No. 20-1958

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 Case No. 18-6091

CLAIMANTS-APPELLEES' RESPONSE BRIEF

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July 13, 2021

CERTIFICATE OF INTEREST

Counsel for Claimants-Appellees certifies the following:

1. The full names of all entities represented by the undersigned counsel in this case are:

   Amanda Jane Wolfe; Peter Boerschinger.

2. The full names of all real entities in interest for the parties are:

   Not Applicable.

3. The full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities are:

   Not Applicable.

4. The names of 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 are:

   Sidley Austin LLP: Mark B. Blocker, Kara L. McCall, Lindsey K. Eastman (withdrawn), Eric T. O'Brien (withdrawn); Emily Wexler and

   National Veterans Legal Services Program: Barton F. Stichman, Alessandra Venuti, Renee Burbank, John Niles (withdrawn), Patrick Berkshire (withdrawn)

5. 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 is:

   None.

6. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees).

None.

Dated: July 13, 2021

/s/ Mark B. Blocker

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of this Court's Rules, counsel for Claimants-Appellees are unaware of any other appeal from this civil action that has previously been before this Court or any other appellate court under the same or similar title. Counsel for Claimants-Appellees are unaware of any case pending in this or any other court that may directly affect or be directly affected by this Court's decision in this case

COUNTERSTATEMENT OF THE ISSUES

The Department of Veterans Affairs ("VA") reimburses emergency care expenses incurred by veterans who do not have health insurance. The VA refuses, however, to pay for emergency care services if Medicare, Medicaid, TRICARE or other insurance provides partial coverage. In other words, the VA makes uninsured veterans whole, but does not reimburse insured veterans at all, even though their partial coverage mitigates the financial impact on the VA. This leaves insured veterans on the hook to pay deductibles and coinsurance, which can amount to thousands of dollars for just one episode of care.

This practice has been unlawful for more than a decade. Congress passed the Emergency Care Fairness Act ("ECFA") in 2010 to put insured

and uninsured veterans on equal footing by requiring the VA to reimburse insured veterans for partially covered emergency services. When the VA refused and promulgated a rule barring such payments, the Unites States Court of Appeals for Veterans Claims ("Veterans Court") set the regulation aside in *Staab v. McDonald*, 28 Vet. App. 50 (2016).

Unfortunately, the VA ignored *Staab*. For more than a year, the VA's website continued to tell veterans that they were *per se* ineligible for reimbursement if they had any health insurance. For almost 18 months, the VA refused to process claims from insured veterans, delaying more than a million claims from veterans seeking reimbursement for emergency healthcare.

Then, in January 2018, the VA published an interim final rule ("IFR") with immediate effect. The IFR was a remarkable end run around *Staab*. At the same time it revoked the specific regulation struck down in *Staab*, the IFR amended a different rule to ban reimbursement of any "copayments," "deductibles," or "coinsurance." 38 C.F.R. § 17.1005(f) (2012). Because those three categories exhaust the known universe of

out-of-pocket costs, the IFR put insured veterans right back where they were before *Staab*.

Within days of publishing the IFR, the VA updated its website and began processing the backlog of claims. The VA rejected or denied *effectively all* such claims. Moreover, the VA's rejection and denial letters, sent to more than a million veterans, continued to misrepresent the law by stating that insured veterans were *per se* ineligible for reimbursement.

Petitioners Wolfe and Boerschinger were among the veterans who received the VA's false letters. They petitioned the Veterans Court for mandamus relief because the VA's misconduct had flouted both the ECFA and *Staab*. Petitioners further alleged that the misrepresentations had deterred other veterans from pursuing their claims and sought to represent two classes of similarly situated veterans.

In an exhaustive opinion, the Veterans Court concluded that the VA had "circumvent[ed] our *Staab* decision (or at least its effects)." Appx17. The court found the VA's conduct to be "startling" and "unacceptable." Appx2. It was "difficult to conceive" how the VA could believe its actions were "somehow appropriate." *Id.* Indeed, the court found that the VA's "misrepresentation[s]" had affected "over 600,000

veterans." Appx2, 13. Because the VA had engaged in "a clear abuse of administrati[ve] discretion and disrespect for judicial power," Appx17, "an extraordinary writ [was] appropriate," Appx18. Further, because the VA "could circumvent another decision," "a means for prompt collective enforcement" was necessary. Appx26.

On appeal, the issues are:

1) Did the Veterans Court properly issue mandamus to correct the VA's clear abuse of discretion?

2) Was the Veterans Court within its discretion to certify a class?

STATEMENT OF THE CASE

I. BACKGROUND

A. Veterans Millennium Health Care and Benefits Act

In 1999, Congress passed the Veterans Millennium Health Care and Benefits Act, Pub. L. No. 106-117, 113 Stat. 1545, which directed the VA to reimburse veterans for emergency treatment in non-VA facilities. *Id.* at 1553. One prerequisite was that the veteran be "personally liable," which was defined to exclude situations where the veteran had "recourse against a third party that would, *in whole or in part*, extinguish" their liability. *Id.* at 1554 (emphasis added). The unintended result was to penalize veterans with health insurance. Because insurance frequently

covers only part of the cost of emergency services, insured veterans often must make substantial out-of-pocket payments. Those amounts could not be recovered from the VA, even though the VA pays all liability incurred by uninsured veterans for the same services.

Insured veterans are the majority of veterans: about 80% of veterans maintain health insurance coverage beyond their VA benefits. *See* Z. Joan Wang et al., *2019 Survey of Veteran Enrollees' Use of Health Care* 31-39 (2020).[1] Most insured veterans are participants in Medicare (based on age or disability), Medicaid (based on low income), or TRICARE (based on a service-related disability). *See id.* But even for insured veterans, a substantial medical bill can have a devastating impact. As a bipartisan group of 22 Senators summarized:

> [T]hose who are most affected . . . are our elderly veterans, many of whom are living on fixed incomes and have limited resources to pay medical bills. Often, these veterans find themselves dealing with collection agencies as a result of emergency care received in the community. This potentially increases stress for these veterans, causes them to lose faith in the VA and keeps them from seeking future medical attention out of fear

[1] https://www.va.gov/HEALTHPOLICYPLANNING/SOE2019/2019_Enrollee_Data_Findings_Report-March_2020_508_Compliant.pdf (last visited July 12, 2021).

> of acquiring additional medical bills for which they would be financially responsible.

Letter from Sen. Rounds, et al. to Sec. McDonald (Dec. 8, 2016) at 1.[2]

B. Emergency Care Fairness Act

Congress addressed this disparity with the Emergency Care Fairness Act (ECFA) in 2010. Congress amended the statute to "allow the VA to reimburse veterans for treatment in a non-VA facility if they have a third-party insurer that would pay a portion of the emergency care." H.R. Rep. 111-55 at 3 (2009). Specifically, Congress struck the words "or in part" from 38 U.S.C. § 1725(b)(3)(C), thereby requiring the VA to reimburse insured veterans for their out-of-pocket costs for emergency services.

Congress also added new provisions explaining how such coverage should work. Congress decreed that the VA is "the secondary payer" for emergency care at non-VA facilities whenever "a third party is financially responsible for part of the veteran's emergency treatment expenses."

[2] https://www.baldwin.senate.gov/imo/media/doc/12.09.16%20-Letter%20in%20support%20of%20the%20ECFA.pdf (last visited July 12, 2021).

38 U.S.C. § 1725(c)(4)(B).[3] Congress specified that the amount covered by the VA "shall be the amount by which the costs for the emergency treatment exceed the amount payable or paid by the third party." *Id.* § 1725(c)(4)(A). Finally, Congress stated that the VA "may not reimburse a veteran . . . for any copayment or similar payment that the veteran owes the third party or for which the veteran is responsible under a health-plan contract." *Id.* § 1725(c)(4)(D).

The VA proposed rules to implement the ECFA in May 2011. The proposal claimed that "veterans who are covered by a health-plan contract [remained] ineligible for VA payment or reimbursement" after the ECFA. Payment or Reimbursement for Emergency Services for Non Service-Connected Conditions in Non-Veteran Facilities, 76 Fed. Reg. 30598 (May 26, 2011). The VA therefore proposed to keep in place a regulation preventing "payment where the veteran is under a health-plan contract." *Id.* at 30599. In response to adverse comments, the VA argued that the ECFA failed to accomplish its express purpose because

[3] The term "third party" includes "health-plan contracts," which in turn includes private insurance, Medicare, Medicaid, and workers compensation. *See* 38 U.S.C. § 1725(f)(2) and (3)(E).

Congress had not also amended the definition of "personally liable" in 38 U.S.C. § 1725(b)(3)(B). *See* 77 Fed. Reg. 23615, 23616 (Apr. 20, 2012).

C. *Staab v. McDonald*

The Veterans Court struck down the 2012 regulation in a landmark decision called *Staab v. McDonald*, 28 Vet. App. 50 (2016). The Board of Veterans' Appeals ("Board") applied the 2012 regulation forbidding payment to veterans with "coverage under a health-plan contract . . . in whole or in part." 38 C.F.R. § 17.1002(f) (2012). Based on that rule, the Board denied Richard Staab's claim because Medicare had covered a portion of his emergency care expenses.

The Veterans Court found that the VA's regulation was contrary to the unambiguous statute. The court first rejected the VA's reading of 38 U.S.C. § 1725(b)(3)(B). This provision applies only where the veteran's insurance provides an "entitlement" to a particular service, which "means 'an *absolute right*.'" *Staab*, 28 Vet. App. at 54 (quoting Black's Law Dictionary (10th ed. 2014)). In other words, § 1725(b)(3)(B) applies only when the veteran's other health insurance "would *wholly* extinguish [the] veteran's financial liability." *Id.*

This reading harmonizes § 1725(b)(3)(B) with the rest of the statute. First, "subsections 1725(b)(3)(A), (C), and (D) all contemplate situations that would wholly extinguish the veteran's responsibility for payment." *Id.* To be consistent, § 1725(b)(3)(B) also "must contemplate a health-plan contract covering the treatment *in full*." *Id.* Second, § 1725(c)(4)(A) through (D) dictate how the VA should reimburse veterans who have health insurance. These provisions, and particularly § 1725(c)(4)(A), "would be superfluous if reimbursement is barred whenever a veteran has partial coverage from a health-plan contract." *Id.* at 54-55.

D. The VA's Short-Lived Appeal of *Staab*

On April 28, 2016, the VA sought reconsideration of the *Staab* decision, which was denied by the panel on June 29, 2016, and by the full Veterans Court on July 22, 2016.

On July 14, 2016, the VA sought a stay on the ground that *Staab* would "result in costs to the Department of $2,565,698,000 over a 5-year period and $10,775,241,000 over a 10-year period." *Staab v. Shulkin*, No. 14-957 (Vet. App. Ct. July 14, 2016) at 8. The stay was denied on July 14, 2016. After noticing an appeal, the VA again sought a stay on February

17, 2017, again claiming that *Staab* would impose billions of dollars of new costs. *Staab v. Shulkin*, No. 14-957 (Vet. App. Ct. Feb. 17, 2017). The second stay request was denied 5 days later. *Staab v. Shulkin*, No. 14-957 (Vet. App. Ct. Feb. 21, 2017).

Briefing of the VA's appeal was complete in April 2017. For reasons that are unclear, the VA moved to withdraw its appeal on July 14, 2017. *Staab v. Shulkin*, No. 16-2671, ECF No. 62 (Fed. Cir. July 14, 2017) (This Court granted the motion, dismissed the appeal, and issued its mandate three days later. *Staab v. Shulkin*, No. 16-2671, ECF No. 63 (Fed. Cir. July 17, 2017).

E. The VA's Effort to Circumvent *Staab*.

Staab held that the VA must 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." 28 Vet. App. at 55. That holding has been binding on the VA from the date of the decision, April 8, 2016. Unfortunately, the VA has consistently tried to circumvent its obligations under *Staab*.

1. Moratorium

Immediately after the *Staab* decision, the VA stopped processing claims for emergency medical care expenses. Appx289-90. The VA

imposed this moratorium with no publicity and to the great prejudice of all affected veterans. Ultimately, the moratorium delayed resolution of approximately one million claims. Appx302.

2. Interim Final Rule

The VA published an interim final rule ("IFR") on January 9, 2018 that took immediate effect. Under the Administrative Procedure Act, an IFR requires a showing of "good cause" that notice and comment would be "impracticable, unnecessary or contrary to the public interest." 5 U.S.C. § 553(b)(B). Good cause also must exist before any rule can take immediate effect. *Id.* § 553(d)(3). To claim good cause, the VA cynically pointed to *its own decision* to stop processing claims related to emergency medical care. *See generally* Reimbursement for Emergency Treatment, 83 Fed. Reg. 974 (Jan. 9, 2018).

The VA also claimed that the "purpose" of the IFR was "to comply with" *Staab*. *Id.* at 975. Whatever its purpose might have been, the effect of the IFR was to continue the unlawful ban struck down in *Staab*. When Congress mandated that the VA begin reimbursing insured veterans for their out-of-pocket costs, *see* 38 U.S.C. § 1725(c)(4)(A), Congress also forbade reimbursement of "any copayment or similar payment,"

38 U.S.C. § 1725(c)(4)(D). The IFR unlawfully expanded that provision by adding two additional words:

> VA will not reimburse a veteran under this section for any copayment, *deductible, coinsurance,* or similar payment . . .

38 C.F.R. § 17.1005(f) (2012) (emphasis added). The IFR did not explain why the VA had concluded that "coinsurance" and "deductibles" are similar to copayments. Nor did the IFR address the fact that this rule meant that the VA would *never* have to reimburse insured veterans for partially covered emergency services.

To understand how the IFR works, one has to understand how healthcare services are reimbursed. A "claim" for reimbursement can include many individual healthcare "services," and coverage is provided (or not) at the "service" level. When an insurer *does not cover* a service, the veteran is uninsured as to that service and the VA makes the veteran whole (this was true even before the ECFA). When an insurer *fully covers* a service, then the insurance has extinguished the veteran's liability and there is nothing for the veteran to seek from the VA. This also was not changed by the ECFA.

The IFR comes into play only when insurance *partially* covers a particular service. In this situation, the insurer pays some of the costs billed by the provider, and the veteran must pay the remainder. The veteran's share of the liability is the "out of pocket" cost of the service. Insurers, including the Centers for Medicare & Medicaid Services ("CMS"), refer to out-of-pocket costs as "cost sharing":

> **Cost Sharing**
>
> Your share of costs for services that a plan covers that you must pay out of your own pocket (sometimes called 'out-of-pocket costs').

CMS, *Glossary of Health Coverage and Medical Terms*.[4] There are only three known types of cost shares: copayments, deductibles, and coinsurance. *See id.* By prohibiting payment of any and all cost shares, the IFR ensured that insured veterans would never recover any out-of-pocket costs from the VA.

3. Refusal to Make Payment

With the IFR in place, the VA lifted its moratorium and began to process the backlog of claims by rejecting wholesale the claims it was supposed to pay under the ECFA and *Staab*. Press reports indicate that,

[4] https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/Uniform-Glossary-01-2020.pdf (last visited July 12, 2021).

as of February 2019, the VA had paid a grand total of $12 (no zeroes missing) for such claims. Appx343.

Mr. Staab's own experience is unfortunately emblematic. Mr. Staab experienced a heart attack and went to the closest emergency room in December 2010. Appx605. Although he had Medicare, his out-of-pocket expenses were substantial. Appx606. Even though he won his appeal in April 2016, Mr. Staab had not received a penny from the VA on his claim as of December 2019. Appx607-09. Tragically, Mr. Staab passed away earlier this year without receiving full payment. Matthew Simon, *Veteran at center of ER visit reform dies without full court ordered VA refund*, WHIO-TV7 (May 12, 2021).[5]

4. Misrepresentations

The VA also waged a disinformation campaign against veterans. Well after the decision in *Staab*, the VA's website continued to claim that veterans with insurance were ineligible for reimbursement. Through at least June 2017, that website[6] directed veterans to a 2010 "Fact Sheet"

[5] https://www.whio.com/news/i-team-veteran-center-er-visit-reform-dies-without-full-court-ordered-va-refund/QX2KCN36SFFM5MSOKUB5VKABN4/ (last visited July 12, 2021).

[6] VHA Office of Community Care, *Community Emergency Care, Emergency Care of Nonservice-Connected Conditions* (archived version dated June 28, 2017),

arguing that the EFCA did not "change the requirement that a Veteran can have no entitlement to care and services under a health plan contract . . . ."[7] The website also directed veterans to a "Fact Sheet" created after *Staab* that asserted that the eligibility criteria included that "Veteran has no other health insurance coverage."[8]

In contrast, the VA immediately updated its website to reflect the IFR. The January 11, 2018 version of the website stated:

> By law, VA cannot reimburse remaining costs such as copayments, cost shares or deductibles associated with a Veteran's [other health insurance]."[9]

Notably, the updated website paraphrased the IFR by replacing the word "coinsurance" with the phrase "cost shares."

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https://web.archive.org/web/20170628084013/https://www.va.gov/COMMUNITYCARE/programs/veterans/Emergency_Care.asp (last visited July 13, 2021).

[7] Fact Sheet 16-13, *Veterans' Emergency Care Fairness Act* (Feb. 2010) (archived version dated June 28, 2017), https://web.archive.org/web/20170628085229/https://www.va.gov/HEALTHBENEFITS/assets/documents/publications/FS16-13.pdf (last visited July 13, 2021).

[8] Fact Sheet 20-02, *Emergency Care for Veterans* (November 2016) (archived version dated June 29, 2017), https://web.archive.org/web/20170629011601/https://www.va.gov/COMMUNITYCARE/docs/pubfiles/factsheets/FactSheet_20-02.pdf (last visited July 13, 2021).

[9] VHA Office of Community Care, *Emergency Medical Care, Emergency Care of Nonservice Connected Conditions* (archived version dated Jan. 11, 2018), https://web.archive.org/web/20180111184350/https:/www.va.gov/COMMUNITYCARE/programs/veterans/Emergency_Care.asp (last visited July 13, 2021).

The VA also included misrepresentations in its letters to veterans. In February 2018, Claimant-Appellee Amanda Wolfe received a denial letter stating that the presence of any "coverage under a health-plan contract" precluded reimbursement. Appx199. In November 2018, Claimant-Appellee Peter Boerschinger received a denial containing both that misrepresentation and another:

> Veteran has other insurance coverage eligible to make payment on the claim. The veteran must not have coverage under a health-plan contract for payment or reimbursement, in whole or in part, for the emergency treatment.

Appx212. The VA has conceded that it sent at least **111,831** denial letters containing these or similar false statements between April 8, 2016, and February 8, 2019. Appx731-32.

The VA also sent "rejection" letters effectively telling insured veterans not to bother pursuing their claims. Those letters stated, in bold, that reimbursement is available only if "**Veteran has no coverage under a health plan contract**." *E.g.*, Appx216, 218, 220, 223, 225. The rejection letters further stated:

> By law, VA cannot reimburse costs such as copayments, cost shares or deductibles associated with a Veteran's OHI.

E.g., Appx216, 218. The VA invited the veterans to submit more information, but only if the veteran could show liability that was not attributable to copayments, cost shares or deductibles. *E.g.*, *id.* The VA sent at least **1,017,406** rejection letters containing these or similar false statements between April 8, 2016 and February 8, 2019. Appx731-32.

Beginning on or about February 8, 2019, the VA began sending denial letters with similar language:

> To be eligible for VA reimbursement under 38 U.S.C. 1725, as implemented, all of the following requirements must be met: . . .
>
> (4) You are financially liable to the provider for the costs of the emergency treatment after any payment by . . . a health-plan contract, *excluding any copayment, deductibles, coinsurance*, or other similar payments . . .

Appx309-10 (emphasis added). The VA sent at least **12,899** denial letters with such language between February 8, 2019, and the date of the decision below, September 9, 2019. Appx732.

II. PROCEEDINGS BELOW

A. The VA's Admission of Wrongdoing

The Amended Petition sought (1) certification of two classes of veterans; (2) a declaration that the IFR was contrary to law; (3) an order compelling the VA to re-adjudicate its denials of claims related to

emergency care; and (4) an order requiring the VA to stop making, and to correct, its misrepresentations. Appx136-38.

The VA responded by conceding that Petitioner's allegations "about VA's letters [are] well-taken." Appx242. The VA admitted that, after *Staab*, it had sent "correspondence that erroneously advised veterans that their claim could not be granted if they had whole or partial other health insurance," Appx290, which it described as a "regrettable error." Appx298. The VA committed to a "corrective action plan" that would satisfy "each item of relief Boerschinger has requested." Appx293. The VA thus promised to invalidate its prior decisions, send correction notices, re-adjudicate the affected claims, and re-set applicable deadlines. *See* Appx290-93; *see also* Appx303-05.

Unfortunately, the VA's correction notices made matters worse. Some correction letters claimed that the veterans' claims had been "properly denied" or "properly rejected." Appx353, 355. Most also stated that it was "important to note that VA has no legal authority to pay a Veteran's cost shares, deductibles, or copayments associated with their other health insurance." *Id.* The VA sent approximately 42,050 such

notices. Appx388. Whatever their intent, the effect of these assertions was to deter veterans from pursuing their claims.

B. The VA's Defense of the Interim Final Rule

Several aspects of the VA's defense of the IFR are important. First, the VA repudiated its predictions (*see supra* 11-13) that *Staab* would require billions in additional payments to veterans—another "regrettable error." Appx412. The VA's revised position was that *Staab* had no discernable impact on the VA's reimbursement payments to veterans for emergency care services. Appx417.

Second, to explain why *Staab* had no impact, the VA adopted the extraordinary position that 38 U.S.C. § 1725(c)(4)(A) is surplusage (or at least mostly so) in light of 38 U.S.C. § 1725(c)(4)(D). According to the VA, when it passed the ECFA, "Congress removed the partial health insurance bar but simultaneously erected a bar that covers nearly all of the same ground." Appx412-13. In other words, VA contended that Congress failed to do what it set out to do in the ECFA.

Third, to save § 1725(c)(4)(A) from being *completely* surplusage, the VA suggested that it "may" reimburse a veteran if a provider engages in "balance billing." Appx413. The VA omitted that the practice of balance

billing is frequently illegal.[10] The VA also provided no evidence indicating that it had ever actually made such reimbursement.

Fourth, the VA invented the term "cost-share exclusion" for § 1725(c)(4)(D). Appx413-15. Although the statute never mentions cost sharing, the VA claimed that the statute commands it "not to reimburse . . . cost-sharing obligations." Appx417; *see* Appx416 (claiming that the statute imposes an "independent obligation to enforce the cost-share exclusion.").

Finally, the VA claimed that the words "or similar copayment" in § 1725(c)(4)(D) would be surplusage unless coinsurance and deductibles were excluded. Appx416-17; *see* Appx257 ("if deductibles and coinsurance are not similar payments to copayments . . . VA is not aware of any other form of payment that would be") (cleaned up).

[10] Insurers set allowed amounts that providers may charge. Balance billing (also known as "surprise billing") occurs "[w]hen a provider bills [the patient] for the difference between [its] charge and the allowed amount." Healthcare.gov, https://www.healthcare.gov/glossary/balance-billing/. The federal healthcare programs have long forbidden this practice. *See, e.g.*, 38 C.F.R. §§ 199.6(a)(11), 196.16(d)(5) (TRICARE).

C. The Decision Below

In a careful opinion, the Veterans Court granted mandamus and certified the *Wolfe* class ("the class"). The court found jurisdiction appropriate for several reasons. First, the All Writs Act authorizes mandamus in aid of a court's prospective jurisdiction, and the VA's misconduct had undermined the court's jurisdiction by deterring veterans from pursuing claims and litigating appeals. Appx17. Second, the court found that the IFR had been promulgated "to achieve the same effect that the invalid regulation in *Staab*." *Id.* The court described the end run around *Staab* as "startling," "unacceptable," and "a clear abuse of administrat[ive] discretion." Appx2, 17. The VA's "disrespect for judicial power" created "a truly exceptional situation," Appx17, and was additional cause for mandamus, Appx18. Third, the court explained that Congress intended for the Veterans Court to "hear challenges to VA regulations through class actions." Appx19 (citing *Monk v. Shulkin*, 855 F.3d 1312, 1320 n.4 (Fed. Cir. 2017)). Fourth, the Veterans Court concluded that the exercise of jurisdiction over the class would not conflict with the jurisdiction of any other tribunal. Appx18-19.

The court next addressed the need to certify the class.[11] The court determined that the requested relief was appropriate for a class action and that the proposed class met the requirements of numerosity, commonality, typicality, and adequacy of representation and counsel. Appx20-26. Moreover, a class was superior to allowing individual claims to proceed through the administrative process because the VA could just "circumvent another decision." Appx26-27.

Turning to the merits, the Veterans Court held that mandamus was warranted. The court assumed *arguendo* that the IFR should be evaluated under *Chevron* step two. Appx28-29 (citing *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984)). Even under that standard, the IFR was plainly invalid. First, it was unreasonable for the VA to claim that coinsurance and deductibles are "similar to" copayments given the vastly different economic impact they have on veterans. Appx29-30, 32-33. Second, the IFR eliminated any possibility that the VA would ever reimburse veterans for partially covered services, which was

[11] The court dismissed the request to certify the *Boerschinger* class as moot because the VA had conceded error and agreed to provide relief. Appx14-15.

contrary to *Staab* and rendered § 1725(c)(4)(A) surplusage. Appx30-31.[12] Third, the VA erred in construing § 1725(c)(4)(B) as a cost-share exclusion when Congress had not used that term and had excluded only the narrower category of "any copayment and similar payments." Appx32-33.

Finally, the court held that the class lacked an alternative remedy. The court determined that it would be "futile" and a "useless act" to force Ms. Wolfe to pursue her individual appeal. Appx33. The court further held that the class members would not be able to exercise their appellate rights unless the court intervened "to prevent enormous bureaucratic waste that would result from VA's continued erroneous adjudications and communications." Appx34.

Ultimately, the court (1) certified the class; (2) invalidated the IFR; (3) vacated any prior VA denials based on the IFR and ordered the VA to re-adjudicate those claims; (4) ordered the VA to stop making misrepresentations to veterans, including the class members; and

[12] The court rejected the VA's argument that reimbursement remained available for balance billing. The court noted that balance billing was generally unlawful, and it faulted the VA for failing to show that the agency actually reimburses veterans for balance billing. Appx30-31.

(5) ordered the VA to prepare a corrective action plan to cure its misrepresentations. Appx36.

As described in the Brief for Respondent-Appellant ("Br."), Judge Falvey dissented. *See* Br. 12-14.

D. Continued Misrepresentations

A core aspect of the writ was an order that the VA must stop misrepresenting that it has "no legal authority to pay a Veteran's cost shares, deductibles, or copayments . . . ." Appx36.

For nearly six months after the writ, the VA continued to make that exact misrepresentation. The VA's website for veterans continued to falsely state, in bold font, that "**[b]y law, VA cannot pay copayments, coinsurance, deductibles . . . a Veteran may owe**." Appx761; *see* Appx767. Below, the VA waived that misrepresentation off as another in its string of "regrettable errors." Appx779.

As of this writing, the VA continues to make similarly false claims. For example, the VA still publishes Fact Sheet 16-13,[13] which claims that the EFCA did not "change the requirement that a Veteran can have no

[13] https://www.va.gov/healthbenefits/assets/documents/publications/FS16-3.pdf (last visited July 12, 2021).

entitlement to care and services under a health plan." As a second example, the VA still publishes (at multiple sites) the April 2018 version of its *Emergency Medical Care* Fact Sheet,[14] which states:

> **By law, VA cannot pay:**
> - Copayments
> - Coinsurance
> - Deductibles
> - Similar payments a Veteran may owe to the provider as required by their OHI

As a third, the VA still publishes the April 2018 version of its *Emergency Transportation (Ambulance)* Fact Sheet,[15] which includes the same misrepresentation as an endnote.

E. Continued Refusal to Pay

Two months after the writ, the Board granted Ms. Wolfe's claim. Appx724-27. Despite having no legal authority to withhold payment, the VA still has not paid what it owes to Ms. Wolfe, which continues to cause ongoing hardship. In its brief, the VA indicates that it is withholding the

[14] https://www.southtexas.va.gov/Documents/EmergencyMedCareFactSheet2002.pdf (last visited July 12, 2021); https://www.phoenix.va.gov/docs/Services/VRC/Emergency_Care_FactSheet.pdf (last visited July 12, 2021); https://www.chillicothe.va.gov/Documents/Veteran_Orientation_Documents/Emergency_Medical_Care.pdf (last visited July 12, 2021); https://www.tennesseevalley.va.gov/docs/TVHSNewsS18.pdf (last visited July 12, 2021).

[15] https://www.fargo.va.gov/images/2018/EmergencyTransportation.pdf (last visited July 12, 2021).

amount owed to Ms. Wolfe to avoid mooting her "personal stake in the outcome of this case." Br. 15 n.7.

SUMMARY OF ARGUMENT

This case involved "an extraordinary situation" that demanded "extraordinary relief." Appx2. The Veterans Court found that the VA had promulgated an interim final rule that had the effect of reinstituting a rule that the Veterans Court had struck down. The Veterans Court found that the VA had misrepresented the law in hundreds of thousands of letters to veterans, which had deterred them from pursuing their claims or appealing the VA's illegitimate denials. The Veterans Court issued a writ of mandamus to correct that extraordinary misconduct, and it did so on a class basis to ensure that the VA did not circumvent its ruling in another individual case. Appx26.

The VA's appeal from the writ is entirely without merit. The VA's brief fails to deal with the extraordinary circumstances of this case, thereby ignoring all of the factors that led to the imposition of an extraordinary writ.

As a threshold issue, there is no jurisdictional problem because the Veterans Court had prospective jurisdiction over Ms. Wolfe's claim and

those of the class. The relief entered by the writ was in aid of that jurisdiction, as well as the court's prior jurisdiction and its jurisdiction to hear class actions. Moreover, the writ was independently justified as an exercise of the court's supervisory authority to address the VA's clear abuse of discretion and usurpation of authority. Nor did the writ impinge upon the jurisdiction of any other tribunal.

Next, the elements of mandamus were satisfied. Mandamus requires a clear right to relief, no other adequate means to attain relief, and a showing that relief is appropriate under the circumstances. The VA does not challenge the third element. The first element is met because the IFR is plainly contrary to the ECFA, and especially 38 U.S.C. § 1725(c)(4)(A), because it rendered the requirement that the VA reimburse insured veterans surplusage. And the second element is met because there is no other means for the class to obtain the relief entered by the writ and because requiring Ms. Wolfe to exhaust administrative remedies would have been futile and lead to years of unreasonable and wholly unnecessary delay for both her and the class.

Although the VA does not challenge the Veterans Court's application of the Rule 23 factors in certifying the class, it does raise

certain challenges to the membership of the class. These arguments were not made below and are waived, and are without merit in any case. Any class member's claims that were denied are appropriately maintained within the class through equitable tolling. Any class member's claims that have not yet been denied are appropriately maintained within the class as an exercise of prospective jurisdiction. Finally, the class appropriately includes all veterans who were harmed by the IFR, regardless of whether their individual claims sought reimbursement of deductibles, coinsurance, or both.

ARGUMENT

I. THE VETERANS COURT APPROPRIATELY ISSUED A WRIT OF MANDAMUS.

The Veterans Court has power to issue mandamus against the VA, *Cox v. West*, 149 F.3d 1360, 1363 (Fed. Cir. 1988), including on a class basis "to compel correction of systemic error." *Monk v. Shulkin*, 855 F.3d 1312, 1321 (Fed. Cir. 2017). Whether to issue a writ of mandamus "is in large part a matter of discretion with the court." *Kerr v. U.S. Dist. Ct. for N.D. Cal.*, 426 U.S. 394, 403 (1976). Mandamus generally is appropriate where (1) the petitioner has a clear and indisputable right to relief; (2) there is no other adequate means to attain relief; and (3)

extraordinary relief is appropriate under the circumstances. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004).

On appeal, the VA primarily raises jurisdictional challenges. *See* Br. 18-34. The VA also challenges the first and second elements of mandamus. *See* Br. 34-50. The VA does not challenge the third element, thereby conceding that mandamus was "appropriate under the circumstances." *Cheney*, 542 U.S. at 381.

By conceding the third element, the VA avoids having to discuss (much less refute) the "extraordinary—if not unique—circumstances" that the court found below. Appx34. For instance, the VA mentions its many misrepresentations only in a footnote, and it euphemistically dubs them a "notice issue." Br. 22 n.8. In another footnote, the VA wonders why the Veterans Court found that its misconduct was a clear abuse of discretion and disrespect for the judiciary. *Id.* 24 n.11. Those two notes are the only places where the VA even comes close to acknowledging the extraordinary nature of this case.

In any event, the class's claims were (and are) within the prospective jurisdiction of the Veterans Court. The writ was proper under the All Writs Act because it was in aid of the court's prospective

jurisdiction, its prior jurisdiction, and its authority to hear class actions. The writ was independently proper because it was necessary to correct the VA's clear abuse of discretion. Nor did the writ impinge upon the jurisdiction of any other tribunal.

The elements of mandamus also were satisfied. Petitioners' right to a writ is clear and indisputable because the IFR is contrary to both the plain meaning of the statute and the unappealed, precedential judgment in *Staab*. Finally, in light of the extraordinary circumstances of this case, mandamus is the only adequate remedy.

A. The Veterans Court Properly Asserted Jurisdiction.

1. The Class Was Within The Prospective Jurisdiction Of The Veterans Court.

All agree that the subject matter jurisdiction of the Veterans Court is appellate in nature and includes appeals from decisions of the Board. 38 U.S.C. § 7252(a). The *prospective* jurisdiction of the Veterans Court therefore includes any claim that a veteran might appeal to the Board and, from there, to the Veterans Court. *See, e.g.*, *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (prospective jurisdiction includes potential appeals that are "not then pending but may be later perfected"); *Roche v. Evaporated Milk Ass'n*, 319 U. S. 21, 25 (1943) (prospective jurisdiction

"extends to those cases which are within [a court's] appellate jurisdiction although no appeal has been perfected"). Because class members have filed claims and received denials, Appx36, 731-32, they all are within the prospective jurisdiction of the Veterans Court.

In re Tennant, 359 F.3d 523 (D.C. Cir. 2004), shows that the Veterans Court properly asserted prospective jurisdiction. There, the D.C. Circuit lacked authority to issue mandamus because the petitioner "never initiated a proceeding with the FCC." *Id.* at 529. Mandamus requires that "a proceeding of *some* kind" be "instituted before [the] agency . . . that might lead to an appeal." *Id.* Once such a proceeding exists, the matter is within the "prospective or potential" jurisdiction of the court. *Id.* In other words, courts have prospective jurisdiction so long as the petitioner has taken "at least the first preliminary step that might lead to appellate jurisdiction . . . in the future." *Id.*[16]

[16] The VA cites *Tennant* to assert erroneously that the Veterans Court exercised "original jurisdiction" over the class's claims for reimbursement. *See* Br. 33. *Tennant* explains that a court exercises original jurisdiction when it creates a new proceeding. 359 F.3d at 530 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175-76 (1803)). A writ remains part of the court's appellate jurisdiction if it addresses "'proceedings in a cause already instituted.'" *Id.* Because it addressed ongoing proceedings (claims that had already been filed by class members and denied by the VA), the writ was clearly appellate in nature.

This Court recently followed *Tennant* in *Mylan Labs Ltd. v. Janssen Pharmaceutica, N.V.*, which arose from a preliminary decision of the Patent Trial and Appeal Board that ordinarily was not appealable. 989 F.3d 1375, 1379-80 (Fed. Cir. 2021). The Court nevertheless found it had *prospective* jurisdiction (and, therefore, authority to issue mandamus) because the petitioner had taken the "first preliminary step that might lead to appellate jurisdiction . . . in the future" by commencing the proceedings below. *Id.* at 1380.

Here, the first "preliminary step" was the submission to the VA of a claim for reimbursement of emergency care services. The second "preliminary step" was the VA's decision to deny the claims. As class representative, Ms. Wolfe also took third and fourth "preliminary steps" by filing Notices of Disagreement prior to seeking mandamus. Appx205-06, 210. Under *Mylan Labs* and *Tennant*, those steps were sufficient to bring both Ms. Wolfe and the class within the prospective jurisdiction of the Veterans Court. *See also, e.g.*, *Erspamer v. Derwinski*, 1 Vet. App. 3, 8-9 (1990) (prospective jurisdiction exists over Notices of Disagreement).

2. The Writ Was In Aid Of Prospective Jurisdiction.

The VA argues at length that the writ was not "in aid of" the court's prospective jurisdiction. *See* Br. 18-26. That argument fails for at least three independent reasons.

[a] All agree that the Veterans Court may issue mandamus to correct agency misconduct that "frustrate[s]" the court's prospective jurisdiction. *In re Wick*, 40 F.3d 367, 373 (Fed. Cir. 1994). The VA suggests that only unreasonable delay or an outright refusal to act can have that effect, *see* Br. 22-24, but that is clearly incorrect. Any agency misconduct that deters or chills veterans from pursuing their claims also frustrates prospective jurisdiction. *See, e.g.*, *Moore v. Derwinski*, 1 Vet. App. 83, 84 (1990) (alleged retaliation against a veteran was "grossly improper" and "if true, would establish an effort to restrict the jurisdiction of this Court through intimidation"). The VA concedes as much by admitting that mandamus is an "appropriate remedy" to correct its misrepresentations. Br. at 22 n.8.

The VA tries to limit that concession to Mr. Boerschinger, *id.*, but it applies equally to the class. The VA falsely told Mr. Boerschinger that his health insurance still precluded payment after *Staab*. *See* Appx212.

The VA sent denial letters containing versions of the same false message to **61,533** members of the class, *see* Appx731, including Ms. Wolfe, *see* Appx199.

In addition, all **74,432** members of the class received denial letters from the VA falsely stating that the statute prohibited the VA from reimbursing any cost shares, including coinsurance or deductibles. *See* Appx731-32; *see also* Appx225, 309-10. Class members also were likely among the 42,050 veterans who received the "corrective" notices that the VA began sending in April 2019, Appx388, which repeated the misrepresentation that the agency lacked authority to reimburse coinsurance or deductibles. Appx351.

The writ ordered the VA to stop making that false statement. Appx35-36; *see* Br. 12 (ordering "VA to stop sending certain notices to veterans and to propose a plan for providing corrected notices"). As the Veterans Court explained, that misrepresentation could deter veterans from pursuing their claims and/or from filing appeals. Appx17. It follows that the writ was an express effort to protect and preserve the prospective jurisdiction of the Veterans Court.

[b] The VA also argues that a writ cannot be in aid of prospective jurisdiction if it invalidates a "benefits regulation," because doing so allegedly amounts to a "'merits decision.'" Br. 23 (quoting *Heath v. West*, 11 Vet. App. 400, 402-03 (1998)); *see* Br. 25 (claiming that courts are prohibited from using "mandamus to decide the merits of a matter for a lower tribunal") (citing *Platt v. 3M*, 376 U.S. 240, 245 (1964)). This argument misstates what happened below.

Petitioners argued that the VA had deterred veterans from pursuing claims and appeals by repeatedly misrepresenting that their claims were doomed to fail. Appx364-65. The Veterans Court determined that the VA's statement was, in fact, a "misrepresentation." Appx2. To make that determination, the Veterans Court necessarily had to decide whether the IFR conflicted with the statute. In other words, the invalidity of the regulation was an inextricable part of the threat to the court's prospective jurisdiction. *Compare In re Innotron Diagnostics*, 800 F.2d 1077, 1082 (Fed. Cir. 1986) (mandamus can address issues that are "intimately bound up with . . . [the] jurisprudential responsibilities of this court" even if the issue "would not necessarily frustrate this court's appellate jurisdiction").

The cases the VA cites in its brief reinforce, rather than undermine, the conclusion that the Veteran Court appropriately issued a writ of mandamus. In *Platt*, the district court denied a motion to transfer, citing several factors. *See* 376 U.S. at 241. The circuit court entered mandamus on the ground that one of the factors was inappropriate and immediately transferred the case. *See id.* at 243-44. The Supreme Court approved of mandamus "to determine the appropriate criteria" for a motion for transfer. *Id.* at 245. The Supreme Court objected only to the transfer order; having clarified the appropriate criteria, the circuit court should have remanded the case to the trial judge for further consideration. *Id.* The writ below is thus consistent with *Platt*. The Veterans Court did not order that any claim be allowed or that any money be paid. Instead, the writ clarified that the IFR did not contain "appropriate criteria" for the VA to use to deny a claim, and it remanded all affected claims to the VA for re-adjudication.

Similarly, in *Heath*, the Veterans Court found that it had power to order the VA "to adjudicate [a] claim," but would not "assume the role of adjudicator in the first instance." 11 Vet. App. at 402-03. Again, the writ here did not place the Veterans Court in the role of adjudicator. The VA's

own corrective action plans recognize that the VA remains responsible for re-adjudicating all class members' claims. *See* Appx741 ("VA will re-decide your claim and issue a new decision"); Appx742 ("VA will re-decide your claim(s) and will issue a new decision"); Appx743 ("your appeal period has been re-started and you will have one year from the date of this letter to appeal"); Appx744 ("your claim will be processed in accordance with current applicable law").

Finally, because the writ ordered the VA to re-adjudicate the affected claims, the VA's repeated assertion that the writ eliminated the need for future review (*see* Br. 24-26) is without factual basis. No one knows how the VA will re-adjudicate a given claim. *Cf. Erspamer*, 1 Vet. App. at 9 ("It is impossible for this court to predict what course petitioner's claim might follow in the future and there is nothing to be gained by engaging in such an exercise."). The VA may deny class members' claims if there is a legitimate reason to do so, and any disappointed class member can appeal such denial to the Board and, from there, to the Veterans Court.

[c] The VA also suggests that the record below was insufficient to support a finding that the VA had deterred veterans from pursuing

their appeal rights. *See* Br. 21-22 (accusing the court below of "hyperbole" and "speculation"). This argument fails because the factual finding of deterrence is outside the scope of review. 38 U.S.C. § 7292(d)(2); *Delisle v. McDonald*, 789 F.3d 1372, 1374 (Fed. Cir. 2015).

More fundamentally, the argument fails because it addresses only the court's statement that the IFR itself was a deterrent. *See* Br. 21-22. The VA completely ignores the court's alternative holding that the VA's misrepresentations had frustrated its prospective jurisdiction. As the court put it, the VA's misrepresentations were "critically important because, if left uncorrected, [veterans] won't appeal or, perhaps, not even continue with a claim." Appx17. That finding was neither speculative nor hyperbolic.

To begin, the false statements on the VA's website, *see supra* 16-17, likely deterred an unknowable number of veterans from even filing claims. Indeed, the VA *still* publishes a Fact Sheet containing that false claim. *See supra* 24-25. Common sense teaches that at least some veterans relied on the VA's misrepresentations to their detriment by deciding not to submit their claims.

Next, the VA likely caused veterans to abandon rejected claims. The VA rejected **1,017,406** claims from insured veterans after *Staab*. Appx731-32. The rejection letters falsely stated that veterans with other health insurance were ineligible for reimbursement. The rejection letters also instructed veterans to submit more information only if they could show out-of-pocket costs other than coinsurance, deductibles, or copayments. Appx216, 218. Later, the putative "correction" notices that the VA sent beginning in April 2019 falsely told these veterans that it was "important to note that the VA has no legal authority to pay a Veteran's cost shares, deductibles, or copayments." Appx355. It is not speculative to conclude that veterans likely responded to these letters by abandoning their claims.

Finally, the VA deterred veterans from appealing denied claims by including similar false statements in its denial letters. The VA claims that the "tens of thousands of ***claims and appeals*** of the members of the Wolfe Class" shows that no deterrence occurred. Br. 22 (emphasis added). Conjoining "claims and appeals" in that sentence is misleading. After the writ issued, the VA revealed that it has denied 74,432 ***claims*** involving class members, but it did not say how many class members filed

appeals. The record includes absolutely no evidence suggesting that "tens of thousands" of class members had filed appeals prior to the writ.

3. The Writ Was In Aid Of Prior Jurisdiction.

The VA wrongly asserts that mandamus is available "only" to assist a court's "future" jurisdiction. *See, e.g.*, Br. 9, 16, 20, 25. Although mandamus frequently protects prospective jurisdiction, it also is available to protect a prior exercise of jurisdiction.

As the Supreme Court has explained, "the fact that mandamus is closely connected with the appellate power does not necessarily mean that the power to issue it is absent where there is no existing or future appellate jurisdiction to which it can relate." *United States v. U.S. Dist. Court for S.D.N.Y.*, 334 U.S. 258, 263 (1948). "It is, indeed, a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court." *Id.* at 264. "***That function may be as important in protecting a past exercise of jurisdiction*** as in safeguarding a present or future one." *Id.* (emphasis added). Appellate bodies therefore have authority to use mandamus "to compel adherence" to their prior judgments. *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999). Indeed, a lower tribunal "'is

without power to do anything which is contrary to either the letter or spirit of [a] mandate'" issued by an appellate court. *Yablonski v. United Mine Workers of Am.*, 454 F.2d 1036, 1038 (D.C. Cir. 1971). "[I]t is well settled that mandamus lies to rectify a deviation." *Id.*

The VA completely ignores this important line of authority. The Veterans Court found that the IFR had been promulgated "to achieve the same effect as the invalid regulation in *Staab*." Appx17. The court also found that the VA had used the IFR "to circumvent our *Staab* decision (or at least its effects)." *Id.* The court correctly recognized that these facts presented "a truly exceptional situation," and an independent justification for the writ. Appx17-18. The VA has no response.

4. The Writ Was An Appropriate Use Of The Court's Authority To Hear Class Actions.

The Veterans Court has power to hear class actions under several authorities, including the All Writs Act. *See Monk*, 855 F.3d at 1318; *see also U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974) (the All Writs Act allows courts to fashion "'appropriate modes of procedure'") (quoting *Harris v. Nelson*, 394 US 286, 299 (1969)). Class actions serve a critical function. They promote "efficiency, consistency, and fairness." *Monk*, 855 F.3d at 1320. They improve "access to legal and expert

assistance" for veterans who frequently have "limited resources." *Id.* Class actions also advance the judiciary's interest by increasing the frequency of precedential decisions and by limiting the VA's ability to evade review by intentionally mooting individual claims. *See id.* at 1320-21. Most importantly, class actions can "compel correction of systemic error and to ensure that like veterans are treated alike." *Id.* at 1321.

The VA makes two incorrect arguments that the writ was not an appropriate use of the court's authority to entertain class actions. First, the VA contends that class actions in the Veterans Court are available only to compel a final determination or correct unreasonable delay, Br. 54; *see id.* at 20, 32, and cannot challenge its regulations, *id.* at 30. Second, and relatedly, the VA argues that a class action in the Veterans Court cannot include a "direct challenge" to a VA regulation. *Id.* at 15-16, 27, 32, 55. It is wrong on both points.

[a] The VA's first argument wrongly conflates jurisdiction and authority to enter relief. The *jurisdiction* of the Veterans Court to hear a class action stems from its prospective jurisdiction under 38 U.S.C. § 7252(a). When prospective jurisdiction exists (as it did below), the Veterans Court has *authority* to take any of the actions outlined in

38 U.S.C. § 7261. Thus, 38 U.S.C. § 7261(a)(2) authorizes the Veterans Court to compel a final decision or to correct an unreasonable delay. The same statute also authorizes the VA to provide an authoritative interpretation of the law, *id.* § 7261(a)(1), and to invalidate "regulations," *id.* § 7261(a)(3). Nothing in the statute prohibits the use of these powers in class actions.

[b] The VA notably does not specify what it means by a "direct challenge." At points, the VA suggests that a "direct" challenge is one that attacks the "facial validity" of a rule. Br. 56; *see also id.* at 29. The suggestion that the Veterans Court lacks authority to entertain "facial" challenges (as opposed to "as applied" challenges) is clearly wrong. There is no such limitation in 38 U.S.C. § 7261(a)(3), which does not distinguish between facial and as-applied challenges. To the contrary, Congress modeled that provision after the Administrative Procedure Act ("APA"), *see Martin v. O'Rourke*, 891 F.3d 1338, 1343 (Fed. Cir. 2018), and facial challenges to agency regulations are a routine part of APA practice. *See, e.g.*, *Mistick PBT v. Chao*, 440 F.3d 503, 508-09 (D.C. Cir. 2006). Moreover, the Supreme Court has affirmed at least one Veterans Court

decision that facially invalidated a VA regulation. *Brown v. Gardner,* 513 U.S. 115, 116-17 (1994).

At other points, the VA suggests that a "direct challenge" is one brought by a veteran who has not yet obtained a ruling from the Board. Br. 28; *see id. at* 15 (asserting that Ms. Wolfe should have "simply followed the appeals process"). This version of the "direct challenge" argument fails for three reasons.

First, and most importantly, the VA cites no statute requiring a class representative to obtain a Board decision prior to bringing a class action. Unlike some other federal programs that have *jurisdictional* exhaustion requirements, *see, e.g.*, 42 U.S.C. § 405(h) (Social Security); *id.* § 1395ii (Medicare), exhaustion is not jurisdictional for veterans' claims. *Ledford v. West*, 136 F.3d 776, 780 (Fed. Cir. 1998).

Second, requiring class representatives to exhaust the VA's appeal process would effectively nullify class action practice (which Petitioners believe is the true goal of this appeal). As the Court has recognized, the "average time from the filing a Notice of Disagreement to the issuance of a [Board] decision is over five years." *Martin*, 891 F.3d at 1341-42. Veterans should be able to obtain class relief without losing "years of

their lives living in constant uncertainty, possibly in need of daily necessities such as food and shelter, deprived of the very funds to which they are later found to have been entitled." *Id.* at 1350 (Moore, J., concurring). Indeed, many claims are extinguished when veterans pass away still trying to navigate the VA's "bureaucratic morass," *id.*, as occurred to Mr. Staab.

Third, this Court recently reiterated that Congress passed the Veterans' Judicial Review Act of 1988 ("VJRA") and created the Veterans Court "'for the express purpose of ensuring that veterans were treated fairly by the Government and to see that all veterans entitled to benefits received them.'" *Taylor v. McDonough*, --- F.4th ---, No. 2019-211, 2021 WL 2672307, at *7 (Fed. Cir. June 30, 2021) (quoting *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed Cir. 2006)) (cleaned up). In doing so, Congress left intact "common law adjudicatory tools." *Id.* at *6. As this Court held in *Monk*, one of the common-law tools that the VJRA preserved was the ability of veterans to bring class actions to challenge VA regulations. *See* 855 F.3d at 1320 ("we find no persuasive indication that Congress intended to *remove* class action protection for veterans when it enacted the VJRA"); *id.* at 1320 n.4 (legislative history "suggests

that Congress intended that the Veterans Court would have the authority to maintain class actions" and that "'most challenges to regulations are class actions, involving large groups of beneficiaries or potential beneficiaries'") (quoting H.R. Rep. No. 100-963, pt. 1, at 41-42 (1988)).

In the decades prior to the VJRA, veterans were not required to exhaust the VA's appeal procedures prior to bringing class actions. *See generally Johnson v. Robison*, 415 U.S. 361 (1974); *Wayne State Univ. v. Cleland*, 590 F.2d 627 (6th Cir. 1978); *Giusti-Bravo v. U.S. Veterans Admin.*, 853 F. Supp. 34 (D.P.R. 1993); *see also Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113, 121 (N.D. Cal. 1987) ("The Court is not aware of any statute mandating exhaustion . . . ."). *Monk* and *Taylor* teach that Congress intended for such class actions to remain available through petitions for mandamus under the All Writs Act.

5. The Writ Was Necessary To Correct A Clear Abuse Of Discretion.

The writ was separately justified by the extraordinary facts of this case. The Supreme Court has stressed that mandamus is not "'confined . . . to an arbitrary or technical definition of 'jurisdiction.'" *Cheney*, 542 U.S. at 380 (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)).

Mandamus is appropriate when an official's "action is not mere error but usurpation of power." *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945). *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-83 (1953); *Will*, 389 U.S. at 95. Mandamus must be available to correct an official's "'clear abuse of discretion.'" *Cheney*, 542 U.S. at 380.

This is such a case. As the Veterans Court put it, an "extraordinary situation demands extraordinary relief." Appx2. In the proceedings below, the VA confessed to three different "regrettable errors." Appx298, 412, 779. Beyond the confessed errors, the VA's misconduct includes a unilateral moratorium on claim processing, an interim final rule that lacked good cause, a regulation that circumvented both the statute and *Staab*, its refusal to pay veterans like Ms. Wolfe, and ongoing misrepresentations. Given this extraordinary record, the Veterans Court was well within its supervisory authority to issue mandamus. *Cf. La Buy v. Howes Leather Co.*, 352 U.S. 249, 258 (1957) ("there is an end of patience").

6. The Writ Did Not Interfere With The Jurisdiction Of Any Other Tribunal.

The VA alleges that the writ "seized" this Court's jurisdiction under 38 U.S.C. § 502 and the Board's jurisdiction under 38 U.S.C. § 7104(a).

Despite the substantial amount of ink spilt, *see* Br. 27-34, these are not serious arguments.

[a] Section 502 states as follows:

> An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provisions of chapter 72 of this title, the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.

38 U.S.C. § 502. Each sentence is important. The first states that the VA's publications in the Federal Register (*see* 5 U.S.C. 552(a)(1)) and its rules (*see* 5 U.S.C. § 553) are subject to judicial review.

The second sentence incorporates the review provisions of the APA, but specifies that this Court is the exclusive forum. Absent that restriction, every district court would be a potential forum, 5 U.S.C. § 702, and that is the only sense in which § 502 is "exclusive." *See Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1352 (Fed. Cir. 2011) (absent § 502, "these suits would be brought under the APA in another court"). As the Ninth Circuit has explained, Congress altered the usual APA approach to prevent the possibility of circuit splits. *See United*

States v. Szabo, 760 F.3d 997, 1005 (9th Cir. 2014) (it was "Congress's intent 'to avoid the possible disruption of VA benefit administration which could arise from conflicting opinions on the same subject due to the availability of review in the 12 Federal Circuits or the 94 Federal Districts'") (quoting H.R. Rep. No. 100-963, at 28 (1988)).

While the second sentence of § 502 does not address the relationship between this Court and the Veterans Court, the third does. That sentence states that "such review" (i.e., review of a VA rule) also can be "sought in connection with an appeal brought under the provisions of chapter 72" (i.e., in the Veterans Court). When that occurs, the provisions of chapter 72, including § 7252 and § 7261, control. In other words, § 502 recognizes that regulatory challenges can and do occur in the Veterans Court. Indeed, "review of regulations . . . in the Veterans Court under § 7252 . . . is common." *Wingard v. McDonald*, 779 F.3d 1354, 1358 (Fed. Cir. 2015). Importantly, nothing in sections 502, 7252, or 7261 suggests that the Veterans Court cannot review regulations as an exercise of prospective jurisdiction or in a class action.

Finally, none of the cases cited by the VA actually supports the conclusion that the Veterans Court cannot review a VA regulation

"absent a board decision." Br. 31. *Wingard* dealt with a different statutory provision that precludes the Veterans Court from reviewing the schedule of ratings for disabilities. 779 F.3d at 1357. *Preminger* rejected the government's argument that this Court could not review the VA's denial of a rulemaking petition. 632 F.3d at 1353-54. *Dacoron v. Brown*, affirmatively asserts that the Veterans Court "has authority to reach constitutional issues in considering petitions for extraordinary writs." 4 Vet. App. 115, 119 (1993).

In fact, one of the VA's cases directly undercuts its position. The VA cites *American Legion v. Nicholson*, but that case actually confirmed that mandamus would be proper so long as a writ *could* lead to a Board decision over which the court *would* have jurisdiction *in the future*. 21 Vet. App. 1, 7 (2007). As discussed above (*supra* 24-26) and again immediately below, the writ remanded all claims to the VA for re-adjudication. The VA retains appropriate discretion to deny each claim on a different ground, as does the Board. As a result, the writ may well lead to innumerable Board decisions over which the Veterans Court will have jurisdiction in the future.

[b] There is no factual basis for the VA to assert that the Veterans Court "decid[ed] the merits of Ms. Wolfe's claim (and those of the class)." Br. 33; *see id.* 13, 16, 26. The assertion relies on wordplay. Veterans submit "claims" to the VA seeking "a specific benefit." 38 C.F.R. § 3.1(p). In this case, Ms. Wolfe submitted, and the VA denied, Claim # 752227. *See* Appx110. When the VA asserts that the Veterans Court decided Ms. Wolfe's "claim," however, the VA is not referring to Claim 752227. Rather, the VA is using the word "claim" to refer to the ***regulatory challenge*** that Ms. Wolfe advanced on behalf of tens of thousands of similarly situated veterans.[17]

The difference is critical. The VA might have had a valid objection if the Veterans Court had granted Claim 752227 or ordered the VA to pay Ms. Wolfe a specific sum. Such orders would be similar to the transfer that the Supreme Court found impermissible in *Platt*, 376 U.S. at 245. However, the writ below did no such thing. By invalidating the IFR, the writ simply determined the appropriate criteria and remanded all claims

[17] Indeed, the VA's brief drops the charade at one point. *See* Br. at 21 (asserting that the court below addressed "the merits of Ms. Wolfe's ***regulatory challenge***") (emphasis added).

to the VA for re-adjudication, which the Supreme Court held was appropriate in *Platt*, 376 U.S. at 245.

Finally, the fact that the Board ruled in favor of Ms. Wolfe, *see* Br. 34, proves absolutely nothing. The Board followed the decision below to conclude that coinsurance was reimbursable. *See* Appx726. Had there been a different ground to deny payment, the Board could, and presumably would, have used it to deny Ms. Wolfe's claim. *See* Appx725 ("The agency . . . has not contended, and the record does not otherwise reflect, that the Veteran did not meet the statutory and regulatory requirements . . . .").

B. The Class Was Clearly Entitled To A Writ

The class's entitlement to a writ turns on whether the IFR is consistent with the statute. *See* Appx28. The VA accepts that framing on appeal, but argues that the Veterans Court should have deferred to the IFR as a "reasonable" interpretation of the statute "in light of the VA's explicit and broad authority" to establish regulations. Br. 45. For several reasons, the VA is not entitled to any deference.

First, courts defer to agencies only where Congress delegated authority ***and*** the interpretation in question "was promulgated in the

exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Here, Congress conditioned the VA's rulemaking authority on compliance with the notice-and-comment requirements of the APA. *See* 38 U.S.C. § 501(d). The IFR did not go through notice and comment and, because there was no good cause to skip notice and comment, the IFR violated the APA. *See, e.g.*, *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1380-81 (Fed. Cir. 2017). In light of the violation, VA is not entitled to any deference with respect to the IFR. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2006) (no deference where the Attorney General had not "exercised" his delegated rulemaking authority in the "specific ways" required by Congress).

Second, and likely because the public had no advance opportunity to comment, the Federal Register notice announcing the IFR contained no discussion of the issues in this case. The fact that the VA invented all of its statutory arguments during this litigation is an additional reason not to defer. *See GHS HMO, Inc. v. United States*, 536 F.3d 1293, 1300 (Fed. Cir. 2008) (no deference where the agency's arguments did not "appear in the Federal Register where [it] justified the adoption of this regulation"); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213

(1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *Parker v. OPM*, 974 F.2d 164, 166 (Fed. Cir. 1992) ("[P]ost-hoc rationalizations will not create a statutory interpretation deserving of deference.").

Third, because the statute is clear, the validity of the IFR should be resolved at *Chevron* step one where the agency receives no deference. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). Moreover, the first step requires that courts apply all the traditional tools of statutory interpretation. *Id.* One of those tools is the canon against surplusage. *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 644-45 (D.C. Cir. 2000). The fundamental problem with the IFR is that it prevents the VA from reimbursing ***any*** out-of-pocket costs incurred by insured veterans. As a result, the IFR is *ultra vires* because it renders the statutory command that the VA reimburse insured veterans for "the amount by which the costs for the emergency treatment exceed the amount payable or paid by the [insurer]," 38 U.S.C. § 1725(c)(4)(A), null and void.

There is no real dispute that the IFR impermissibly rendered § 1725(c)(4)(A) surplusage. The VA has not identified a single veteran who obtained reimbursement under § 1725(c)(4)(A) while the IFR was in

force. Indeed, the VA stated that the total amount reimbursed under § 1725(c)(4)(A) was just $12.00 – and never identified what that amount was for. Appx343.

The VA cannot identify even a ***theoretical*** way for an insured veteran to obtain reimbursement under § 1725(c)(4)(A). Below, the VA argued that "balance billing" was a possibility. The Veterans Court below rightly rejected that suggestion, Appx30-31, and the VA no longer pursues it on appeal. Instead, the VA now argues for the first time that "annual or lifetime limits on covered costs" and "short-term limited duration" ("STLD") insurance plans are reasons why the IFR does not render § 1725(c)(4)(A) surplusage. Br. 47.

The VA clearly waived both arguments by failing to present them to the Veterans Court in any of its five briefs below. *See Boggs v. West*, 188 F.3d 1335, 1337-38 (Fed. Cir. 1999) ("As a general rule, an appellate court will not hear on appeal issues that were not clearly raised in the proceedings below."). It is disingenuous for the VA to claim that the analysis below was "incomplete," or to assign "error" to the Veterans Court, Br. 46-47, when the VA failed to raise either of these points in any of the five briefs it filed below.

The arguments also fail on their own terms. When lifetime or annual limits were lawful,[18] they worked by increasing the insured's coinsurance responsibility to 100% for any amounts over the cap. The IFR would have banned reimbursement of a veteran's liability above the cap just like any other coinsurance payment. Similarly, STLD plans are not different from "normal" insurance in any relevant way. Where STLD plans do not cover a service, veterans are "personally liable for . . . all of the costs." Br. 47. The VA has provided reimbursement in that situation, since before the ECFA. *See supra* 6-7. Where STLD plans provide only partial coverage and leave veterans "personally liable for some . . . of the costs," Br. 47, the IFR would apply just as it does to "normal" insurance plans. Simply put, if the IFR is allowed to stand, the VA will never have to make a payment under 38 U.S.C. § 1725(c)(4)(A), meaning that Congress's goal in passing the ECFA will be defeated.

The VA responds that the IFR must ban all forms of cost sharing (and thus prohibit all possible reimbursement) to give meaning to the

[18] The VA concedes that lifetime and annual limits were banned by the Affordable Care Act ("ACA") on March 2, 2010. Br. 47 n.16. It is plainly unreasonable for the VA to imply that Congress's ***main goal*** in passing 38 U.S.C. § 1725(a)(C)(4)(A) on February 1, 2010 was to address practices that it banned just 49 days later. Indeed, the ACA had already passed the Senate when Congress enacted the ECFA.

phrase "or similar payments" in 38 U.S.C. § 1725(a)(C)(4)(D). This, too, is meritless. The VA conceded below that the statute "affords VA the regulatory flexibility to align this provision's scope with evolving health insurance practice and terminology." Appx30. Even on appeal, the VA concedes, "Congress baked this flexibility into the statutory text." Br. 48. Such concessions are fatal—there is no requirement that the phrase "or similar payment" have an ***additional*** meaning.[19]

Another tool that the Court should apply at step one is the "pro-veteran canon." *Procopio v. Wilkie*, 913 F.3d 1371, 1383 (Fed. Cir. 2019) (O'Malley, J., concurring). Below, the VA expressly argued that Congress simultaneously gave with one hand and took away with the other. *See* Appx412-13 ("Congress removed the partial health insurance bar but simultaneously erected a bar that covers nearly all of the same ground"). Congress generally does not "bait and switch" when it passes laws. *See*, *e.g.*, *Iwata v. Intel Corp.*, 349 F. Supp. 2d 135, 147 (D. Mass. 2004) ("It seems unlikely that Congress intended to create a bait-and-switch, where an individual is only covered by the statute until the moment when she

[19] The VA's comment that the IFR also preserves this flexibility, *see* Br. 48 ("the same can be said for VA's regulation"), has nothing to do with whether the flexibility is enough to give meaning to the statutory phrase.

actually needs its protection."). It definitely does not do so when creating veteran benefits. *See Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004) ("[T]he veterans benefit system is designed to award entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign.") (internal quotation marks omitted).

Finally**,** even at *Chevron* step two, the IFR is not a reasonable construction of the statute because coinsurance and deductibles are not reasonably "similar" to copayments. The Veterans Court rightly found that, as a factual matter, copayments are fixed and small, often $100 or less. Appx29-30. In contrast, deductibles are fixed but much larger, often thousands of dollars. Appx30 Coinsurance is neither fixed nor small, and can saddle a veteran with tens of thousands of dollars per visit to the emergency room. *Id.* Thus, intuitively and empirically, coinsurance and deductibles are not similar to copayments.

The VA does not challenge these facts. Instead, the VA responds that the three categories of expenses must be all similar because they are all forms of cost sharing. Br. 45. In particular, the VA asserts that the Court should look to how Congress subsequently defined "cost-sharing"

in the ACA.[20] Br. 45-46. The VA's quotation of the statute is incomplete. The ACA actually defined the term "cost-sharing" to include "deductibles, coinsurance, copayments ***and*** any other expenditure required of an insured individual which is a qualified medical expense . . . with respect to essential health benefits covered by the plan." 42 U.S.C. § 18022(e)(3)(A)(i)-(ii) (emphasis added). The full quotation thus confirms that the VA's interpretation of 38 U.S.C. § 1725(c)(4)(D) is unreasonable and leads to surplusage. ***All*** out-of-pocket expenditures required of an insured veteran are cost shares under the ACA definition. If the VA can prohibit reimbursement of all forms of "cost sharing," then it will have succeeded in prohibiting all reimbursement under § 1725(c)(4)(A).

C. The Class Lacked An Alternative Remedy

The writ entered several forms of relief that are only available on a class basis. This includes an order directing the VA to stop misrepresenting the law, an order directing the VA to correct such misrepresentations, and an order directing the VA to re-adjudicate all

[20] The VA inconsistently argues that the Court ***should consider*** the definition of cost sharing in the ACA, Br. 46, but ***must ignore*** the fact that the ACA banned lifetime limits, *id.* at 47 n.16.

affected claims. Appx36. None of this relief would be available through Ms. Wolfe's individual appeal.

The VA completely ignores the class nature of the relief entered below. Instead, it raises the general point that mandamus should not be used as a substitute for the normal appellate process. Br. 35. The VA relies on *Lamb v. Principi*, 284 F.3d 1378 (Fed. Cir. 2002), to suggest that an individual appeal before the Board is always a sufficient remedy. Br. 36. The reliance is misplaced. *Lamb* was "an ordinary case in which a veteran who has been awarded disability benefits seeks an earlier date for their commencement." 284 F.3d at 1382. The petitioner in *Lamb* had not sought class relief, had not challenged the criteria that the VA was using to adjudicate a class of claims, and had not shown any of the extraordinary circumstances that exist in this case.

More broadly, the principle that a petitioner should exhaust the administrative process rather than seek mandamus is far from absolute. For instance, the VA relies (Br. 40) on *Ledford*, where this Court held that "the doctrine of exhaustion of administrative remedies is not

jurisdictional." 136 F.3d at 780.[21] Exhaustion is an "intensely practical" consideration and should only be required when doing do "would further the doctrine's underlying policies." *Id.*

The VA also relies (Br. 41) on *Bowen v. City of New York*, where the Supreme Court found exhaustion was ***not*** consistent with the policies underlying exhaustion. The Supreme Court explained:

> [T]he relief afforded by the [court below] is fully consistent with the policies underlying exhaustion. The court did not order that class members be paid benefits. Nor does its decision in any way interfere with the agency's role as the ultimate determiner of eligibility under the relevant statutes and regulations. Indeed, by ordering simply that the claims be reopened at the administrative level, the [court] showed proper respect for the administrative process.

476 U.S. 467, 485 (1986). Just so here.

Indeed, exhaustion gives way to multiple exceptions. *See McCarthy v. Madigan*, 503 U.S. 146-149 (1992). The Veterans Court relied on the

[21] Because exhaustion is not jurisdictional, the VA errs in relying on either *Heckler v. Ringer*, 466 U.S. 602 (1984) or *Lifestar Ambulance Service Inc. v. United States*, 365 F.3d 1293 (11th Cir. 2004). *See* Br. 38, 41. Both cases arose under Medicare where exhaustion ***is*** jurisdictional because the Social Security Act ***affirmatively strips away*** district court jurisdiction unless the administrative pathway has been exhausted. *See Ringer*, 466 U.S. at 614-15 (discussing the third sentence of 42 U.S.C. § 405(h)); *Lifestar*, 365 F.3d at 1295-96.

principle that exhaustion is not required when there is "'doubt as to whether the agency was empowered to grant effective relief.'" *Id.* at 147 (quoting *Gibson v. Berryhill*, 411 U. S. 564, 575, n.14 (1973)). The court did not, as the VA puts it, "consider[] Ms. Wolfe's chance of success." Br. 38. Rather, the Veterans Court found that exhaustion would be futile because the IFR *required* the Board to deny all of the claims of the class members. Appx33.[22]

Unreasonable delay also is sufficient to excuse exhaustion. *McCarthy*, 503 U.S. at 146-47. The VA claims delay is never relevant to mandamus, *see* Br. 39 n.12, but its cases involved unremarkable district court orders and the time it would take to proceed to final judgment. *See, e.g.*, *Bankers Life & Cas. Co.*, 346 U.S. at 383 (transfer of venue); *Roche*, 319 U.S. at 31 (motion to dismiss an indictment). Even in that setting, mandamus is proper to avoid delay in resolving important issues. *See Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) (discovery order raising "new and important problems"); *In re Google LLC*, 949 F.3d 1338, 1341

[22] The VA's citation (Br. 38) to *Clinton v. Goldsmith*, 526 U.S. 529 (1999), is inapt. In that case, the Court vacated an injunction as outside the tribunal's statutory jurisdiction and, therefore, not authorized by the All Writs Act. *Id.* at 540. The Court had no cause to consider the petitioner's "chance of success" and the opinion does not indicate that any party raised that issue.

(Fed. Cir. 2020) ("basic" and "undecided" questions regarding venue). It follows *a fortiori* that mandamus was appropriate here, where it accelerated by more than five years the resolution of an important regulatory challenge affecting up to 80% of all veterans.

II. THE VETERANS COURT DID NOT ABUSE ITS DISCRETION BY CERTIFYING THE CLASS.

The VA does not dispute that the Veteran Courts appropriately applied the Rule 23 requirements and appropriately certified a class and instead argues that the class was too broad. *See* Br. at 50-57. In particular, the Secretary argues that three groups of veterans should not have been included in the class. As explained below, none of the VA's challenges has merit.

A. Equitable Tolling Justifies The Court's Decision to Order Re-adjudication Of All Claims.

Citing *Skaar v. Wilkie*, 32 Vet. App. 156 (2019), the VA first argues that the Veterans Court lacked jurisdiction over class members who did not timely appeal their denials. Br. 52. The VA waived this argument by failing to raise it below. *See Boggs*, 188 F.3d at 1337-38.

Even if not waived, the argument still fails. The applicable deadlines are not jurisdictional. *See generally Henderson v. Shinseki*, 562 U.S. 428 (2011). Courts routinely equitably toll appeal periods for class

members whose claims would have otherwise expired during the pendency of a class action. *Bright v. U.S.,* 603 F.3d 1273, 1278-81 (Fed. Cir. 2010). The Veterans Court's decision to extend equitable tolling to all affected veterans who did not appeal within the prescribed period is warranted in light of these longstanding principles as well as the extraordinary circumstances present, including the factual finding below that the VA's misrepresentations had deterred veterans from pursuing their appeals. *See Skaar*, 32 Vet. App. 156, 204 (2019) (Schoelen, J., concurring in part) ("[W]hen analyzing whether equitable tolling is warranted . . . in a class context, two questions are presented: (1) whether equitable tolling is consistent with Congress' intent, and (2) whether tolling is appropriate on these facts.") (internal quotations; and citation omitted).

None of the cases cited by the VA requires a different result. For instance, *Skaar* involved none of the extraordinary circumstances identified below. Indeed, the panel in that case specifically found that Mr. Skaar had not even alleged (let alone established) that the proposed class members "were precluded from timely filing appeals to this Court

for any reason other than VA's historical practice in adjudicating claims." *Id.* at 187.[23]

B. Undecided Claims Are Within The Prospective Jurisdiction Of The Veterans Court.

The VA next argues that the Veterans Court lacks jurisdiction over claims that the Board has not yet decided. Br. 54. The VA waived this argument as well. *See Boggs*, 188 F.3d at 1337-38.

Regardless, for reasons already discussed, such claims are within the court's prospective jurisdiction. *See supra* 30-32 (discussing prospective jurisdiction under *Tennant* and *Mylan Labs*). Indeed, the VA concedes that, under *Monk*, the Veterans Court "may properly certify a class that includes claims still awaiting a board decision." Br. at 54. The VA argues that this power is limited to compelling agency action that has been unreasonable delayed or unlawfully withheld, *see id.,* but the suggestion is pure *ipse dixit*. Once prospective jurisdiction exists, the Veterans Court may exercise *all* of the powers enumerated in 38 U.S.C. § 7261, not just the power described in § 7261(a)(2). *See supra* 42-43.

[23] The VA also cites to *Cook v. Principi*, 318 F.3d 1334, 1339 (Fed. Cir. 2002), and *Jordan v. Nicholson*, 401 F.3d 1296, 1299 (Fed. Cir. 2005), but neither is on point. Neither case even discusses equitable tolling, which remains a viable exception to the doctrine of finality.

C. The Class Seeks Common Relief For A Common Injury.

Finally, the VA argues that the class should not include claims for reimbursement of deductibles, because Ms. Wolfe herself was denied reimbursement only for coinsurance payments. Br. 55-57. This argument is based on a misunderstanding of the class. The class challenges the validity of the IFR on its face. Claimants-Appellees did not ask the Veterans Court to review any individual claim, but to invalidate the IFR and order the VA to stop misrepresenting the law to claimants and to re-adjudicate all affected claims. Each member of the class was injured by the IFR, and each member's injury was properly redressed by the writ.

Separately, the VA's suggestion to limit the class to claims seeking reimbursement of only coinsurance is unworkable. Many class members submitted claims seeking reimbursement of both deductible and coinsurance payments. The VA's suggestion will lead to a convoluted, disastrous result wherein some veterans are both in and out of the class. This will prevent them from being made whole and goes against the notion that class actions should "ensure that like veterans are treated alike." *Monk*, 855 F.3d at 1321.

CONCLUSION

For the foregoing reasons, Claimants-Appellees respectfully request that the Court affirm the decision issued by the Veterans Court.

Respectfully submitted,

Dated: July 13, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Circuit Rule 32(b)(1), claimants-appellee'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 13,241 words.

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit using the Court's CM/ECF system, which will send notifications to all counsel registered to receive electronic notices.

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