Nos. 2021-1757 and 2021-1812

IN THE 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 U.S. Court of Appeals for Veterans Claims in Case No. 17-2574

CORRECTED PRINCIPAL AND RESPONSE BRIEF OF CLAIMANT-CROSS-APPELLANT

Matthew Handley, Law Student Intern
Adam Henderson, Law Student Intern
Joshua Herman, Law Student Intern
Caroline Markowitz, Law Student Intern
Meghan Brooks
Michael J. Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Org.
Yale Law School†
P.O. Box 209090
New Haven, CT 06520-9090
Tel: (203) 432-4800
michael.wishnie@ylsclinics.org

Lynn K. Neuner
Simpson Thacher & Bartlett LLP
425 Lexington Ave.
New York, NY 10017
Tel: (212) 455-2000
lneuner@stblaw.com

Counsel for Claimant-Cross-Appellant

CERTIFICATE OF INTEREST

Counsel for Claimant-Cross-Appellant certifies the following:

1. The full names of every party or amicus represented by me is: Victor B. Skaar.
2. The name of the real party in interest if the party named in the caption is not the real party in interest is: None.
3. All parent corporations and any publicly held corporations that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None.
4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or who are expected to appear in this Court, in addition to the counsel who have already appeared in this appeal, are: Danielle Tarantolo, New York Legal Assistance Group; Renée Burbank, Dana Montalto, Supervising Attorneys, Jerome N. Frank Legal Services Organization, Yale Law School; Jacob Bennett, Claire Blumenthal, Kendal Corkle, Lily Halpern, Lauren Lin, Lara Markey, Corey Meyer, Derek Mraz, Molly Petchenik, John Super, Tomoaki Takaki, Law Student Interns, Jerome N. Frank Legal Services Organization, Yale Law School.
5. The following cases are those known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this

Court's decision in the pending appeal: *Wolfe v. McDonough*, No. 2020-1958 (Fed. Cir.).

6. The following information is required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees): N/A.

Dated: October 18, 2021

Respectfully submitted,

/s/ Michael J. Wishnie
Michael J. Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Org.
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
Tel: (203) 432-4800
michael.wishnie@ylsclinics.org

Counsel for Claimant-Cross-Appellant

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STATEMENT OF RELATED CASES

Wolfe v. McDonough, No. 2020-1958 (Fed. Cir.), which is presently before this Court, may affect the law governing the certification of classes that include veterans whose claims the Secretary of Veterans Affairs (the "Secretary") will in the future deny. Claimant-Cross-Appellant is unaware of other past or pending cases in this or any other court stemming from this action or that will directly affect or be directly affected by this Court's decision in this appeal.

JURISDICTIONAL STATEMENT

The jurisdiction of the U.S. Court of Appeals for Veterans Claims (the "Veterans Court") was proper under the Veterans Judicial Review Act (VJRA), 38 U.S.C. § 7252. This Court has exclusive jurisdiction over decisions of the Veterans Court on questions of law. *Id.* § 7292. The Veterans Court entered final judgment on January 12, 2021. Appx1. The Secretary filed a notice of appeal on March 12, 2021. Appx109. Mr. Skaar filed a notice of cross-appeal on March 25, 2021. *Id.*

STATEMENT OF THE ISSUES

1. Whether the Veterans Court has the authority to certify an injunctive class that includes veterans whose disability benefits claims have been or will be denied pursuant to a regulatory methodology that the Veterans Court found to be unjustified, where the class representative's claim was properly presented and exhausted.

2. Whether the Veterans Court misinterpreted equitable tolling and waiver of exhaustion standards so as to exclude from the certified class veterans who had not timely appealed past agency denials.

STATEMENT OF THE CASE

I. Background

On January 17, 1966, two Air Force planes collided over Palomares, Spain, dropping four hydrogen bombs over the Spanish countryside. Appx5. Two of these bombs conventionally exploded on impact, dispersing clouds of plutonium dust in the air. *Id.* The military deployed approximately 1,400 servicemembers to clean up the debris, including Claimant-Cross-Appellant, retired Air Force Chief Master Sergeant Victor Skaar. *Id.* This team worked at the site for months, participating in clean-up and monitoring operations on land extensively contaminated by radioactive plutonium and other radiogenic materials. *Id.* The team lacked proper protective equipment and was exposed to ionizing radiation. Appx154. Mr. Skaar and his

fellow servicemembers developed radiogenic conditions as a result of their exposure. For decades, however, the Secretary has failed to recognize that their radiation exposure is service-connected and has denied applications for disability compensation benefits by veterans who served faithfully at Palomares. Appx5–6.

II. Agency Proceedings

For more than fifty years, Mr. Skaar and his fellow Palomares veterans have faced an arduous Department of Veterans Affairs (VA) claims process that has refused to acknowledge their radiation exposure. Doctors diagnosed Mr. Skaar with leukopenia (a low white blood cell count), a radiogenic condition, in 1998. Appx5. However, when he filed a claim for service connection due to his exposure at Palomares, the VA informed him that he must present additional evidence sufficient to link his radiogenic condition to his exposure at Palomares. *Id.* Over the next two decades, Palomares veterans filed Freedom of Information Act (FOIA) requests to seek disclosure of their radiation exposure. *See, e.g.*, *Vietnam Veterans of Am. v. Dep't of Def.*, 453 F. Supp. 3d 508, 513–14 (D. Conn. 2020).

Because the "VA does not recognize the Palomares plutonium dust cleanup as a radiation risk activity,"[1] Palomares veterans are forced to seek service-

[1] The VA recognizes presence at certain sites or incidents as "radiation-risk activities." *See* 38 C.F.R. § 3.309(d)(3)(ii). Veterans who participated in a "radiation-risk activity," and who later develop radiogenic conditions classified as "diseases specific to radiation-exposed veterans" under § 3.309(d)(1), benefit from

connected disability benefits under the "less favorable provisions" of 38 C.F.R. § 3.311. Appx6. Thus, the VA must determine whether "sound scientific and medical evidence supports the conclusion [that] it is at least as likely as not" that the condition is the result of ionizing radiation exposure. § 3.311(a), (c).

When a Palomares veteran files a claim for disability benefits under § 3.311, the VA requests a radiation exposure estimate from the Air Force. Appx5–6. For decades, the VA has simply "accept[ed] uncritically the dose estimate the Air Force provide[s]." *See* Appx76. In 2001, the Air Force hired consulting firm Labat-Anderson to analyze bioassay samples taken from Palomares veterans and recommend a dose estimate methodology. Appx71–72. The Labat-Anderson Report (the "LA Report") excluded from its methodology the on-site urine samples reflecting the highest levels of radiation exposure and assigned greater weight to environmental sampling done in the Palomares area over fifteen years after the incident. *Id*. Princeton nuclear physicist Dr. Frank von Hippel later concluded that

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a presumption of service connection. The presumption is not available to this class because the VA refuses to recognize the Palomares incident under § 3.309(d). Notably, civilian employees of the U.S. Department of Energy (DOE) who handled barrels of contaminated soil from Palomares that were shipped to South Carolina, months after the clean-up, are presumed to have been exposed to radiation. Designation of a Class of Employees for Addition to the Special Exposure Cohort, 77 Fed. Reg. 9250–51 (Feb. 16, 2012) (adding DOE employees, including personnel who buried 4,827 fifty-five-gallon drums of contaminated soil and vegetation removed from Palomares at Savannah River Site in Aiken, South Carolina, to Special Exposure Cohort).

this methodology—favoring environmental samples over on-site urine samples, and unjustifiably excluding the urine samples showing the highest radiation levels—resulted in dose estimates that "grossly underestimated" Palomares veterans' exposure. Appx155. Although the LA Report warned that its findings were "preliminary" and recommended further study, Appx171, the Air Force adopted its preliminary methodology "in full." Appx72.

The VA has accepted uncritically the results generated by the flawed "preliminary" methodology, which systematically underestimates radiation exposure for Palomares claimants. Appx72. Mr. Skaar reopened his claim for leukopenia in March 2011. Appx65. Based on the deficient methodology recommended by the LA Report, the VA denied service connection, stating that "it is unlikely that his leukopenia . . . can be attributed to radiation exposure." *Id*. Mr. Skaar appealed to the Board of Veterans' Appeals (BVA or the "Board"). *Id.*

Due in part to ongoing advocacy from Palomares veterans and surviving family members, in December 2013, the Air Force conceded there had been inconsistencies in its dose assessments for Palomares veterans and reevaluated its methodology. *See* Appx65. When the Air Force recalculated Mr. Skaar's radiation exposure, his effective dose more than quadrupled. Appx12. However, the new methodology did not rectify the fatal flaw of the LA Report—its exclusion of the on-site urine samples with the highest radiation doses. Appx161–162, Appx168.

Because of this new dose estimate, the BVA reopened Mr. Skaar's leukopenia claim in May 2015. Appx66. Despite Mr. Skaar's new dose estimate and his primary care physician's statement that his leukopenia "is likely related to exposure to heavy radioactive material" at Palomares, the Secretary again denied Mr. Skaar's claim. Appx65–67. He appealed to the BVA, which denied his claim on April 14, 2017. *Id.* He timely appealed to the Veterans Court on August 10, 2017. Appx102.

III. Proceedings at the Court of Appeals for Veterans Claims

At the Veterans Court, Mr. Skaar moved to certify a class of all Palomares veterans "whose application for service-connected disability compensation based on exposure to ionizing radiation the VA has denied *or will deny*." Appx7 (emphasis added). The class alleged that the VA has failed to comply with 38 C.F.R. § 3.311(c)'s requirement that the VA utilize "sound scientific and medical evidence" when adjudicating claims of radiation exposure by Palomares veterans. *Id*. at 8. On behalf of the proposed class, Mr. Skaar further alleged that the VA's reliance on the flawed dose estimate methodology and refusal to classify the Palomares clean-up as a "radiation-risk activity," which qualifies veterans with certain radiogenic conditions for presumptive service connection under 38 C.F.R. § 3.309, is arbitrary and capricious and a violation of due process and equal protection. *Id*. Mr. Skaar also sought to represent the class on a claim challenging the VA's omission of Palomares from its list of radiation risk activities in 38 C.F.R. § 3.309(d)(3)(ii). *Id.*

The Veterans Court ordered a limited remand to the Board because it had erred by "completely fail[ing] to adjudicate or address" the § 3.311 argument "whatsoever" in its April 2017 decision. Appx124. Despite the Veterans Court's instruction and submission of additional evidence on remand showing that the LA Report's preliminary dose estimate methodology seriously underestimated radiation exposure and, the Board again failed to critically examine the methodology.

On return to the Veterans Court, the *en banc* court held that Mr. Skaar had standing to pursue the § 3.311 claim on behalf of the class, Appx11,[2] and that the Veterans Court had the authority to certify class actions in the context of an appeal from the Board, Appx15 (a holding the Secretary does not challenge on this appeal. Br. of Resp't.-Appellant, ECF No. 21 at 2 [hereinafter Gov't Br.]). The Veterans Court divided the potential class members into five categories. *See* Appx15–16.

Type of Claimant	**Definition**
Past	Claims denied before reaching the Board and as to which the veteran did not perfect an appeal to the Board
Expired	Claims denied by the Board which the veteran did not appeal to the Veterans Court within 120 days
Present	Claims denied by the Board which the veteran timely appealed to the Veterans Court or which are still within the 120-day window
Present-Future	Claims pending at any level of the VA that the VA will deny
Future-Future	Claims not yet filed

[2] The Veterans Court held that Mr. Skaar lacked standing to represent the class on the challenge to the validity of 38 C.F.R. § 3.309. Appx11.

The Veterans Court certified a class of the last three listed categories, what the court termed the present, present-future, and future-future claimants. Appx37. The Veterans Court looked to this Court's decision in *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017) (*Monk II*), which held that the Veterans Court has authority to certify class actions pursuant to its statutory authority, the All Writs Act (AWA), and the Veterans Court's inherent powers. Appx14–15.

Examining its "one source of jurisdiction: 38 U.S.C. § 7252," the Veterans Court explained that the statute's plain text requires one thing: "a Board decision." Appx17–18. The Veterans Court held that the Board decision in Mr. Skaar's case satisfied the sole "'statutory prerequisite'" necessary to confer jurisdiction. *Id.* (quoting *Wick v. Brown (In re Wick*), 40 F.3d 367, 373 (Fed. Cir. 1994)). The court found that the claims of the remaining class members were "collateral to Mr. Skaar's claim for benefits," and that without the ability to aggregate and "collaterally challenge systemic wrongdoing," the aging and dying Palomares veterans would be forced to each individually "exhaust their administrative remedies" only to ask the BVA for "relief it is powerless to give." Appx22.

The Veterans Court also held that it has the authority to include the past and expired claimants in the class by waiving the exhaustion requirement and equitably tolling the statute of limitations. Appx23 (explaining that the Supreme Court had "[left] it to us to determine whether and when waiver applied"). But the Veterans

Court declined to include the past and expired claimants. *Id*. at 23–25. As Judge Schoelen noted in her separate opinion, it was "unclear . . . whether the majority purport[ed] to adopt" the framework for equitable tolling from *Bowen v. City of New York*, 476 U.S. 467 (1986), and simply believed the *Bowen* standard was not met, or whether the majority intended to reject the *Bowen* framework in this case. Appx40.

Following the class certification decision, the *en banc* Veterans Court returned the matter to a three-judge panel, which decided the merits of Mr. Skaar's individual appeal. The panel held that the Board had "failed to meet its obligation under 38 C.F.R. § 3.311(c)" to utilize "sound scientific evidence," and remanded Mr. Skaar's claim to the Board. Appx63; *see also id*. (directing that "[t]his portion of our decision applies to the class certified in this matter"). In this appeal the government does not appear to challenge that remand on the merits of the § 3.311 claim. *See* Gov't Br. at 2 (confining the Statement of the Issue to the class claims).

SUMMARY OF THE ARGUMENT

The Veterans Court did not err in certifying an injunctive class that includes veterans who have been or will be denied benefits because of the Secretary's reliance on an obsolete and unjustified dose estimate methodology. The government argues that the Veterans Court's class certification order improperly exceeds its jurisdiction under the Veterans' Judicial Review Act. The Secretary is incorrect.

The Veterans Court has exercised jurisdiction over the VA's compliance with the "sound scientific evidence" requirement of § 3.311 and its related statutory and constitutional obligations—the common legal question before the Veterans Court—through the presentation of, and final Board decision on, this question in Mr. Skaar's case. Therefore, the VJRA's jurisdictional statute, 38 U.S.C. § 7252, authorizes certification of this injunctive class. The Veterans Court did not decide the merits of individual cases not yet before it; it did, however, reject the Secretary's reliance on an unsound methodology in all Palomares cases. A favorable class decision on the merits of this legal challenge is thus collateral to individual class members' claims for VA benefits, but will ensure their claims are not denied for the same unlawful reason as Mr. Skaar's.

Moreover, the Veterans Court will not exercise jurisdiction over the merits of individual claims until those claims reach the court. Rather, the inclusion of these claimants in the class is necessary to fulfill the efficiency, fairness, and enforcement goals of the class action device. In recognition of these goals, courts regularly certify future-oriented injunctive class actions under analogous statutes—most notably pursuant to the Administrative Procedure Act (APA), on which Congress most closely modeled the VJRA.

For five-and-a-half decades, the VA has denied recognition to Palomares veterans, who are now aging and many of whom are sick. Including future-oriented

class members in this class action gives them improved access to legal counsel and enables them to avail themselves of the Veterans Court's monitoring and enforcement capabilities. This class definition is appropriate in light of the unique circumstances of the Palomares veterans and the uniquely pro-claimant orientation of the VA adjudication system. Moreover, the All Writs Act, which allows the Veterans Court to enter orders in aid of its *prospective* jurisdiction over the claims of Palomares veterans not yet before it, and the Veterans Court's inherent powers to set its own rules of practice and procedure, each independently also provide the authority to certify class actions including claims that have been or will be denied.

Finally, the Veterans Court misinterpreted the standard for equitable tolling and waiver of exhaustion when it excluded from the class veterans who had not timely appealed claims denied by the VA. The Veterans Court correctly held that it has the authority to certify classes that include past and expired claims. However, it relied on an incorrect understanding of Social Security precedent—which does not even apply to tolling or exhaustion under the VA's own statutes—as requiring that the challenged government action be "secretive" to justify equitable tolling and waiver of exhaustion. To the contrary, the Veterans Court may equitably toll and waive exhaustion of claims wherever it is permitted by statute and in the interest of justice, including here, where decades of government action has had the practical effect of preventing timely appeal.

ARGUMENT

I. Standard of Review

On an appeal from the Veterans Court, this Court "shall decide all relevant questions of law . . . ." 38 U.S.C. § 7292(d)(1). Whether the Veterans Court exceeded its jurisdiction in certifying a class that includes veterans whose claims the VA will deny pursuant to its deficient methodology ("present-future" and "future-future" claimants) is a question of law, which this Court reviews *de novo*. *See Monk II*, 855 F.3d at 1316. The Veterans Court's interpretation of the waiver and tolling standards is also a question of law, which this Court reviews *de novo*. *See James v. Wilkie*, 917 F.3d 1368, 1372 (Fed. Cir. 2019) ("[W]hen 'the material facts are not in dispute and the adoption of a particular legal standard would dictate the outcome of the equitable tolling claim, this court has treated the question . . . as a matter of law.'" (citation omitted)).

II. The Veterans Court Has the Statutory Authority to Certify a Class That Includes Veterans Without Board Decisions on Their Individual Claims

Congress granted the Veterans Court the "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." 38 U.S.C. § 7252. This jurisdictional grant includes the authority to certify a class, such as the class represented by Mr. Skaar, of veterans who have been or will be denied benefits by the Secretary's unlawful reliance on a flawed dose estimate methodology. Mr. Skaar has obtained a final Board decision regarding the VA's compliance with the "sound

scientific evidence" requirement of § 3.311, satisfying the jurisdictional requirement of § 7252 that there must be a "decision of the Board." As the Veterans Court held, Mr. Skaar's satisfaction of this jurisdictional requirement allows aggregation of his claim challenging the deficient methodology with those of other class members. Appx18–19.

Certification of this class, including individuals who have not yet received a Board decision as to their underlying benefits claims, is consistent with the Court's jurisdictional statute for two reasons. First, the Veterans Court decided a common legal question over which it has jurisdiction and that is collateral to class members' individual claims for benefits. Second, the Veterans Court is not exercising jurisdiction over the individual claims on the merits of future members until they present claims at the VA and those claims reach the court through an administrative appeal. *Cf.* Gov't Br. at 28 (arguing the Veterans Court is improperly "extend[ing] its jurisdiction" by including veterans who have yet to receive a Board decision).

The VA's objection is belied by the actual effect of certifying a class including future claimants, and by Congress's intent in crafting the VJRA, which it modeled primarily on the Administrative Procedure Act. Courts have allowed certification of future-oriented class actions in countless APA cases, approving classes that include persons who "have been or will be" adversely affected by final agency action. Such common-place class certification orders under the APA, to which Congress looked

in crafting the VJRA, confirm the propriety of the decision here. Moreover, as the Veterans Court recognized, its order promotes fairness and efficiency for class members—elderly, disabled veterans—and courts. As reflected in the plain text of the VJRA, Congress was aware of the benefits of class-wide adjudication and did not intend to deny the Veterans Court the ability to certify future-oriented classes.

A. The Veterans Court Can Certify Future-Oriented Classes to Decide Common Legal Questions Collateral to Individual Claims for Benefits.

Certification of "mixed" classes is permitted under § 7252 where, as here, the Veterans Court is asked to decide a common legal question that affects the VA's adjudication of the underlying benefits claims, but is collateral to individual claims for benefits. The government argues that every class member must have a final Board decision. Gov't Br. at 26–27, 31. But that misses the point of class certification. Certification of a mixed class allows for adjudication of the common, collateral legal question: whether the dose estimate methodology the VA uses to deny all class members' claims constitutes sound scientific evidence in accordance with the requirements of 38 C.F.R. § 3.311. Individual veterans with a Board decision may still obtain review of all other issues present in their claims.

In Section 7252, Congress authorized the Veterans Court to "affirm, modify, or reverse *a decision of the Board*." 38 U.S.C. § 7252(a) (emphasis added). A Board decision is therefore the trigger for Veterans Court jurisdiction, and here that condition is satisfied. *See* Appx17; *Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir.

1998) ("[J]urisdiction is premised on and defined by the Board's decision concerning the matter being appealed"). In *Tyrues v. Shinseki*, this Court held that distinct theories of entitlement may be bifurcated and appealed separately to the Veterans Court. 732 F.3d 1351 (Fed. Cir. 2013). Under *Tyrues*, a legal issue in a claim can be immediately appealed if "its ruling is definitive and sufficiently separate" from other portions of the claim on which there is not a final decision. *Id.* at 1356. The Veterans Court thus appropriately exerted its authority over the common legal question of whether the VA has met its obligations under § 3.311—a question as to which there has been a final decision and that is present in, but sufficiently separate from, future-oriented class members' benefits claims.

B. Class Representatives Can Bring Claims on Behalf of "Mixed" Classes Because the Veterans Court Will Not Exercise Jurisdiction Over Future Claims Until They Reach the Court.

Federal courts routinely certify and award injunctive relief to "mixed" classes that include claims that have been or will be denied at the agency level, where doing so promotes the fairness, efficiency, and consistency goals of the class action device. The government argues that "the Veterans Court must have jurisdiction over *all* the members of a putative class, not merely the named appellant." Gov't Br. at 26 (emphasis in original).[3] But this is simply not the case for future-oriented injunctive

[3] It may be that the government's objective is to frustrate the ability of this and any other proposed appeals class to satisfy the numerosity requirement of Vet. App. R.

class actions, including for benefits programs, both today and at the time the VJRA was passed. *See* Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 23:10 (4th ed. 2003) ("[F]uture applicants for benefits properly have been included in government benefits class actions."); *see also infra* Section II.C. (citing numerous future-oriented class actions certified under the APA).

Certification of future-oriented class actions does not require the exercise of jurisdiction over individual future class members until they present claims to the Court. When a court certifies a class to include unexhausted and unpresented claims it is not "extend[ing] its jurisdiction," Gov't Br. at 28, because the court is not yet exerting jurisdiction over those claims. Instead, class certification preserves the court's capability to enforce its decision over future members by announcing to future claimants that presenting or pursuing their claims before the Agency will not be futile. *See* Adam S. Zimmerman, *The Class Appeal*, 89 U. Chi. L. Rev. (forthcoming 2022) (manuscript at 23) (manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3901197) (explaining that the uniform relief afforded through mass adjudication allows "applicants, opponents, and the public . . . [to] know with certainty the terms of [an] opinion and enforcing mandate" (quoting *American Trucking Ass'n v. ICC*, 669 F.2d 957, 961 (5th Cir. 1982))). For this

23(a)(1); *see* Gov't. Br. at 21 (arguing that only those appeals actually pending at the Veterans Court may ever be included in any appeals class).

reason, courts routinely certify classes under the APA that include individual claims not yet ripe for judicial review. *See infra* Section II.C.

In this case, the Veterans Court is exerting jurisdiction over a properly exhausted legal question common to all class members, and its injunctive relief will not actually affect future-oriented class members until they present benefits claims to the VA (and if necessary later, to the Veterans Court). The government ignores this reality, arguing that the Veterans Court is "assert[ing] jurisdiction over hundreds of other veterans who do not meet the statutorily-mandated jurisdictional requirements." Gov't Br. at 27–28. This is an incorrect characterization of the effect of class certification in this case and ignores the purpose of the class action device.

This Court articulated the purpose of class actions in the Veterans Court in *Monk II,* explaining that "[c]lass actions can help the Veterans Court exercise that authority by promoting efficiency, consistency, and fairness, and improving access to legal and expert assistance by parties with limited resources." *Monk II,* 855 F.3d at 1320. Inclusion in the class ensures efficient, consistent, and fair adjudication of future claims, and communicates to future members that presenting their claim for benefits will not be futile—legally or in practice.

Members of this class are veterans who were exposed to radiation over fifty-five years ago as the result of a catastrophic nuclear incident that involved the crash of an Air Force plane carrying nuclear weapons. Many are sick and dying. As the

class definition makes clear, they must be suffering from radiation-related illnesses in order to benefit from the relief sought. The Secretary has previously rejected applications from many of these veterans. Access to VA healthcare and other benefits is urgent for these veterans' immediate medical needs and to grant them the peace of mind that their survivors will also receive the support their service has earned. As the Veterans Court recognized, the interest in efficiency in this case is overwhelming; "[t]he advanced age of the class members, especially considering they all must suffer from a radiogenic disability to qualify, suggests a need for the availability of prompt remedial enforcement." Appx35.

The Veterans Court's ability to issue precedential decisions is not a substitute for a class action. The Veterans Court correctly noted that claimants not party to a precedential decision do not have any right to prompt remedial enforcement. Appx34. Instead, they must exhaust all administrative remedies, file a notice of appeal, and litigate their claims. *See Wolfe v. Wilkie,* 32 Vet. App. 1, 33 (2019) (explaining that "sometimes circumstances indicate a need for prompt remedial enforcement" and "class certification provides such enforcement"). Even where there is no evidence that the Agency is likely to disobey, the class in this case certainly needs prompt remedial enforcement, including to overcome any potential flaw at the agency level in applying the injunctive relief sought here. *See* 2 Newberg on Class Actions § 4:35 (explaining that courts have noted the value of class

certification when "there was no certainty that the defendant would apply the judgment uniformly to all members of the proposed class" or when the defendant has not "taken any concrete steps to address the plaintiffs' concerns").

Additionally, many veterans do not have the resources, knowledge (amassed by Mr. Skaar through decades of advocacy), FOIA expertise (*see Vietnam Veterans of Am.*, 453 F. Supp. at 513–14), or litigation capacity to challenge the VA's dose estimate methodology individually, even with the benefit of a precedential decision. *See* Zimmerman, *The Class Appeal*, 89 U. Chi. L. Rev. (manuscript at 16) (explaining that the class action device was designed to protect claimants who "otherwise lack counsel, resources or certainty that the government will be able to adhere to a court order," and that "[c]laimants can rely on class counsel and do not have to seek separate legal representation to protect their rights in subsequent proceedings"). All class members, including and especially future-oriented class members who will present claims to the VA and the Veterans Court, have the utmost interest in obtaining a timely decision and in securing consistent and efficient judicial supervision in the future.

Including claims that have been or will be denied in the class is also consistent with the uniquely pro-claimant orientation of the veterans' benefits adjudication system and its emphasis on fairness. *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (explaining that, "in the context of veterans' benefits where the system of

awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight"). The Veterans Court reasoned that "[c]lass actions can also be an effective force for institutional change." Appx15. Where the VA has mishandled Palomares veterans' claims for decades, employing the class action device to ensure swift institutional change at the VA is not only fair, but necessary.

The government urges this court to consider the risk of prejudice to absent class members with a more persuasive case than Mr. Skaar's, who would be precluded as a matter of *res judicata* from later raising the same claims as his. Gov't Br. at 30. This is a red herring. First, Mr. Skaar *won* his legal challenge on the merits before the Veterans Court panel. Appx87–88. Second, this is really an argument that the VA should be immune from class actions because members of a class are bound by the result. But this is always the case with class actions, and judicial rules and constitutional due process requirements protect the interests of absent class members under well-developed standards. *See, e.g.*, Vet. App. R. 22, 23 (based on Fed. R. Civ. P. 23). Finally, and most fundamentally, the Secretary's newfound concern for the welfare of Palomares veterans ignores the urgency of class members' claims, and the VA's decades of willful blindness to their needs. If the Veterans Court does not act now, many Palomares survivors will never receive the benefits they deserve.

Moreover, participation in this class is not a complete bar to bringing a future claim: only the ancillary challenge to the VA's longstanding reliance on junk science, in violation of § 3.311, is at issue. Class members will not be precluded from bringing individual claims on any other ground, including based on direct evidence linking any particular veteran's radiogenic condition to exposure at Palomares.

C. Congress Modeled the VJRA on the APA, Under Which Courts Have Routinely Certified Mixed Classes.

Congress looked to the APA when it fashioned the Veterans Court's jurisdiction and scope of review provisions in the VJRA:

<table>
<tr><td>VJRA Jurisdiction; Finality of Decision:
38 U.S.C. § 7252</td><td colspan="2">"The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate."</td></tr>
<tr><td>APA Actions Reviewable:
5 U.S.C. § 704</td><td colspan="2">"[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review."</td></tr>
<tr><td>VJRA Scope of Review:
38 U.S.C. § 7261(a)(3)</td><td>The Veterans Court shall "hold unlawful and set aside decisions of the VA which are:"</td><td rowspan="2">"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
(D) without observance of procedure required by law . . . ."</td></tr>
<tr><td>APA Scope of Review:
5 U.S.C. § 706</td><td>"[t]he reviewing court shall hold unlawful and set aside agency action" it finds to be:</td></tr>
</table>

These textual similarities confirm that Congress intended the VJRA to provide for judicial review of VA decisions in a similar fashion to how the APA provides for judicial review of other agency decisions. The Supreme Court and this Court have recognized as much. *See Henderson v. Shinseki*, 562 U.S. 428, 432 n.2 (2011) ("[T]he Veterans Court's scope of review, § 7261, is similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706."); *Euzebio v. McDonough*, 989 F.3d 1305, 1318 (Fed. Cir. 2021) (same).

Additionally, there is clear evidence in the proposed bills that eventually became the VJRA confirming that Congress looked to the APA in fashioning the VJRA's judicial review provisions.[4] Members of Congress understood that the VA's longstanding immunity from judicial review "violate[d] the principle of the Administrative Procedure[] Act" and "d[id] our retired military personnel a serious injustice." 122 Cong. Rec. S16345 (June 3, 1976) (statement of Sen. Hart). Accordingly, they set out to subject the VA to APA-type review.

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[4] Legislative history from previous Congresses discussing a bill passed in a future Congress can be persuasive. *See Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1347 n.1 (Fed. Cir. 2001) ("It is proper for us to look to the legislative history from the [previous] Congress for guidance in interpreting the [statute], because the language did not change."); *see also United States v. Enmons*, 410 U.S. 396, 405 n.14 (1973) ("Surely an interpretation placed by the sponsor of a bill on the very language subsequently enacted by Congress cannot be dismissed out of hand . . . simply because the interpretation was given two years earlier.").

As similar legislation was introduced in subsequent Congresses, sponsors and government officials repeatedly recognized that the bills sought to establish APA-type review of VA decisions. In the 95th Congress, the Deputy Assistant Attorney General testified that "[w]e expect that these new claims would be reviewed under the same 'substantial evidence on record' test which applies in most judicial reviews under the Administrative Procedure[] Act." *VA Administrative Procedure and Judicial Review Act: Hearing on S. 364 and Related Bills Before the S. Comm. on Veterans' Affairs*, 95th Cong. 400 (1977) (prepared statement of Paul Nejelski, Deputy Assistant Att'y Gen., Office for Improvements in the Administration of Justice). In the 96th Congress, the VA noted that the bill was "virtually identical to the provisions contained in the Administrative Procedure Act (APA)." *Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearing on S. 330 Before the S. Comm. on Veterans' Affairs*, 96th Cong. 44 (1979) (statement by the Veterans' Administration, Office of the Administrator of Veterans' Affairs). In the 98th Congress, Representative John LaFalce emphasized that "[i]t is time to bring our veterans under the broad umbrella of constitutional and statutory protections that shield every other American from the arbitrary and capricious decisions of the Federal bureaucracy." *Judicial Review of Veterans Claims: Hearing on H.R. 1959 Before the Subcomm. on Oversight and Investigations of the H. Comm. On Veterans' Affairs*, 98th Cong. 3 (1983) (statement of Rep. LaFalce). In hearings and debate

over bills to establish judicial review over VA claims, the APA was the consistent model.

The Senate Report on the final bill was consistent with this history. It explained that "[t]he Committee feels that such a position [of statutory preclusion of judicial review] is no longer tenable, particularly in light of the protection[s], including access to court, that have been extended to recipients of most other Federal benefits." S. Rep. No. 100-418, at 30 (1988); *see also id.* at 60 (noting "the Committee's intention that the [Veterans] 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"); H.R. Rep. No. 100-963, at 36 (1988) (stating that in establishing judicial review of VA claims, the committee "has relied upon the restatement of the APA scope of review doctrine published by the Administrative Law Section of the American Bar Association").

Indeed, when Congress drafted and passed the VJRA in 1988, Congress was aware that courts had certified future-oriented class actions under the APA, including classes comprised of veterans. *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361 (1974) (reviewing an APA class action of conscientious objectors who were denied benefits, even those who had not yet applied for them); *Wayne State Univ. v. Cleland*, 440 F. Supp. 811 (E.D. Mich. 1977) (certifying an APA class of veterans

enrolled in college programs, including those who had not yet enrolled in the program); *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113, 116, 125 (N.D. Cal. 1987) (granting motion for class certification under the APA for a class of Vietnam veterans exposed to dioxins, including those who had not yet applied for VA benefits).[5] Congress did not add language to the VJRA to *preclude* the certification of similar classes in the Veterans Court.

The government acknowledges that Congress was aware of future-oriented APA class actions when it enacted the VJRA. Gov't Br. at 46–47 (arguing Congress was critical of *"Wayne State* line of cases") (quoting H.R. Rep. No. 100-963, at 21). However, the government draws the wrong conclusion from one statement in a Committee Report. If Congress meant to exclude similar cases from the Veterans Court, as the government suggests, they would have expressed it in the text of the statute, not hidden it in a Committee Report. *See Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring) ("Committee reports . . . are frail

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[5] Congress's decision not to give fact-finding power to the Veterans Court does not mean it intended to prohibit class actions. *Cf.* Gov't Br. at 47 (discussing *Nehmer* discovery). The procedural history of this case itself shows that the Veterans Court understands the limits on its own fact-finding. *See* Appx 87–88 (ordering limited remand to the Board); Appx79 (holding VA failed to justify reliance on dose estimate methodology and remanding for further proceedings); *see also Wolfe v. McDonough*, No. 18-6091 (Vet. App. Mar. 24, 2021) (appointing Special Master to assist the court in managing the class action, including to assess compliance issues and provide information to the court).

substitutes for bicameral vote upon the text of a law and its presentment to the President.”).

If anything, the Committee Report’s reference to the *Wayne State* line of cases demonstrates that Congress was aware of the existence of APA class actions that included future beneficiaries and claimants and yet chose not to insert language into the VJRA to exclude similar future-oriented class actions from the Veterans Court. After all, the motivating purpose of the VJRA was to *expand* judicial review of VA claims, not to further narrow the limited review then available. *See Spencer v. Brown* 17 F.3d 368, 372 (Fed. Cir. 1994) (“It is clear that the VJRA instituted changes in the veterans’ benefits system and expanded the rights of veterans relating to the adjudication of their claims, including the right to seek judicial review . . . .”). This Court should not read such an exclusion into the statute where none exists.

Under the APA, courts have routinely certified mixed classes of exhausted and unexhausted claims, including classes of government benefits claimants, despite the APA requirement of a “final agency action.” 5 U.S.C. § 704. *See, e.g.*, *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 369 (S.D.N.Y. 2019) (“The fact that the proposed [APA] class includes members at various stages of administrative review does not defeat class certification.”). The examples of class actions certified under the APA to include members who have not exhausted or presented individual benefits claims

are too numerous to catalogue exhaustively. These examples abound across agencies and have spanned decades. In the veterans law context:

> *See, e.g.*, *supra* Section II.C. at 24–25; *Manker v. Spencer*, 329 F.R.D. 110, 123 (D. Conn. 2018) (certifying APA class of Navy and Marine Corps veterans who "have not received upgrades of their discharge statuses"); Order Approving Final Settlement, *Kennedy v. McCarthy*, No. 3:16-cv-2010-CSH, ECF No. 223, at 8 (D. Conn. Apr. 6, 2021) (approving class action settlement that benefits Army veterans previously denied discharge upgrade by Army board and veterans who "have not yet applied for an upgrade"); *Kennedy v. Esper*, No. 3:16-cv-2010 (WWE), 2018 WL 6727353, at *7 (certifying APA class of same).

In the government benefits context:

> *See, e.g.*, *Aiken v. Miller*, 442 F. Supp. 628, 657–58 (E.D. Cal. 1977) (certifying class of all those "whose application for food stamps was denied, delayed, or never made" and "who have been or will be affected by" the agency rule at issue); *Lightfoot v. District of Columbia*, Civil Action No. 01-1484 (CKK), 2004 U.S. Dist. LEXIS 22158, at *8–12 (D.D.C. Jan. 14, 2004) (certifying class of "[a]ll persons who have received or will receive disability compensation benefits . . . and whose benefits have been terminated, suspended or reduced" or "whose benefits *will* be terminated, suspended or reduced in the future"); *Barry v. Corrigan*, 79 F. Supp. 3d 712, 751 (E.D. Mich. 2015) (certifying class of "[a]ll past, present, and future applicants for, or recipients of, benefits administered by the Michigan Department of Human Services . . . who have suffered or will suffer actual or threatened denial, termination, or reduction of public assistance benefits"); *Olenhouse v. Commodity Credit Corp.*, 136 F.R.D. 672, 681 (1991) (certifying class of farmers in an action to enforce their entitlements under federal grant-in-aid program and defining class to include those who had not exhausted administrative appeals); *Alexander v. Price*, 275 F. Supp. 3d 313, 318 (D. Conn. 2017) (certifying class of Medicare beneficiaries who "have received or will have received 'observation services'"); *Hill v. Sullivan*, 125 F.R.D. 86, 87 (S.D.N.Y. 1989) (certifying class of "widows or widowers who have or will apply for disability benefits"); *McKenzie v. Heckler*, 602 F. Supp. 1150, 1160 (D. Minn. 1985) (certifying class of "all persons residing in Minnesota whose

applications for SSI and RSDI have been or will be adjudicated concurrently"); *Kendrick v. Sullivan*, 784 F. Supp. 94, 104 (S.D.N.Y. 1992) (certifying class of "all claimants for Social Security benefits whose claims have been or will be assigned to [the Administrative Law Judge] for decision"); *Reed v. Lukhard*, 591 F. Supp. 1247, 1251 (W.D. Va. 1984) (certifying class of "persons in Virginia whose benefits . . . have been, continue to be, or will be denied, reduced, or terminated"); *McDonald v. Heckler*, 612 F. Supp. 293, 299 (D. Mass. 1985) (certifying class of "[a]ll persons residing in Massachusetts who have filed or will file applications for disability benefits"); *Newkirk v. Pierre*, 2020 WL 5035930, at *12 (E.D.N.Y. Aug. 26, 2020) ("[T]hat the class includes future members . . . does not pose an obstacle to certification."); *Kennedy v. Sullivan*, 138 F.R.D. 484, 487 (N.D. W. Va. 1991) (certifying class of persons "whose SSI benefits have been or will be denied, terminated, or reduced"); *Raymond v. Rowland*, 220 F.R.D. 173, 181 (D. Conn. 2004) (certifying class of "[a]ll disabled individuals who are or will be eligible for subsistence benefits through AABD, TFA, SAGA, Food Stamps, or Medicaid programs"); *Bruns v. Mayhew*, No. 1:12-CV-00131-JAW, 2013 WL 12233685, at *1, 11 (D. Me. Mar. 25, 2013) (certifying class of those "who applied for, or who will apply for MaineCare benefits").

In the criminal justice context:

See, e.g., *N.S. v. Hughes*, 335 F.R.D. 337, 355 (D.D.C. 2020) (certifying class of "all indigent criminal defendants . . . who were, are, or will be detained"); *Sacora v. Thomas*, 2009 U.S. Dist. LEXIS 112594, at *34 (D. Or. Dec. 3, 2009) (certifying class of prisoners who "have been . . . or will be denied community corrections placement").

In the immigration context:

See, e.g., *Batalla Vidal v. Wolf,* 501 F. Supp. 3d 117, 138 (E.D.N.Y. 2020) (certifying "DACA Class" of "[a]ll persons who are or will be *prima facie* eligible for deferred action under the terms of the 2012 Napolitano Memorandum"); Stipulated Order Certifying Class at 2, ECF No. 38, *Lewis-McCoy v. Wolf*, No. 1:20-cv-01142-JMF (S.D.N.Y. Apr. 17, 2020) (certifying class that included "[a]ll New York State residents . . . who intend to enroll or re-enroll in Global Entry"); *Doe #1 v. Trump*, 335 F.R.D. 416, 437 (D. Or.

2020) (certifying injunctive class of individuals who "have or will have an approved or pending petition" for visa sponsorship and "individuals who . . . have applied for or will soon apply" for an immigrant visa); *Galvez v. Cuccinelli*, No. C19-0321RSL, 2019 U.S. Dist. LEXIS 119172, at *5 (W.D. Wash. Jul. 17, 2019) (certifying class of all individuals who "have submitted or will submit" Special Immigrant Juvenile Status petitions to USCIS prior to turning twenty-one years old); *J.L. v. Cissna*, No.18-cv-04914-NC, 2019 WL 415579, at *12 (N.D. Cal. Feb. 1, 2019) (certifying class of "[c]hildren who have received or will receive guardianship orders" and "who have received or will receive denials of their SIJ status petitions"); *Guam Contractors Ass'n v. Sessions*, No. 16-00075, 2018 U.S. Dist. LEXIS 56319, at *20 (D. Guam Mar. 31, 2018) (certifying class of "petitioners who have filed or will file" for a worker visa and "have received or will receive a denial"); Order and Opinion Granting Plaintiffs' Motion for Class Certification at 2, ECF No. 27, *Bremer v. Beers*, No. 13-1226-CV-W-ODS (W.D. Miss. Oct. 10, 2014) (certifying class of individuals who "have been or will in the future be the petitioner of an I-130 visa petition"); *Rosario v. United States Citizenship*, No. C15-0813JLR, 2017 U.S. Dist. LEXIS 111761, at *30 (W.D. Wash. July 18, 2017) (certifying class of "[n]oncitizens who have filed or will file applications for employment authorization"); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 180, 191 (D.D.C. 2015) (certifying class of Central American mothers and children "who . . . have been or will be detained"); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 329 (D.D.C. 2018) (certifying class of asylum seekers who had credible fear of persecution and "are or will be detained by ICE . . . after having been denied parole under the authority of [certain] ICE Field Officers").

Despite this abundant record of agency class actions with future claimants, the government attempts to argue that certification of classes including members whose claims have been or will be denied is a "novel legal theor[y]." Gov't Br. at 47. To the contrary, for decades courts have certified such classes under the APA, the statute to which Congress looked when writing the VJRA.

The analogous text of the APA ("final agency action") should be understood to have a different meaning from the VJRA ("a Board decision") only if there is a "clearly expressed legislative intention to the contrary." *Wyeth v. Kappos*, 591 F.3d 1364, 1369 (Fed. Cir. 2010) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). But the only potentially meaningful distinction between the APA and VJRA text is the VJRA jurisdictional provision's omission of the APA requirement that a Board decision be "final." Nevertheless, given the textual similarities and congressional intent to model the VJRA on the APA, this Court should follow the long history of APA classes allowing individuals whose claims have been or will be denied to be included in an injunctive class.

D. The VA's Reliance on Inapposite Social Security Cases Is Unavailing.

Congress did not model the VJRA on the Social Security Act (SSA). There are but a handful of scattered and infrequent references to the SSA in the legislative history of the VJRA. In contrast, the Committee Reports and statements of legislators show that the APA was a frequent and salient point of reference when crafting the VJRA. *See supra* Section II.C.

In congressional debate, the SSA was referenced simply to illustrate that disability benefits claimants in other settings were afforded judicial review. *See, e.g.*, 131 Cong. Rec. S10405 (daily ed. July 30, 1985) (statement of Sen. Hart) ("By contrast, the Social Security Administration – which [] also adjudicates disability

claims – has been subject to judicial review of its final benefit decisions (42 U.S.C. 405(g)) for more than [two] decades.”). The government cites no legislative history demonstrating congressional intent to model the VJRA on the SSA, and counsel is aware of none.

The VA nonetheless relies on inapposite examples of class actions under the Social Security Act to argue for an outlier position that each individual member must have a final Board decision in order to be included in the class. Gov't Br. at 35. The VA's position ignores that the Veterans Court is not exercising jurisdiction until after claims are presented, *see supra* Section II.B., and it ignores the legislative history demonstrating that Congress modeled the VJRA judicial review provisions on the APA, and the long history of future-oriented APA class actions, *see supra* Section II.C. Moreover, these Social Security cases are distinguishable because of important differences between the VJRA and the SSA.

The relevant text of the SSA and VJRA demonstrates the inappropriateness of the government's reliance on SSA precedent. The SSA judicial review provision states, in relevant part, "[a]ny individual, after a final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action commenced within sixty days." 42 U.S.C. § 405(g). The VJRA states, "[t]he Court shall have power to affirm, modify, or reverse a decision of the Board," 38 U.S.C. § 7252(a), and "[r]eview in the Court

shall be on the record of proceedings before the Secretary and the Board." *Id.* § 7252(b). These two statutory provisions are materially different.

Specifically, the SSA judicial review statute contains two jurisdictional restrictions not present in its VJRA counterpart. First, it requires a "*final* decision" (emphasis added). Second, the decision must have occurred after "a hearing to which [the claimant] was a party." The VJRA merely requires "a decision of the Board," without mentioning finality or explicitly requiring appellants to have been party to an agency hearing. Therefore, the text of the VJRA is more permissive than the SSA of judicial review of claims that not only have been but *will be* denied by the Agency.

The word "final" exists in the SSA judicial review statute, but not in the jurisdictional statute of the VJRA.[6] The government incorrectly characterizes the SSA judicial review statute as containing more waivable elements than the VJRA's jurisdictional statute. Gov't Br. at 32–33. However, the language of finality in the VJRA comes only in a later section titled "Procedure." *See* 38 U.S.C. § 7266(a) ("In order to obtain review by the Court of Appeals for Veterans Claims of a *final* decision of the Board of Veterans' Appeals . . . ." (emphasis added)). In addition, the Supreme Court concluded in *Henderson v. Shinseki* that the requirements of § 7266 are waivable because "the language of § 7266 provides no clear indication

[6] Indeed, the APA's jurisdictional provision also requires "final agency action," 5 U.S.C. § 704, making the omission of a finality requirement from the VJRA's jurisdictional provision all the more significant.

that Congress wanted that provision to be treated as having jurisdictional attributes." 562 U.S. 428, 439 (2011). The notable absence of a finality requirement in the VJRA's jurisdictional statute thus justifies a greater, not lesser, ability to waive the exhaustion and presentment requirements under the VJRA than the SSA. *Cf.* Gov't Br. at 32–33 (arguing that *Bowen v. City of New York*, 476 U.S. 467 (1986), allowing certification of a mixed class, is inapplicable because the SSA judicial review statute contains more waivable elements than the VJRA).

Thus, the SSA cases on which the government relies—*Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Mathews v. Eldridge,* 424 U.S. 319 (1976)—are inapposite. Gov't Br. at 33–34. The more relevant cases are those arising under the APA, on which Congress modeled the VJRA, and in which courts have routinely certified mixed classes including future members. *See supra* Section II.C.[7]

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[7] The government also points to cases not arising in the context of government benefits claims to argue that 38 U.S.C. § 7252(a) contains no waivable elements. Gov't Br. at 33–43. These cases are also inapposite. *Bowles v. Russell*, 551 U.S. 205 (2007) is distinguishable as it involved a requirement for the timely filing of a notice of appeal. A similar requirement in VJRA § 7266 was already held by the Supreme Court to not be jurisdictional. *See Henderson*, 562 U.S. at 441. The government also cites *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), a damages class action arising under Fed. R. Civ. P. 23(b)(3), which is inapplicable because class members in this case seek only injunctive relief, such as that authorized under Rule 23(b)(2). If the Court grants the class-wide relief sought, the VA will still assess each veteran's eligibility for benefits individually. The government also cites *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009) to argue that individuals who do not meet the requirements for judicial review under the VJRA cannot be included in the class. Gov't Br. at 25. *Arctic Slope*, however, involved a statutory requirement that

The government also ignores important differences in the context of SSA and VA adjudication that undermine the relevance of SSA precedent here. This Court has recognized the uniquely pro-claimant orientation of the VA adjudicatory system. *See, e.g.*, *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (noting that Congress intended the VA adjudicatory system to be more claimant-friendly than the Social Security adjudicatory structure); *Hayre v. West*, 188 F.3d 1327, 1333–34 (Fed. Cir. 1999) (noting the "the strongly and uniquely pro-claimant system of awarding benefits to veterans"). Moreover, the VA has a special statutory duty to assist veterans in developing evidence necessary to substantiate their claims, and only in the VA system do claimants have the benefit of the doubt. 38 U.S.C. § 5103A; *id.* § 5107(b); *see also Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990). These important differences between the VJRA and SSA undermine the government's reliance on SSA precedent in this case. The more relevant precedents are cases arising under the APA, to which Congress looked when crafting the VJRA, not cases arising under the SSA, to which Congress did not look.

III. The Authority of the Veterans Court Under the All Writs Act Extends to All Cases Within Its Prospective Jurisdiction

The Veterans Court properly invoked additional authority under the All Writs

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claims be presented within six years after the claims accrued, 41 U.S.C. § 605(a), which the court held to be jurisdictional. 583 F.3d at 795 n.2. The VJRA contains no similar requirement.

Act to certify a class including claims that have been or will be denied because it is well established that the AWA permits the exercise of appellate jurisdiction even where no appeal has been perfected. The AWA provides courts with the power to certify a class action in order to protect and exercise their underlying jurisdiction, including their *prospective* jurisdiction. The Veterans Court thus has the authority under the AWA to certify a class including claims that have been or will be denied. Here, class certification is in aid of the Veterans Court's jurisdiction because it ensures the fair, consistent, and efficient resolution of the common question presented by the class: whether the Board's dose estimate methodology for Palomares-related nuclear radiation exposure constitutes sound scientific evidence. Because the AWA applies to appeals as well as to mandamus petitions, the Veterans Court correctly invoked the AWA to certify the class in this appeal.

The All Writs Act provides that "[t]he 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). While the AWA does not create an independent source of jurisdiction, it applies where a legislative scheme is unclear or incomplete and operates as a gap-filler, providing courts with additional powers to fully exercise their jurisdiction. *See, e.g.*, *Clinton v. Goldsmith*, 526 U.S. 529, 534–35 (1999) (explaining that the All Writs Act "authorizes employment of extraordinary writs

. . . 'in aid of' the issuing court's jurisdiction" but "does not enlarge that jurisdiction"); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099 (11th Cir. 2004) ("[The AWA] is a codification of the federal courts' traditional, inherent power to protect the jurisdiction they already have, derived from some other source."). As the Supreme Court explained in *Harris v. Nelson*,

> [The AWA] has served since its inclusion, in substance, in the original Judiciary Act as a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" It has been recognized that the courts may rely upon this statute in issuing orders appropriate to assist them in conducting factual inquiries.

394 U.S. 286, 299 (1969) (citations omitted); *see also Monk II*, 855 F.3d 1312, 1318 ("[The AWA] permits federal courts to fill gaps in their judicial power where those gaps would thwart the otherwise proper exercise of their jurisdiction.").

Of particular relevance here, a federal court's authority under the AWA extends to all cases within its appellate jurisdiction, including its *prospective* jurisdiction. As this Court held in *Monk II*, "[u]nder the All Writs Act, the authority of the Veterans Court 'is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.'" 855 F.3d. at 1318 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943)). Thus, while the AWA does not enlarge a court's underlying jurisdiction, it permits a court to aggregate claims in aid of its prospective jurisdiction. The Veterans Court was thus fully

correct in relying on the AWA as an additional source of authority to include claims that have been or will be denied in the class certified here, because such claims are within the Veterans Court's prospective jurisdiction.

The Veterans Court is not the first to rely on its authority under the AWA to certify classes that include class members who have not yet presented a claim. In *United States ex rel. Sero v. Preiser*, the Second Circuit found that a district court had authority under the AWA to provide class-wide *habeas corpus* relief to a class consisting of all individuals convicted of misdemeanors and sentenced to a reformatory institution, including those who had no pending claims before any court. 506 F.2d 1115, 1118, 1125 (2d Cir. 1974). In affirming the certification of the class, the Second Circuit explained that even though Federal Rule of Civil Procedure 23 does not apply in the *habeas* context, the AWA permits courts to create "appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage." *Id.* at 1125 (quoting *Harris*, 394 U.S. at 299). The court in *Preiser* further explained that "the unusual circumstances of this case" and "the nature of the claim . . . applicable on behalf of the entire class" provided a "compelling justification for allowing a multi-party proceeding." *Id.* at 1125–26.

The nature of the claim before the Veterans Court here, which involves the adjudication of veterans' benefits for aging, ill veterans, provides a similarly compelling justification for the use of the class action device under the AWA. All

Palomares veterans are suffering the same wrong as a result of the VA's use of an improper and unsupported dose estimate methodology to assess their claims for benefits, and so present the same mixed factual and legal issue before the Court. The Second Circuit recognized in *Preiser* the broad authority provided by the AWA for a court "to fashion expeditious methods of procedure," and the procedural utility of certifying a class action to consider a specific issue applicable to all class members, including prisoners who had not yet filed a *habeas* petition. *Id.* at 1125. The Veterans Court here properly certified the class to include claims that have been or will be denied.

A class action is the most appropriate procedural mechanism to consider the specific issue of whether the Board's dose estimate methodology constitutes sound scientific evidence, a question over which the Veterans Court has jurisdiction. As the Federal Circuit concluded in *Monk II*, there is "no limitation in the All Writs Act precluding it from forming the authoritative basis to entertain a class action." 855 F.3d at 1318. There is similarly no limitation in the AWA precluding the Veterans Court from entertaining a class action that includes individuals who have not yet filed claims or exhausted administrative remedies. Therefore, the Veterans Court's decision certifying the class action here is an appropriate application of the AWA to "fill the gaps" in the court's appellate authority.

The government contends that the Veterans Court cannot rely on the AWA because, unlike *Monk II*, this action is an appeal, not a mandamus petition. This is a false distinction with no support in *Monk II* or in the Supreme Court's AWA jurisprudence. In holding that the Veterans Court has the authority under the AWA to implement class action procedures, the Federal Circuit in *Monk II* did not limit this authority to petitions for mandamus. Rather the Federal Circuit offered a broad interpretation of the AWA, finding "[t]he All Writs Act unquestionably applies in the Veterans Court," and ultimately concluding that there is "no principled reason why the Veterans Court cannot rely on the All Writs Act to aggregate claims in aid of [its] jurisdiction." *Monk II*, 855 F.3d at 1318–19. In fact, the Federal Circuit's opinion in *Monk II* does not even mention the word "petition" in its analysis of the AWA and its conclusion that the AWA provides the Veterans Court with the authoritative basis to entertain a class action. *See id.* The government is thus concocting an interpretation of *Monk II* that is not found in the *Monk II* opinion itself.

Similarly, the government's false distinction between an appeal and mandamus petition relies on a misinterpretation of the Supreme Court's AWA jurisprudence. For example, in *Roche*, *see* Gov't Br. at 37–38, the Supreme Court did not state that the authority to exercise jurisdiction over future appeals can only arise in the mandamus context, nor did the Court conclude that the AWA can *only* be used to remedy obstructions to appeal. *See* 319 U.S. at 26 (noting that "a function

of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal," without stating that a court's powers under the AWA are limited to this single purpose). Rather, the Supreme Court emphasized a court's broad discretion and flexibility under the AWA, noting that a court's authority under the AWA "may be granted or withheld in the sound discretion of the court . . . [and] [i]n determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action." *Id.* at 25–26.

The Veterans Court's use of the class action mechanism to certify a class of Palomares veterans, including claimants that have been or will be denied benefits, is a proper exercise of the court's authority under the AWA. All of the claimants in this class are U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares and have since suffered illnesses as a result of their exposure to ionizing radiation. All members of the class, including veterans whose claims have not yet been denied, are suffering the same wrong at the hands of the VA: the VA's use of an improper and unsupported methodology with respect to claims for benefits.

The AWA provides an additional source of authority for the Veterans Court to employ procedural devices in aid of its jurisdiction, including its prospective jurisdiction over claims that will be denied. The class action tool allows the Veterans Court to ensure that *all* afflicted Palomares servicemembers will receive the benefit

of its rulings. All Palomares servicemembers in this class will be made subject to the Veterans Court's ongoing enforcement authority, ensuring the efficient, consistent, and fair adjudication of their benefits claims at the VA. Using the class action procedural device to achieve these ends is authorized by the AWA as such a result is "agreeable to the usages and principles of law." *See* 28 U.S.C. § 1651(a).

IV. The Veterans Court Has the Inherent Authority to Certify Classes and Craft Rules of Procedure to Govern How Such Classes Are Defined

The inherent powers of the judiciary are broad, multi-dimensional, and flexible. In *Monk II*, this Court recognized the Veterans Court's inherent powers as one of the sources of its authority to certify class actions. 855 F.3d at 1318. The Veterans Court correctly recognized that it has the inherent power to certify a class that includes individuals whose claims have been or will be denied.

A. The Government Cannot Avoid the Veterans Court's Inherent Powers by Labelling the Monk II *Analysis "Unclarified Dicta."*

In holding that the Veterans Court has authority to certify and adjudicate class actions, the *Monk II* court identified three sources of that authority: "the Veterans Court has such authority under the All Writs Act, other statutory authority, and the Veterans Court's *inherent powers*." *Id.* (emphasis added). The government only briefly addresses the Veterans Court's inherent powers, dedicating just over a page to the issue. The government asserts that this Court's reference to the Veterans Court's inherent power is "unclarified dicta." Gov't Br. at 39. This is not so.

After identifying the three bases for its holding, the *Monk II* court then addressed each of these sources in separate subsections. 855 F.3d at 1318–22. While it did not use the words "inherent power," the subsection titled "Absence of Statutory Restriction" explains this Court's holding with respect to inherent power. *See id.* at 1320–22. In that section, the *Monk II* court summarized and dismissed an argument (reminiscent of the government's argument here) that the statutes governing the Veterans Court strictly circumscribe its jurisdiction and "the Veterans Court would exceed its jurisdiction if, for example, it certified a class that included veterans that had not yet received a Board decision or had not yet filed a notice appealing a Board decision." *Id.* at 1320. The Court categorically rejected that argument: "We disagree that the Veterans Court's authority is so limited." *Id.* Rather, the *Monk II* opinion explained that, in the absence of specific statutory authority to the contrary, the Veterans Court has the ability to exercise various fundamental judicial powers. *Id.* at 1320–22. These are its inherent powers.

Moreover, the government provides no support for the distinction it draws between the scope of the Veterans Court's inherent authority in the petition context and the scope of such authority in connection with appeals. Gov't Br. at 36–38. No such distinction exists. The *Monk II* court broadly held that the Veterans Court has "the authority to establish a class action mechanism or other method of aggregating claims." 855 F.3d at 1322. Nothing in *Monk II* indicates the authority of the

Veteran's Court to certify classes is limited to petitions alone. Indeed, *Monk II* expressly discussed the appeal context when it rejected the government's argument that the Veterans Court would lack jurisdiction over veterans who "had not yet received a Board decision or had not yet filed a notice *appealing* a Board decision." *Id.* at 1320 (emphasis added).

The government's claim that the Veterans Court's inherent authority is somehow diminished in the appeal context would also have absurd practical results. Appeals are a common, routine, and integral part of the process for affording veterans relief—much more so than petitions for mandamus relief. Indeed, the Veterans Court handles significantly more appeals than it does petitions. In FY 2020, for instance, the Veterans Court issued decisions addressing 8,430 appeals, and only 309 petitions. *See* Jonathan M. Gaffney, Congressional Research Service, IF11365, *U.S. Court of Appeals for Veterans Claims: A Brief Introduction* 2 (2021). The class action mechanism exists to "promot[e] efficiency, consistency, and fairness, and improv[e] access to legal and expert assistance by parties with limited resources." *Monk II*, 855 F.3d at 1320. These aims will not be achieved if class action relief is limited to the context of petitions, which make up a comparatively small portion of the Veterans Court's docket. The Veterans Court has inherent authority to craft class action procedures not only in the petition context but also in the vast majority of cases which reach the Veterans Court on appeal.

B. The Veterans Court Properly Exercised its Inherent Authority to Certify a Class of Individuals Whose Claims Have Been or Will Be Denied.

The Veterans Court's holding is consistent with precedent regarding the broad contours of its inherent powers. The Veterans Court, like all federal courts, maintains inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).[8] Such power is "incidental to all Courts," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991), including Article I courts, because such courts "exercise the judicial power of the United States," *see Freytag v. Comm'r*, 501 U.S. 868, 889 (1991).

The Veterans Court has exercised its inherent and equitable powers to manage the cases on its docket and set its own rules of practice and procedure in a variety of contexts. *See, e.g.*, *Rosenberg v. Mansfield*, 22 Vet. App. 1, 6 (2007) (Kasold, J., concurring) (confirming that "as with any federal court, [the Veterans Court has] all the authority necessary to exercise equitable jurisdiction and direct equitable relief not otherwise restricted by law," including to review arguments seeking equitable relief due to error on the part of the Secretary); *Gazaille v. McDonald*, 27 Vet. App.

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[8] *See also Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944) (explaining that equitable powers have "always been characterized by flexibility" so that courts may "meet new situations which demand equitable intervention, [and] accord all the relief necessary to correct the particular injustices involved in these situations.").

205, 214 (2014) (Greenberg, J., concurring) (noting the Veterans Court may use its equitable powers with "flexibility . . . [and] adaptability to circumstances" similar to the power of federal district courts to apply equitable remedies, including estoppel); *Ferguson v. Shinseki*, No. 13-1149, 2014 WL 463690, at *1, 4 (Feb. 6, 2014) (Greenberg, J., concurring) (affirming that the Veterans Court is "a court applying the principles of Article III of the Constitution, and emphatically a court with equitable power," and finding veteran was entitled to equitable tolling); *Pacheco v. Gibson*, 27 Vet. App. 21, 43–44 (2014) (Greenberg, J., concurring in part and dissenting in part) (noting the Veterans Court's equitable powers are "informed by clear congressional intent, and the judicial tradition of executing that intent when reviewing veterans benefits," and urging the Court to "exercise its statutory and inherent—that is, constitutional—powers of equity, to ensure justice for th[e] veteran"). This well-established inherent authority to manage proceedings and provide equitable relief to veterans empowers the Veterans Court to certify a class that includes individuals whose claims have been or will be denied.

As this Court recognized in *Monk II*, there are multiple reasons why it may be appropriate for the Veterans Court to exercise its inherent powers to certify class actions. While the government asserts that the *Monk II* court only "contemplated a class action involving claimants who had not received board decisions" because of undue delay, Gov't Br. at 17, the decision in that case should not be read to be so

limited. The *Monk II* court also acknowledged that class action and claim aggregation procedures may "help the Veterans Court consistently adjudicate cases by increasing its prospects for precedential opinions" and "compel correction of systemic error and [] ensure that like veterans are treated alike." 855 F.3d at 1321.

These rationales are not limited to claims of delay and apply with even greater force here. All veterans present at the Palomares accident site were exposed to radioactive material, and individuals must be suffering from radiation-related illnesses in order to benefit from the injunctive relief sought in this case. All those who seek related disability benefits have been, or will be, subjected to the government's arbitrary and unsubstantiated dose estimate methodology utilized to deny the veterans' claims. Thus, the Veterans Court's certification of a class including individuals whose claims have been or will be denied was a proper exercise of its inherent power in furtherance of the goals of consistency and the correction of systematic error.

V. The Veterans Court Misinterpreted the Equitable Tolling and Waiver of Exhaustion Standards

The Veterans Court correctly found that it has the power to certify a class that includes what it termed "past" and "expired" claimants. Appx23–25. However, the Veterans Court declined to exercise that power in this case because it misconstrued the legal standard for granting equitable tolling and waiver of exhaustion. First, the Veterans Court interpreted *Bowen* as creating a categorical rule that challenged

policies must be "secretive" to grant equitable tolling and waiver of exhaustion, when *Bowen* in fact created no such rule. Second, the Veterans Court held that its mistaken interpretation of *Bowen* controls under the VJRA, an entirely different statute that Congress intended to be more claimant-friendly. *See also* Appx40 (Schoelen, J., concurring in part and dissenting in part) (asserting that Veterans Court interpreted standard for equitable tolling and waiver of exhaustion in a manner that was "far too narrow"). A court has more discretion to determine whether to permit equitable tolling and waive exhaustion; the correct, more liberal standard also better reflects the policies underlying the VA benefits system and the goals of the class action device.

A. The Legal Standards for Waiver of Exhaustion and Equitable Tolling Under the VJRA Do Not Require "Secretive" VA Action.

After the Veterans Court recognized its authority to grant equitable tolling to past and expired claimants, it analyzed whether to exercise that authority by analogizing to *Bowen*. Appx23. However, the Veterans Court's reading of *Bowen* is improperly narrow for two reasons. First, *Bowen* did not establish a categorical rule that equitable tolling and waiver of exhaustion are available only to claimants challenging a "secretive" government action. Second, *Bowen* arose under the SSA and concerns adjudications by the Social Security Administration; even if the Veterans' Court's interpretation of *Bowen* is correct, the doctrine of equitable tolling must be applied more broadly under the more claimant-friendly VJRA.

In *Bowen*, a class action under 42 U.S.C. § 405(g) challenged a policy that effectively denied disability benefits to numerous qualified claimants. 476 U.S. at 469. The policy was unknown to applicants and other parties because it was enforced through internal documents. *Id.* at 475. The district court concluded that these practices constituted a "fixed clandestine policy against those with mental illness" and certified a class that included plaintiffs that had not exhausted administrative remedies. *Id*. On appeal, the Supreme Court considered "whether equitable tolling is consistent with Congress' intent in enacting § 405(g), and whether tolling is appropriate on these facts." *Id.* at 480. The Court did not articulate a general rule. Instead, after conducting a *fact-specific* analysis that included the harms of a secretive policy, the Court concluded that, "*on these facts* the equities in favor of tolling are compelling." *Id.* (emphasis added).

Despite the fact-specific analysis in *Bowen*, the Veterans Court declined to allow equitable tolling in this case because it did not want to "equate VA's adjudication of Palomares veterans' claims with the secretive conduct the Supreme Court found so reprehensible in [*Bowen*]." Appx24. By denying equitable tolling because the challenged action was not "equivalent" to the challenged action in *Bowen*, the Veterans Court majority "implicitly held that 'secretive conduct' must be at issue to trigger equitable tolling." Appx41 (Schoelen, J., concurring in part and dissenting in part). This reading of *Bowen* as creating a categorical rule requiring

proof of a "secret" policy contradicts the Supreme Court's instruction that equitable tolling is a matter assessed on a case-by-case basis, with "flexibility" and without "mechanical rules." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotations omitted); *see also James v. Wilkie*, 917 F.3d 1368, 1373 (Fed. Cir. 2019). As Judge Schoelen observed, a more appropriate reading of *Bowen*'s framework simply addresses the two questions presented in that case: consistency with Congress's intent and appropriateness with respect to the facts at hand. Appx40 (Schoelen, J., concurring in part and dissenting in part).

Numerous federal courts have followed this path, finding that *Bowen* does not require "secretive conduct" to trigger equitable tolling. For example, the Eighth Circuit concluded that "a secret, internal policy [as in *Bowen*] is probably not a prerequisite to equitable tolling," *Medellin v. Shalala*, 23 F.3d 199, 204 (8th Cir. 1994), because generally, "some type of misconduct on the part of the agency . . . should justify this extraordinary remedy." *Id.* Similarly, in *Schoolcraft v. Sullivan*, the Eighth Circuit read *Bowen* as more concerned with *fairness* than *secrecy*, holding that "the district court erred in ruling that a secret policy is a prerequisite to waiver of exhaustion." 971 F.2d 81, 85 (8th Cir. 1992); *see also Gould v. Sullivan*, 131 F.R.D. 108, 112 (S.D. Ohio 1989) (allowing equitable tolling even though the challenged policy was not secret or clandestine); *Hill v. Sullivan*, 125 F.R.D. 86, 95 (S.D.N.Y. 1989) (stating that it is not "necessary to determine whether . . . behavior

amounts to a 'clandestine policy'" because the government's actions "had the same *practical effect* on claimants as the defendant's secretive conduct in [*Bowen*]" (citations omitted) (emphasis added). These cases firmly support a more flexible standard for equitable tolling and waiver of exhaustion. The Veterans Court erred as a matter of law when it narrowly interpreted *Bowen* to impose a "secrecy" requirement. To affirm the Veterans Court holding on this point, moreover, would create a circuit split with at least the Eighth Circuit.

Even if *Bowen* did in fact hold that secretive conduct is necessary to trigger equitable tolling, that rule should not extend to the VJRA.[9] Numerous courts have held that *Bowen*'s scope is limited to the Social Security context. *See, e.g.*, *Andre v. Chater*, 910 F. Supp. 1352, 1360 (S.D. Ind. 1995) (noting that *Bailey v. Sullivan*, 885 F.2d 52 (3d Cir. 1989), which quotes and applies *Bowen*, is a guide for Seventh

[9] Moreover, even if *Bowen* created a secretive conduct requirement that *does* apply to the VJRA, the Veterans Court erred by adopting too strict a definition of "secrecy." The VA's conduct in this case *does* satisfy a "secretive" standard. Palomares veterans spent decades filing Freedom of Information Act requests to obtain information about their radiation exposure. *See Vietnam Veterans of Am. v. Dept. of Def.*, 453 F. Supp. 3d 508, 513–14 (D. Conn. 2020). Even after obtaining that information, they needed to consult a Princeton nuclear physicist to understand the flaws in the methodology on which the VA relied. *See* Appx73. The VA's ongoing failure to fully explain its methodology or make necessary data available renders these standards so opaque as to be secretive; it was *impossible* in practice for most veterans to know the extent of the systematic failures of the methodology until they were revealed during this litigation—long after their claims had lapsed. *See* Appx78–79. Therefore, just like in *Bowen*, claimants here "could not know that . . . adverse decisions had been made on the basis of a systematic procedural irregularity that rendered them subject to court challenge." 476 U.S. at 480–81.

Circuit courts "on class composition issues *in the social security context*") (emphasis added); *see also Hyatt v. Heckler*, 807 F.2d 376, 378 (4th Cir. 1986) (discussing *Bowen*'s implications for Section 405(g)); *Castle v. Chater*, 934 F. Supp. 847, 848 (E.D. Ky. 1996) ("Since *Bowen*, there have been relatively few published opinions from the Sixth Circuit Court of Appeals to more precisely define what specific instances would . . . justify tolling the limitations period *under Section 405*.") (emphasis added). Therefore, even if it had identified the correct standard for allowing equitable tolling from *Bowen*, the Veterans Court erred by applying that standard to the more claimant-friendly VJRA.

B. More Generous Tolling and Waiver Standards Align with the Legislative Intent in Establishing the VA Benefits System.

The Veterans Court's narrow interpretation of the equitable tolling and waiver of exhaustion standards under the VJRA, which led the Court to exclude the past and expired claimants from the class, frustrates the policy rationale underlying the exhaustion doctrine and the intent of Congress in designing the uniquely pro-claimant VA adjudicatory system.

Courts may waive exhaustion when doing otherwise would frustrate "the policies underlying the exhaustion requirement." *Rafeedie v. I.N.S.*, 880 F.2d 506, 527 (D.C. Cir. 1989) (Ginsburg, J., concurring) (internal quotation omitted). The policy rationale underlying the exhaustion requirement is to (1) allow an agency to "function efficiently[;]" (2) give it the opportunity to "correct its own errors[;]" (3)

provide claimants and the court "the benefit of its experience and expertise[;]" and (4) "compile a record which is adequate for judicial review." *Id*. at 527–28. "Where those purposes are not served," the court should waive exhaustion requirements. *Id*. at 528.

The purposes of the exhaustion doctrine are decidedly not served by the Veterans Court declining to certify the past and expired claimants. VA adjudication of Palomares claims under § 3.311 has been far from efficient, as the VA clung to a flawed methodology long after it was revealed to be deficient. *See* Appx42 (Schoelen, J., concurring in part and dissenting in part). The VA has repeatedly declined to correct its own errors, even when confronted with the shortcomings in its methodology. *Id*. Palomares veterans have been forced to turn to outside experts, rather than the VA, to receive the benefit of proper expertise. *Id.* As to the fourth factor, the Veterans Court found that the parties had compiled a "detailed factual record" that was "sufficient" to consider the class certification motion, Appx9, and the Veterans Court possesses ample tools to supplement that record where necessary, *see* Appx126 (ordering limited remand); Appx79 (holding the VA had failed to justify reliance on its methodology and remanding for further proceedings); *see also* Order, *Wolfe v. McDonough*, No. 18-6091 (Vet. App. Mar. 24, 2021) (appointing a Special Master).

Courts should apply equitable tolling of statutes of limitations where it is consistent with Congressional intent—particularly when evidenced by "a statute that Congress designed to be 'unusually protective' of claimants." *Bowen*, 476 U.S. at 480; *see also Conoco, Inc. v. U.S. Foreign–Trade Zones Bd.*, 18 F.3d 1581, 1585 (Fed. Cir. 1994). The VJRA is uniquely pro-claimant, explicitly designed to favor judicial review for veterans*.* *See Henderson*, 562 U.S. at 441 (holding that the 120-day appeals deadline is not jurisdictional precisely because the VJRA is "decidedly favorable to veterans"); *see also Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (recognizing that the "entire scheme" of veterans' benefits "is imbued with special beneficence from a grateful sovereign"). This special beneficence towards veterans has been "noted time and again in caselaw," and this Court has recognized that the veterans' benefits system is intended to be "so uniquely pro-claimant" that "systemic fairness" and even the "appearance of fairness" carries great weight. Appx40 (Schoelen, J., concurring in part and dissenting in part) (quoting *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998)).

The majority below stated that "[t]he proper course for [expired] claimants is to file supplemental claims based on new and relevant evidence with VA . . . ." Appx24. However, this proposed solution undercuts the very reasons why the Veterans Court favored a class action in this case and why the Veterans Court should include past and expired claimants in similar cases in the future. Here, the record is

"complex and voluminous," making it "extraordinarily difficult" for individual litigants to litigate their claims, because they "lack[ed] the ability to obtain the information necessary to substantiate" those claims. Appx33.

By including past and expired claimants in a certified class such as this, consistent with the proper legal standard, the Veterans Court would recognize the limited likelihood that they will successfully proffer "new and relevant evidence" to reopen their claims on their own and make clear its willingness to ensure consistent and accurate implementation of a favorable merits decision to all similarly situated servicemembers. *See, e.g.*, *Wolfe v. Wilkie*, 32 Vet. App. 1, 11 (2019) (finding that the VA responded to a precedential decision by creating a scheme that was "indistinguishable from" the scheme the Veterans Court "*authoritatively held impermissible*"). A precedential decision offers no such efficiency and equity advantages.

This Court should ensure that the "special beneficence" promised to veterans by the VJRA, *Barrett*, 466 F.3d at 1044, is extended to Palomares veterans by vacating and remanding the Veterans Court's decision to exclude the past and expired claimants with instructions to apply the proper equitable tolling and waiver of exhaustion standard so that these Palomares veterans receive the full benefit of the Veterans Court's rulings on the merits.

CONCLUSION

The Veterans Court's decision to certify a class of Palomares veterans who have been or will be denied benefits pursuant to an obsolete and unjustified methodology was well within its authority pursuant to the VJRA, the All Writs Act, and the court's inherent powers. Had the Veterans Court not misinterpreted the proper legal standard for equitable tolling and exhaustion of claims, it could have gone a step further by including the past and expired claimants in the class.

This Court should continue to encourage the Veterans Court to "serve as lawgiver and error corrector" and employ the class action mechanism broadly "to compel correction of systemic error and to ensure that like veterans are treated alike." *Monk II*, 855 F.3d at 1321. Accordingly, the Claimant-Cross-Appellant respectfully asks that this Court AFFIRM the decision of the Veterans Court certifying the class of present, present-future, and future-future claimants. Further, Claimant-Cross-Appellant asks that this Court VACATE the decision of the Veterans Court excluding the past and expired claimants from the certified class, which was based on the court's misinterpretation of the exhaustion and tolling standards, and REMAND for further proceedings under the proper legal standards.

Dated: October 18, 2021

Respectfully submitted,

Matthew Handley, Law Student Intern
Adam Henderson, Law Student Intern
Joshua Herman, Law Student Intern
Caroline Markowitz, Law Student Intern
Meghan Brooks
Michael J. Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Org.
Yale Law School†
P.O. Box 209090
New Haven, CT 06520-9090
Tel: (203) 432-4800
michael.wishnie@ylsclinics.org

Lynn K. Neuner
Simpson Thacher & Bartlett LLP
425 Lexington Ave.
New York, NY 10017
Tel: (212) 455-2000
lneuner@stblaw.com

Counsel for Claimant-Cross-Appellant

†This brief does not purport to represent the views of Yale Law School, if any

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Federal Circuit Rule 32(b), the undersigned certifies that the word processing software used to prepare this brief indicates there are a total of 15,047 words, excluding the portions of the brief identified in the rules. The brief complies with the typeface requirements and type style requirements of Fed. R. App. P. 32(a)(5) and has been prepared using Times New Roman 14 point font, proportionally spaced typeface.

Dated: October 18, 2021

Respectfully submitted,

/s/ Michael. J. Wishnie
Michael J. Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Org.
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
Tel: (203) 432-4800
michael.wishnie@ylsclinics.org

Counsel for Claimant-Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2021, Claimant-Cross-Appellant's foregoing Corrected Principal and Response Brief was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

Dated: October 18, 2021

Respectfully submitted,

/s/ Michael J. Wishnie
Michael J. Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Org.
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
Tel: (203) 432-4800
michael.wishnie@ylsclinics.org

Counsel for Claimant-Cross-Appellant