Nos. 2021-1757 and 2021-1812

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

VICTOR B. SKAAR,

***Claimant-Cross-Appellant*,**

v.

DENIS MCDONOUGH, Secretary of Veterans Affairs,

***Respondent-Appellant*.**

Appeal from the United States Court of Appeals for Veterans Claims in Case No. 17-2574

Brief of National Veterans Legal Services Program as *Amicus Curiae* in Support of the Claimant-Cross-Appellant

October 12, 2021

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Certificate of Interest

Case Numbers 2021-1757 and 2021-1812

Short Case Caption Skaar v. McDonough

Filing Party/Entity National Veterans Legal Services Program

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INTEREST OF AMICUS CURIAE

The National Veterans Legal Services Program (NVLSP) is a 501(c)(3) nonprofit organization that has worked since 1981 to ensure that the government delivers to our nation's twenty-two million veterans and active-duty personnel the benefits to which they are entitled because of disabilities associated with their military service to our country.[1]

NVLSP publishes the "Veterans Benefits Manual," an exhaustive guide for advocates who assist veterans and their families in obtaining benefits from the Department of Veterans Affairs (VA). NVLSP provided critical leadership in supporting the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), which created the Court of Appeals for Veterans Claims (CAVC) and bestowed upon it the authority to review a final VA decision denying a claim for benefits. Since the VJRA passed in 1988, NVLSP has directly represented thousands of veterans in individual appeals to the CAVC. NVLSP has also filed class-action lawsuits challenging the legality of various VA rules and policies. Its expertise bears directly on the issues before the Court.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* certifies that no part of this brief was authored by counsel for any other party to this case, and no party in this case, counsel for a party in this case, or person other than *amicus curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief. All parties to this case have consented to this filing.

INTRODUCTION

The Federal Circuit expressly recognized the ability of the CAVC to certify a class in *Monk II*. This case presents the same issue without distinction because the CAVC has broad statutory authority to make legal determinations as necessary to carry out its critical mission of reviewing decisions of the Board of Veterans' Appeals (Board). The statutory text governing the CAVC, along with the legislative history of the VJRA, provides express support for such certification. Congress did not intend to remove existing relief available to veterans when it created the CAVC, and Congress knew class action relief was available then. Congress intended the CAVC, within its statutory authority and with the powers available to it under the All Writs Act, to have the authority to certify classes in the direct appeal context. The CAVC thus correctly determined that it could certify a class in Mr. Skaar's appeal, including members with pending and future claims.

ARGUMENT

I. Class Certification Before Enactment of the VJRA, Including Members with Pending and Future Claims, Supports that Such Certification Is Available Under the VJRA

Class actions were available to veterans before the VJRA's enactment. Because the VJRA was intended to expand, not limit, veterans' access to the courts, the CAVC's jurisdiction to entertain veterans-related class actions should be at least comparable to district courts' class action authority in veterans cases pre-VJRA. Recognizing the CAVC's class action authority under the VJRA as comparable to

pre-VJRA authority will, therefore, not "open the floodgates," as the Secretary contends. Gov't Br. at 44. Instead, it will maintain relief previously available to veterans.

A. Before Enactment of the VJRA, Courts Routinely Certified Classes in Veterans-Related Litigation Including Members with Pending Claims and Members Who Had Not Yet Filed a Claim

Before enactment of the VJRA, class certification in veterans-related litigation was relatively routine. Courts certified classes with "present future" members, those with pending claims, and with "future-future" members, those with future claims, both of which the Secretary erroneously contends must be excluded from CAVC class certification. Gov't Br. at 21-35.

In *Nehmer v. U.S. Veterans' Administration*, before enactment of the VJRA, the district court certified a class of veterans seeking benefits after contracting diseases due to exposure to Agent Orange. 118 F.R.D. 113, 115 (N.D. Cal. 1987). The veterans contended that the VA's Agent Orange compensation regulation violated the statute requiring VA to engage in rulemaking by imposing an excessively high standard of proof for the determination whether a disease is associated with exposure to Agent Orange and argued that as a result, the VA must promulgate replacement regulations and void all compensation decisions made based on the challenged regulation. *Id.* at 116.

The court in *Nehmer* certified a class of the following members:

> all current or former service members, or their next of kin (a) who are eligible to apply to, who will become eligible to apply to, or who have an existing claim pending before the Veteran's Administration for service-connected disabilities or deaths arising from exposure during active-duty service to herbicides containing dioxin or (b) who have had a claim denied by the VA for service-connected disabilities or deaths arising from exposure during active-duty service to herbicides containing dioxin.

Id. at 116. The certified class thus included those with pending claims and those yet to file a claim. *Id.* at 120. Although the VA argued that "class certification should be denied, since the named plaintiffs have failed to exhaust their administrative remedies" by obtaining a Board decision, *id.* at 120, the district court disagreed, stating that there was no "statutorily mandated exhaustion requirement." *Id.* at 121.

The court in *Nehmer* recognized that its certification was not anomalous, noting that "a class of plaintiffs composed of 'all persons who claim injury from exposure to Agent Orange and their spouses, children, and parents who claim direct or derivative injury therefrom'" had previously been certified. *Id*. at 125, *citing In Re "Agent Orange" Product Liability Litigation*, 506 F.Supp. 762, 788 (E.D.N.Y. 1980) (granting conditional certification")[2] and *In Re "Agent Orange" Product*

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[2] The Secretary contends that this action is "unpersuasive" because "the Federal Government was dismissed from the litigation." Gov't Br. at 46. The dismissed claims, however, were the defendant's third-party claims against the Government, which were dismissed based on sovereign immunity. 506 F. Supp. at 782. The court made clear that denial of plaintiff's motion to amend its complaint to add the Government as a party was "without prejudice to whatever rights plaintiffs may have to assert those claims in separate proceedings." *Id*. Moreover, to the extent the

Liability Litigation, 100 F.R.D. 718, 729 (E.D.N.Y. 1983) (granting final certification).

In *Guisti-Bravo v. U.S. Veterans Administration,* 853 F. Supp. 34 (D.P.R. 1993), the district court approved a class action settlement after conducting a fairness hearing. That case concerned a challenge to a mass review conducted by the VA in the early 1980s of all veterans residing in Puerto Rico and the U.S. Virgin Islands who were rated by the VA as 100% disabled for a mental disorder to determine whether each class member's 100% rating should be reduced pursuant to standards contained in an unpublished directive that allegedly violated published VA regulations. The settlement the court approved invalidated the unpublished directive, voided all rating reductions made in any class member's case, and required VA to re-adjudicate whether the class member's 100% rating should be reduced under the criteria contained in published VA regulations. *See id.* at 35.

The Secretary contends that "the district court never actually certified the class." Gov't Br. at 46. Although the court did not directly address the Government's jurisdictional challenge, *id*, at 36-37, the court unquestionably approved the settlement with respect to the "certified class" of 708 veterans based on a settlement agreement negotiated by the Government. *Id*. at 41, 42.

Secretary's argument is relevant, the Government was indisputably a party in *Nehmer*.

In *Wayne State University v. Cleland*, the class representatives sued for educational assistance benefits, challenging VA education benefits regulations. 440 F. Supp. 811, 812 (E.D. Mich. 1977), *aff'd in part*, *rev'd in part on other grounds*, 590 F.2d 627 (6th Cir. 1978). The district court certified the class of "all full-time veteran students enrolled in the Weekend College Program who are otherwise eligible to receive full-time veterans' educational assistance allowance benefits," thus including those with pending claims and those who had not yet sought relief from the VA. *Id.* at 814. The Court of Appeals for the Sixth Circuit confirmed that the district court certified "an appropriate class," 590 F.2d at 628 n.1, and agreed that "federal jurisdiction exists." *Id*. at 634.

Similarly, in *Beauchesne v. Nimmo*, the plaintiff sought class certification to "represent all persons in Connecticut, who have had or will have VA benefits payable to the deceased beneficiaries directly deposited into their bank accounts and who subsequently have had or may in the future have their accounts debited by actions of the defendants to recover those benefits paid." 562 F. Supp. 250, 259 (D. Conn. 1983). The court granted the request, certifying the class, including members with current claims and members yet to file claims. *Id.*

In *Johnson v. Robison*, the Supreme Court exercised its authority to review a class action in which conscientious objectors, who performed mandatory alternative civil service, challenged the constitutionality of veterans educational benefits

legislation excluding them as beneficiaries. 415 U.S. 361, 365 (1974). The district court certified the class as including "all those selective service registrants" who had completed their alternative service or been released from it, thus including those with pending claims and those who had not yet presented claims to the VA. *Robison v. Johnson*, 352 F. Supp. 848, 851 (D. Mass. 1973), *aff'd in part*, *rev'd on other grounds*, 415 U.S. at 366. In fact, the district court rejected a challenge based on Robison's failure to exhaust his administrative remedies, reasoning that Robison had "no such remedy available to him, because the Board of Veterans' Appeals has gone on record as stating that it has no jurisdiction to decide the constitutionality of the educational benefits legislation," and therefore Robison "could not have his claims heard by appealing through administrative channels." *Id*. at 853. Thus, the failure of Robison and members of the class to present claims to the Board did not preclude consideration of the class challenge.

In *Semenchuk v. Walters*, No. 84-cv-3132, 1985 U.S. Dist. LEXIS 21667 (N.D. Ill. Mar. 18, 1985), the district court certified a class of "all past, present, and future Illinois recipients of Veterans need-based non-service connected disability pensions whose pensions have been or may be reduced or terminated without adequate notice and/or opportunity for a hearing before the effective date of the termination or reduction" without regard to whether they had appealed the reduction or termination and obtained a decision from the Board. *Id*. at *7.

In *National Association of Radiation Survivors v. Walters*, the class representative sued for VA service-connected death and disability compensation based on exposure to nuclear radiation from government atomic bomb tests, challenging the constitutionality of the $10.00 fee limit for all work done by an attorney in representing a veteran pursuing Service-Connected Death and Disability (SCDD) claims before the VA. 111 F.R.D. 595 (N.D. Ca. 1986).

The proposed class was "[a]ll persons who currently have pending or who file or re-open VA [SCDD] claims based on exposure to nuclear radiation from government atomic bomb tests in the Marshall Islands or the Nevada Test Site or from the atomic bombs dropped on Hiroshima and Nagasaki in 1945." *Id*. at 597. The district court conditionally certified the class, which it characterized as consisting of "all past, present and future ionizing radiation claimants who have, or will have, some form of 'active' claim relating to SCDD benefits before the VA," without any limitation on presentment *Id*. at 598. The class included those with pending claims and those who would file or re-open claims.

These cases amply demonstrate that pre-VJRA, courts certified classes in veterans-related actions including class members with pending claims and members who had not yet presented claims to VA, exactly the members the Secretary argues must be excluded here. Gov't Br. at 21-35. Other courts certified such classes as well. *Bedgood v. Cleland*, 521 F. Supp. 80, 82 (D. Minn. 1981) (certifying class

"composed of all recipients of veterans pension benefits in the State of Minnesota whose individual benefits have been or may in the future be reduced, terminated, or suspended without being afforded adequate notice and opportunity for a hearing prior to the change in their monthly pension benefits"); *Plato v. Roudebush*, 397 F. Supp. 1295, 1314 (D. Md. 1975) (certifying the class "of all persons whose individual Veteran's Administration monthly pension benefits have been or may in the future be administratively reduced, terminated, or suspended without first being afforded adequate advance notice and the opportunity for a prior hearing."); *Ziviak v. United States*, 411 F. Supp. 416, 418 (D. Mass. 1976) (certifying class of "parents of deceased incompetent veterans who would be entitled to veterans' benefits but for the language in 38 U.S.C. § 3203 dealing with survivors of such veterans").

The Secretary incorrectly asserts that before enactment of the VJRA, district courts certified veteran class actions "on rare occasion." Gov't Br. at 45. The cases above demonstrate that is not correct. In fact, considering the extensive history of pre-VJRA veterans-related class certification, including members with pending claims and those who had not yet presented claims, Mr. Skaar's request for class certification is not new. There is no reason to deny Mr. Skaar's request for class certification merely because class member claims are pending or have not yet been presented. Such class certification unquestionably existed before the VJRA.

B. The Secretary's Attempts to Distinguish Pre-VJRA Class Certification Fail

The Secretary argues that class certification in *Nehmer* was only acceptable because the case was before a district court able to develop the record through discovery, whereas the CAVC is unable to do so. Gov't Br. at 46-47. This argument, however, ignores the context of the *Nehme*r court's statements on its ability to develop the record. The court did not determine that it could certify the class just because it could develop the record, but instead considered that as part of a seven-part balancing test. *Nehmer*, 118 F.R.D. at 121-22. Other factors weighing in favor of certification were similar to those present here. For example, the *Nehmer* court found that the claim that the VA "committed procedural and substantive errors in adopting its regulation [was] collateral to the types of issues the individual litigants would ordinarily raise before the VA, such as whether they had been exposed to dioxin." *Id.* at 123-25. Here, there is a common legal question of whether the dose estimate methodology the VA uses to deny all class members' claims constitutes sound scientific evidence in accordance with 38 C.F.R. § 3.311.

Nonetheless, any concerns about record development can be addressed through the CAVC's power to remand to the VA, as has been done in this case. Appx87-88 (vacating and remanding). Moreover, a procedural concern regarding record development pales in comparison with the ability of class actions to assist veterans and the administration of justice "by promoting efficiency, consistency, and

fairness, and improving access to legal and expert assistance by parties with limited resources." *See Monk II* at 1321.

The Secretary contends that Congress criticized the approach taken in *Wayne State* for "paying too much attention to the policy . . . and not enough attention to the explicit language that Congress used." Gov't Br. at 46. But the full quote from the legislative history is that courts were "not [paying] enough attention to the explicit language that Congress used *in isolating decisions of the Administrator from judicial scrutiny*." H.R. Rep. No. 100-963 at 21 (1988) (emphasis added). The Committee in fact recognized that *Wayne State* "did not involve an individual veteran's challenge to an agency decision in his or her case," *id*., which at the time was isolated from judicial scrutiny. *Id*. at 10 ("the Veterans' Administration stands in 'splendid isolation as the single federal administrative agency whose major functions are explicitly insulated from judicial review,'" *quoting* Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 Stanford Law Review 905 (1975).)

Finally, the Secretary contends that "the Supreme Court's instruction that the 'review opportunities available to veterans before the VJRA was enacted are of little help in interpreting' the VJRA" makes it inappropriate to consider pre-VJRA class certification decisions. Gov't Br. at 45, *citing Henderson v. Shinseki*, 562 U.S. 428, 441 (2011). The Court in *Henderson*, however, addressed whether the 120-day filing

deadline in 38 U.S.C. § 7266(a) was jurisdictional. The Secretary had argued that because before enactment of the VJRA, "VA decisions were not subject to any further review at all," was no reason to conclude that the jurisdictional filing deadline it urged was "inconsistent with a pro-veteran administrative scheme." *Id*. The Supreme Court rejected the Secretary's argument. That VA decisions were not subject to review "at all" before enactment of the VJRA was not relevant to whether the filing deadline in section 7266(a) was jurisdictional. In any event, the Supreme Court's rejection of the Secretary's argument in *Henderson* does not support turning a blind eye to the class certification available to veterans before the VJRA was enacted.

II. The Legislative History of the VJRA Demonstrates that Congress Intended to Expand Veterans Rights, Not Diminish Them

When it enacted the VJRA, Congress was well aware of the class-action relief veterans had pursued and obtained. Indeed, according to a Congressional Budget Office cost estimate issued shortly before the VJRA was enacted, Congress understood the importance of class actions in the veterans context. H.R. Rep. No. 100-963 at 41-42 (stating that "most challenges to regulations are class actions, involving large groups of beneficiaries or potential beneficiaries"). There is no indication that Congress intended to limit or curtail veterans seeking such relief with the passage of the VJRA. The text of 38 U.S.C. § 7252 does not preclude the CAVC's jurisdiction to certify class actions with members who have not fully

exhausted their claims at the Board. Veterans class actions containing both exhausted and unexhausted claims were the norm before the VJRA was enacted and are the norm under administrative regimes with similar jurisdictional statutes, including the APA. The scope of section 7252, therefore, must be read in that context.

Further, in establishing the CAVC, Congress did not want the reviewing body to "affect an individual's ability to bring any other type of challenge—such as a challenge to the lawfulness or constitutionality of VA action or procedure not involving a VA rule or regulation, or a challenge under the Freedom of Information Act or the Privacy Act, or an equal opportunity challenge, to name a few—through any judicial forum or process currently available to an aggrieved party." 134 Cong. Rec. H-10,333 (daily ed. Oct. 19, 1988) (Rep. Edwards). Congress's intent was plain that it did not mean the VJRA to curtail the rights of veterans, which already included a right to relief through class action mechanism, but to instead focus redress of those rights at the CAVC.

A. The Legislative History Demonstrates the Primacy of the APA to the VJRA

As enacted, the VJRA "followed the APA model in almost all respects . . . ."

Roberson v. Principi, 17 Vet App. 135, 146 (2003).[3] In the context of an appeal of a Board decision, the Supreme Court has explained that the CAVC's scope of review under 38 U.S.C. § 7261 is similar to that of an Article III court reviewing an agency action under the APA under 5 U.S.C. § 706. *Henderson*, 562 U.S. at 432 n.2; *see also Euzebio v. McDonough*, 989 F.3d 1305, 1318 (Fed. Cir. 2021).

Judicial review of federal agency actions was first permitted in 1946 with enactment of the Administrative Procedure Act (APA) and was formalized in 1976 when Congress waived sovereign immunity and permitted judgments to be entered against the United States. Section 702 of the APA, titled "Right of review," directs that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

Veterans, however, were specifically excluded from the judicial review provisions of the APA. In 1988, Congress enacted the VJRA, finally providing judicial review of veterans benefits decisions. Passage of the VJRA was an arduous process, taking over a decade. Year after year, members of Congress recognized the

[3] One possible exception is that the VJRA replaced the APA's "substantial evidence" standard with a "clearly erroneous" test. The Supreme Court has noted, however, that "the difference [between the 'substantial evidence' and 'clearly erroneous' standards] is a subtle one - so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome." *Dickinson v. Zurko*, 527 U.S. 150, 162-63 (1999).

benefit of judicial review to veterans, who it was said, should not be treated as second-class citizens. 134 Cong. Rec. 31,461 (daily ed. Oct. 18, 1988) (statement of Sen. Cranston) ("In the last four Congresses, the Senate has gone on record as supporting legislation to eliminate provisions in current law that accord veterans second-class citizenship in the very fundamental area of their relationship with the Veterans' Administration with respect to statutory benefits and services.").

When ultimately enacted, it was clear that an overriding purpose of the VJRA was to treat veterans fairly. S. Rep. No. 100-418, at 30-31 (1988) ("This legislation [VJRA] is designed to ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives from [] VA every benefit and service to which he or she is entitled under law"); 134 Cong. Rec. 31,454, 31,465 (daily ed. Oct. 18, 1988) (statement of Sen. Cranston) ("One of the principal reasons judicial review is needed is to help ensure fairness to individual claimants before [] VA").

In the decade that Congress considered enacting legislation to permit judicial review of veterans claims and to provide that fairness to veterans, the APA was always a primary model for any proposed legislation. When the VJRA was finally enacted, the APA and its judicial review provisions remained the primary model on which the law was based.

In the Ninety-Sixth Congress, S. 330 was proposed to provide judicial review of veterans' claims by allowing federal district courts to review Board decisions. 125 Cong. Rec. 1701 (daily ed. Feb. 1, 1979). The Senate debated and passed it. In doing so, members of the Senate repeatedly confirmed that the APA was used as a model for the legislation. 125 Cong. Rec. 24,751-74 (daily ed. Sept. 17, 1979) (development of the record, 24,759; content of a Board decision, 24,769; and rule of prejudicial error, 24,764). In addition, as introduced, S. 330 "allowed court review of questions of both law and fact and defined the court's role on questions of fact by using the 'substantial evidence' test as in the Administrative Procedure Act and the Social Security Act (SSA)." *Id*. at 24,755. There were concerns, however, about how the "substantial evidence test" was applied in the SSA context, "the concerns being that courts are disregarding the intent of that test and substituting their own judgment for that of administrative decision-makers." *Id*. As a result, "the committee amended the bill to replace the 'substantial evidence' test with an 'arbitrary or capricious' test. Under this latter test, a court would have to affirm a factual finding unless it found the VA's decision to be arbitrary or capricious." *Id*. While S. 330 was passed by the Senate, no legislation was considered by the House.

In the Ninety-Seventh Congress, the Senate considered and passed a similar bill, S. 349. In addressing that legislation, it was noted that preclusion of judicial review and the then $10 limitation on attorneys fees "are at odds with the

adjudicative rights afforded, primarily by virtue of the Administrative Procedure Act, to claimants for other Federal benefits." 128 Cong. Rec. 23,373-88 at 77 (daily ed. Sept. 14, 1982) (statement of Sen. Cranston). The House committee did not hold hearings on or report out a bill concerning judicial review of veterans claims.

In the Ninety-Eighth Congress, the Senate considered S. 636, the central components of which were not changed from the previous legislation considered by the Senate. 129 Cong. Rec. 15,963 (daily ed. June 15, 1983). Legislation was also introduced in the House, one of its sponsors stating that "[t]he basic right of appeal to a higher authority, a right extended to all Americans who feel they have been wrongly judged by an agency of the Federal Government, must be extended to veterans whose lives and well-being can be dramatically affected by VA decision." 129 Cong. Rec. 15,179 (daily ed. June 14, 1983) (statement by Rep. LaFalce).

In the Ninety-Ninth Congress, a veterans judicial review bill, S. 367, was introduced, which was virtually identical to the previous bills passed by the Senate. 131 Cong. Rec. 21,397 (daily ed. July 30, 1985). It passed as well.

In the One-Hundredth Congress, both the House and the Senate considered veterans judicial review legislation. The Senate considered and passed S. 11, which authorized U.S. courts of appeals to review Board decisions. 134 Cong. Rec. S-148 (daily ed. Jan. 6, 1988). The House passed H.R. 5288, which was quite different from S. 11 in that it abolished the sixty-five-member Board and authorized a newly-

created Article I court with sixty-five judges to review regional office decisions. 134 Cong. Rec. H-7615 (daily ed. Sept. 14, 1988).

The Senate and House then conferred and reached a compromise, which was enacted as the VJRA. 134 Cong. Rec. H-10,344-51 (daily ed. Oct. 19, 1988); 134 Cong. Rec. S-16,650-58 (daily ed. Oct. 19, 1988). That compromise legislation retained the Board and introduced the Article I Court of Veterans Appeals for judicial review of Board decisions, as opposed to the Article III courts proposed in previous Senate legislation. 133 Cong. Rec. S-148 (daily ed. Jan. 6, 1987).

During debate on the House floor, Representative Edwards stated that the compromise agreement included "scaling back the article 1 court created by H.R. 5288, as well as maintaining and strengthening the Board of Veterans' Appeals, which H.R. 5288 would abolish." 134 Cong. Rec. 27,790 (daily ed. Oct. 3, 1988). Representative Evans noted that "Veterans will be allowed their day in court before a smaller article I court." *Id*. at 27,791. And Representative Florio noted that the legislation "calls for the creation of a small article I Court of Veterans Appeals to review all veterans questions, under a 'clearly erroneous' standard. Further review of regulations and law would be provided by an article III court in the form of the Court of Appeals for the Federal Circuit." *Id*. at 27,792. That scaled back or smaller Article I court was relative to the 65-member court that had been proposed in H.R.

5288 along with abolishing the Board. 134 Cong. Rec. H-10,333 (daily ed. Oct. 19, 1988).

In considering the compromise legislation, the Senate noted that the newly-created court "will be permitted to rule on issues of fact related to particular cases, providing the facts in question meet a strict standard of review, with such rulings being final . . . will also be empowered to rule on VA regulations and on the agency's compliance with existing law . . . and will be permitted to devise its own standards of practice and procedure." 134 Cong. Rec. 31,460 (daily ed. Oct. 18, 1988) (statement of Sen. Matsunaga).

The road to compromise reflects Congress's intent to grant the CAVC broad authority and the Federal Circuit more limited authority to review legal issues. The explanatory statements confirm that the compromise agreement provided broad jurisdiction of the CAVC as: "the Court shall have the power to affirm, modify, or reverse a decision of the Board, or remand the matter, as appropriate." 134 Cong. Rec. H-10,333 (1988) ("Explanatory Statement on Division A of the Compromise Agreement on S. 11 as Amended, the [VJRA]"). The limited authority of the Federal Circuit to review legal, and not factual, determinations, similar to S. 11, which passed the Senate in 1987, was also confirmed, its sponsor explaining when the compromise version of S. 11 was brought back to the House that "we have crafted a compromise bill which will allow an independent review by a court of the VA's

decision on a veteran's claim" and "will allow judicial review of VA regulations and legal interpretations." 134 Cong. Rec. H-10,333 (statement of Rep. Montgomery).

B. Courts Have Confirmed the Primacy of the APA to the VJRA

The jurisdiction of the CAVC, as provided in section 7252, is directly tied to its scope of review in section 7261. 38 U.S.C. § 7252 ("The extent of the review shall be limited to the scope provided in section 7261 of this title.)" Courts have repeatedly confirmed the primacy of the APA as undergirding the CAVC's scope of review as enacted in the VJRA.

As to 38 U.S.C. § 7261(b)(2) and the requirement that the CAVC "take due account of the rule of prejudicial error," the Supreme Court has stated that Congress used the same words in the [APA]. 5 U.S.C. § 706 ("a court shall review the whole record . . . and due account shall be taken of the rule of prejudicial error") and noted that the legislative history "confirms that Congress intended the Veterans Court 'prejudicial error' statute to 'incorporate a reference' to the APA's approach. S. Rep. No. 100-418, p 61 (1988)." *Shinseki v. Sanders*, 556 U.S. 396, 406-07 (2009). The Federal Circuit has noted that the CAVC's authority to "compel action of the Secretary unlawfully withheld or unreasonably delayed" in 38 U.S.C. § 7261(a)(2) "was derived from the similar scope of review statute in the [APA]" in 5 U.S.C. § 706(1). *Martin v. O'Rourke*, 891 F.3d 1338, 1343 (Fed. Cir. 2018), noting S. Rep. No. 100-418, at 60 (1988) ("[T]he other major scope of review provisions contained

in proposed section 4026(a)(1) through (a)(3) are derived specifically from section 706 of the APA. Thus, it is the Committee's intention that the court shall have the same authority as it would in cases arising under the APA to review and act upon questions other than matters of material fact made in reaching a decision on an individual claim for VA benefits . . . .") And in considering a constitutional challenge to a statute, the CAVC itself has recognized that 38 U.S.C. §§ 7261(a)(1) through (a)(3) are derived specifically from the APA. *Copeland v. Shinseki*, 26 Vet. App. 86, 91 n.4 (2012), quoting S. Rep. No. 100-418, at 60 (1988) ("[Subsections (a)(1) through (a)(3)] are derived specifically from section 706 of the [Administrative Procedure Act (APA)]. Thus, it is the Committee's intention that the [CAVC] shall have the same authority as it would in cases arising under the APA to review and act upon . . . constitutional challenges.").

C. The Secretary's Recounting of the Legislative History is Inaccurate

The Secretary presents an inaccurate picture of the legislative history of the VJRA, arguing that H.R. 5288 did not pass until the power of the CAVC was limited. Gov't. Br. 42-43. But the Secretary mistakenly cites to a discussion of federal court review, not review by the CAVC. Representative Solomon supported a system in which Article III courts would not review factual determinations by the CAVC. *See* 134 Cong. Rec. H-9253 (daily ed. Oct. 3, 1988) ("[t]he issue of factual review has been a pivotal one with the veterans groups, and most do not want it *beyond* a

specialized court" (emphasis added)). Rep. Solomon was not referring to the CAVC, the specialist court, but instead federal courts that would have reviewed Board decisions in an earlier iteration of the legislation.

The Secretary also errs in citing Representative Edwards as supporting a "scaled back" Article I court. The original H.R. 5288 bill would have eliminated the sixty-five-member Board and established a sixty-five-judge Court of Veterans' Appeals to replace it, to "generally [have] jurisdiction over all questions involving benefits under laws administered by the VA." 134 Cong. Rec. H-10,333; *see Barrera v. Gober*, 122 F.3d 1030 at **20 (Fed. Cir. 1997). Representative Edwards made his remarks in this context, with the shift of the proposed veterans court as a review court smaller in number, not one less powerful.

The Secretary also errs in describing the VJRA's purpose. Instead of the "narrow purpose" the Secretary alleges, Congress created the CAVC to determine legal questions in the first instance, in lieu of initial review by Article III courts. 134 Cong. Rec. H10,333 ("The compromise agreement (section 301) would add a new chapter 72 providing for judicial review of Board decisions on the record, and of VA rules and regulations challenged in the course of a case, by a new Article I court to be known as the United States Court of Veterans Appeals"). The court level for judicial oversight of the Board was contested for years before Congress settled on the creation of the CAVC. Before the VJRA, to appeal from the Board, a claimant

could only ask for reconsideration or ask the local VA office to overturn the Board's decision under a clear and unmistakable error standard. 38 C.F.R. § 3.105(a) (1988). The claimant was otherwise barred from federal court review. 38 U.S.C. § 211(a) (1988). This flawed system was replaced by the creation of the CAVC, with "jurisdiction over all questions involving benefits under laws administered by the VA," 134 Cong. Rec. H10,333. That jurisdiction necessarily includes class certification in direct appeals in order to achieve Congress's stated goal of ensuring "that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives from [] VA every benefit and service to which he or she is entitled under law." 134 Cong. Rec. 31,454, 31,465 (1988) (statement of Sen. Cranston).

III. The Broad Power Granted the CAVC Includes Powers Granted Under the All Writs Act

The VJRA alone is enough to confer to CAVC the authority to entertain class actions with both exhausted and unexhausted claims. The powers of the All Writs Act also confer that authority and provide an independent basis to support the class definition set forth by Mr. Skaar. This Court has declared that "[t]he All Writs Act unquestionably applies in the [CAVC]" and, based on enactment of the VJRA, held that the CAVC has class certification authority "under the All Writs Act, other statutory authority, and [its] inherent powers." *Monk v. Shulkin*, 855 F.3d 1312, 1318-19 (Fed. Cir. 2017) (*Monk II)*. The authority under the All Writs Act (AWA)

permits the CAVC "to create appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage." *Id.* at 1319.

The AWA thus provides powers to the CAVC in all cases within its jurisdictional scope, not simply over petitions seeking a writ of mandamus, as the Secretary implies. Gov't Br. at 37. To be sure, as with other courts, the scope of the CAVC's AWA authority turns on the scope of its jurisdiction. But because the CAVC possesses exclusive jurisdiction to review decisions of the Board, including the authority to "decide all relevant questions of law, interpret . . . statutory[] and regulatory provisions, and . . . hold unlawful and set aside . . . regulations issued or adopted by the Secretary . . . found to be . . . in violation of a statutory right," 38 U.S.C. §§ 7261(a), 7252(a), CAVC possesses the authority under the AWA to issue orders in aid of that jurisdiction. This means it can issue writs of mandamus, of course, *Monk*, 855 F.3d at 1318-19, but also issue writs and orders in direct appeal cases. Nothing in the VJRA explicitly limits the CAVC's AWA authority. Instead, CAVC's authority to act in aid of its jurisdiction is co-extensive with other courts, and CAVC may certify class actions that include claims within the court's prospective jurisdiction – that is, those with respect to unexhausted and unfiled claims.

Originally enacted as Section 14 of the Judiciary Act of 1789, 1 Stat. 81, the AWA provides: "The Supreme Court and all courts established by Act of Congress

may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2012). Congress codified this "historic and great" tool from historic common law traditions, *see Price v. Johnston*, 334 U.S. 266, 283 (1944), by which judges possess "unbridled discretion to order a defendant in personam to do (or refrain from doing) a particular act," Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 803 (2001).

Congress intended the AWA to provide courts with flexible powers to use any appropriate procedural tool in aid of the performance of their duties. *See Price*, 334 U.S. at 282 (the AWA provides a "legislatively approved source of procedural instruments" not confined to "the precise forms of that writ in vogue at the common law or in the English system"). Its broad language demonstrates legislative intent not to cabin the nature of the tools available to federal courts acting within their jurisdiction. *Id.* at 283-84 ("Congress has said as much by the very breadth of its language in [the AWA]. It follows that we should not write in limitations which Congress did not see fit to make.").

Courts have consistently recognized the broad, flexible powers granted by the AWA. "Justice may on occasion require the use of a variation or a modification of an established writ. It thus becomes essential not to limit appellate courts to the ordinary forms and purposes of legal process." *Id.*; *United States v. New York Tel.*

Co., 434 U.S. 159, 173 (1977) ("[A] federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it."); *Adams v United States*, 317 U.S. 269, 274 (1942) ("[D]ry formalism should not sterilize procedural resources which Congress has made available to the federal courts."); *United States v. Catoggio*, 698 F.3d 64, 67 (2d Cir. 2012) ("The broad power conferred by the All Writs Act is aimed at achieving the rational ends of law, and thus, courts have significant flexibility in exercising their authority under the Act."); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1203 (9th Cir. 1975) ("The very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected.").

Courts have also recognized that the broad and flexible powers conferred by the AWA extend to issuing writs in aid of a court's prospective jurisdiction over claims not yet before it. *See, e.g.*, *McClellan v. Carland*, 217 U.S. 268, 280 (1910) (issuing writ requiring district court to proceed with a pending case in aid of jurisdiction over a future direct appeal). In *Telecom. Res. & Action Center v. F.C.C.*, the court declined to issue a writ of mandamus but found that its authority under the AWA "extend[ed] to support an ultimate power of review, even though it is not immediately and directly involved." That power, the court reasoned, "protect[ed] its

future jurisdiction." 750 F.2d 70, 76 (D.C. Cir. 1984). In *In re Paralyzed Veterans of America*, the Federal Circuit exercised its authority under the AWA to direct compliance with a statutory timeline for rulemaking based on 38 U.S.C. § 1116, which relates to presumptions of service connection, to avoid delay in "receipt of benefits to those veterans otherwise entitled." 392 F. App'x 858, 861 (Fed. Cir. 2010). A challenge to section 1116 would be based on the CAVC's jurisdiction under section 7252. *See McCartt v. West*, 12 Vet. App. 164 (1999) (The CAVC has jurisdiction under section 7252 to consider presumptive service connection under section 1116).

And specifically with respect to class actions, this Court has endorsed the use of the AWA to enable courts "to serve as lawgiver and error corrector simultaneously, while also reducing the delays associated with individual appeals." *Monk*, 855 F.3d at 1321 (quoting Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. Mich. J. L. Reform 483, 522 n.231 (2007)). That power in "individual appeals" supports the ability to certify a class via direct appeal in addition to by mandamus.

The AWA thus empowers the CAVC to issue writs in aid of its jurisdiction over Board decisions, including writs in aid of its prospective jurisdiction over such decisions.

CONCLUSION

This Court should affirm the right and ability of the CAVC to use class actions in direct appeals including class members with pending and future claims to aid veterans in obtaining the benefits they deserve.

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Respectfully submitted

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 29(a)(5) and Fed. Cir. R. 32(b) because it contains 6,783 words, excluding the parts of the brief exempt by FRAP 32(f) and Fed. Cir. R. 32(b)(2).

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office 365 Word in 14 point Times New Roman font.

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