No. 2020-1305

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, and STANLEY STOKES,
Petitioner-Appellants,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims
in Case No. 15-1280 (Chief Judge Davis and Judges Schoelen, Pietsch, Bartley, Greenberg, Allen, Meredith, Toth, and Falvey)

BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE

STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of this Court's Rules, counsel for respondent-appellee states that this case was previously before this Court under the title *Monk v. Shulkin*, Fed. Cir. Nos. 2015-7092 and 2015-7106, 855 F.3d 1312 (Fed. Cir. 2017). The class action aspect of this case is currently pending a decision under Fed. Cir. No. 2019-1094. Counsel is unaware of any other case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

STATEMENT OF THE ISSUES

1. Whether the U.S. Court of Appeals for Veterans Claims (Veterans Court) correctly dismissed as moot six of Appellants' petitions for extraordinary relief in the nature of a writ of mandamus, where those appellants had received the relief requested in their petitions.

2. Whether appellant William Dolphin's petition is now moot because he has received a Board of Veterans' Appeals (board) decision on his underlying Department of Veterans Affairs (VA) benefits claim.

3. Alternatively, whether the Veterans Court abused its discretion in declining to issue a writ of mandamus in Mr. Dolphin's case.

STATEMENT OF THE CASE SETTING OUT RELEVANT FACTS

I. Nature Of The Case

Appellants Conley F. Monk, Jr., Tom Coyne, William Dolphin, Jimmie Hudson, Samuel Merrick, Lyle Obie, and Stanley Stokes appeal the *en banc* decision of the Veterans Court in *Monk v. Wilkie*, No. 15-1280 (Vet. App. Oct. 23, 2019), which (1) denied Mr. Dolphin's petition for extraordinary relief in the nature of a writ of mandamus, and (2) dismissed the other Appellants' petitions as moot. Appx1-26.[1]

[1] "Appx__" refers to pages of the joint appendix filed in this case.

II. Statement of Facts and Course of Proceedings Below

A. Appellants' Underlying Appeals

1. Conley F. Monk, Jr.

In July 2013, Mr. Monk filed a Notice of Disagreement (NOD) with the VA regional office's (RO's) initial denial of his benefits claim. Appx1330. Later that month, VA offered Mr. Monk review by a Decision Review Officer (DRO). *Id.* In November 2013, Mr. Monk requested a DRO hearing, which VA scheduled for January 2014, but was postponed at Mr. Monk's request to February 2014. *Id.* Also in February 2014, VA requested pertinent records for the claim from the National Personnel Records Center (NPRC). *Id.* VA issued a second NPRC request in April 2014, and a third request in March 2015, but all the requests garnered a response that the records were currently checked out by the Board for Correction of Naval Records (BCNR). Appx1331.

In June 2015, VA received the pertinent records and notice that the BCNR had upgraded Mr. Monk's discharge (rendering him eligible for VA benefits), and VA scheduled two medical examinations for Mr. Monk. *Id.* In September 2015, VA awarded an overall 100% disability rating, plus special monthly compensation (SMC), for Mr. Monk's service-connected disabilities, effective July 20, 2012. *See* Appx1271.

In December 2015, VA received a new NOD from Mr. Monk, arguing for an earlier effective date for his benefits. *See* Appx1260; Appx1271. In September 2016, VA issued a Statement of the Case (SOC) on the matter. *See* Appx1260; *see also* 38 U.S.C. § 7105(d) (2016). In November 2016, Mr. Monk filed a substantive appeal to the board. *See* Appx1260; Appx1271; *see also* 38 U.S.C. § 7105(a), (d)(3) (2016). In August 2017, VA awarded Mr. Monk service connection for additional disabilities. Appx1332-1333. In a December 2018 decision, the board denied an earlier effective date. Appx1265-1277. In January 2019, Mr. Monk appealed that matter to the Veterans Court. Appx368.

2. William Dolphin

In November 2014, VA received Mr. Dolphin's NOD with decisions that had awarded an overall 90% disability rating for his six service-connected disabilities, but denied service connection for four other disabilities and a total disability rating based on individual unemployability (TDIU). Appx468-479. In December 2014, VA offered Mr. Dolphin DRO review. Appx1286. In January 2015, Mr. Dolphin requested a DRO hearing, which VA scheduled for February 2015, but was postponed at Mr. Dolphin's request to March 2015. *Id.*

In June and September 2015, VA granted Mr. Dolphin benefits on other claims, resulting in an overall 100% disability rating with SMC. *Id.* In March 2016, to assess his disabilities on appeal, VA scheduled medical examinations for

Mr. Dolphin, which were conducted in June 2016. *Id.* VA also issued two rating decisions on Mr. Dolphin's other claims in May and September 2016. *Id.*

In January 2018, VA offered Mr. Dolphin an opportunity to leave the legacy appeals system,[2] and enter into the new, more streamlined Veterans Appeals Improvement and Modernization Act of 2017 (AMA) system through a Rapid Appeals Modernization Program (RAMP) election. Appx1287; *see* Pub. L. No. 115-55, 31 Stat. 1105 (2017); 38 C.F.R. § 3.2400(c)(1); Appx1416-1417; "Rapid Appeals Modernization Program (RAMP)," https://benefits.va.gov/benefits/appeals-ramp.asp (last visited Mar. 26, 2020). Also, in a January 2018 rating decision and SOC, VA granted TDIU, an earlier effective date for benefits for six of Mr. Dolphin's disabilities, an increased rating for two disabilities, and service connection for two additional disabilities. Appx1151-1174; Appx370-440.

In March 2018, VA received Mr. Dolphin's substantive appeal to the board, which requested an even earlier effective date for his benefits, as well as a board hearing on the matter. Appx1287. In February 2019, the appeal was certified to the board and, in August 2019, the appeal was placed on the board's docket.

[2] The appeals process for initial decisions issued prior to February 19, 2019, is referred to herein as the "legacy" system. *See* 38 C.F.R. § 19.2.

Appx1287; Appx1309. In February 2020, the board granted Mr. Dolphin an earlier effective date for his benefits, and remanded other issues. Appx1313-1322.[3]

3. Jimmie Hudson

In January 2013, Mr. Hudson filed an NOD with VA's initial denial of his request for TDIU and service connection for post-traumatic stress disorder (PTSD) and hypertension. Appx532. Between April 2013 and November 2014, VA received relevant records for the claim, Mr. Hudson's formal application for TDIU, and his statement regarding PTSD. Appx1324-1325. It also adjudicated one of his other claims during this time. *Id.* In June 2016, VA conducted a medical examination for Mr. Hudson's PTSD, and then issued a partially-favorable rating decision and SOC on the appeal. Appx1207-1210; Appx1216-1237. In July 2016, Mr. Hudson filed a substantive appeal to the board. Appx1244. (In January 2017, VA adjudicated one of his other claims. Appx1328.) In November 2018, the board issued a decision remanding the appeal. Appx1249-1256.

4. Lyle Obie

In August 2015, VA received argument from Ms. Obie, in response to a decision awarding dependency benefits for her spouse and son, that she was also

[3] Since Mr. Dolphin is already in receipt of an overall 100% rating plus SMC, the award of additional or higher individual ratings on remand will not result in his receipt of higher compensation unless other provisions of SMC are implicated. *See generally* 38 U.S.C. § 1114; 38 C.F.R. § 4.25.

entitled to dependency benefits for her daughter. Appx523. In October 2016, August 2017, and January 2018, VA informed her that submission of the requisite information on a VA Form 21-674 was required, but she did not submit that form until January 2018. Appx523-524. During this time, she also received VA medical examinations and VA decisions on unrelated claims. Appx523.

In March 2018, VA denied dependency benefits for Ms. Obie's daughter. Appx1200-1203. In April 2018, Ms. Obie filed an NOD with the denial. Appx867-868. In November 2018, VA granted dependency benefits for Ms. Obie's daughter. Appx1204-1206.

5. Stanley Stokes, Samuel Merrick, and Tom Coyne

These appellants are no longer pursuing their individual mandamus petitions, but have reserved the right to represent the putative class. App. Br. 4.

B. Appellants' Petitions For The Extraordinary Relief Of A Writ Of Mandamus

In April 2015, Mr. Monk filed at the Veterans Court a petition for extraordinary relief in the nature of a writ of mandamus compelling VA to immediately adjudicate Mr. Monk's claim for benefits and all those "similarly situated . . . whose applications are pending twelve months or more since timely submission of an NOD." Appx60. The Veterans Court denied the request for class certification in May 2015—asserting a lack of authority to entertain it—and denied the petition in July 2015. *See Monk v. Shulkin*, 855 F.3d 1312, 1315 (Fed. Cir.

2017). Mr. Monk appealed to this Court, which (1) held that the Veterans Court had authority to entertain a class action and (2) remanded the matter. *Monk*, 855 F.3d at 1321-22.

In December 2017, Mr. Monk moved to amend his petition and join the six[4] above-listed Appellants to his case. Appx66. The amended petition requested class certification and a writ of mandamus compelling VA to "render decisions on pending appeals within one year of receipt of timely NODs and to render decisions on named Petitioners' pending appeals within sixty days." Appx100. The Veterans Court accepted the amendment and joinder, but denied class certification in August 2018. Appx34; Appx37.[5] Then, in an October 23, 2019, *en banc* decision, the Veterans Court dismissed six of Appellants' petitions as moot, and denied Mr. Dolphin's petition upon a finding that he did not demonstrate entitlement to mandamus. Appx1-26.

1. The Veterans Court Finds Six Of Appellants' Petitions To Be Moot

At the outset,[6] the Veterans Court noted that Mr. Coyne, Mr. Merrick, and Mr. Stokes conceded that their petitions were moot because they received the relief

[4] Two other petitioners have since requested to leave this litigation. Appx6.

[5] The class certification decision has been appealed and is the subject of Fed. Cir. No. 19-1054.

[6] As a preliminary matter, the Veterans Court held that it had jurisdiction to proceed on the merits of the petitions, even though Appellants had appealed the

sought in their petition. Appx6. It then entertained arguments from Mr. Monk and Mr. Hudson (who both had received board decisions on their appeals) and Ms. Obie (who received a grant of her dependency benefits appeal[7]) that exceptions to the mootness doctrine should be applied to their cases. *Id.*

With regard to the exception for challenges that are capable of repetition but evading review, the court stated that "the concept of a wrong being too short to rush to court does not fit comfortably with delay-based claims" and, "on the facts before us," Appellants had not shown that the challenged action here (the processing time from NOD to board decision) was too short to be fully litigated prior to cessation or expiration. Appx7-8. The court also found "speculative" Appellants' assertion that they would experience similar processing times in future VA appeals. Appx8.

Moreover, with regard to the exception pertaining to defendants who voluntarily cease the challenged conduct, the court noted that this exception "doesn't fit the situation before the [c]ourt," as VA adjudicated the underlying

court's earlier decision on class certification to this Court. Appx2-6. Judge Pietsch dissented on this issue. Appx24-26.

[7] The court acknowledged Appellants' argument that Ms. Obie desired an earlier effective date for these benefits, but noted that her petition was based on the issue of *entitlement* to the benefits, and the proper effective date was a downstream issue that would require a new NOD. Appx7. Based on counsel's review of Ms. Obie's claims file, she did not file a new NOD on that issue.

claims in the normal course, without bad faith. *Id.* ("[T]he [b]oard is required to consider cases in docket number order, 38 U.S.C. § 7107, and, here, the petitioners' docket numbers were reached.").

The court concluded that these six appellants received the relief they sought, and it was "not at all clear what the [c]ourt would order the Secretary to do under the petitioners' theory that their claims are not moot." Appx9.

2. The Veterans Court Finds That Mr. Dolphin Did Not Establish Entitlement To The Writ

Because Mr. Dolphin had not yet received the relief he sought, the Veterans Court evaluated his claim of unreasonable delay under the "*TRAC*" factors *(Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984)), pursuant to this Court's holding in *Martin v. O'Rourke*, 891 F.3d 1338, 1344 (Fed. Cir. 2018). Appx10-11.

First, the court examined the "rule of reason," which "requires this [c]ourt to 'look at the particular agency action for which unreasonable delay is alleged and evaluate the reasonableness of the delay given the specific factual circumstance.'" Appx11 (quoting *Martin*, 891 F.3d at 1345). The court noted that Mr. Dolphin's claim was "complex," involving 17 distinct issues and a "voluminous claims file" with over 1600 pages of military and medical records. Appx12; Appx14; *see* Appx9. The court found that much of the appellate processing time resulted from VA "fulfilling substantive [a]gency actions to comply with statutory duties," such

as obtaining evidence and providing medical examinations pursuant to the duty to assist, reviewing the record evidence, and preparing an SOC. Appx12. Also, while processing his appeal, VA was acting on Mr. Dolphin's other claims—actions that increased his monthly compensation to 100%, plus SMC. *Id.* Overall, the court found that the adjudication of Mr. Dolphin's claim was not "occasioned by VA inefficiency and inaction," but by VA "complying with its legal duties." Appx13.

Second, the court considered Congressional expectations with regard to processing time, Appx14 (citing *Martin*, 891 F.3d at 1345), and recognized that "Congress chose to design an adjudicatory system without providing deadlines for VA determinations or any other secretarial action." *Id*. The court noted that Congress created a system with "multiple steps for adjudication," assistance, and review; and, even though it recently refashioned the system to "expedite VA's appeals process," Congress did not include deadlines. *Id.*

Third, the court evaluated the nature and extent of the prejudice at issue, with the understanding that delays in the sphere of economic regulation are less tolerable when human health and welfare are at stake. Appx15 (citing *Martin*, 891 F.3d at 1346). The court noted that Mr. Dolphin's claim involved human health and welfare, but also that Mr. Dolphin had been receiving, for almost the entirety of his appeal, the highest level of monthly disability compensation (100%) plus

SMC. Appx15. Moreover, Mr. Dolphin had never asserted that his basic needs (food, housing, medical care) were dependent on the backpay that was at issue in his appeal. *Id.*

Fourth, the court examined the effect of expediting action on VA priorities, noted VA's limited resources, and acknowledged that shifting resources to Mr. Dolphin's appeal "may work a detriment to other veterans," who are also awaiting VA adjudications and may not be receiving 100% monthly compensation like Mr. Dolphin. *Id.* (quoting *Martin*, 891 F.3d at 1347). The court recognized that prioritizing Mr. Dolphin's appeal would necessarily delay those who have earlier docket numbers, have been advanced on the docket because of serious illness or severe financial hardship, or those who are entitled to expeditious treatment under statute. Appx16.

Fifth, the court noted that a writ may be appropriate under *TRAC* even when there is no evidence of bad faith. *Id.* (citing *Martin*, 891 F.3d at 1348). Nevertheless, based on "the *entire* period that Mr. Dolphin's claims have been on appeal," the court found that Mr. Dolphin had not demonstrated unreasonable delay and that the *TRAC* factors did not warrant granting the writ. Appx14; Appx16.[8]

[8] Judges Allen and Greenberg concurred on the court's mootness analysis, Appx18, but dissented on the unreasonable delay issue. Appx20-24.

As a final note, the court acknowledged that Mr. Dolphin had urged it "to conduct a due process analysis." Appx17. But it declined—following *Martin*'s explicit instruction that a court employing a *TRAC* analysis "need not separately analyze the due process claim based on that same delay." *Id.* (quoting 891 F.3d at 1348-49). Judgment was entered on November 14, 2019, and this appeal followed. Appx40.

SUMMARY OF THE ARGUMENT

There is no dispute that the legacy appeals system is overburdened, complex, non-linear and broken. Over the past decade, VA lobbied for a more streamlined system; Congress enacted a new system (the AMA) specifically structured to avoid the sources of delay in the legacy system; and VA has attempted to move as many claimants as possible into the new system. This litigation involves seven legacy appellants, who experienced both the advantages (multiple reviews, multiple decisions, a continual duty to assist, a continual open record) and the disadvantages (delayed processing times) that come with the legacy system. But at this point, each has received the relief requested in their petitions: a favorable decision or board decision on their appeals. Thus, their petitions are moot.

Though Appellants argue that their case is "capable of repetition, yet evading review," they fail to meaningfully grapple with the fact that any future appeals they file will be governed by the more streamlined AMA system—making

it exceedingly unlikely that they will again be subject to the processing times they have previously experienced. Also, contrary to their arguments, the "voluntary cessation" exception to mootness does not apply here, where VA was not manipulating the legacy appeals queue or procedures to moot Appellants' cases, but merely adjudicating their appeals in the normal course.

Because Mr. Dolphin's petition was not moot at the time of the Veterans Court's decision (though it is now), the court assessed his entitlement to a writ of mandamus based on unreasonable delay by applying the six *TRAC* factors to his circumstances. If the Court reaches this issue, it should hold that the Veterans Court did not abuse its discretion in declining to issue a writ for Mr. Dolphin. Although Appellants attempt to construe the Veterans Court's *TRAC* analysis as rendering bright-line rulings, or implicitly resurrecting a rejected standard, a fair review of the decision reflects that the court was simply considering all the relevant factors, consistent with this Court's decision in *Martin*. Appellants are forced to argue about an "implicit" or "sub silencio" resurrection because the *actual* decision below does not support their argument. And finally, though Appellants argue that the Veterans Court should have conducted a separate due process analysis, this Court's precedent holds otherwise.

ARGUMENT

I. Jurisdiction And Standard Of Review

Pursuant to 38 U.S.C. § 7292(a), this Court has jurisdiction to review a Veterans Court's decision with respect to the validity of a decision on a rule of law or to the validity or interpretation of any statute or regulation relied on by the Veterans Court in making that decision. This Court also has jurisdiction to "interpret constitutional and statutory provisions, to the extent presented and necessary to a decision," and to "decide all relevant questions of law." 38 U.S.C. § 7292(c), (d)(1). This Court may not, however, "review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case," except to the extent that the appeal presents a constitutional issue. 38 U.S.C. § 7292(d)(2); *see Conway v. Principi*, 353 F.3d 1369 (Fed. Cir. 2004) ("[W]hile we can review questions of law, we cannot review applications of law to fact.").

In accordance with these statutory provisions, this Court may review the denial or dismissal of a petition for a writ of mandamus if it "raises a non-frivolous legal question" within the Court's limited jurisdiction under 38 U.S.C. § 7292(a). *Beasley v. Shinseki*, 709 F.3d 1154, 1158 (Fed. Cir. 2013). But the Court cannot "review the factual merits of the veteran's claim" or otherwise "interfere with the Veterans Court's role as the final appellate arbiter of the facts underlying a

veteran's claim or the application of veterans' benefits law to the particular facts of a veteran's case." *Id.*

Thus, a Veterans Court finding that a particular petitioner's circumstances do not constitute "unreasonable" delay is beyond this Court's jurisdiction. *See Martin*, 891 F.3d at 1338 (evaluating the "rule of reason" for a particular delay "is best left to the discretion of the Veterans Court"); *see also McLean v. Wilkie*, 780 F. App'x 892, 895 (Fed. Cir. 2019) (nonprecedential). Similarly, the Veterans Court's simple "application of the law of mootness to the particular circumstances of [a] petition" is beyond this Court's jurisdiction. *Browder v. O'Rourke*, 736 F. App'x 886, 887 (Fed. Cir. 2018) (nonprecedential).

II. The Veterans Court Committed No Legal Error In Finding That Six Of Appellants' Petitions Were Moot

In Appellants' December 2017 petition, they requested a writ of mandamus compelling VA "to render decisions on named Petitioners' pending appeals within sixty days." Appx100. By the time the Veterans Court issued the *en banc* decision on appeal here, Mr. Coyne, Mr. Merrick, and Mr. Stokes conceded receipt of their requested relief; Mr. Monk and Mr. Hudson had received board decisions on their appeals; and Ms. Obie had received a favorable decision awarding dependency benefits for her daughter. Appx6-7; *see* Appx230 n.6. Thus, as the Veterans Court held, these six appellants' petitions are moot. Appx6-9; *see Monk*, 855 F.3d at 1316 (case is moot when "the relief sought by a plaintiff is satisfied") (citing

DeFunis v. Odegaard, 416 U.S. 312, 317 (1974)).

To reach that holding, the court correctly recognized that Ms. Obie's ability to file a new appeal on a downstream issue (the effective date of dependency benefits) did not change the fact that the appeal forming the basis of her petition had been resolved. Appx7; Appx87; *see Martin*, 891 F.3d at 1349 (dismissing appellant Betty Scyphers's petition as moot because her appeal was granted; though she had since filed a new appeal with regard to her benefits' effective date, "the delays on which her original mandamus petition was based have essentially been reset"); *see also Rose v. O'Rourke*, 891 F.3d 1366 (Fed. Cir. 2018) (even if he intended to appeal a recent decision granting benefits, appellant Taylor Daniels's current petition is moot); *see generally Grantham v. Brown*, 114 F.3d 1156, 1158-59 (Fed. Cir. 1997) (new appeal required for downstream issues).

Moreover, the court's holding correctly reflected that, regardless of the particular outcome of Mr. Monk's and Mr. Hudson's board decisions, they received their requested relief: decisions on their appeals. Appx7; Appx100; *see McChesky v. McDonald*, 635 F. App'x 882, 884-85 (Fed. Cir. 2015) (nonprecedential) (quoting *Ex parte Burtis*, 103 U.S. 238 (1880) ("A writ of mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction, but not to control its discretion while acting, nor reverse its decisions when made.") (citation omitted)); *see also Martin*, 891 F.3d at 1349 (dismissing

appellant Sarah Aktepy's petition as moot, where "the [board] recently issued its decision," which Fed. Cir. No. 17-1747, ECF No. 82, Ex. A, reflects was a remand order).

In their opening brief, Appellants argue that the Veterans Court "fail[ed] to apply obvious exceptions to the mootness doctrine including 'voluntary cessation' and 'capable of repetition, but evading review.'" App. Br. 5. To the contrary, the Veterans Court carefully explained why these exceptions were inapplicable here. Appx7-8. To the extent this Court has jurisdiction over that application of the well-established law on mootness to the facts here, 38 U.S.C. § 7292(d)(2); *Beasley*, 709 F.3d at 1158, the Veterans Court was correct.

A. Consistent with This Court's *Ebanks* Precedent, The Instant Matter Is Not "Capable Of Repetition, Yet Evading Review"

The "capable of repetition, yet evading review" exception "applies only in exceptional situations," where the moot party establishes that "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration" and 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) (internal quotation marks and alterations omitted); *Torrington Co. v. United States*, 44 F.3d 1572, 1577 (Fed. Cir. 1995); *see also Ill. State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 187-88 (1979) (moot party bears burden of proof).

Appellants have not established either condition. Appx7-8. First, 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. *See id.* ("[T]he concept of a wrong being too short to rush to court does not fit comfortably with delay-based claims."). While explicitly declining to hold that this exception can *never* apply to delay-based claims, the Veterans Court found that, "on the facts before us," Appellants had not shown that the challenged action here—the processing time from NOD to board decision—was too short to be fully litigated prior to cessation or expiration. Appx8. This finding is a natural result of Appellants' arguments in their petition. It is also an application of law to fact beyond this Court's jurisdiction, 38 U.S.C. § 7292(d)(2); *Beasley*, 709 F.3d at 1158; *cf. Shinseki v. Sanders*, 556 U.S. 396, 412 (2009) (recognizing that the Veterans Court "sees sufficient case-specific raw material in veterans' cases to enable it to make . . . an informed judgment" on these types of issues).

Second, it is not reasonably likely that Appellants will be subject in the future to the processing times they have previously experienced. This Court's holding in *Ebanks v. Shulkin*, 877 F.3d 1037, 1039 (Fed. Cir. 2017), is directly on point. *Ebanks* held that an appellant would not again be subject to the delays associated with his initial board hearing, because (1) any "hearings on remand are subject to expedited treatment" under 38 U.S.C. § 7112 and (2) any future appeal

will be "subjected to this new [Appeals Modernization Act] regime." *Id*. (citing Pub. Law No. 115-55 (2017)). Similarly, for Appellants here, (1) any appeals remanded by the board are entitled to 38 U.S.C. § 5109B expedited treatment, and (2) any future appeals they file will be governed by the new AMA system. *See* 38 C.F.R. § 19.2 (AMA applies to initial decisions issued on or after February 19, 2019); *contra* App. Br. 56 n.17.

As the Veterans Court indicated, it is entirely "speculative" to assert that future claims governed by the AMA will experience processing times on par with those challenged here. Appx8; *see Murphy v. Hunt*, 455 U.S. 478, 482 (1998) ("theoretical possibility" of recurrence does not suffice); *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975) (likelihood of recurrence "must be something more than an ingenious academic exercise in the conceivable" (internal quotation marks omitted)). The AMA was specifically structured to avoid the sources of delay in the legacy system—chiefly by eliminating redundant reviews and disentangling claim development from appellate consideration. *See* Pub. L. 115-55, § 2(d), (h), (q), (t), (w). For instance, instead of waiting for issuance of an SOC and then having to file a substantive appeal that must be transferred to the board, 38 U.S.C. § 7105(d), 38 C.F.R. §§ 19.35, 19.36 (2016), the AMA allows claimants to appeal initial decisions directly to the board and, if they wish, be placed on a docket reserved exclusively for those who desire an immediate board decision (as opposed

to those who desire additional opportunities to testify or submit evidence), 38 U.S.C. §§ 7105(b)(2)(C), 7107(a)(3).[9] Given the stark differences in these systems, any delay under the AMA would be "materially different" from the legacy system delays being challenged here and, in any event, Appellants would be free to file a new petition if AMA delay were to occur. Appx8.

In their brief, Appellants attempt to avoid *Ebanks*—this Court's governing precedent on mootness in cases of VA appeal delays—by citing cases about procurement contracts and election advertisements, and arguing that "a challenged action can take *years* and still fall within the capable-of-repetition exception." App. Br. 51 (citing cases involving two-year windows for review). But the fact that this exception "can" be invoked in certain contexts does not demonstrate Veterans Court legal error in *this* context—a *delay* case where Appellants are simultaneously alleging that the process at issue is (1) interminably long and yet (2) too short for judicial review. *Compare* App. Br. 6, *with id.* at 51.[10] Moreover, although Appellants brush off *Ebanks* as a case of "too many 'contingencies"' to

[9] Based on Appx666, the direct filing of an NOD with the board would seem to remove 1,418 days of average processing time. *See also* Appx1380 (VA's projections for AMA processing time).

[10] Similarly, although one amicus brief cites other "federal benefits cases" invoking the exception for capable of repetition, yet evading review, none of the circuit cases cited involve an unreasonable delay claim, let alone a change in law (such as the AMA) affecting the likelihood of recurrence. *See* ECF No. 29, at 12-14.

expect recurrence of delay, App. Br. 54 n.15, there are just as many contingencies here: Appellants would have to (1) file a new claim, (2) receive a denial, (3) appeal to the board (as opposed to pursuing other AMA options designed for streamlined resolution, *see* 38 U.S.C. § 5104C), and (4) spend years waiting for the board to draft its—now purely appellate, *see* 38 U.S.C. § 5103A(g) (limiting the duty to assist in AMA cases)—decision.

Appellants also argue that delay will still occur "for the thousands of legacy claimants that remain." App. Br. 50. But the Supreme Court has held that this exception evaluates whether the challenged conduct will recur for the *party in the case*. *Kingdomware Techs.*, 136 S. Ct. at 1976 (examining whether "the same complaining party" will be subject to the same action again); *DeFunis*, 416 U.S. at 319 (where appellant will never again apply to law school, the question at issue "is certainly not 'capable of repetition' so far as he is concerned").

If this case involved a properly certified class, a different analysis may be warranted. *See Ebanks*, 877 F.3d at 1040 (rejecting any exception to mootness for the appellant, but suggesting that the issue could be addressed in a class action); *Monk*, 855 F.3d at 1316-18 (discussing mootness in the class action context). But here, where Appellants did not propose a class that met the requirements for certification, *Monk v. Wilkie*, 30 Vet. App. 167, 181 (2018), *appeal pending* in Fed. Cir. No. 19-1094, Appellants cannot rely on other claimants' situations to exempt

their individual petitions from a finding of mootness. *See generally Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties" (internal quotation marks omitted)).

B. VA Adjudicated These Appeals In The Normal Course, Not As An Attempt To Manipulate This Litigation

The "voluntary cessation" exception to mootness protects against a defendant that might "stop [the challenged conduct] when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013); *see* Appx8 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953)). When considering this exception, the Supreme Court distinguishes between cases mooted in the normal course and cases mooted by a change in the very procedures targeted in the litigation. *See DeFunis*, 416 U.S. at 317-18 (because mootness arose from appellant "register[ing] for his final [law school] term," not from "a unilateral change in the *admissions procedures*" being challenged, exception does not apply).

Here, VA did not advance Appellants' cases or temporarily suspend legacy system procedures in order to moot this litigation; rather, Appellants' cases were mooted by decisions issued in the normal course of proceedings. Appx8 ("[T]he [b]oard is required to consider cases in docket number order, 38 U.S.C. § 7107, and, here, the petitioners' docket numbers were reached."). Thus, the concern

underlying the "voluntary cessation" exception "doesn't fit the situation before the Court." *Id.* (invoking this exception to mootness when VA adjudicates a claim in normal course is like trying "to fit a round peg into a square hole").

Per Supreme Court precedent, this exception also requires consideration of whether the challenged conduct could "reasonably be expected to recur." *Already,* 568 U.S. at 92. As discussed above, *supra* at Argument II.A, consistent with *Ebanks* and given the facts here, it would be entirely speculative to conclude that Appellants (either in any remanded appeals expedited by § 5109B, or in any future appeals governed by the AMA) will again be subject to the processing times they have previously experienced in the legacy system. *See* 877 F.2d at 1039; Appx8.

In their brief, Appellants speak generally about VA "manipulating court proceedings to moot claims before the [court] can rule" on a petition alleging unreasonable delay. App. Br. 53.[11] But, notably, Appellants do not accuse VA of

[11] Appellants are referring to the fact that, when a preventable delay or ministerial error gets called to VA's attention through a petition, VA sometimes has attempted to correct that error or jumpstart processing. This is not "manipulation" but an agency taking corrective action that it agrees is justified. Appellants' assumption that this is a *negative* outcome for claimants is debatable, and Appellants do not grapple with the troubling implication of their position: that VA should be *deliberately refusing to act* on matters that are either fixable errors or cases that are ready for decision in the ordinary course simply because a petition is pending, lest it appear that VA is "manipulating" the court proceedings.

any "bad faith" or any attempt to "pick[ ] off" the claims in this proceeding, Appx8,[12] so it is unclear how these general allegations advance their cause here.

C. As The Law Has Changed, The Court's Prior Expectations For Mr. Monk Do Not Constitute Law Of The Case

Appellants also argue that this Court's declaration in April 2017—that Mr. Monk "will likely be subject to the same average delay" in the processing of his second NOD as his first—is law of the case. App. Br. 55 (citing *Monk*, 855 F.3d at 1318). They are incorrect. Law of the case does not apply where there has been an intervening change in law. *Dow Chem. Co. v. Nova Chems. Corp. (Can.)*, 803 F.3d 620, 628 (Fed. Cir. 2015); *Wopsock v. Natchees*, 454 F.3d 1327, 1333 (Fed. Cir. 2006). The AMA, a complete restructuring of the VA appellate system, was signed into law in August 2017 and effective for initial decisions issued on or after February 19, 2019. *See* Pub. L. 115-55; 38 C.F.R. § 19.2. This fundamentally changes expectations for appellate processing times, including any future appeals filed by Mr. Monk. *See supra* at n.9.

[12] One amicus brief makes this accusation, ECF No. 43, at 3 (charging that VA "changed course" on Appellants' cases "on the eve of the [Veterans Court's] review"), but the timeline here definitively counters such an allegation. Mr. Monk received a favorable decision after the Veterans Court had already decided his petition, Appx1271; Mr. Hudson and Ms. Obie received their requested decisions ten months after the joining this litigation; and Mr. Dolphin received his board decision two years after joining. *See* Appx1271; Appx1249; Appx1204; Appx1313.

D. Appellants Have Received Their Requested Remedy

As a final remark on mootness, Appellants criticize the Veterans Court's comment that "it is not at all clear what the court would order the Secretary to do under these petitioners' theory that their claims are not moot." Appx9; *see* App. Br. 57. They retort that a "remedy is essential," but still do not explain what that remedy would be for Appellants who have received the decisions for which they had petitioned the court. *Id.*

Assuming they desire a judicial declaration of "unreasonable delay" in their cases, such abstract relief is not warranted, let alone compelled as a matter of law. *See Alvarez v. Smith*, 558 U.S. 87, 93 (2009) (where property dispute had been resolved, question of procedure's legality was "abstracted from any concrete" issue and the case was moot); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) (cautioning against unnecessary judicial pronouncement when "the only concrete interest in the controversy has terminated"); *Preiser*, 422 U.S. at 401-02 (as federal courts must only resolve "a real and substantial controversy admitting of specific relief through a decree of a conclusive character," request for declaratory relief was moot) (internal quotation marks omitted); *In re Wick*, 40 F.3d 367, 372 (Fed. Cir. 1994); *Mahl v. Principi*, 15 Vet. App. 37, 39 (2001) (declaration of legal rights "would be nothing more than [an] advisory" opinion).

Alternatively, if they seek the judicial imposition of a mandatory or

presumptive one-year deadline on VA appeal processing, *see* Appx60; Appx100, then that request must fail because a writ of mandamus may not be used to institute broad systemic change to an administrative process through judicial fiat. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004) (mandamus may be used for "enforcement of a specific, unequivocal command, the ordering of a precise, definite act," but not a "broad programmatic attack" (internal quotation marks and citation omitted); *Martin*, 891 F.3d at 1348 (mandamus is "limited to discrete agency action and precludes" a broad declaration on the entire VA appeals process (internal quotation marks omitted)); *see also Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891 (1990) (petitioner "cannot seek wholesale improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58-59 (1973) (respecting "separation of powers by staying our hand" with regard to the "consideration and initiation of fundamental reforms . . . reserved for the legislative processes"); *Martin*, 891 F.3d at 1351 (Moore, J., concurring) ("Under separation of powers, we do not have the authority to require the Secretary to take specific actions to fix" systemic problems; "we are constrained to the facts of the particular cases in front of us.").[13]

[13] This is particularly the case where Congress has recently provided comprehensive legislation in an attempt to remedy the situation. Pub. L. 115-55; *see Bush v. Lucas*, 462 U.S. 367, 388 (1983) (rejecting the "creation of a new

III. Mr. Dolphin's Petition Is Now Moot

At the time of the Veterans Court's decision, Mr. Dolphin had not received a board decision on his earlier effective date appeal. Appx10. As Appellants concede in their brief, he now has received a board decision that, inter alia, granted an earlier effective date for his benefits. App. Br. 11, 49 n.14; Appx1313-1322. Accordingly, the above analysis regarding mootness also applies to his petition. This Court should dismiss his petition as moot.

IV. Alternatively, The Veterans Court Did Not Abuse Its Discretion In Declining To Issue A Writ For Mr. Dolphin

Under the All Writs Act, courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The writ is one of "the most potent weapons in the judicial arsenal" and "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380

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judicial remedy" when Congress has constructed an "elaborate" system "step by step, with careful attention to conflicting policy considerations"); *Cumberland County Hosp. Sys., Inc. v. Burwell*, 816 F.3d 48, 56 (4th Cir. 2016) (questioning whether judicial intervention would improve backlogs and concluding that "the political branches are best-suited to alleviated" delays); *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 476 (D.C. Cir. 1998) (though "frustration with the agencies' slow and faltering pace is understandable . . . , we have no idea what the unintended consequences" would be upon imposing the requested remedy); *Wright v. Califano*, 587 F.2d 345, 356 (7th Cir. 1978) (rejecting judicial intervention for delays where "[n]either the Congress nor the agency has been unmindful of this complex problem" and a judicially-imposed solution could create "more injustice to claimants than justice").

(2004); *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 402 (1976). "[E]xtraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial." *Lamb v. Principi*, 284 F.3d 1378, 1384 (Fed. Cir. 2002) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953)).

Three conditions must be satisfied for a writ to issue: (1) the petitioner must demonstrate a lack of adequate alternative means to obtain the desired relief; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the court must be convinced that the writ is appropriate under the circumstances. *Cheney*, 542 U.S. at 380-81; *Kerr*, 426 U.S. at 403; *Beasley*, 709 F.3d at 1157. Ultimately, issuance of the writ is "a matter vested in the discretion of the court to which the petition is made," *Cheney*, 542 U.S. at 391; *see Kerr*, 426 U.S. at 403, reviewed by this Court for abuse of discretion. *Lamb*, 284 F.3d at 1384; *see Deflanders v. Wilkie*, 794 F. App'x 938 (Fed. Cir. 2019) (nonprecedential) (finding no abuse of discretion in Veterans Court's *TRAC* analysis).

A. The Veterans Court Committed No Legal Error In Applying The *TRAC* Factors To Mr. Dolphin's Circumstances

To determine whether there is a clear and indisputable right to a writ based on allegedly unreasonable delay, "the Veterans Court should look to the *TRAC* factors as guidance." *Martin*, 891 F.3d at 1349. Here, the Veterans Court applied

the *TRAC* factors to Mr. Dolphin's circumstances and found that he had not established a clear and indisputable right to the writ based on unreasonable delay. Appx10-16. To the extent this Court has jurisdiction over that application of the established *TRAC* factors to the particular facts here, 38 U.S.C. § 7292(d)(2); *Beasley*, 709 F.3d at 1158, the Veterans Court did not abuse its discretion in deciding that Mr. Dolphin had not demonstrated entitlement to the writ, *Lamb*, 284 F.3d at 1384.

1. The "Rule Of Reason" Must Consider The Context Of The Delay

The first *TRAC* factor instructs that the time agencies take to make decisions must be governed by a "rule of reason," which "must, of course, look at the particular agency action for which unreasonable delay is alleged." *Martin*, 891 F.3d at 1345. For example, a delay associated with VA performing its statutory duty to assist a claimant in developing the case is more reasonable than a delay associated with VA failing to complete a clerical or ministerial task. *Id.* at 1346.

Here, Mr. Dolphin filed an NOD in November 2014 relating to (1) the disability ratings and effective dates assigned for his six service-connected disabilities (resulting in a 90% overall disability rating), (2) the denial of service connection for four other disabilities, and (3) the denial of TDIU. Appx9. In March 2015, he was provided a DRO hearing, at which he submitted a brief and more than 1600 pages of military and medical records. *Id.*; Appx12.

In June 2015, he received a favorable VA decision on a different claim he had filed—resulting in a 100% overall disability rating, plus SMC, effective February 2015. Appx10. Three more VA decisions on other claims followed in 2015 and 2016. Appx10 n.8; Appx1286. And in 2016, VA obtained 10 medical examinations in order to properly evaluate the disabilities that were the subject of his appeal. Appx12.

In January 2018, he received an SOC and accompanying rating decision that partially resolved his appeal by granting TDIU (effective December 2013), two of the previously-denied claims, earlier effective dates for benefits for six conditions, and increased ratings for two conditions. Appx10. In March 2018, Mr. Dolphin filed a substantive appeal to the board requesting a videoconference hearing; in February 2019, his appeal was certified to the board; and in August 2019, his appeal was placed on the board's docket. *Id.*

Chronicling these circumstances, the Veterans Court noted that Mr. Dolphin's appeal was "complex"—involving a "voluminous claims file" and (between his service connection, disability rating, and effective date disputes) 17 distinct issues. Appx12-14; *see* Appx13 (highlighting that the *list* of relevant evidence in the SOC itself was six pages long). The court recognized that much of the appellate processing time resulted from VA "fulfilling substantive [a]gency actions to comply with statutory duties," such as obtaining evidence and providing

medical examinations pursuant to the duty to assist, reviewing the record evidence, and preparing an SOC. Appx12. The court added that, while processing his appeal, VA was also acting on Mr. Dolphin's other claims—actions that increased his monthly compensation to 100%, plus SMC. *Id.*

Although the "ministerial" task of certification to the board took ten months,[14] the court found that, "on balance," a "significant portion" of the processing time for Mr. Dolphin's appeal was "attributable to VA actions in complying with its legal duties." Appx13. The court added that, given the complexity of Mr. Dolphin's appeal, eight months (at that point) between certification and a board decision was "not too long," though it stressed (twice in its decision) that its ultimate conclusion was based on the "*entire* period that Mr. Dolphin's claims have been on appeal." Appx13-14; *see* Appx14 n.14.

Appellants' primary dispute with the Veterans Court's analysis is that it allegedly "measured the delay in terms of the time that had elapsed since VA's last action, rather than since the start of the appeal." App. Br. 21. But that is not the case. As noted above, the Veterans Court reviewed the entire history of the appeal—and then reiterated, twice, that its determination was based on the entire

[14] Despite this characterization, the Veterans Court has previously recognized that the certification process is not entirely ministerial: there is a substantive step, "pre-certification review," which necessarily takes time and can warrant further development before a claim is transferred to the board. *Godsey v. Wilkie*, 31 Vet. App. 207, 216 (2019).

history of the appeal. Appx9-14; Appx14 & n.4. While Appellants in their brief continue to invoke this argument in different iterations, *see, e.g.*, App. Br. 22 (alleging that the court "slic[ed] and dic[ed]" the "delay into multiple procedural steps"), 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. Appx9-14. This is consistent with *Martin*, 891 F.3d at 1345-46.

Appellants also confuse the Veterans Court's consideration of all the relevant facts here with bright-line holdings. For instance, they argue that the Veterans Court held that "egregious delays are justified whenever a veteran's case is complicated." App. Br. 28. But, the court's consideration of the complexity of Mr. Dolphin's appeal as one factor among many was *not* a holding. Appx9-16. Similarly, they argue that the Veterans Court treated VA's duty to assist "as a blanket excuse for unreasonable delay." App. Br. 30. Again, the court did not render a blanket or *per se* rule on the issue; it simply considered as part of its analysis the time it takes for VA to complete its statutory obligations under the duty to assist, Appx9-16, as *Martin* instructs it to do, 891 F.3d at 1346.[15]

[15] To be clear, the duty to assist in the legacy system is not limited to "one stage of an appeal." App. Br. 30. It evolves with the claim; as new information is received, new records may become "relevant" and new examinations may become "necessary to make a decision." 38 U.S.C. § 5103A(b), (d). The disentangling of the duty to assist and the appellate process in the AMA, 38 U.S.C. § 5103A(e),

Finally, Appellants argue that the court's approach to this *TRAC* factor makes it "almost impossible to conceive of delay that would be unreasonable." App. Br. 22 (quoting Appx22). This is hyperbole. Mr. Dolphin's appeal involved 17 different issues, a need to review over 1,600 pages of medical records, and a need to obtain 10 medical examinations. Appx9-14. Other, less complicated appeals likely would present different expectations for reasonable processing time.

2. Congress Prioritized Multiple Reviews, Development, And An Open Record In The Legacy Appeals System

The second *TRAC* factor considers whether Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed. 891 F.3d at 1345. As the Veterans Court noted, Congress chose to design the legacy appeals system with an emphasis on development, multiple reviews, multiple opportunities to be heard, and an open record, 38 U.S.C. § 5103A, 7105(d)-(e), 7107(b) (2016), and "without providing deadlines for VA determinations or any other secretarial action." Appx14. Moreover, while Congress's enactment of the AMA was a concession that a new framework was required to achieve faster processing, H.R. REP. NO. 115-135 at 2, 5 (2017) (recognizing that delays are inevitable "if the current appeals process is not

demonstrates Congress' recognition that the continual duty to assist in the legacy system (which leads to the feedback loops further described *infra* at Argument IV.C) was a significant structural impediment to efficiency, not a mere talisman that VA invokes to ward off delay claims.

changed," and noting the AMA's purpose to "expedite VA's appeals process while protecting veterans' due process rights"), Congress nonetheless "chose not to impose any deadlines on VA's adjudication of claims." Appx14.

On appeal, Appellants argue that Congress intended for veterans to receive decisions in a timely manner. App. Br. 31 (citing S. REP. NO. 100-439, at 13 (1988) ("A timely decision is at the core of a fair and just determination."")). All other things being equal, that is correct, Appx14, but the actual statutory provisions Congress implemented for the legacy system—ensuring that every VA claimant has multiple opportunities to submit evidence, receive assistance in securing evidence, and obtain an intermediate appellate decision before receiving a final board decision, 38 U.S.C. § 5103A, 7105(d)-(e) (2016)—inherently prioritized process over speed.[16]

3. Mr. Dolphin's Claim Involves Health And Welfare, But He Received 100% Monthly Compensation Plus SMC For The Majority of The Appeal Period

The third and fifth *TRAC* factors evaluate the nature and extent of the prejudice of a delay, with the understanding that delays in the sphere of economic

[16] Appellants also suggest that a statutory term like "expeditiously" can indicate a Congressional expectation for speed. App. Br. 31. We agree, but Congress used the term "expeditious" in 38 U.S.C. §§ 5109B and 7112 to dictate processing for *remanded* appeals—not appeals like Mr. Dolphin's at the time the Veterans Court issued its opinion.

regulation are less tolerable when human health and welfare are at stake. *Martin*, 891 F.3d at 1345. Here, the Veterans Court recognized that disability compensation claims involve human health and welfare. Appx15. But it also noted that, since June 2015, Mr. Dolphin had been receiving the highest level of monthly disability compensation (100%), plus SMC. *Id.*[17] And it noted that Mr. Dolphin had presented no evidence that his basic needs (food, housing, medical care) were "wholly dependent" on the backpay that was at issue in his appeal. *Id.* (quoting *Martin*, 891 F.3d at 1347).

On appeal, Appellants argue that the third factor is a categorical inquiry, and the fifth factor is individualized, such that the Veterans Court should have reserved its comment on Mr. Dolphin's receipt of 100% disability compensation for the fifth factor. App. Br. 33. Then, not more than one paragraph after arguing that the fifth factor looks to the "*individual* veteran," Appellants reverse course and argue that the fifth factor should look "beyond the petitioner's interests." *Id.* In any event, the argument is much ado about nothing: the *TRAC* factors are "hardly ironclad" and these two factors "often overlap." *Martin*, 891 F.3d at 1345-46.

Appellants also argue that "uncertainty" should be considered "as a distinct interest" in the fifth factor. App. Br. 34. It is unclear how this concept brings

[17] As of December 2019, this amounts to $3,476.65 every month. *See* 2020 VA special monthly compensation rates, https://www.va.gov/disability/compensation-rates/special-monthly-compensation-rates/ (last visited Apr. 21, 2020).

something new to the table. There was no dispute that Mr. Dolphin had an interest in receiving a timely board decision, i.e., ending the uncertainty regarding his appeal. But, consistent with the Veterans Court's determination, Mr. Dolphin's uncertainty about his backpay during the delay—as a veteran receiving 100% compensation plus SMC every month—is not as prejudicial as the uncertainty associated with claimants whose "basic necessities" depend on a timely decision. *Martin*, 891 F.3d at 1347; *see* Appx15.

4. VA Is Constrained By Limited Resources; And Expediting One Case Delays Other Equally-Deserving Cases

The fourth *TRAC* factor examines the effect of expediting delayed action on agency activities of a higher or competing priority, with consideration of the practical realities of the burdened veterans' benefits system. *Martin*, 891 F.3d at 1347. In addressing this factor, the Veterans Court first noted that "VA has limited resources and is in a better position than this [c]ourt to decide how to use its fixed resources on other VA activities of a higher or competing priority." Appx15. This statement is consistent with Supreme Court's instruction that "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities," *Mass. v. EPA*, 549 U.S. 497 (2007); *see also Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."), as well as this Court's explanation in *Martin* that

> VA is necessarily constrained by the resources Congress appropriates [and] . . . is in a better position than the courts to evaluate how to use those limited resources. . . . "In short, we have no basis for reordering agency priorities. The agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack."

891 F.3d at 1347 (quoting *In re Barr Labs., Inc*., 930 F.2d 72, 76 (D.C. Cir. 1991)).

The Veterans Court also recognized that "granting Mr. Dolphin's petition will merely shift resources away from adjudicating claims of other veterans who may be in a less favorable position than Mr. Dolphin—who has been receiving compensation benefits at the 100% disability rate." Appx15. Otherwise stated, "his appeal would be advanced ahead of those of other categories of claimants Congress has declared entitled to a higher priority," including those with earlier docket numbers or those who face serious illness or severe financial hardship. Appx16 (citing 38 U.S.C. § 7107(a)(1)-(2) (2016)).

This finding is consistent with this Court's repeated recognition that a judicial mandate ordering VA to attribute resources to a certain claimant or type of claimant may harm other claimants. *Martin*, 891 F.3d at 1347 (granting mandamus "may simply shift a finite number of resources from one pending claim to another"); *Ebanks*, 877 F.3d at 1039-40 (granting mandamus in a "first-come-first-served queue . . . may result in no more than line-jumping" (citing *In re Barr Labs.*, 930 F.2d at 75 ("[A] judicial order putting [petitioner] at the head of the

queue simply moves all others back one space and produces no net gain."))); *Beasley*, 709 F.3d at 1159 (granting mandamus "would necessarily displace other cases that are awaiting adjudication," and encourage use of the writ "as a substitute for the ordinary appeals process. . . . That is not a result that would be beneficial to the system as a whole.").

On appeal, Appellants argue that "limits on an agency's resources do not, in and of themselves, excuse unreasonable delay." App. Br. 35. The Veterans Court, however, never suggested that it did; the court merely considered this factor among the other *TRAC* factors. Appx11-16. Appellants similarly assert that "competing . . . priorities can be outweighed by egregious delay." App. Br. 35. Depending on the circumstances, that could be the case; but the question here was whether *Mr. Dolphin's* circumstances warranted advancing his appeal at the expense of others that Congress has prioritized, i.e., those with earlier docket numbers or those who face serious illness or severe financial hardship.

Appellants additionally argue that VA was required to identify its competing priorities and the effect of advancing Mr. Dolphin's claim on other applications. App. Br. 35. This is unambiguous burden-shifting. *See In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1387 (Fed. Cir. 1996) ("The petitioner has the burden of establishing that its right to issuance of the writ is clear and undisputable."). In any event, VA's resource allocations and agency priorities are no mystery to

Appellants—who presented that publicly-available information below, Appx746-778—and the effect of line-jumping or resource diversion on other veterans is well chronicled in this Court's decisions, *Martin*, 891 F.3d at 1347; *Ebanks*, 877 F.3d at 1039-40; *Beasley*, 709 F.3d at 1159. Even Appellants at one point in their brief recognize the fundamental truth that, "[i]f the [court] mandates more timely dispositions at one stage, delay will merely increase elsewhere." App. Br. 23.[18]

Finally, Appellants argue that line-jumping concerns can be avoided through class certification. App. Br. 36. That may be, but it requires Appellants to propose a class that meets the requirements for class certification, which they did not do

[18] This is why Appellants' charge that VA "inaction" accounts for "45% to 76% of the total time for each phase in the appeals process" is misleading. App. Br. 8 (citing Appx595). VA does not have the resources to act on all appeals simultaneously. Nor would VA somehow gain this capability in response to a hypothetical system-wide judicially created deadline. When VA employees are not acting on one appeal, it is because they are acting on other claims or appeals. Certainly, there is always at least some room for increased efficiency, but even the report providing that statistic explicitly acknowledges that periods of inactivity are generally the result of VA's limited resources and resource-allocation choices. Appx597.

Succinctly stated, we vehemently dispute any notion that VA deliberately allows preventable delays to fester, or that VA can simply will itself to adjudicate appeals faster. In fiscal year 2018, the board (after onboarding 242 new employees) issued 85,288 decisions—the most decisions in its history, and 33,000 decisions more than the previous year—and the board *still* had 137,383 cases pending. Appx676; Appx651. The passage of the AMA constitutes recognition from Congress and the President that the statutory structure of the appeals system, not VA efforts or resource allocations, has been the primary inhibitor of timely appeal processing. *See* H.R. REP. 115-135, at 4-5.

here. *See Monk*, 30 Vet. App. at 181, *appeal pending* in Fed. Cir. No. 19-1094. Although Appellants assert that the Veterans Court "cannot have it both ways," App. Br. 36 (internal quotation marks omitted), it is completely appropriate for the court to deny class certification for reasons specific to the dynamics of the class being proposed (e.g., lack of commonality) and then to consider, in a *TRAC* analysis for the named petitioner, the effects of advancing that petitioner's appeal ahead of others. The implication of Appellants' argument—that the Veterans Court must either certify their class or ignore the fourth *TRAC* factor—disregards the distinct law that governs these two distinct issues.

5. The Veterans Court Never Suggested That Agency Impropriety Was Required

Finally, the sixth *TRAC* factor instructs that a court need not find "any impropriety lurking behind agency lassitude" to hold that agency action is unreasonably delayed. *Martin*, 891 F.3d at 1348. Appellants allege that the Veterans Court undermined this factor by holding that "VA's good faith efforts justify its delay." App. Br. 36. It did not. The court recognized this factor's instruction, noted no allegations of VA bad faith, and concluded that the "sixth factor *does not favor either party*." Appx16 (emphasis added).

B. The Veterans Court Did Not Undercut *Martin* Or Resurrect *Costanza*

Throughout its brief, Appellants characterize the Veterans Court's decision

as imposing a "total inaction" requirement on delay claims and "effectively reinstat[ing]" the *Costanza v. West*, 12 Vet. App. 133 (1999), standard that this Court discontinued in *Martin*. App. Br. 27-28; *see id.* at 21 (alleging that the court "re-imposed the unlawful and impossibly high *Costanza* standard in everything but name"). They assert that the Veterans Court '"focuse[d] solely on the VA's interests at the expense of the veteran's interests," a "core defect of the *Costanza* standard." App. Br. 23-24 (quoting *Martin*, 891 F.3d at 1345). These arguments misconstrue the court's decision.

As discussed above, the court examined all six *TRAC* factors and held that—given the complexities of Mr. Dolphin's appeal, the legal duties with which VA had to comply, Congressional intent, VA's other priorities, Mr. Dolphin's circumstances, and other veterans' interests—this particular delay was not unreasonable. Appx9-14. To be clear, it chronicled both Mr. Dolphin's interest and VA's interest—the "balanced approach" prescribed by *Martin*. 891 F.3d at 1345. Contrary to Appellants' allegation, the court did not hold or even suggest that it was rejecting Mr. Dolphin's petition because he "could not demonstrate there was 'no action whatsoever on the part of VA.'" App. Br. 27. Indeed, Appellants are forced to argue about an "implicit" or "sub silencio" resurrection of *Costanza* because the actual decision below does not support their argument. App. Br. 16, 28.

Furthermore, although the Veterans Court discussed one of its recent precedents where there was "no action whatsoever" on appeals awaiting certification and the court found unreasonable delay, Appx14 (citing *Godsey*, 31 Vet. App. at 228), drawing that contrast is certainly not reinstating *Costanza*. Indeed, *Martin* explicitly invited the court to draw such a contrast. *See* 891 F.3d at 1345-46 ("The 'rule of reason' analysis may also consider whether the delays complained of are based on complete inaction by the VA, or whether the delays are due in part to the VA's statutory duty to assist a claimant in developing his or her case."). There is no reasonable basis to preclude the Veterans Court from reviewing other precedents on "unreasonable delay" to inform a decision on the delay claim before it.[19]

C. Mandamus Statistics Provide No Insight On The Veterans Court's Fidelity to *Martin*

Appellants also assume that the Veterans Court "has misinterpreted *Martin*" based on statistics that it "has denied every single mandamus petition except one" since *Martin*. App. Br. 3. At the outset, it must be stated that this one petition was

[19] One amicus brief argues that "if an 18-month delay is *per se* unreasonable for one thing" (pre-certification review, as held in *Godsey*), it does not follow "that another delay is reasonable for something else, like Appellant Dolphin's five-year-delay in his [board] appeal." ECF No. 29, at 3. We agree, but it gives short thrift to the Veterans Court's analysis to allege that this was the court's logic.

a class action involving 2,305 VA benefit claimants.[20] *See Godsey*, 31 Vet. App. at 226-30. But, more importantly, even under the *TRAC/Martin* standard, there are multiple reasons why petitions are not easily granted: (1) the Supreme Court has declared mandamus to be a drastic remedy, only for use in extraordinary situations, *Cheney*, 542 U.S. at 380; (2) the Supreme Court has declared that writs are not to be used as a substitute for the appeals process, *id.* at 380-81; (3) this Court has recognized that pushing one claim ahead in VA's queue stalls other equally-deserving claims, *Martin*, 891 F.3d at 1347; *Ebanks*, 877 F.3d at 1039-40; *Beasley*, 709 F.3d at 1159; (4) this Court has recognized that the statutes governing the legacy appeals system provide multiple stages of development, review, and opportunities to be heard—and VA compliance with those duties takes time, 891 F.3d at 1345-46, and (5) when a more ministerial error comes to VA's attention through a petition, VA's general approach has been to correct that error, which benefits the claimant but generally moots the petition, *see generally Monk*, 855 F.3d at 1320-21. For these reasons, statistics regarding the number of petitions granted at the Veterans Court provide no insight on that court's fidelity to *Martin*.[21]

[20] This number is chronicled in the Oct. 9, 2019, docket entry for Vet. App. No. 17-4361, available at http://m.uscourts.cavc.gov/Dockets.php.

[21] One amicus brief asserts that dozens of nonprecedential Veterans Court decisions have been applying *TRAC* in a "formulaic" and "rote" manner with "little more than a cursory analysis" and insufficient "truly unique sentences." ECF No. 45, at 5-6. The examples amicus cites are six- and ten-page decisions providing

Appellants appear to read Judge Moore's concurrence to advocate for a general increase in granted petitions. *See* App. Br. 20 (citing 891 F.3d at 1351-52 (Moore, J., concurring) (with the issuance of *Martin*, "veterans should have a much easier time forcing VA action through the mechanism of mandamus")). But Judge Moore was primarily referring to cases waiting for the completion of "ministerial" tasks in a "non-substantive stage" of the appeals process. *Id.* at 1352; *compare id.* at 1350 ("[I]t is understandable that preparing the statement of the case, and other substantive steps in the process, may take significant amounts of time."). Between the *Godsey* class action, RAMP, and the AMA, fewer claimants are waiting in a non-substantive stage than ever before.[22]

D. Appellants' Invocation Of The *Gardner* Doctrine Is Inapposite Here

Appellants also invoke Congress's general solicitude for veterans, and *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994) (stating in dicta that "interpretive

full *TRAC* analyses. *See id.* at 5. Judges "have wide latitude in deciding . . . how to write an opinion," *Bernklau v. Principi*, 291 F.3d 795, 801 (Fed. Cir. 2002), and, if the petitioners in those cases thought their decision contained a deficient *TRAC* analysis, they had an opportunity to appeal.

[22] *Godsey* compelled VA action on certain appeals awaiting board certification, 31 Vet. App. at 231; RAMP allowed legacy appellants to opt-in to the AMA system, 38 C.F.R. § 3.2400(c)(1); Appx1416-1417; and the AMA provides for direct filing of appeals with the board (i.e., no certification stage), 38 U.S.C. § 7105(b)(2)(C). Given these and other developments, the board is projecting that all legacy appeals will receive a board decision by 2022. *See* Appx1361.

doubt must be resolved in the veterans favor"), to argue that there should be a lower threshold for "unreasonable" delay in VA cases than in other agency delay contexts. App. Br. 24-25.

Under *TRAC*, however, each case must be considered on its distinct circumstances. *Martin*, 891 F.3d at 1346 n.10; *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984).[23] While Appellants invoke multi-year delays found unreasonable in different contexts, *see* App. Br. 25-26 (citing cases involving, e.g., delay in an Occupational Safety and Health Administration rulemaking on a chemical presenting significant risk of grave danger, and delays in visa processing exceeding Congress's explicit mandate of a 9-month time limit), that in no way demonstrates that the Veterans Court committed legal error in its assessment of this case. *See Martin*, 891 F.3d at 1346 (the "rule of reason" for VA delays is "best left to the discretion of the Veterans Court").

Appellants cannot rely on decisions finding that three years of delay is "too long" in a certain context, and declare that, because of *Gardner*, a three-year delay

[23] One amicus brief chronicles the appellate plights of multiple unnamed claimants. *See* ECF No. 38, at 6-8. A writ for Mr. Dolphin, however, cannot be premised on the fact-patterns of other claimants; "[e]ach mandamus petition should be based on the facts of that particular case." *Martin*, 891 F.3d at 1346 n.10; *see id.* at 1351 (Moore, J., concurring) ("[W]e are constrained to the facts of the particular cases in front of us.").

must also be, *per se*, too long in the veterans context. *Contra* App. Br. 26 (reasoning that, if a certain delay is unreasonable outside the veterans' context, then the Veterans Court must have "erroneously interpreted *TRAC*"). While the length of delay certainly matters in a *TRAC* assessment, it cannot be assessed in a vacuum. Appx11 (rejecting Appellants' argument that the first *TRAC* factor should examine "the length of delay" but "not the VA's level of activity").

Similarly, Appellants argue that, despite the continuous steps by VA here, "there must be some limit to the time" for a board decision, i.e., that "[t]here is a point when the court must let the agency know, in no uncertain terms, that enough is enough." App. Br. 29 (internal quotation marks omitted). In *Martin*, however, this Court was clear that there is no "hard and fast rule with respect to the point in time at which a delay becomes unreasonable," and that unreasonable delay determinations are "best left to the discretion of the Veterans Court" on a case-by-case basis. 891 F.3d at 1346. As such, the Veterans Court was certainly within its discretion to decline to impose a hard and fast timeline on this case or on appeals generally. Appx11 n.11 (request for 12-month deadline for appeal processing is "out of step with *Martin*"); *see also Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 184-85 (D.D.C. 2014) ("[B]ecause context means everything in assessing an alleged undue delay, there is no *per se* rule as to what amount of time constitutes undue delay.").

V. After Performing A *TRAC* Analysis, The Veterans Court Was Not Required To Perform A Separate Due Process Analysis

Petitioners also argue on appeal that the Veterans Court erred when it complied with this Court's statement in *Martin* that a court "employing the *TRAC* analysis . . . need not separately analyze the due process claim based on that same delay." Appx17 (citing *Martin*, 891 F.3d at 1348-49); *see* App. Br. 47-48. *Martin* unambiguously forecloses that argument.

In *Martin*, the nine petitioners raised claims of both unreasonable delay under 38 U.S.C. § 7261(a)(2) and unconstitutional deprivation under the due process clause of the Fifth Amendment. 891 F.3d at 1342. This Court found the *TRAC* standard appropriate for evaluating unreasonable delay, and then held that, "[i]f the Veterans Court, employing the *TRAC* analysis, finds a delay unreasonable (or not unreasonable), it need not separately analyze the due process claim based on that same delay." 891 F.3d at 1348-49. In support, it noted that a delay claim based on due process

> is essentially no different than an unreasonable delay claim; indeed, if there is any difference at all, it is that an unreasonable delay claim would likely be triggered prior to a delay becoming so prolonged that it qualifies as a constitutional deprivation of property.

Id. at 1348 (quoting *Vietnam Veterans of Am. & Veterans of Modern Warfare v. Shinseki*, 599 F.3d 654, 660 (D.C. Cir. 2010)).[24]

Thus, the Veterans Court committed no legal error when it evaluated Mr. Dolphin's "unreasonable" delay claim in lieu of a (due process) "unconstitutional" deprivation analysis.[25] Nonetheless, we address herein Appellants' due process contentions based on the *FDIC v. Mallen*, 486 U.S. 230 (1988), factors: (1) the private interest and harm at stake; (2) the government's justification and the underlying governmental interest; and (3) the likelihood that the interim decision may have been mistaken.

A. Mr. Dolphin Has An Interest In Timely Adjudication Of His Appeal, But Already Receives Maximum Monthly Compensation From VA

As to the first *Mallen* factor, the private interest and harm at stake, we discussed this issue *supra* at Argument IV.A.3. Mr. Dolphin's interest in obtaining timely adjudication of his earlier effective date appeal was not in dispute.

[24] Appellants' attempt to show differences in the two tests suggests that it is easier to prove unconstitutional delay than unreasonable delay. App. Br. 47 (suggesting that the agency's priorities have less weight in a due process inquiry). Such an outcome would be quite bizarre. *See Vietnam Veterans of Am.*, 599 F.3d at 660 (cautioning against "unnecessary constitutional decisions when a statutory ground for the decision would do").

[25] On a related note, one amicus brief criticizes the Veterans Court for "grafting the *TRAC* factors wholesale from the rulemaking context to the veterans' appeals context." ECF No. 38, at 23. To be clear, that decision was *Martin*'s, not the Veterans Court's.

Nevertheless, while waiting for that adjudication, he had been receiving the maximum monthly VA compensation (100%) plus SMC since June 2015.

Addressing this factor, Appellants highlight the amount of the retroactive payment at issue, Mr. Dolphin's unemployability, and cases recognizing the hardship of unemployability. App. Br. 41 (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), and *Jones v. City of Modesto*, 408 F. Supp. 2d 935 (E.D. Cal. 2005)). These cases are not on point.

Jones involved an appellant who did not receive a hearing on his business's suspension until after the suspension was over, leaving him without "any income" for two months. 408 F. Supp. 2d at 954-55. In contrast, Mr. Dolphin received multiple decisions on his multiple claims for benefits, such that he was receiving 100% monthly compensation plus SMC while waiting for a final board decision on retroactive payment. In *Loudermill*, the Supreme Court noted the burdens of unemployment, but held that the mere assertion that a certain delay "is too long to wait" does not demonstrate a due process violation, particularly where the delay "stem[s] in part from the thoroughness of procedures." 470 U.S. at 547.[26]

[26] Appellants also cite *Schroeder v. Chicago*, 927 F.2d 957, 960 (7th Cir. 1991), for the proposition that "at some point delay must ripen into deprivation." App. Br. 42. But, for Mr. Dolphin's case, the more instructive portion of *Schroeder*—which rejected the due process claim it was presented—is its discussion of retroactive payment. *See* 927 F.2d at 960 ("[A] loss of the time value of money, consequent on delay in receiving money to which one is entitled, is not considered an

B. The Government's Interest Is A Balance Between Timely Adjudication And Sufficient Process To Help Substantiate Claims

As to the second *Mallen* factor, the government's justification and the underlying governmental interest, we have discussed this issue *supra* at Argument IV.A.4. VA has no interest in keeping claimants in a legacy appeals system that is overburdened, complex, non-linear, and broken. Appx615; Appx654. Over the past decade, VA advocated for a more streamlined system and worked with stakeholders to strike the compromises that ultimately formed the basis of the AMA. H.R. REP. NO. 115-135, at 5; Appx615-616. And since enactment of the AMA, VA has taken advantage of test periods and opt-in provisions, Pub. L. 115-55, §§ 2(x)(5), 4(a), to move as many claimants as possible into the AMA system, Appx657; *see* Appx1287 (noting that RAMP was offered to Mr. Dolphin).

For those appeals still governed by the legacy appeals system, however, VA is bound by that system's statutory mandates.[27] And, as discussed above, that system was structured by Congress with beneficent intentions: to ensure that claimants are afforded every opportunity to substantiate their claim, with VA liberally construing the claim, generating evidence, providing assistance, and

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irreparable harm, even though it is a real loss.").

[27] To the extent Appellants believe that VA can simply "implement regulations that would accelerate the agency review process," App. Br. 43 (quoting *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 491 (3d Cir. 1980)), they overlook the statutory mandates, which VA cannot alter, that set the contours of the legacy system.

reconsidering potential entitlement at every step of the process. *See generally Henderson v. Shinseki*, 562 U.S. 428, 431-32 (2011); *Hodge v. West*, 155 F.3d 1356, 1362-63 (Fed. Cir. 1998). It is Congress's prerogative to balance the scales between process and speed in the veterans' benefits system. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985) ("legislatures must be allowed considerable leeway to formulate" procedures and "great weight must be accorded to the Government interest" in shaping the veterans' benefits system).

Addressing this factor in their brief, Appellants primarily restate their arguments about *TRAC* factor four in "due process" terms. For instance, they quote *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976), for the proposition that "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard." App. Br. 44. Appellants ignore the next two sentences of *Mathews*, which (1) clarify that "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed," and (2) recognize that resources diverted to certain claimants "may in the end" impact other claimants "since resources available for any particular program of social welfare are not unlimited." 424 U.S. at 348.

Appellants similarly argue that "caseload and backlog" cannot justify a delay, App. Br. 43 (quoting *Kuck v. Danaher*, 600 F.3d 159, 166 (2d Cir. 2010)),

but the leading case they cite involved a purported "backlog" for 40 appeal hearings per year. 600 F.3d at 166-67 (finding that the circumstances did not reflect an "overburdened bureaucracy"). In fiscal year 2019, the board had a backlog despite holding 22,495 legacy appeal hearings. Appx1368. Due process is flexible in light of the demands of the particular situation. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

C. The Supreme Court Has Eschewed The Type Of Statistics On Erroneous Decisions In Open-Record Systems That Mr. Dolphin Presents Here

Though the third *Mallen* factor examines "the likelihood that the interim decision may have been mistaken," 486 U.S. at 242, it requires more than rote recitation of statistics. In fact, *Mallen* did not address statistics in its analysis at all. *Id.* at 244-45. Rather, this factor is about examining the "fairness and reliability" of existing procedures to ensure that any deprivations before a hearing are not arbitrary. *Mathews*, 424 U.S. at 343; *see Mallen*, 486 U.S. at 244 (addressing this factor and concluding that initial "probable cause" finding ensured that the suspension was "not arbitrary"); *see also Gilbert v. Homar*, 520 U.S. 924, 931 (1997) (addressing this factor and concluding that procedures surrounding arrest and filing of charges provide "adequate assurance" that suspension is not "baseless or unwarranted"); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993) (addressing this factor and concluding that existing procedure "affords little

to no protection" to individuals).

Here, the legacy system—imposing duties on VA to apply the benefit of the doubt rule and provide a statement of reasons in all decisions, continually accept and consider all evidence, continually assist with evidence gathering, and specifically issue an intermediate appellate decision, 38 U.S.C. §§ 5103A, 5104(b), 5107(b), 7105(d)-(e) (2016)—provides sufficient safeguards against arbitrary initial decisions. The system ensures that an individual receives "*some* form of hearing"—with "the opportunity to present his case and have its merits fairly judged"— before being "finally deprived of a protected property interest," which is all due process requires. *Logan v. Zimmerman Brush*, 455 U.S. 422, 433 (1982) (internal quotation marks omitted).[28]

Appellants attempt to prove their argument on this factor through statistics, arguing that "[n]early 80% of RO decisions were not fully affirmed in Fiscal Year 2018." App. Br. 46 (citing Appx672). But that misreads the statistic cited, because only 10-11% of RO decisions are appealed, i.e., there is no indication of

[28] It is important to emphasize here that, at the time of the Veterans Court's decision, Mr. Dolphin had received (1) a decision assigning an effective date for his benefits, Appx468-476, and (2) a second decision, specifically responsive to his arguments on appeal, that assigned an earlier effective date, Appx370-440 (SOC). He believes that VA's delayed issuance of a *third* decision on this matter constitutes a constitutional deprivation.

claimant disagreement with 89-90% of RO decisions issued. *Veterans' Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. On Disability Assistance and Mem'l Affairs, H. Comm. on Veterans' Affairs*, 114th Cong. at 5 (2015) (statement of Beth McCoy, Veterans Benefits Administration Deputy Under Secretary for Field Operations) (noting that 10-11% of claimants disagree with their initial rating decision, and 4-5% ultimately proceed to the board).

Moreover, Appellants' statistics on this matter are inherently skewed by the fact that the majority of board remands and reversals in the legacy system "are the result of the pro-claimant open record that allows new evidence to be submitted or obtained up until" board adjudication. *Why Are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans' Disability Benefits Claims: Hearing Before Subcomm. On Disability Assistance and Mem'l Affairs, H. Comm. on Veterans' Affairs*, 113th Cong. at 8 (2013) (statement of Laura Eskenazi, Principal Deputy Vice Chairman of the board); *Veterans' Dilemma*, 114th Cong. at 6 ("[T]wo-thirds of [board remands] are due to additional evidence received after [appeals] have been certified to the [b]oard").

This open-record system means that *correct* RO decisions often turn into remands or reversals due to evidence submitted and arguments proffered later in the legacy appeals process. Mr. Dolphin's recent board decision provides an

example. VA decisions in 2014 and 2018 may have assigned correct ratings for his conditions, Appx468-476, but his recent assertions that the conditions had worsened prompted a board remand, Appx1317.

It is precisely this ability to continue to develop a claim as it proceeds through the system that has caused the Supreme Court to eschew statistics, like Appellants have presented, of reversal rates in an open-record system. *Mathews*, 424 U.S. at 346-47 (statistics on reversal "rarely provide a satisfactory measure of the fairness of a decisionmaking process" and are "especially suspect" where "the administrative review system is operated on an open file basis"). Other statistics may provide a better measure of accuracy and claimant-satisfaction with initial decisions. *See Veterans' Dilemma*, 114th Cong. at 5; Veterans Benefits Administration Reports (noting issue-level accuracy rate of 95.36 percent in the last twelve months), https://www.benefits.va.gov/reports/detailed_claims_data.asp (last visited Mar. 26, 2020). And for those initial decisions that are indeed erroneous, as noted above, VA's duty to assist in the legacy system increases the likelihood that such decisions will be corrected in an SOC—even before the board's review—and thus provides a "further safeguard against mistake." *Mathews*, 424 U.S. at 346-47 (explaining that notice, access, and opportunity to submit evidence and argument provide a "further safeguard against mistake").

Finally, Appellants assert that "there is now unequivocal evidence that the interim decision in Mr. Dolphin's case was in fact mistaken," as reflected in the board's recent award of an earlier effective date on appeal. App. Br. 46. Even assuming that the prior decision was mistaken,[29] as indicated above, this factor does not incorporate assessing particular outcomes with hindsight. The legacy appeals system is sufficient to ensure that any deprivations before Mr. Dolphin's board decision were not arbitrary, and that's all that *Mallen*—per the actual analysis employed in that decision—requires. 486 U.S. at 244.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court dismiss this appeal or, alternatively, affirm the Veterans Court's decision.

[29] The SOC explained that Mr. Dolphin's November 2009 submission was not an "informal claim" because it was submitted for medical treatment purposes, not as an indication of an intent for compensation. Appx428. The board never disputed that logic, instead simply stating that, "resolving all reasonable doubt in favor of the Veteran," it would consider the November 2009 submission as an "informal claim." Appx1346. To the extent the board was overly aggressive in its application of the reasonable doubt doctrine, VA has no avenue to appeal that. *See Am. Legion v. Nicholson*, 21 Vet. App. 1, 8 (2007).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 13,759 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

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