a five-year delay reasonable, the CAVC ignored *TRAC* and instead improperly created a heightened standard for unreasonable delay in the veterans benefits context.

Third, the CAVC's failure to issue any writs, except one, since *Martin* demonstrates its misinterpretation of this Court's rulings and the *TRAC* test. *See* ECF 45 ("NLSVCC Amicus Br.") 3-5. The Secretary claims these abysmal statistics "provide no insight on the [CAVC's] fidelity to *Martin*." Appellee's Br. 43. That is incorrect. They demonstrate that disabled veterans have simply *not* had "a much easier time" obtaining relief since *Martin. See* 891 F.3d at 1351 (Moore, J., concurring).

Appellants do not contend that *Martin* required a "general increase in granted petitions." Appellee's Br. 45. Rather, Appellants ask this Court to engage in a meaningful review of the CAVC's interpretation of *TRAC* and its departure from the "more balanced approach" required by *Martin* and *TRAC* precedent. *Martin*, 891 F.3d at 1345, 1349. This Court may also consider the undeniable pattern of CAVC denials and consistent refusal to hold the VA accountable for unreasonable delay.

The CAVC's decision in *Godsey* also cuts against the Secretary's claim. If a case about delays at the certification stage—a ministerial process that should take "two and a half hours to complete" by the VA's own standards, and yet takes the Secretary 773 days on average, *id.* at 1341—is the only case out of more than a hundred since *Martin* that warrants a writ under the CAVC's interpretation of *TRAC*, then the CAVC's interpretation is impermissibly restrictive. *See* NLSVCC

Amicus Br. 3-5; Appx14 (citing *Godsey v. Wilkie*, 31 Vet. App. 207 (2019)); Appx20 (Allen, J., opinion).

Finally, the VA provides no reason why the pro-veteran rule of statutory construction should not apply to a statutory regime governing veterans benefits. This canon of statutory construction has always applied to legislation concerning veterans benefits and is not, as the Secretary claims, mere "dicta." Appellee's Br. 45; *see King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (recognizing the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (applying rule that veterans benefits statutes must be "liberally construed for the benefit of those who left private life to serve their country").

Importantly, Appellants do not seek a lower standard for unreasonable delay in the veterans benefits context. *Cf.* Appellee's Br. 45-46. Under *TRAC* itself, five years is too long to wait for a decision in a single veteran's benefits appeal. Opening Br. 25-26, 28-30. If, however, this Court believes the *TRAC* analysis should be different in the veterans benefits context in any way, it should be *more* favorable for veterans, not less. The CAVC did the opposite, which this Court should reject.

B. Under a Correct Interpretation of the *TRAC* Standard, the CAVC Erred in Not Issuing a Writ to Mr. Dolphin to Remedy Unreasonable Delay.

The Secretary's five-year delay in Mr. Dolphin's case constitutes unreasonable delay as a matter of law. The VA obfuscates that the CAVC has held Mr. Dolphin to the impossible legal standard of showing *complete inaction* by the VA to justify an unreasonable delay. Opening Br. 3, 27. That standard is legal error. Opening Br. 27.

The first *TRAC* factor requires agency delay be subject to a rule of reason. Opening Br. 27. The VA's response ignores precedent which confirms that complexity and the statutory duty to assist do not justify egregious delay under the first *TRAC* factor. Opening Br. 27-30. As Appellants have shown, and as Judge Allen noted in dissent, the CAVC improperly allowed those considerations to swallow its analysis of the rule of reason. *Id*.; Appx20-21 (Allen, J., opinion). The VA has no response other than suggesting the CAVC's reasoning is implicit rather than an explicit "holding." Appellee's Br. 33, 42. But errors in reasoning that lead to an incorrect holding are themselves legal error.

The VA is similarly unresponsive to Appellants' arguments about the second *TRAC* factor, which look to the presence of congressional timetables or other indicia of congressional intent. Opening Br. 31. The VA only reiterates the lack of a congressionally-mandated timetable and notes the passage of the AMA.

Appellee's Br. 33. Clear precedent shows that, beyond timetables, the second *TRAC* factor weighs in Appellants' favor where there are "other indicia" of congressional intent to have a speedy process, as there are here. Opening Br. 31-32. That Congress sought to address delays and expedite the appeals process underscores that it intended a timely appeals process. Opening Br. 32. Further, the VA does not contest that its long history of delays weighs in Appellants' favor under the second factor. *Id*.

The Secretary also misconstrues Appellants' argument with respect to the third and fifth *TRAC* factors—human health and welfare and interests prejudiced by delays. Appellee's Br. 35-36. These inquiries "often overlap[]," but while the third always weighs in favor of the veteran, the fifth can look beyond the individual petitioner's interests to the impact on public confidence in the administrative process. Opening Br. 33-34. In its analysis of these factors, the VA downplays the magnitude of the harms Mr. Dolphin has suffered as a result of egregious delay in his appeal. Mr. Dolphin was unlawfully denied approximately $150,000 for five years. Opening Br. 40. In fact, he is *still* waiting for these funds months after the Board's decision. Mr. Dolphin could have used those funds to access health care, as his health has significantly worsened during the VA's delay. *Id.* at 41. The withheld benefits would have allowed him to enjoy a greater quality of life with his wife, who attended the March 2019 CAVC oral argument and then

passed away in June. *Id.* The VA minimizes these harms and fails to acknowledge the magnitude of the denied benefits. Appellee's Br. 35-37. The harms Mr. Dolphin has suffered are *exactly* the human toll that *TRAC* factors three and five are meant to incorporate. *Id*. at 33-34; *see also Blankenship v. Sec. of HEW*, 587 F.2d 329, 334 (6th Cir. 1978) (finding delays in disability benefits were more intolerable than those in other contexts because they resulted in "[s]ubstantial hardship"); *Pub. Citizen Health Research Group v. Comm'r., Food & Drug Admin*., 740 F.2d 21, 35 (D.C. Cir. 1984) (noting a court's "grave responsibility to ensure that the pace of agency action does not jeopardize . . . lives").

The VA likewise does not contest that uncertainty itself is an interest prejudiced by delay. Appellee's Br. 34. Instead, the VA minimizes the uncertainty Mr. Dolphin faced during the five-year delay by claiming that Mr. Dolphin's "basic necessities" did not depend on the $150,000 the VA still owes him. Appellee's Br. 36. In other contexts, though, where courts recognized uncertainty as a distinct interest weighing in a petitioner's favor, they have required no showing that "basic necessities" were at stake. *See, e.g.*, *Geneme v. Holder*, 935 F. Supp. 2d 184, 194 (D.D.C. 2013); *Potomac Elec. Power Co. v. Interstate Commerce Comm'n*, 702 F.2d 1026, 1035 (D.C. Cir. 1983). Rather, courts have recognized that the ability to plan for the future, enjoy peace of mind, and carry on with activities such as work or travel suffice to weigh the fifth *TRAC* factor in a

petitioner's favor. *Id.* Mr. Dolphin survives on a limited income and has not been able to work for many years due to his service-connected injuries. The hardship he and his wife experienced while waiting five years for $150,000 in disability benefits that he earned through his service is substantial.

Under the fourth *TRAC* factor, which considers the impact on competing agency priorities, the burden is on the agency to demonstrate that impact and its priorities (even if the overall burden is on claimants to demonstrate that the writ should issue). Opening Br. 34-35. Moreover, limited resources cannot, by themselves, justify extensive delay. *Id.* at 45. The VA is unresponsive to this case law, again only noting that the CAVC considered other factors. Appellee's Br. 39. The thrust of the VA's arguments is that Mr. Dolphin must demonstrate that he is worse off than hundreds of thousands of other veterans. *Id.* at 37. Such a burden is impracticable and incompatible with *Martin*'s holding that writs of mandamus must be attainable for veterans. Opening Br. 18.

Finally, the CAVC need not create a *per se* rule to hold a five-year delay is always unreasonable. That question was not before the CAVC when it decided this case, and Appellants do not ask this Court to draw a "mandatory or presumptive one-year deadline on VA appeal processing." Appellee's Br. 26-27. Rather, the issue in this appeal is whether the five-year delay in Mr. Dolphin's case was, as a matter of law, beyond the statutory ambit of reasonableness.

IV. The CAVC Was Required to Conduct a Separate Due Process Analysis, and the VA Violated Mr. Dolphin's Constitutional Rights.

Unreasonable delay is not the same as unconstitutional delay, and the CAVC cannot ignore due process claims after applying *TRAC*. Opening Br. 47-48. The Secretary contends that acknowledging these differences would lead to the "bizarre" result of making it "easier to prove unconstitutional delay than unreasonable delay." Appellee's Br. 49 n.24. But the due process inquiry is not "easier" for plaintiffs; rather, it simply weighs different factors. For instance, unlike *TRAC*, due process considers "the likelihood that the interim decision may have been mistaken." *FDIC v. Mallen*, 486 U.S. 230, 242 (1988). This factor could favor either party.

Even if this Court determines that the CAVC's *TRAC* analysis here is not wrong as a matter of law, this Court must still review Mr. Dolphin's constitutional due process claims under 38 U.S.C. § 7292(d)(2) and determine if the CAVC applied the facts incorrectly to the proper due process framework. Mr. Dolphin's claim satisfies all three prongs of an unconstitutional delay claim: (1) Mr. Dolphin has an important interest in his benefits decision, (2) the Secretary's "justification" for the VA's delay is inadequate, and (3) the likelihood the RO's "interim decision may have been mistaken" is high. *See id*. at 242.

Mr. Dolphin's delayed decision meets the first prong: $150,000 is an important interest. That he received some benefits during the years of delay does

not negate Mr. Dolphin's interest in this life-changing sum. The Supreme Court is clear on this point: there is no "rule of 'necessity.'" *Fuentes v. Shevin*, 407 U.S. 67, 89 (1972). An "important interest," even one which "does not rise to the level of 'necessity' exemplified by wages and welfare benefits" is nevertheless "entitled to the protection of procedural due process of law." *Id.*

The Secretary also concedes that a showing of financial need is not necessary to warrant Fifth Amendment protection and that "living in constant uncertainty," without the ability to make financial plans or order one's life affairs, is in itself a serious harm. *See* Opening Br. 41-42 (citing *Martin*, 891 F.3d at 1350); Appellee's Br. 36-37, 49-50. Mr. Dolphin has not been able to plan for his family because of the VA's egregious delay. This is the harm that violates due process, not simply the "loss of the time value of money." *See* Appellee's Br. 50 n.26.

The second prong of the due process analysis also weighs in Mr. Dolphin's favor because the VA's justifications for delay do not outweigh its own interest in the "uninterrupted provision" of benefits to those eligible. *See* Opening Br. 44-45 (citing *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970)). The Secretary tries to justify the VA's routine violation of due process with its backlog and attempts to ameliorate delay. *See* Appellee's Br. 52-53. But these are not sufficient to discharge the VA's obligations. In *White v. Mathews*, the Social Security

Administration's backlog of 113,000 cases and its attempts to resolve delay did not justify six and seven month delays in the disposition of benefits appeals. 434 F. Supp. 1252, 1254-57 (D. Conn. 1976), *aff'd*, 559 F.2d 852 (2d Cir. 1977). So too here—the AMA and backlog do not excuse the VA's delay or justify due process violations.

Appellants acknowledge that due process considers collateral effects and the Government's interest in preserving scarce resources. *See* Appellee's Br. 52. But "the question is not whether there shall be costs incurred, but who shall bear them while the governmental machinery responsible for providing appeals puts itself in order." *White*, 434 F. Supp. at 1261. The Secretary would place the costs on veterans languishing in delay, "den[ying] due process rights to aggrieved applicants and conflict[ing] with the statutory purposes and provisions" of the VA. *Id.* In doing so, he neglects the VA's interest in fulfilling its mandate.

The third prong of the due process analysis—the likelihood of a mistaken interim decision—also weighs in favor of Mr. Dolphin. The Secretary misunderstands Appellants' argument when he states "there is no indication of claimant disagreement with 89-90% of RO decisions." *See* Appellee's Br. 54-55. Appellants are challenging the delay in Board decisions, not initial RO decisions. *Cf. White*, 434 F. Supp. at 1261 (determining that relevant group was "only individuals who have taken an appeal" and assessing error rate accordingly). Of

appealed RO decisions subject to Board review, "[n]early 80% . . . were not fully affirmed in Fiscal Year 2018." Opening Br. 46 (citing Appx672).

The Secretary improperly relies on *Logan v. Zimmerman Brush*, 455 U.S. 422, 433 (1982) to argue that "all that due process requires" is "'*some* form of hearing.'" Appellee's Br. 54. *Logan*, however, did not involve delay and was decided before *Mallen*. *Id*. at 424-28. The *Mallen* test determines "*how long* a delay is justified" before it becomes a deprivation. *Mallen*, 486 U.S. at 242 (emphasis added). Moreover, the Court determined that there must be a point at which an unjustified delay in a post-deprivation proceeding becomes unconstitutional. *Id.* The needless five-year delay in Mr. Dolphin's case—which deprived him of the $150,000 he earned by serving his country—crosses that line and this Court should find it unconstitutional.

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 respect to the Due Process Clause claims; and (4) remand for further proceedings consistent with these rulings.

Respectfully submitted,

June 4, 2020

/s/ Michael J. Wishnie
Michael J. Wishnie, Supervising Attorney
Renée Burbank, Supervising Attorney
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Org.
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800

Lynn K. Neuner
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
Tel: (212) 455-2000
lneuner@stblaw.com

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Federal Circuit Rule 32(a). This brief contains 6,905 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.

Respectfully submitted,

June 4, 2020

/s/ Michael Wishnie

Michael J. Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
Tel: (203) 432-4800
michael.wishnie@ylsclinics.org

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2020, Appellants' foregoing Reply 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.

Respectfully submitted,

June 4, 2020

/s/ Michael Wishnie
Michael J. Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
Tel: (203) 432-4800
michael.wishnie@ylsclinics.org

Counsel for Appellants