2020-1958

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 in No. 18-6091, Judge Greenberg, Judge Allen, and Judge Falvey

REPLY BRIEF FOR RESPONDENT-APPELLANT

BRIAN M. BOYNTON
Acting Assistant Attorney General

MARTIN F. HOCKEY, JR.
Acting Director

Of Counsel:

SUSAN BLAUERT
Chief Counsel
Health Care Law Group

JONATHAN KRISCH
UDUAKABASI HENRY
Attorneys
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

ERIC P. BRUSKIN
Assistant Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, DC 20044
(202) 307-5958
Eric.Bruskin@usdoj.gov

Attorneys for Respondent-Appellant

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INTRODUCTION

This appeal centers on the Veterans Court's misuse of the All Writs Act (AWA) to invalidate a substantive veterans' benefits regulation even though the petitioner, Ms. Wolfe, had two adequate means to obtain that desired relief. Ms. Wolfe could have (and can still today) file a 38 U.S.C. § 502 petition challenging VA's promulgation of 38 C.F.R. § 17.1005(a)(5) in this Court, which has exclusive authority to directly review VA rulemaking. She also could have continued to pursue an administrative appeal, which would have led to a final board decision triggering the Veterans Court's jurisdiction and authority to review § 17.1005(a)(5) as applied by the board. Ms. Wolfe decided instead to skip these statutory review processes under the theory that the Veterans Court can, like this Court, directly review VA regulations, albeit under the AWA. The Veterans Court's embrace of this theory and disregard of title 38 are but two of the court's numerous legal errors requiring reversal of the writ. As addressed in our opening brief and further below, these errors also include: (1) overstepping its statutory jurisdiction when it directly reviewed the IFR[1] and remanded class claims with directions that required VA to grant them; (2) treating its potential jurisdiction as if it were actual jurisdiction; (3)

[1] Given Ms. Wolfe's use of "IFR" to denote VA's regulation, we use "IFR" interchangeably with 38 C.F.R. § 17.1005(a)(5) in our reply.

finding a clear and indisputable right to mandamus; and (4) certifying an overly broad class.

Ms. Wolfe spends most of her response painting VA as a nefarious actor. She labels the case "extraordinary" five times just in her summary of the argument. But whether one sees the case as "extraordinary"—and the facts are far more mundane than Ms. Wolfe's retelling suggests—the legal prerequisites for mandamus must be satisfied. The "extraordinary" circumstances precipitating a mandamus petition are, after all, only one of the three factors that must be met under *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-881 (2004). That said, we understand Ms. Wolfe's desire to deflect the Court's attention from the basic legal questions. VA conceded that it sent erroneous notices to members of the Boerschinger proposed class, so it makes sense for Ms. Wolfe to attempt to bootstrap her petition to his. But the Boerschinger notice had very little to do with Ms. Wolfe, and nothing to do with her petition. Ms. Wolfe sought mandamus for one purpose—to invalidate § 17.1005(a)(5) because it conflicts with 38 U.S.C. § 1725(c)(4)(D). *See* Pet. Br. 66. When the court granted her petition, therefore, it did not correct a notice issue, but struck down a substantive regulation outside the bounds of its authority and without due regard for the demanding standard required for mandamus.

ARGUMENT

I. The Writ Does Not Aid The Veterans Court's Exercise Of Jurisdiction

The lone source of the Veterans Court's jurisdiction, 38 U.S.C. § 7252(a), authorizes it to "review decisions of the Board of Veterans' Appeals." *See Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998). The AWA authorizes the Veterans Court to "issue writs in aid of [the] jurisdiction" it already possesses. *Cox v. West*, 149 F.3d 1360, 1364-66 (Fed. Cir. 1998). To pass muster, therefore, the writ must aid the court's review of a final board decision, but this writ does not. VA Br. 18-26. To the contrary, as Judge Falvey correctly recognized, the writ "abrogate[d] the need for" a reviewable final board decision. Appx38.

Ms. Wolfe concedes that her claim (and those of most class members) is not within the Veterans Court's *actual* jurisdiction because she had no final board decision, but contends it does not matter for two reasons. First, she argues that the writ aided the court's exercise of prospective jurisdiction. *Id.* at 30-40. Second, in the alternative, she argues that the writ aided the court's exercise of its "prior jurisdiction." *Id.* at 40-41. Neither argument works.

A. The Writ Does Not Protect The Veterans Court's Jurisdiction

To start, Ms. Wolfe argues that class claims, including hers, fall within the Veterans Court's prospective jurisdiction because they were pending at the agency.

Pet. Br 29-31. This is largely uncontested.[2] VA Br. 20-24. But even when a claim is within the "potential jurisdiction of the appellate court[,]" that is not enough—mandamus is only appropriate where the court's exercise of actual jurisdiction "might otherwise be defeated" without it. *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966).

On this score, the Veterans Court concluded the IFR might defeat its actual jurisdiction because of its "categorical" wording. Appx17. This conclusion is unsupported and dangerous—justifying mandamus on the speculated effect of a clearly worded substantive regulation drastically expands the reach of the AWA well into the realm of title 38. VA Br. 18-26. This is impermissible. *See Pa. Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985).

Rather than defend the court's reasoning, Ms. Wolfe pins her case on the Boerschinger notice, wherein VA informed members *of the Boerschinger proposed class* that they could not receive payment because they had other health insurance (OHI). *See* Pet. Br. 33-34; Appx135-36. She argues that because she and other members of the Wolfe class likely received the Boerschinger notice, VA's concession of error "applies equally" to her petition. *Id.* Thus, she contends, even if the IFR did not pose a real threat to the court's jurisdiction, this Court should

[2] Unappealable claims are not even within the court's prospective jurisdiction. *See* VA Br. 52-53.

nevertheless affirm the writ because the Boerschinger notice did.[3] Pet. Br. 38. This argument defies reason.

Ms. Wolfe's mandamus petition asked the court to do one thing and one thing only—to review and invalidate the IFR. Appx54; Appx135; Appx147-53. Separately, Mr. Boerschinger asked the court to correct VA's notice about OHI. Appx135-38. VA conceded that it sent an erroneous notice about OHI in response to Mr. Boerschinger's petition and proposed various corrective notices. Appx242; Appx289-93. The court accepted VA's concession and remedial plan, and dismissed Mr. Boerschinger's petition as moot. Appx15. The Boerschinger notice did not and could not, therefore, supply the rationale for the court's decision to review and invalidate the IFR via mandamus.

To get around this inconvenient history, Ms. Wolfe portrays the court's review of the IFR as part and parcel of its review of the Boerschinger petition and VA's remedial plan. Pet. Br. 35. She contends she argued below that VA's

[3] Even Ms. Wolfe's misplaced reliance on the Boerschinger notice only goes so far. She asserts only that it "likely deterred an unknowable number of veterans from even filing claims"—more speculation. Pet. Br. 38. Unlike the court, Ms. Wolfe tries to dress up her speculation as fact, citing statistics to suggest that claimants have been discouraged from seeking payment under § 1725. *Id.* at 33-34. But the fact that VA received over one million claims following *Staab*, including over 74,000 that VA denied "in whole or in part" because they sought payment of coinsurance or deductibles, proves our point. Pet. Br. 39 (citing Appx731-32).

proposed corrective notices to the Boerschinger proposed class referenced the IFR's payment limitations, which would deter veterans from pursuing claims, so "the Veterans Court necessarily had to decide whether the IFR conflicted with the statute" to assess that contention. *Id.* (citing Appx364-65). In essence, she argues that the court *had* to review the IFR to determine whether VA's remedial plan would correctly inform claimants that it could not pay for coinsurance or deductibles pursuant to the IFR. Pet. Br. 35. But any corrective notice informing claimants that VA could not pay coinsurance or deductibles correctly stated the law *until* the court invalidated the IFR, so Ms. Wolfe's logic is circular.

In reality, the court only reviewed and invalidated the IFR because Ms. Wolfe asked it to—not because it was "inextricabl[y] part" of analyzing some other "threat to the court's prospective jurisdiction." Pet. Br. 35; *see* Appx123-24; Appx135-36. And the court justified its exercise of AWA authority on speculation that the IFR was discouraging veterans from pursuing claims or appeals. Appx17. Ms. Wolfe does not defend this holding, perhaps because her own claim history—including a notice of disagreement and substantive board appeal—undermines it.

As a last resort, Ms. Wolfe argues that 38 U.S.C. § 7292(d)(2) precludes this Court from reviewing the Veterans Court's fact finding on the effect of the IFR. Pet. Br. 37-38. This Court has already held, however, that § 7292(d)(2) does *not* "insulate from judicial review [the Veterans Court's] ruling on mandamus

petitions." *Lamb v. Principi*, 284 F.3d 1378, 1381-82 (Fed. Cir. 2002); *Beasley v. Shinseki*, 709 F.3d 1154, 1157 (Fed. Cir. 2013). This is especially important here, where the court in part *assumed* the IFR posed a "risk" to its jurisdiction simply because Ms. Wolfe alleged it did. Appx17 at n.107 ("We have assumed the truth of allegations in a petition for assessing our jurisdiction under the AWA."); *see Will v. United States*, 389 U.S. 90, 107 (1967) (emphasizing that courts must find facts justifying the issuance of mandamus).

B. The Limited Use Of Mandamus To Compel Adherence To Prior Judgments Is Inapplicable Here

In the alternative, Ms. Wolfe argues for the first time that because courts can issue writs to "protect a prior exercise of jurisdiction," the writ was justified as a means of protecting *Staab v. McDonald*, 28 Vet. App. 50 (2016), from the IFR. Pet. Br. 40. But the cases she cites involve an appellate court's relationship to a lower court, not an agency.[4] If an agency promulgates a rule (or Congress enacts legislation) in response to a decision, the issuing court has no basis for "protecting" that decision through mandamus. Regulations allegedly "circumventing" judicial

[4] Writs may obviously issue to "confine an inferior court to a lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). But even the cases cited by one amicus (ECF No. 44) emphasize that courts may not routinely use writs "as a means of reviewing interlocutory orders," *La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957), which is what the court did here—review Ms. Wolfe's merits arguments before there was a final board decision on her claim.

decisions are commonplace. *See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1375-76 (Fed. Cir. 2001); *Century Steel Erectors, Inc. v. Dole*, 888 F.2d 1399, 1405 (D.C. Cir. 1989). As long as the regulation is validly promulgated, no matter how offended the court is by the sequence of events, *see* Appx17 (alleging "disrespect for judicial power"), the court's desire to "protect a past exercise of jurisdiction" does not justify mandamus. VA was authorized to issue the IFR, 38 U.S.C. § 501(a), so there is no basis for characterizing it as a "usurpation of authority." Pet. Br. 27.

Additionally, Ms. Wolfe's cited cases involve situations where mandamus protected an appellate court's judgment in subsequent proceedings of the same litigation. In *United States v. U.S. Dist. Ct. for Southern Dist. of New York*, the Supreme Court held that mandamus may be appropriate "to compel obedience with the mandate," which "turns on whether the lower court has obstructed enforcement of it, not on the collateral repercussions which enforcement may entail." 334 U.S. 258, 263-65 (1948). The Court confirmed in *Clinton v. Goldsmith* that mandamus would be appropriate to ensure compliance with an appellate court's mandate in the same case. 526 U.S. 529, 536 (1999); *see also Yablonski v. United Mine Workers of Am.*, 454 F.2d 1036, 1038-39 (D.C. Cir. 1972). That is not the situation here. Ms. Wolfe's petition is not a continuation of the *Staab* litigation, which involved 38 C.F.R. § 17.1002(f), not § 17.1005(a)(5).

II. The Writ Expands The Veterans Court's Jurisdiction

The writ: (1) infringes on this Court's exclusive jurisdiction to hear direct regulatory challenges under 38 U.S.C. § 502; and (2) infringes on the board's exclusive jurisdiction to decide the merits of claims on appeal from VA agencies of original jurisdiction (AOJ) under 38 U.S.C. § 7104(a). VA Br. 26-34. Ms. Wolfe provides a series of responses, but none are persuasive.

A. This Court Has Exclusive Jurisdiction To Hear Direct Challenges To VA Regulations

Although Ms. Wolfe feigns confusion about our § 502 argument, it's not all that complicated. Pet. Br. 43, 47-48. Section 502 authorizes this Court—and this Court alone—to hear *direct* regulatory challenges. 38 U.S.C. §§ 7252(a) and 7261(a)(3) empower the Veterans Court to hear *as-applied* regulatory challenges. The relevant statutes, legislative history, and precedent overwhelmingly confirm these jurisdictional lines. VA Br. 27-29. The Veterans Court understands them too, *see Dacoron v. Brown*, 4 Vet. App. 115, 117 (1993), but ignored them here.[5]

Ms. Wolfe recycles the court's faulty contention that the exclusivity in § 502's first sentence only precludes federal district courts from hearing direct challenges to regulations. Pet. Br. 48. Even the language Ms. Wolfe quotes from

[5] Ms. Wolfe contends that the Veterans Court may reach "constitutional issues in considering petitions for extraordinary writs" under *Dacoron*, Pet. Br. 50, but she did not challenge the IFR on constitutional grounds.

Preminger supports our position—"absent § 502, 'these suits would be brought under the APA *in another court*[.]'" *Id.* (citing *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1352 (Fed. Cir. 2011) (emphasis added)). Clearly, the Veterans Court is a "court." 38 U.S.C. § 7251.

It is true that § 502's third sentence provides an exception to the statute's exclusivity, but it only authorizes regulatory challenges at the Veterans Court "in connection with an appeal brought under the provisions of chapter 72"—that is, challenges to regulations as applied in a final board decision. *See* VA Br. 27-28. Ms. Wolfe's petition does not fit the bill—there was no "appeal brought under the provisions of chapter 72[.]" 38 U.S.C. § 502. The "action brought under" chapter 72 refers to a 38 U.S.C. § 7266 notice of appeal from a "final decision of the Board," not a mandamus petition. Thus, the Veterans Court has jurisdiction over the merits of a matter, including as-applied regulatory challenges, when there is a "decision[] of the Board[.]" 38 U.S.C. § 7252(a); *see Jackson v. Brown*, 55 F.3d 589, 591 (Fed. Cir. 1995), abrogated on other grounds by *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020).[6] There was no final board decision here.

[6] Congress did not intend for the Veterans Court to hear direct regulatory challenges. *See* 134 Cong. Rec. S16632 (compromise agreement to "establish an article I court for review of [board] decisions on the record *and VA rules and regulations challenged in a [board] case*") (emphasis added). Congress was explicit that it did not want the Veterans Court to "have arrogated . . . power" or to

Nevertheless, Ms. Wolfe argues that as long as petitioners have initiated the VA claims process and seek class-wide relief via mandamus, the Veterans Court can exercise any of its § 7261 powers even in the absence of a final board decision. Pet. Br. 42-43. Such a holding would radically expand the court's § 7261 powers based on the limited notion of prospective jurisdiction recognized in AWA jurisprudence that, if adopted, would erase the need for § 7252(a) or § 502 jurisdiction altogether. In effect, Ms. Wolfe puts prospective jurisdiction on the same level as actual jurisdiction, but they are not the same. Where prospective jurisdiction lies, it only permits an appellate court to issue writs that facilitate the court's eventual exercise of actual jurisdiction. *See Roche*, 319 U.S. at 26; *Formica Corp. v. Lefkowitz*, 590 F.2d 915, 921 (C.C.P.A. 1979). By equating the two, Ms. Wolfe essentially rewrites title 38 to permit the Veterans Court to exercise all of its § 7261 powers when reviewing (1) a final board decision under § 7252(a) *or* (2) any other action that may someday lead to a final board decision under the AWA.[7] This reads words into title 38, *see Bates v. United States*, 522

"feel free to review any challenge to the [VA] involving a question of law." H.R. Rep. No. 100-963, at 22 (1988). Congress stressed that it intended "to allow only a very narrow review" authority at the Veterans Court for "individual benefits adjudications." S. Rep. No. 100-418, at 59 (1988); *see* H.R. Rep. 100-963, at 26.

[7] The implications of this argument are staggering given the authority Congress gave the Veterans Court in § 7261 when reviewing final agency decisions, including review of fact findings. 38 U.S.C. § 7261(a)(4).

U.S. 23, 29 (1997), and improperly "augment[s] the jurisdiction of" the Veterans Court. *Wick v. Brown*, 40 F.3d 367, 373 (Fed. Cir. 1994).

Ms. Wolfe doubles down, arguing that "[n]othing in [§ 7261] prohibits the use of these powers in class actions." Pet Br. 43. This assertion ignores § 502, which prohibits free-standing regulatory challenges in any court beside this one, whether brought individually or on behalf of a class. This Court has, moreover, routinely interpreted § 7261 as authorizing Veterans Court action only where the court "already has jurisdiction by virtue of *a timely appeal from a final board decision*[.]" *Mayer v. Brown*, 37 F.3d 618, 620 (Fed. Cir. 1994); *Jackson*, 55 F.3d at 591 (the Veterans Court's authority to review regulations arises "only if the challenge is raised in connection with a benefits claim appeal from the Board of Veterans Appeals"); *see also Skaar v. Wilkie*, 32 Vet. App. 156, 180-81 (2019) (en banc). The contrary holding here—that a class-based regulatory challenge pursuant to the AWA also triggers the Veterans Court's § 7261 powers—cannot stand: "Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pa. Bureau of Corr.*, 474 U.S. at 43.

Section 502's exclusivity likewise undermines any reliance on *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017), which recognized § 7261(a)(2)'s role in remedying unreasonable delay that obstructs the court's actual jurisdiction. Pet.

Br. 43. The panel in *Monk* saw "no principled reason why the Veterans Court" could not exercise its § 7261(a)(2) power to "compel action of the Secretary unlawfully withheld or unreasonably delayed" without a final board decision. *Monk*, 855 F.3d at 1319 (citation omitted); *see* VA Br. 23 n.9. Here, there is a statutory reason why the Veterans Court cannot use § 7261(a)(3) to review a regulation not addressed in a board decision—38 U.S.C. § 502.

Ms. Wolfe inexplicably argues that we did not identify a statute requiring a class representative to obtain a board decision prior to bringing a class action. Pet. Br. 44. We did. VA Br. 19-20, 26-27. It is well-established that § 7252(a) requires a final board decision for the court to review the substantive merits of a veteran's benefits matter, and nothing about the class action mechanism displaces this jurisdictional requirement. *See* VA Br. 51 n.19. She also argues that requiring claimants to go through the title 38 appeals process is too slow and would somehow nullify class action practice.[8] Pet. Br. 44-45. Supreme Court precedent forecloses these arguments. *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953) ("extraordinary writs cannot be used as substitutes for appeals . . .

[8] Ms. Wolfe's ardent defense of class actions in general is misplaced. *E.g.,* Pet. Br. 44. We did not express qualms with the court's class certification, but identified three discrete errors with the class' composition. VA Br. 50-57. This case is not about the virtue of class actions but about whether the Veterans Court still has to follow the law even when it certifies a class.

even though hardship may result from delay and perhaps unnecessary trial"); *U.S. Alkali Exp. Ass'n v. United States*, 325 U.S. 196, 202 (1945).

Finally, Ms. Wolfe asserts that the Veterans' Judicial Review Act (VJRA) "preserved" her pre-VJRA ability to bring class actions without a board decision, Pet. Br. 45-46, but her reliance on pre-VJRA precedent is misplaced. *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) ("the review opportunities available to veterans before the VJRA was enacted are of little help in interpreting" the VJRA); S. Rep. 100-418, at 70. Even for a class, the VJRA only provides two avenues for regulatory challenges: direct challenges in this Court and as-applied challenges in the Veterans Court. VA Br. 27-28. Nothing about the class mechanism justifies creating a third avenue through mandamus.

B. 38 U.S.C. § 7104 Gives The Board Exclusive Jurisdiction To Review Agency Of Original Jurisdiction Decisions

Congress gave the board exclusive jurisdiction to review AOJ decisions. 38 U.S.C. § 7104(a); VA Br. 32-34. By invalidating the IFR and ordering VA to readjudicate claims, including those not yet subject to a final board decision, the writ substitutes the Veterans Court's decision on a question of law for that of the Secretary outside the VJRA's appellate structures. VA Br. 33; *see* 38 U.S.C. § 511(a) ("The Secretary shall decide *all questions of law* and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans[.]" (emphasis added)).

Ms. Wolfe argues that the writ did not actually decide the merits of any claim because it only "ordered VA to re-adjudicate the affected claims" and "[n]o one knows how the VA will re-adjudicate a given claim."[9] Pet. Br. 37. She suggests we "might have had a valid objection if the Veterans Court had granted [Ms. Wolfe's claim] or ordered the VA to pay Ms. Wolfe a specific sum[.]" Pet. Br. 51. But this is just semantics. In *Platt v. Minn. Mining & Mfg. Co.*, the Supreme Court held that a lower court's error does not "empower" an appellate court to examine the record and decide the matter via mandamus. 376 U.S. 240, 244-45 (1964). To the contrary, mandamus may be used "only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so"—not to "actually control the decision of the trial court." *Id.* at 245 (cleaned up); *see also Heath v. West*, 11 Vet. App. 400, 402-03 (1998) (mandamus may be appropriate "to order VA to adjudicate [a] claim," not "to obtain a merits decision from [the court]"). It is equally improper, therefore, for the court to "control [VA's] decision" on class claims, as it did here, as it would be to directly "order" VA to make payment.

[9] Ms. Wolfe accuses us of "word play" by using the word "claim" to refer to her regulatory challenge. Pet. Br. 51. She is mistaken. By dictating the result of VA's readjudication of the claims of Wolfe class members, the Veterans Court *decided the merits of their claims*, which is improper.

Since granting Ms. Wolfe's petition, the court has experienced a course correction, subsequently holding that mandamus "'cannot be used 'to actually control the decision of the trial court,' particularly when [the Veterans Court's] review of that decision could be obtained through the ordinary appeals process." *Gardner-Dickson v. Wilkie*, 33 Vet. App. 50, 58 (2020) (quoting *Platt*, 376 U.S. at 245). The petitioner in *Gardner-Dickson* asked the court to review the merits of a board remand, "find that it was wrong, and direct the Secretary to withdraw the order and adjudicate [the claim] in accordance with her view of the law." *Gardner-Dickson*, 33 Vet. App. at 55. The court held that the petition was "not in aid" of the court's "prospective jurisdiction" because it was "a request for a merits ruling" without a final board decision. *Id.* The court in *Gardner-Dickson* got this question right; the majority here did not.

III. Title 38 Provided Ms. Wolfe With Adequate Means To Obtain Her Desired Relief

Ms. Wolfe could have obtained her desired relief had she continued to follow title 38's appeals process.[10] VA Br. 35-44. Ms. Wolfe sensibly does not argue otherwise. Rather, she deflects from her failure to satisfy this element of *Cheney* by invoking the existence of a class. Pet. Br. 59-63. She argues, for

[10] We note that a decision on a § 502 challenge to the IFR or a Veterans Court precedential decision on appeal from the board would have resolved the issue for Ms. Wolfe and every claimant properly included in the class.

example, that *Lamb*'s holding as to the adequacy of title 38 is inapposite because it did not involve a class. *Id.* at 60. But the contention that precedent in non-class cases is irrelevant once a veteran seeks to represent a class is incorrect. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997) (use of class action procedures "must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right'"). If, as here, a petitioner cannot meet the test for mandamus, the fact that she added a motion for class certification does not save the petition. *See Alabama v. Blue Bird Body Co*., 573 F.2d 309, 327 (5th Cir. 1978) ("[T]he fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief."); *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016) (giving "different rights in a class proceeding" violates the Rules Enabling Act).

Ms. Wolfe next argues that the obligation to go through VA's administrative process before Veterans Court merits review "is far from absolute." Pet. Br. 60. She is wrong. Section 7252(a)'s final decision requirement is jurisdictional and "absolute." *See Ledford*, 136 F.3d at 779 ("[T]he court's jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed.");[11]

[11] Ms. Wolfe argues that *Ledford* refers to the doctrine of exhaustion as non-jurisdictional, Pet. Br. 60-61, but this was a reference to the exhaustion of arguments, not the final decision requirement of § 7252(a). The Veterans Court

Wick, 40 F.3d at 373 ("A Board decision is a statutory prerequisite for the court's jurisdiction."). Her attempt to contrast title 38's final decision requirement with the statutory requirement for a Social Security agency decision, which she deems jurisdictional, Pet. Br. 61 n.21, is backwards. *See Smith v. Berryhill*, 139 S. Ct. 1765, 1773 (2019) (final agency decision requirement in the Social Security statute is "nonjurisdictional"); *Henderson*, 562 U.S. at 439 (explaining that § 7252 "prescribes the jurisdiction of the Veterans Court"). Thus, because § 7252(a) is jurisdictional, the Veterans Court cannot (explicitly or implicitly) waive it—even in the interest of justice. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) (courts have "no authority to create equitable exceptions to jurisdictional requirements").

Finally, Ms. Wolfe argues that "[u]nreasonable delay" justifies abandoning the statutorily-mandated appeal process. Pet. Br. 62. But Ms. Wolfe did not allege actual unreasonable agency delay on her claim or on behalf of the class, so her argument is inapposite.[12] Even so, her argument melds two distinct issues: (1)

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generally has discretion to review a new argument on appeal, but lacks jurisdiction over a claim entirely if there is no board decision on it. *Ledford*, 136 F.3d at 779 (where "there was no Board decision" on unemployability, the Veterans Court "had no jurisdiction to consider that issue"); *see also Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

[12] Ms. Wolfe cites statistics regarding average processing times in the VA appellate system, but "reliance on statistics regarding average delays . . . is merely speculative. Each mandamus petition should be based on the facts of that particular case." *Martin v. O'Rourke*, 891 F.3d 1338, 1346 n.10 (Fed. Cir. 2018)

unreasonable delay is indeed a basis for petitioning the Veterans Court to *remedy that delay*; but (2) it is not a basis for skipping the appeal process and jumping into the substantive merits of a claim.

IV. VA's Regulation Is Not Clearly And Indisputably Invalid

Judge Falvey recognized "the Secretary's reasoned and persuasive statutory-interpretation argument shows that the invalidity of § 17.1005(a)(5) is not a foregone conclusion." Appx40. Yet the majority saw the IFR as an attempt to evade *Staab*, and struck it down. This was erroneous. *See* VA Br. 44-50.

Ms. Wolfe misapprehends our argument in contending the IFR is not entitled to deference. Pet. Br. 52-54. Rather than invoking deference, we explained: (1) the court failed to consider whether the IFR was a reasonable exercise of VA's 38 U.S.C. § 1725(c)(1)(A) and (B) authority (which Ms. Wolfe ignores); and (2) if the IFR is analyzed as an interpretation of § 1725(c)(4)(D), it reflects a plausible reading of the undefined phrase "similar payments," which means that Ms. Wolfe did not have a "clear and indisputable" right to mandamus. VA Br. 44-50.

Ms. Wolfe never defends the Veterans Court's stated reason for holding that Congress intended "similar payments" to capture only *quantitatively* similar charges to copayments. VA Br. 49 (explaining how two remarks from members of

(citation omitted). Ms. Wolfe had to allege and prove that *she* was experiencing unreasonable delay but did (and could) not.

Congress did not support the majority's statutory reading). Rather, she baldly asserts that the statute is clear, Pet. Br. 54, and that the majority got it right because "as a factual matter, copayments are fixed and small," while "deductibles are fixed but much larger" and coinsurance "is neither fixed nor small[.]" *Id.* at 58. It is unclear, however, how Ms. Wolfe gleans a "clear" meaning from the statute. Ms. Wolfe's "facts" certainly do not reveal Congress's intent or demonstrate that § 1725(c)(4)(D) necessarily refers to quantitatively "similar payments" in light of the contrary support in our brief. VA Br. 45-47.

As to our supporting citations, Ms. Wolfe focuses on the Affordable Care Act (ACA), and quotes 42 U.S.C. § 18022(c)(3)(A) to contend the IFR prohibited all payments under § 1725(c)(4)(D). Pet Br. 58-59. But VA did not adopt the ACA's definition of cost-shares, or otherwise bar payment of "any other expenditure of an insured individual which is a qualified medical expense . . . ." Pet. Br. 59 (citing 42 U.S.C. § 18022(c)(3)(A)). The relevant portion of the ACA we cited, VA Br. 45-46, supports the proposition that "similar payment" in § 1725(c)(4)(D) naturally encompasses deductibles and coinsurance. If anything, the fact that Congress in the ACA noted the existence of other cost-sharing charges *besides* copayments, deductibles, and coinsurance confirms that other such charges

exist, and would be reimbursable notwithstanding the IFR.[13]

Ms. Wolfe finally argues that VA did not identify below any reimbursable charges under the IFR aside from "balance billing," and thus waived identification of other recoverable charges on appeal. Pet. Br. 55. But this applies *Boggs v. West*, 188 F.3d 1335 (Fed. Cir. 1999), too broadly. Our identification of reimbursable charges under the IFR (VA Br. 47) is not a new argument, but more explicit support for the same argument made and addressed below. Appx413-14 ("The Secretary reiterates that cost-shares are not the only costs that may remain after payment by a health-plan contract."); Appx9; Appx30-31; *see Bailey v. Int'l Broth. Of Boilermakers,* 175 F.3d 526, 529-30 (7th Cir. 1999) (finding no waiver where party on appeal "fleshed out and emphasized" an argument it "skeletal[ly]" presented and the court addressed below); *see also Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314 (8th Cir. 1991) ("We think it would be in disharmony with one of the primary purposes of appellate review were we to refuse to consider each nuance or shift in approach urged by a party simply because it was not similarly urged below.") (cleaned up). This is especially true since the proper interpretation of a statute or regulation is a purely legal question

[13] This statutory language also undermines Ms. Wolfe's assertion that "lifetime or annual limits . . . worked by increasing the insured's coinsurance responsibility to 100% for any amounts of the cap[,]" for which she provides no citation whatsoever. Pet. Br. 56.

that this Court considers *de novo*. *See Hodge v. West*, 155 F.3d 1356, 1359 (Fed. Cir. 1998).

V. Ms. Wolfe's Arguments On *Cheney's* Third Factor Are Misleading

Although we did not address *Cheney*'s third factor in our opening brief, Ms. Wolfe highlights this factor to repeatedly allege "extraordinary misconduct." We provide a few responses. *See* 16A Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure § 3974.3 (3d ed. 1999) (although "settled that the appellant cannot raise new issues in a reply brief; it can . . . respond to arguments raised for the first time in the appellee's brief").

Broadly, Ms. Wolfe alleges that promulgating the IFR following *Staab* amounted to "extraordinary misconduct." *E.g.*, Pet. Br. 26. But the IFR simply clarified a payment limitation that existed prior to *Staab*, and which the Veterans Court did not address in that case. *Staab* addressed 38 C.F.R. § 17.1002(f), which implemented one criteria for § 1725 eligibility, not § 17.1005(f) (redesignated § 17.1005(a)(5) in the IFR), which addressed VA's payment limitations. *Staab*, 28 Vet. App. at 51. Before *Staab*, § 17.1005(f) provided that "VA will not reimburse a claimant under this section for any deductible, copayment or similar payment that the veteran owes the third party." The IFR clarified that coinsurance was also similar to a copayment, "consistent with 38 U.S.C. § 1725(c)(4)(D)[.]" *See* 83 Fed. Reg. 974 (Jan. 9, 2018); *see* VA Br. 6.

Ms. Wolfe also suggests that VA's decision to temporarily pause processing claims after *Staab* was somehow nefarious. Pet. Br. 9-11. But VA had no existing process by which to establish payment as a secondary payor. After *Staab,* which held that claimants with OHI were entitled to payment, VA needed to establish this process and temporarily delayed processing claims to do so through rulemaking, as required by law. *See* Appx289-90. Ms. Wolfe also misleadingly asserts that Mr. Staab passed away "without receiving full payment." Pet. Br. 14. VA has confirmed it reimbursed the full amount Mr. Staab was entitled to under § 1725 and that the remainder of his claim was for unrelated, non-reimbursable costs.[14]

Finally, Ms. Wolfe points to a few outdated regional VA webpages and a superseded VA fact sheet as examples of more nefarious agency conduct justifying mandamus. Pet. Br. 24-25. Although we agree these statements should have been promptly removed from the internet (and have now been removed), Ms. Wolfe paints only half a picture. VA published the IFR in the Federal Register and it states that having OHI is no bar to reimbursement. 83 Fed. Reg. 974 (Jan. 9, 2018).[15] And VA's emergency medical care website states that (1) OHI is no bar

[14] VA previously paid claims to Mr. Staab's medical providers, and additionally paid Mr. Staab $1,132 on March 9, 2021 pursuant to the writ, prior to his passing. The remaining unpaid amounts were not reimbursable because they related to his nursing home care. *See* May 14, 2019 Oral Argument at 30:34 – 31:58 (available at https://www.youtube.com/watch?v=rtOGLFyVGqc).

[15] *See also* VA press release: "VA will begin processing claims for

to reimbursement and (2) VA is currently prohibited only from reimbursing copayments.[16] In any event, any suggestion that outdated VA documents justify affirming the writ is doubly wrong. No matter how much Ms. Wolfe focuses now on these documents, her petition sought only to invalidate § 17.1005(a)(5) because it conflicted with § 1725. Appx54; Appx135; Appx147-53. Moreover, the court ordered VA to readjudicate class claims, Appx36, eliminating the need for class members to re-submit claims and thus the likelihood of any prejudice from these outdated documents.

VI. The Class Is Improperly Broad

We challenge the jurisdictional propriety of the certified class because it includes claimants with: (1) board decisions that are no longer subject to appeal; (2) claims not yet subject to a board decision; and (3) claims seeking payment of deductibles. VA Br. 50-57. Ms. Wolfe's responses are unpersuasive.

Claimants with unappealable board decisions. Ms. Wolfe argues that equitable tolling justifies the court's resurrection of finally-decided claims in violation of the rule of finality. Pet. Br. 63-64. Her theory does not hold water.

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reimbursement of reasonable costs that were only partially paid by the Veteran's other health insurance" (available at https://www.va.gov/opa/pressrel/pressrelease.cfm?id=3996 (last visited September 13, 2021)).

[16] Available at https://www.va.gov/COMMUNITYCARE/programs/veterans/Emergency_Care.asp (last visited September 13, 2021).

As an initial matter, the Veterans Court did not once mention equitable tolling in its decision, and this Court should not address it in the first instance. *See Glaxo Grp. Ltd. v. TorPham, Inc.*, 153 F.3d 1366, 1371 (Fed. Cir. 1998). Equitable tolling applies when an extraordinary circumstance prevented a timely filing despite the exercise of due diligence, *Checo v. Shinseki*, 748 F.3d 1373, 1379 (Fed. Cir. 2014), but the Veterans Court made no finding that any class member exercised due diligence.[17] Moreover, equitable tolling only applies when a filing is untimely, not when it has not been submitted at all. *McPhail v. Nicholson*, 19 Vet. App. 30, 34 (2005). Finally, although Ms. Wolfe asserts that class members' claims are routinely tolled when the claims "would have otherwise expired during the pendency of a class action," our argument pertains to members of the class whose claims expired before Ms. Wolfe's petition. Pet. Br. 64.[18]

Ms. Wolfe also fails to support the proposition that courts can resurrect finally-decided claims through equitable tolling. "If additional exceptions to the rule of finality . . . are to be created, i[t] is for Congress, not [a] court, to provide

[17] Class members likely did not even try to appeal because they did not file the initial claims—emergency care providers initiated most of these claims. *See* 38 U.S.C. § 1725(a)(2)(A); VA Br. 8 n.3.

[18] The Veterans Court recently expressed skepticism "that the class actually includes" claimants who had unappealable claims at the time of Ms. Wolfe's petition, but this overlooks that VA's regulation precluded reimbursement of deductibles before the IFR. *Wolfe v. McDonough*, 34 Vet. App. 187, 199 (2021).

them." *Cook v. Principi,* 318 F.3d 1334, 1341 (Fed. Cir. 2002) (en banc). The Veterans Court's authority to institute procedures for class proceedings, 38 U.S.C. § 7264, thus does not permit it to create new exceptions to the rule of finality. Indeed, two months after *Wolfe*, the Veterans Court held that a class may *not* include finally-decided claims. *Skaar*, 32 Vet. App. at 187-88. It should have reached the same result here.

Ms. Wolfe also contends we cannot challenge the Veterans Court's violation of the rule of finality because VA did not raise the argument below. Pet. Br. 63. Not so—VA argued below that a class involving "persons whose reimbursement claims are presently final and unappealable" would be too broad because of the "principle of finality of judgments." Appx273. Even if VA had not raised the issue below, the question of jurisdiction—here, the court's jurisdiction over claimants with unappealable board decisions—cannot be waived. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

Claimants without board decisions. Ms. Wolfe argues that prospective jurisdiction justifies the court including claimants without a board decision in the class. Pet. Br. 65. Again, Ms. Wolfe sees no difference between prospective and actual jurisdiction—theorizing that, because the Veterans Court can certify a class of claimants without board decisions *when there is an obstruction to their receipt of a decision*, as addressed in *Monk*, it can certify a class of claimants without

board decisions to decide the merits of an interesting regulatory issue. As explained above, there is no support for this radical proposition, which would entrench the AWA as a permanent substitute for chapter 72 appeals.

Ms. Wolfe also accuses us of using "*ipse dixit*" to assert that mandamus is traditionally used only for "compelling action that has been unreasonabl[y] delayed or unlawfully withheld[.]" Pet. Br. 65. The Court need not take our word for it. The Supreme Court has explained many times that mandamus is "confined" to circumstances where obstructions "threaten to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pa. Bureau of Corr.*, 474 U.S. at 41, 43; *Roche*, 319 U.S. at 26 ("The traditional use of the writ . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.").

Claimants with deductible claims. In the end, instead of the Boerschinger notice, Ms. Wolfe concedes that her petition "challenges the validity of the IFR on its face." Pet. Br. 66. For this reason, she asserts that "[e]ach member of the class was injured by the IFR, and each member's injury was properly redressed by the writ." *Id.* But this argument presumes the Veterans Court can hear direct challenges to VA regulations via mandamus which, as we have established, it cannot. Stripped of its improper arrogation of power via mandamus, the court's decision to include in the class claimants seeking only payment of deductibles

(which Ms. Wolfe did not claim) and to strike down the entire regulation was erroneous. VA Br. 55-57. And Ms. Wolfe's last-ditch allegation that expanding the class definition and, concomitantly, the court's jurisdiction was necessary because limiting the class or the relief to coinsurance claims would be "unworkable," is foreclosed by Supreme Court precedent. Pet. Br. 66; *Amchem Prods.*, 521 U.S. at 613; *Bankers Life*, 346 U.S. at 383.

CONCLUSION

For these reasons, as well as those in our opening brief, we respectfully request that the Court reverse the writ of mandamus issued by the Veterans Court.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

/s/Martin F. Hockey, Jr.
MARTIN F. HOCKEY, JR.
Acting Director

/s/Eric P. Bruskin
ERIC P. BRUSKIN
Assistant Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
PO Box 480, Ben Franklin Station
Washington, DC 20044
(202) 307-5958
Eric.Bruskin@usdoj.gov

Attorneys for Respondent-Appellant

OF COUNSEL:

SUSAN BLAUERT
Chief Counsel
Health Care Law Group

JONATHAN KRISCH
UDUAKABASI HENRY
Attorneys
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

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CERTIFICATE OF COMPLAINCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Federal Circuit Rule 32(b), respondent-appellant's counsel certifies that this brief complies with the Court's type-volume limitation rules. According to the word count calculated by the word processing system with which this brief was prepared, the brief contains a total of 6,919 words.

/s/Eric P. Bruskin
Eric P. Bruskin
Counsel for Respondent-Appellant