No. 20-1958

IN THE
United States Court of Appeals for the Federal Circuit

AMANDA JANE WOLFE, PETER BOERSCHINGER,
Claimants-Appellees,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellant.

Appeal from the United States Court of Appeals for Veterans Claims, Judges Greenberg, Allen, and Falvey in Case No. 18-6091

BRIEF OF DISABLED AMERICAN VETERANS, PARALYZED VETERANS OF AMERICA, VETERANS OF FOREIGN WARS, AND THE AMERICAN LEGION AS AMICI CURIAE IN SUPPORT OF APPELLEES

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-1958

Short Case Caption Wolfe v. McDonough

Filing Party/Entity Disabled American Veterans; Paralyzed Veterans of America; Veterans of Foreign Wars; The American Legion

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Name: Melanie L. Bostwick

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Disabled American Veterans		
Paralyzed Veterans of America		
Veterans of Foreign Wars		
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4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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STATEMENT OF INTEREST AND INTRODUCTION[1]

Disabled American Veterans (DAV), Paralyzed Veterans of America (PVA), Veterans of Foreign Wars (VFW), and The American Legion (collectively, amici) are congressionally chartered veterans service organizations that advocate on behalf of servicemembers and veterans. *See* 36 U.S.C. §§ 21702, 50302, 170102, 230102.

DAV has more than a million members, all of whom are service-connected disabled veterans. Through its marquee "National Service Program," DAV assists veterans with their claims for benefits from the United States Department of Veterans Affairs.

PVA has approximately 17,000 member veterans living with an injury, disease, or other dysfunction of the spinal cord. PVA provides assistance and representation without charge to members in their pursuit of benefits and healthcare, as well as pro bono legal representation before the federal courts.

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[1] No party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than amicus or its counsel contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

The VFW and its Auxiliary comprise over 1.7 million members. The VFW is the nation's largest organization of war veterans and its oldest major veterans' organization. The VFW was instrumental in establishing the VA, creating the World War II GI Bill and the Post-9/11 GI Bill, and developing the national cemetery system.

The American Legion has over two million members, all of whom are wartime veterans, and operates a number of charitable programs to improve the lives of veterans, their dependents, and survivors.

Amici regularly participate in proceedings before the Court of Appeals for Veterans Claims and submit this brief to explain why mandamus and class action procedures in the Veterans Court are essential to providing effective, timely, and comprehensive relief to veterans.

Amici also address the Secretary's efforts to manufacture new "jurisdictional" barriers to meaningful class relief in the Veterans Court. Accepting those manufactured limitations as hard jurisdictional constraints would profoundly curtail that court's ability to use class actions to provide effective relief to veterans in the face of widespread VA wrongdoing.

ARGUMENT

I. The Veterans Court Has Broad Authority To Craft Effective Relief For Veterans and Protect The Court's Jurisdiction.

Congress established the Veterans Court in 1988 to address longstanding problems at the VA. 38 U.S.C. § 7251; Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4113 (1988). Among other issues, Congress heard testimony that a "common" concern was "[t]he VA [being] inflexible in its interpretation of its regulations and the laws it was charged to administer. There was a suspicion that these interpretations were often driven, not by legal analysis, but by fiscal concerns." Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA Is Brought Kicking and Screaming into the World of Meaningful Due Process*, 46 Me. L. Rev. 43, 46 (1994).

To address that concern (and others), Congress created a court independent from the VA and Board of Veterans' Appeals. The "purpose" of this new court was to "ensur[e] that veterans were treated fairly by the [G]overnment and to see that all veterans entitled to benefits received them." *Taylor v. McDonough*, 2021 WL 2672307, at *7

(Fed. Cir. June 30, 2021) (second alteration in original) (citation omitted). Congress gave the Veterans Court "exclusive jurisdiction to review decisions of the Board." 38 U.S.C. § 7252(a). That review includes "decid[ing] all relevant questions of law, interpret[ing] constitutional, statutory, and regulatory provisions," § 7261(a)(1), "compel[ling] action of the Secretary unlawfully withheld or unreasonably delayed," § 7261(a)(2), or, as most relevant here, "hold[ing] unlawful … rules[] and regulations issued or adopted by the Secretary" if they are "in excess of statutory jurisdiction, authority, or limitations," § 7261(a)(3). The Veterans Court also was afforded broad power to "prescribe" "rules of practice and procedure." § 7264(a).

The Veterans Court thus is authorized to use its powers under §§ 7261 and 7264 to craft effective relief for veterans. As explained below, that authority is bolstered by the All Writs Act, which permits the court to overcome the VA's efforts to thwart judicial review. § I.A. And the Veterans Court can provide relief on a classwide basis to ensure redress for all veterans affected by the VA's errors. § I.B.

A. The Veterans Court has broad authority to correct VA errors that fall within its actual or prospective jurisdiction.

The All Writs Act is an important source of authority for the Veterans Court. That statute allows "all courts established by Act of Congress" to exercise authority "in aid of their … jurisdiction[]." 28 U.S.C. § 1651(a). The All Writs Act "authorize[s] the issuance of writs to protect 'not only ongoing proceedings, but potential future proceedings, as well as already-issued orders and judgments.'" *Burr & Forman v. Blair*, 470 F.3d 1019, 1026 (11th Cir. 2006) (citation omitted). This authority "fill[s] the interstices of federal judicial power when those gaps threate[n] to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985).

"Congress intended that [the CAVC] have and, in appropriate instances, use jurisdiction under the All Writs Act." *Erspamer v. Derwinski*, 1 Vet. App. 3, 6 (1990). In particular, the Veterans Court can issue a writ (such as a writ of mandamus) when doing so "would lead to a [Board] decision over which the [Veterans] Court would have jurisdiction" under 38 U.S.C. § 7252(a). *In re Fee Agreement of Cox*, 10

Vet. App. 361, 371 (1997), *vacated on other grounds sub nom. Cox v. West*, 149 F.3d 1360 (Fed. Cir. 1998).

Thus, the Veterans Court's authority "extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943). This ability to protect "prospective jurisdiction," Appx16, makes mandamus an "exception[]" to the ordinary rules of finality, giving a court jurisdiction over a case not yet "final" for purposes of appeal. *WMATC v. Reliable Limousine Serv., LLC*, 776 F.3d 1, 8 & n. 6 (D.C. Cir. 2015); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110-11 (2009). Indeed, this well-established use of the All Writs Act would be rendered a nullity if a final decision capable of direct appeal—the very thing the agency's actions or omissions have tried to prevent—were required in all circumstances.

Decades of experience demonstrate the many ways in which the VA has attempted to thwart the Veterans Court's jurisdiction, making it necessary to invoke this protective power. Mandamus is available to address the VA's unacceptable delay. *E.g.*, *Cox*, 149 F.3d at 1365-66; *Ebanks v. Shulkin,* 877 F.3d 1037, 1039-40 (Fed. Cir. 2017); *Martin v.*

O'Rourke, 891 F.3d 1338, 1343-44 (Fed. Cir. 2018); *Godsey v. Wilkie*, 31 Vet. App. 207, 227-29 (2019). It is available when the VA violates, or threatens to violate, the rights of a veteran while processing his claim. *E.g.*, *Moore v. Derwinski*, 1 Vet. App. 83, 84-85 (1990). It is available when the VA refuses to issue a final Board decision. *E.g.*, *Rosinski v. Wilkie*, 31 Vet. App. 1, 11-12 (2019). And it is available to address the VA's unilateral attempt to stay a class of cases pending appellate review of a decision the Secretary disagrees with. *Ribaudo v. Nicholson*, 20 Vet. App. 552, 560-61 (2007), *abrogated on other grounds by Martin*, 891 F.3d 1338.

This partial accounting of VA obstruction should not be deemed exhaustive. There are many ways in which an "agency deliberately [seeks] to insulate its policy choices from court oversight." Bryan Clark & Amanda C. Leiter, *Regulatory Hide and Seek: What Agencies Can (and Can't) Do to Limit Judicial Review*, 52 B.C. L. Rev. 1687, 1688-91 (2011). Accordingly, as Ms. Wolfe explains, the Veterans Court must retain the latitude to address *any* action or omission on the VA's part that interferes with the court's actual or prospective jurisdiction. Wolfe Br. 33.

B. The Veterans Court also has authority to provide classwide relief.

The Veterans Court is not limited to using the All Writs Act in individual cases. In *Monk v. Shulkin*, this Court recognized that the Veterans Court also has broad authority to use a "class action or similar aggregate resolution procedure" to provide relief to veterans. 855 F.3d 1312, 1318 (Fed. Cir. 2017) (*Monk II*). The Secretary had correctly "concede[d] that the Veterans Court" has such authority because, as this Court explained, "the All Writs Act, other statutory authority, and the Veterans Court's inherent powers" all supported the court's ability to certify a class. *Id.*

The Court emphasized that the All Writs Act could "form[] the authoritative basis to entertain a class action" in the Veterans Court. *Id.* As a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law,'" the All Writs Act "has provided authority to aggregate cases in various contexts." *Id.* One of those contexts is when class treatment is necessary to "fill gaps" that "would thwart" a court's "jurisdiction." *Id.* at 1318-19. In other words, the All Writs Act authorizes the Veterans Court to protect its

jurisdiction—actual or prospective—over both individual veterans or classes of veterans, as necessary.

The Veterans' Judicial Review Act itself supports this authority. It authorizes the court to "conduct[]" its "proceedings … in accordance with such rules of practice and procedure as the Court prescribes." *Monk II*, 855 F.3d at 1319 (quoting § 7264(a)). That "express authority" signaled Congress's intention to preserve at least the "class action protection for veterans" that existed prior to the enactment of the Act. *Id.* at 1319-20 (collecting examples where "veterans seeking to enforce veterans benefit statutes were able to file class actions" even "[b]efore the [Veterans' Judicial Review Act]"). That is, nothing in the Veterans' Judicial Review Act signaled "that Congress intended to *remove* class action protection for veterans." *Id.* at 1320. The Veterans Court thus is empowered to use class actions to craft effective relief to correct "systemic error" by the VA. *Id.* at 1321; *accord Taylor*, 2021 WL 2672307, at *6-7.

II. The Veterans Court Properly Provided Classwide Relief.

Ms. Wolfe's class action petition asked the Veterans Court to use its authority to confront a "startling" problem: an agency wrongly

interpreted an unambiguous directive from Congress, received a binding court decision telling the agency it was wrong, and nonetheless revised its regulations to accomplish the same result the Veterans Court held unlawful. Appx2. What's more, the agency also told hundreds of thousands of veterans that its original interpretation of the law was correct (and therefore that they were not entitled to compensation guaranteed to them by statute). Appx2, Appx17-18. Faced with this "extraordinary" and "unacceptable" situation, Appx2, the Veterans Court could take jurisdiction over Ms. Wolfe's class action petition and award classwide relief to veterans who were wrongly denied reimbursement of emergency medical expenses.

A. The Veterans Court correctly exercised jurisdiction over Ms. Wolfe's class action petition.

Ms. Wolfe's class action petition challenged the validity of a VA regulation, 38 C.F.R. § 17.1005(a)(5), as inconsistent with a statute, 38 U.S.C. § 1725(a). That entirely typical challenge falls squarely within the Veterans Court's jurisdiction. All agree that the Veterans Court would have jurisdiction to review a benefits determination that rested on 38 C.F.R. § 17.1005(a)(5) and, in the course of that review, to set aside the regulation as unlawful. *See* 38 U.S.C. §§ 7252(a), 7261(a)(3).

Assessing the validity of the regulation is therefore within the "prospective and potential jurisdiction of [the] court." *Erspamer*, 1 Vet. App. at 8-9; *see* Wolfe Br. 30-32.

Because of the VA's actions here, the Veterans Court needed to exercise its authority under §§ 7261(a)(3), 7264(a), and the All Writs Act to determine the validity of § 17.1005(a)(5) on a classwide basis. In two critical respects, the Secretary was "thwart[ing] th[is] otherwise proper exercise of [the court's] jurisdiction." *Monk II*, 855 F.3d at 1318; Appx17-18. First, the VA promulgated a regulation that directly defied a precedential decision of the Veterans Court enforcing Congress's unambiguous mandate that the VA "reimburse a veteran … for the reasonable value of emergency treatment furnished the veteran in a non-Department facility," 38 U.S.C. § 1725(a). Appx17. Second, the VA sent misleading communications to hundreds of thousands of veterans about their legal rights. Appx17. Those actions threatened to prevent veterans from pursuing their benefits claims and thus to "stop[] otherwise potentially meritorious appeals from progressing through the system," thwarting the Veterans Court's prospective jurisdiction over final Board decisions. Appx17; *see* Wolfe Br. 33-40.

The Regulation. Although the VA treats § 17.1005(a)(5) as a typical regulation, VA Br. 23-24, it is anything but. In *Staab v. McDonald*, 28 Vet. App. 50 (2016), the Veterans Court struck down a prior regulation that had denied *any* reimbursement to veterans covered by third-party health insurance. The court declared that regulation inconsistent with Congress's unambiguous mandate to "reimburse a veteran … for the reasonable value of emergency treatment furnished the veteran in a non-Department facility," 38 U.S.C. § 1725(a), unless the "veteran's responsibility for payment" would be "wholly extinguished," 28 Vet. App. at 54-55 (citing 38 U.S.C. § 1725(b)(3)). The Veterans Court ordered the VA to "reimburse [veterans] for the portion of their emergency medical costs that is not covered by a third party insurer and for which they are otherwise personally liable." *Id.* at 55.

Instead of doing that, the VA promulgated the regulation at issue here, § 17.1005(a)(5). The regulation categorically denies the very relief the Veterans Court held veterans were entitled to under 38 U.S.C. § 1725, thus "functionally creat[ing] a world indistinguishable from the world [before] *Staab*." Appx2. And, as the Veterans Court explained,

by issuing a sweeping regulation denying relief, the VA communicated that any disagreement with the VA's denial of a claim would be futile. Appx17. In the face of that apparent (but false) futility, "rationally acting claimants"—most of them unrepresented by legal counsel—would of course choose not to continue with the lengthy administrative process to pursue reimbursement. *Id.* Thus, many veterans would never obtain a final Board decision appealable to the Court—a problem that mandamus relief is perfectly designed to remedy.

Misleading Communications. The VA compounded that problem with notification letters stating that the VA was unauthorized to "pay a Veteran's cost shares, deductibles, or copayments associated with their other health insurance." Appx17 & n.109.

Put plainly, these letters told veterans that the law was "exactly opposite" to what the Veterans Court had said it meant. Appx2. And there is every reason to believe "veterans relied on such a misrepresentation … in deciding not to appeal VA decisions that denied reimbursement." Appx2.

The Veterans Court reasonably concluded that these actions interfered with its jurisdiction by discouraging veterans from appealing,

and it thus properly exercised its statutory authority to fashion relief to ensure these veterans' claims would reach its jurisdiction. Appx17, Appx36.

B. Class action treatment of the regulatory challenge is necessary to provide effective relief.

Extending classwide relief to the "hundreds of thousands" of other veterans whose reimbursement claims the "VA has already denied or will deny," Appx20, Appx36, "promot[es] efficiency, consistency, and fairness," while "improving access to legal and expert assistance by parties with limited resources." *Monk II*, 855 F.3d at 1320. And it is a "more efficient and effective vehicle for resolving this case than a precedential decision focused on an individual veteran's case." *Godsey*, 31 Vet. App. at 224.

1. Class treatment avoids the disparate treatment of otherwise similarly situated veterans. As Ms. Wolfe explains (Wolfe Br. 39), when veterans receive a response from the VA informing them that their claims for reimbursement of emergency medical expenses are categorically denied, many are unlikely to pursue an appeal. Without class treatment, most veterans won't get the help they need to determine whether an adverse decision is legally vulnerable. Class

relief affords claimants "with limited resources" access "to legal and expert assistance" to help them evaluate whether their claim is affected by the invalid regulation. *Monk II*, 855 F.3d at 1320.

Statistics from the appeals process illustrate that many veterans will be without expert assistance. The VA reported (in FY 2016) that of the 1.3 million claims submitted by veterans, only 16.6% (or 161,000 claims) were appealed at all. Hugh B. McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. Rev. 277, 285 (2019) [hereinafter "*Balancing Veterans' Rights*"]; *see* Life Cycle of a VA Appeal, Fiscal Year 2016, https://www.bva.va.gov/docs/Life-Cycle-of-a-VA-Appeal-FY2016.pdf. Those appeals capture only a fraction of all denials: other data from the VA indicates that nearly 43% of all claims are denied, McClean, *Balancing Veterans' Rights*, 72 SMU L. Rev. at 285, meaning that hundreds of thousands of denials each year are not appealed at all. Many of these denials are likely erroneous, *id.*, yet there are not enough lawyers or Veterans Service Organization representatives to review those denials and encourage veterans to appeal. Indeed, there are not even enough representatives to cover the

small sliver of appeals (approximately 52,000 in FY 2016) that make it all the way to a Board decision: veterans had no representation in 8.8% of those appeals, and only 14.3% had lawyers. Board of Veterans' Appeals Annual Report, Fiscal Year 2016, at 26, https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2016AR.pdf. The number of Board decisions has increased in recent years (approximately 103,000 in FY 2020), but the representation gap remains. Board of Veterans' Appeals Annual Report, Fiscal Year 2020, at 34-36, 38, https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2020AR.pdf.

As this case illustrates, veterans also cannot rely on the VA for advice. Notwithstanding the VA's obligation to assist veterans in a non-adversarial manner, *see* 38 U.S.C. §§ 5103A, 5107, 5109, here, the agency revealed itself unwilling to inform veterans about the law. It failed to "update its templates for letters" denying a claim despite the decision in *Staab*. Appx11. Even when the VA attempted to correct prior misleading communications, it proposed to "generally acknowledge[] error" without "say[ing] what the error was"—leaving the veteran to figure it out. Appx12. The VA's behavior in this case is

consistent with amici's broader experience. The veterans amici serve often report that they get the run-around even when they take the further step to contact a VA call center to get clarification about a denial.

Even when some veterans (like Ms. Wolfe) manage to challenge invalid regulations on an individual basis, that does not help the vast majority of uncounseled veterans, who are unlikely to learn about such a challenge or to take the necessary steps to preserve their rights. The VA does not notify other potentially affected veterans of pending challenges to VA rules. Rather, the VA "would continue to categorically reject a host of reimbursement claims throughout the pendency of petitioner's direct appeal …, in addition to continuing to mail claimants legally erroneous notifications." Appx18. If those veterans don't pursue an appeal, they won't benefit even if the individual veteran wins a precedential decision invalidating the regulation. And given the time it can take for the individual's appeal to work its way through the system, *see infra* 18-19, the many veterans whose claims are denied in the meantime will miss out.

Class treatment ensures that all similarly situated claimants "are treated alike," *Monk II*, 855 F.3d at 1321, because the class mechanism effectively means that all claimants pursue appeals to the Veterans Court, where they can then be granted relief. No one will miss out solely because they had been misled by the VA into not appealing.

2. The class relief awarded here also helped remedy the lengthy delays veterans otherwise would face.

As this Court has found time and again, "many veterans find themselves trapped for years [at the VA] in a bureaucratic labyrinth, plagued by delays and inaction," *Martin*, 891 F.3d at 1349 (Moore, J., concurring), and face "extraordinary delays" in obtaining Congressionally authorized benefits, *Ebanks*, 877 F.3d at 1040. These delays can deprive veterans and their families of effective relief—or any relief at all. Veterans die while waiting for the Board to act. *Martin*, 891 F.3d at 1349; Wolfe Br. 45. Their spouses may also die, or their minor children may reach age 18 and become ineligible for a parent's benefits. *Martin*, 891 F.3d at 1349-50 (Moore, J., concurring). Meanwhile, veterans who do eventually succeed on appeal to the Board are denied "disability benefits for basic necessities, such as food,

clothing, housing, and medical care" while waiting for a decision. *Id.* at 1347.

Recent information shows modest improvement, but delays still run many months or years. Veterans wait nearly a year for the Board to docket their appeals, and an additional seven-plus months for a decision on their appeal. Board of Veterans' Appeals Annual Report, Fiscal Year 2020, at 30.

Meanwhile, veterans waiting for reimbursement of emergency expenses face extreme hardships. Amici and other veterans service organizations recently explained to the VA that delay here will mean that "hundreds of thousands of veterans continue to suffer severe financial and medical hardships as they wait to be reimbursed," a problem that has "been exacerbated during the COVID-19 pandemic." Letter from Veterans Service Organizations to Sec'y McDonough, at 1 (Feb. 12, 2021), https://www.nvlsp.org/images/uploads/Feb-12-2021_Veterans_Group_Letter_to_VA_Secretary_McDonough_Urging_Withdrawal_of_Wolfe_Appeal.pdf.

Indeed, amici have seen multiple examples of veterans who have been denied or delayed reimbursement for non-VA emergency medical expenses.

Take, for example, one veteran who needed to go to the closest emergency department—a private hospital—after discovering that she could not walk on her own. She was billed $12,738.25 for treatment at the private hospital. Even though it was undisputed that the emergency treatment was medically necessary, that she promptly informed the VA of this event, and that she followed all the steps for reimbursement for non-VA emergency care, the VA still denied her claim. She pressed her case to the Board, where it took five years for the Board to grant her appeal. And even then, she still had to repeatedly call the VA to get reimbursement paid. That payment came just a few months ago, in April 2021—a year and a half after the Board ordered it. In the meantime, the VA's foot-dragging took a toll—the debt had been sent to a collections agency, which compelled the veteran to pay the debt using money she had been saving as she prepared to start school.

There are countless other stories like this one. Another veteran served by amici was denied reimbursement for visiting the emergency room of a private hospital—which he did at the direction of a VA triage nurse who was worried the veteran might have had a brain hemorrhage. The VA's excuse for not reimbursing? The veteran should have gone to a VA hospital—despite the fact that it was 10 pm on a winter night in Wisconsin and no VA hospital was anywhere close.

And still another was denied reimbursement for postpartum care she received—relating to possible complications from her emergency C-section—even though she had been referred to that provider by the VA.

A writ of mandamus—particularly when coupled with class treatment, *Ebanks*, 877 F.3d at 1040—stops the cycle of veterans' claims languishing at the VA and allows the Veterans Court to craft *effective* and *timely* relief. As Judge Reyna recently made clear in his separate opinion in *Monk v. Wilkie*, 978 F.3d 1273, 1278 (Fed. Cir. 2020) (*Monk IV*), class action relief helps counter the sort of "unacceptable" delay that requires "the nation's veterans [to] carry the burden of compounding health and financial implications."

3. A classwide approach is far superior to an individual-claim approach for yet another reason: It ensures prompt enforcement of any decision the Veterans Court makes. Under the approach where an individual like Ms. Wolfe obtains a precedential decision, even veterans who have preserved their rights may not immediately benefit. Rather, "claimants don't have any right to prompt remedial enforcement," because "[f]ull exhaustion of the agency review process, followed by an appeal to [the Veterans] Court, is their only recourse." Appx26. In fact, the Secretary recently "admitted he cannot guarantee VA will find *and* inform each past claimant of the right to appeal previous benefits decisions" following a precedential decision. *Beaudette v. McDonough*, 2021 WL 1526226, at *8 (Vet. App. Apr. 19, 2021).

Moreover, experience bears out that the VA can and will take steps to further extend that delay. Often, the VA will thwart the issuance of a precedential decision—that could help resolve these many outstanding claims—by "mooting claims scheduled for precedential review." *Monk II*, 855 F.3d at 1321; *see also id.* (providing "examples … where the VA offered full benefits to a veteran whose case was scheduled for precedential review, while denying other veterans

benefits on the same grounds"). Or the VA may "circumvent" a precedential decision by effectively preventing veterans from accessing the Veterans Court's jurisdiction. Appx26. After all, *Staab* was a precedential decision, yet the VA's actions following that decision—an erroneous regulation and misleading letters—reveal an intention to circumvent that ruling; "*another* precedential decision" is not likely to solve this problem. Appx26.

This kind of gamesmanship is not possible under a classwide approach, precisely because it allows the Veterans Court "to serve as lawgiver and error corrector simultaneously." *Monk II*, 855 F.3d at 1321. The relief provided here made it much more difficult for the VA to thwart the application of the Veterans Court's decision to other veterans. Appx17-18, Appx26. In one fell swoop, the Veterans Court invalidated all decisions denying reimbursement based on § 17.1005(a)(5), required the Secretary to re-adjudicate those claims for reimbursement, and ordered the Secretary to provide notices correcting earlier communications that had "contained an incorrect statement of the law concerning reimbursement." Appx36. Importantly, this

"resulting relief … could be enforced by *any* class member, … who suffers … error based on VA noncompliance." Appx26.

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In short, the Veterans Court appropriately provided class action treatment. Absent the use of the class action device, "our judicial system" cannot "cope with the challenges of [] mass repetitive wrongdoing." *Skaar v. Wilkie*, 32 Vet. App. 156, 178-79 (2019) (en banc). This case drives home that point: "class action" treatment was necessary to "compel correction of systemic error and to ensure that like veterans are treated alike." *Monk II*, 855 F.3d at 1321. And, in providing that relief, the Veterans Court served its "purpose" by doing everything in its power to "ensure that 'all veterans entitled to benefits receive[] them.'" *Taylor*, 2021 WL 2672307, at *6-7 (citation omitted).

III. This Court Should Dismiss The Secretary's "Jurisdictional" Arguments As Nothing More Than An Effort To Eliminate Meaningful Class Relief In The Veterans Court.

The Secretary does not wholly resist the Veteran Court's authority to provide class relief. Instead, it tries to pick off three broad sets of claimants as not properly within the jurisdiction of the Veterans Court. VA Br. 50-57.

Amici address these arguments in detail because, if accepted as *jurisdictional* constraints, the VA's arguments would risk limiting class actions to a level effectively indistinguishable from the pre-*Monk II* world.

A. The Secretary first maintains that the "Veterans Court lacks jurisdiction over" the set of "'claimants' with claims 'VA has already denied,'" on the theory that "these claims have become final and are no longer subject to appeal." VA Br. 52. That argument strikes at the heart of Veterans Court class actions because these veterans—who failed to appeal as a direct result of the VA's unlawful and misleading actions—need class relief the most.

Nothing the Secretary cites requires excluding these veterans from the class. The Secretary relies on the one-year time limit during which veterans must appeal adverse initial decisions, *see* 38 U.S.C. § 7105(b)(1)(A), and the 120-day limit to appeal adverse board decisions to the Veterans Court, *see id.* § 7266(a). But such provisions are not *jurisdictional*. On the contrary, the Supreme Court has made clear that § 7266(a)'s 120-day limit was not "intended to carry the harsh consequences that accompany the jurisdiction tag." *Henderson v.*

Shinseki, 562 U.S. 428, 441 (2011). The same is true of § 7105(b)(1)(A). *See Skaar*, 32 Vet. App. at 188 (treating failure to appeal to the Board as non-jurisdictional); *Percy v. Shinseki*, 23 Vet. App. 37, 42-43, 45 (2009) (holding predecessor of § 7105(b)(1)(A) non-jurisdictional). To argue otherwise, the Secretary embraces the Veteran Court's decision in *Skaar*, 32 Vet. App. at 186-89, but that decision helps the class, not the VA. *Skaar* recognized (*contra* VA Br. 52) that neither statutory time limit is jurisdictional. *See* 32 Vet. App. at 186 (§ 7266); *id.* at 188 (§ 7105).

Because neither limit is jurisdictional, the Secretary can "waive[] or forfeit[]" them. *Percy*, 23 Vet. App. at 42, 45 (citing *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004)). That's what happened here; as the Veterans Court recently recognized in rejecting the Secretary's motion for a stay pending this appeal, the Secretary raised these timeliness objections "for the first time" in this appeal. *Wolfe v. McDonough*, 2021 WL 1937286, at *6 & n.35 (Vet. App. May 13, 2021). That alone is sufficient basis to reject them. Wolfe Br. 63.

If this Court nonetheless addresses the Secretary's belated timeliness arguments, these class claims still are timely because the

applicable time limits were tolled, in two independent ways. Wolfe Br. 63-64.

First, both deadlines are subject to equitable tolling. *Skaar*, 32 Vet. App. at 186-88; *Sneed v. McDonald*, 819 F.3d 1347, 1351 (Fed. Cir. 2016). While the court did not find it appropriate to toll the class claims in *Skaar*, it recognized that tolling is available when there has been "reliance on incorrect statements by VA officials." 32 Vet. App. at 186-87 (citing *Bailey v. West*, 160 F.3d 1360, 1365-68 (Fed. Cir. 1998) (en banc)); *Bowen v. City of New York*, 476 U.S. 467, 480-81 (1986) (tolling appropriate "[w]here the Government's secretive conduct prevents plaintiffs from knowing of a violation of rights"); *cf. Beaudette*, 2021 WL 1526226, at *8 (agency barred further review altogether).

This case illustrates the circumstances where equitable tolling is appropriate. Here, the VA "effectively rolled back the clock and, *with no transparency*, essentially readopted a position [the court] ha[d] authoritatively held inconsistent with Congress's command." Appx2 (emphasis added). The VA's "secretive conduct," *see Bowen*, 476 U.S. at 480-81, along with its "incorrect statements," *Skaar*, 32 Vet. App. at 186-87—the very actions being challenged here—justify tolling because

those actions dissuaded veterans from seeking further review. *See supra* 11-14. When the Secretary raised his belated timeliness objections in the motion, the Veterans Court rejected them because the VA's "misinformation" and "misrepresentation[s]" justified equitable tolling. *Wolfe*, 2021 WL 1937286, at *8. Indeed, it makes perfect sense to "forgive a potential or denied claimant from ever challenging 'the law' when VA presents it so categorically." Appx17.

Second, "the filing of a class action tolls the statute of limitations" automatically without the need for individualized equitable tolling. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983); *see also Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554-55 (1974). This Court already has applied that rule to class actions filed in another Article I tribunal. *See Bright v. United States*, 603 F.3d 1273, 1274, 1284-90 (Fed. Cir. 2010) (Court of Federal Claims). Other Article I tribunals apply the same rule. *See In re Connaught Grp.*, 491 B.R. 88, 97 (Bankr. S.D.N.Y. 2013). Veterans Court class actions are governed by the same Federal Rule of Civil Procedure 23 considerations that led those courts to apply class action tolling. *See Skaar*, 32 Vet. App. at

189; *Bright*, 603 F.3d at 1285-86. Accordingly, this Court should make clear that such tolling applies in the Veterans Court, too.

Importantly, class action tolling would mean there is not a meaningful number of claimants with expired claims. The class relief ordered here was only with respect to "decisions made under § 17.1005(a)(5)." Appx34, Appx36. As the Veterans Court recognized, that means that "any potential *Wolfe* class member's appeal window would have started, at the earliest, on January 9, 2018, when the challenged regulation became effective." *Wolfe*, 2021 WL 1937286, at *8; *see Reimbursement for Emergency Treatment*, 83 Fed. Reg. 974 (Jan. 9, 2018). When the class action petition was filed on October 30, 2018, the claims of those veterans the "VA has already denied" were timely put before the Veterans Court and, if tolled under *American Pipe*, still would be timely. *See Wolfe*, 2021 WL 1937286, at *8.

B. The Secretary next contends that some veterans with *preserved* claims still fall outside the Veterans Court's jurisdiction because their claims have "not yet been subject to a board decision." VA Br. 54. In the Secretary's view, those veterans must pursue the exact same relief on an individualized basis until the Board decides their

case—a process that takes, on average, "a little over six years," Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. Kan. L. Rev. 513, 532 (2019) (citing 2018 VA Inspector General report)—because the Veterans Court "lacks jurisdiction over a claim *until* it is subject to a board decision." VA Br. 54 (citing 38 U.S.C. § 7252(a)).

This argument is foreclosed by *Monk II*, where this Court "disagree[d] that the Veterans Court's authority is so limited." 855 F.3d at 1320. The Secretary recognizes as much, agreeing that "there are times when the Veterans Court may properly certify a class that includes claims still awaiting a board decision," including "when there is an obstruction to Veterans Court review." VA Br. 54. But it contends that principle has no application here because "the class claims have a clear path to Veterans Court review." *Id.*

That position ignores the Veterans Court's ruling. As explained above (11-14), the Secretary's own actions ensured the path to the Veterans Court would be obstructed. This Court should reject the Secretary's overly narrow conception of what amounts to "obstruction" or "unreasonable delay." VA Br. 54. For the Veterans Court to be able

to "protect[]" its "prospective jurisdiction," it must be allowed to address any obstructions that stand in the way of there being a Board decision in the first place. Appx18; *see Monk II*, 855 F.3d at 1318-20; Wolfe Br. 33, 42-43, 65; *supra* 6-7.

To that end, this Court also should reject the Secretary's suggestion that *Monk II* allowed veterans without a Board decision only the limited relief of "ordering a [Board] decision" in cases of "unreasonable delay." VA Br. 54. *Monk II* focused on the Veterans Court's "authority to 'compel action of the Secretary unlawfully withheld or unreasonably delayed'" because that was the form of VA misbehavior at issue in that case. 855 F.3d at 1320-21 (quoting 38 U.S.C. § 7261(a)(2)). But the provision the Court relied on for that authority, 38 U.S.C. § 7261(a)(2), counts among its neighbors multiple, identically situated provisions authorizing other forms of relief. Each of these provisions—including § 7261(a)(3)'s grant of "authority" to "hold unlawful and set aside … rules[] and regulations"— permits the Veterans Court to grant relief when necessary to protect its jurisdiction. Accordingly, *Monk II* embraces the Veterans Court exercising its § 7261(a)(3) authority in the way it did here—to invalidate a regulation

and extend that relief to a class including "veterans that had not yet received a Board decision." 855 F.3d at 1320-21.

That accords with the Court's discussion of the relevant legislative history of the Veterans' Judicial Review Act, which "suggests that Congress intended that the Veterans Court would have the authority to maintain class actions," including "litigation challenges to VA regulations." *Id.* at 1320 n.4. Indeed, "[b]efore the [Act], veterans seeking to enforce veterans benefit statutes were able to file class actions in some circumstances," *id.* at 1319, including in a case challenging the VA's adoption of a regulation, *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113, 115-16 (N.D. Cal. 1987). And they were able to do so without exhausting the administrative remedies that were the equivalent of obtaining a Board decision here. *Id.* at 121-24; *Skaar*, 32 Vet. App. at 177, 185-86; Wolfe Br. 46. Permitting a class action to go forward here is consistent with this Court's (and the Veterans Court's) understanding that the Act was not meant to "remove" any "class action protection for veterans" when it was enacted. *Monk II*, 855 F.3d at 1320; *see Skaar*, 32 Vet. App. at 177, 186; *Taylor*, 2021 WL 2672307, at *6-7.

For all these reasons, this Court should reject the Secretary's efforts to rebuild the jurisdictional hurdles this Court already addressed in *Monk II*. It is now firmly established that a class may include "veterans that had not yet received a Board decision or had not yet filed a notice appealing a Board decision." 855 F.3d at 1320. This Court should reaffirm that principle and make clear—as the Veterans Court already has, *Skaar*, 32 Vet. App. at 180; Appx18—that it applies just the same in class action challenges to VA regulations.

C. Finally, the Secretary tries to limit the Wolfe Class's ability to challenge § 17.1005(a)(5)'s validity "with respect to deductibles," because Ms. Wolfe's "claim was for reimbursement of a coinsurance obligation alone." VA Br. 55. According to the Secretary, that result is compelled because class representatives are jurisdictionally barred from bringing facial challenges to regulations. VA Br. 55. Here again, the Secretary threatens meaningful class relief by urging a rule that would force veterans pursuing nearly identical relief to go it alone in a series of piecemeal challenges. And here again, this Court should reaffirm an important feature of Veterans Court jurisdiction.

1. The Secretary first argues that the Veterans Court lacks statutory authority to invalidate regulatory provisions in their entirety. VA Br. 55. That is wrong. Section 7261(a)(3) authorizes the Veterans Court to "hold unlawful and set aside … rules[] and regulations" without saying anything to exclude facial challenges. And the Supreme Court has explained that "the Veterans Court's scope of review" under § 7261 "is similar to that of an Article III court reviewing agency action under the Administrative Procedure Act [APA]," *Henderson*, 562 U.S. at 432 n.2, which no doubt encompasses regulatory challenges like the one here. The Veterans Court thus correctly exercises its § 7261 authority to address "a facial challenge to a regulation's validity as contrary to statute." Appx22; *see* Wolfe Br. 66.

The Secretary resists this conclusion but cites no case limiting § 7261(a)(3) to the kind of piecemeal, as-applied challenges he imagines. Instead, the Secretary cites multiple cases establishing the Federal Circuit's authority to entertain direct challenges to VA regulations under 38 U.S.C. § 502. VA Br. 27-29. But that provision establishes only that challenges to VA regulations brought under "title 5"—that is, under the APA itself—may be brought exclusively in this Court.

Accordingly, "the Federal Circuit [has] exclusive jurisdiction over challenges" to regulations only in the sense that § 502 forecloses challenges that "would be brought under the APA in another court." *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1352 (Fed. Cir. 2011); *see* H.R. Rep. No. 100-963, at 28 (1988) ("By vesting jurisdiction of challenges brought *under the APA* solely in the [Federal Circuit], the bill deprives United States District Courts of jurisdiction to hear such matters." (emphasis added)).

That limitation doesn't apply to regulatory challenges in the Veterans Court, which are brought not under the APA but under the Veterans Court's "'exclusive jurisdiction' to review decisions of the Board," whether through the normal appeals process or under the All Writs Act. *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1021-22 (9th Cir. 2012) (quoting § 7252(a)). That the former type of regulatory review is *direct*, while the latter is normally *indirect*, says nothing about the scope of review or relief available for regulatory challenges that do reach the Veterans Court. Rather, the court's "powers include the authority to decide any question of law relevant to benefits proceedings," including all those enumerated in § 7261(a). *See*

Veterans for Common Sense, 678 F.3d at 1022; *Henderson*, 562 U.S. at 432 n.2.

Accordingly, it is not correct that "a direct"—by which the Secretary means § 502—"challenge to the regulation" is necessary to assess facial validity. VA Br. 55; *see* Wolfe Br. 43-44. The Veterans Court can address such facial challenges under §§ 7261(a)(3), 7252, and the All Writs Act once the challenged regulation is applied in the veteran challenger's benefits decision.

2. This Court also should reject the Secretary's related effort to prevent class representatives from bringing facial challenges to regulations as a matter of standing. VA Br. 55-56.

As an initial matter, the Secretary has not explained why the standing requirements that apply in the Veterans Court are *jurisdictional*, where they have been "adopt[ed] as a matter of policy." *Rosinksi v. Shulkin*, 29 Vet. App. 183, 189 (2018) (alteration in original) (citation omitted). Even if standing is jurisdictional, the Secretary's concern—that some class members are harmed in a slightly different manner than Ms. Wolfe, VA Br. 55-56—is not a standing problem. Rather, that issue is best analyzed under the class certification analysis

of Federal Rule of Civil Procedure 23(a). Once the named plaintiff shows she "is entitled to litigate the interests of the class she seeks to represent," the "examination" "shift[s] … from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.'" *Sosna v. Iowa*, 419 U.S. 393, 403 (1975) (quoting Rule 23(a)). As a result, the prevailing view is that "any issues regarding the relationship between the class representative and the passive class members—such as dissimilarity in injuries suffered—are relevant only to class certification, not to standing." *Melendres v. Arpaio*, 784 F.3d 1254, 1261-62 (9th Cir. 2015) (citing Newberg on Class Actions § 2:6).

The Veterans Court extensively addressed the class certification issue below, Appx20-23, and this Court should reject the Secretary's attempts to elevate its analytical quibbles into jurisdictional concerns.

CONCLUSION

The Court should affirm the order of the Court of Appeals for Veterans Claims.

July 20, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. Cir. R. 29(b) and Fed. Cir. R. 32(b), because this brief contains 7000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

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