No. 22-815

IN THE

Supreme Court of the United States

VICTOR B. SKAAR,
Petitioner,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Federal Circuit

BRIEF FOR NVLSP, IAVA AND VVA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are veterans service organizations that know all too well the injustices that befall veterans who are forced to pursue their claims alone. The decision below exacerbates these injustices by smothering class-action eligibility for disabled veterans and their families. Both the decision and the harms it heralds call for prompt correction.

Founded in 1981, National Veterans Legal Services Program (NVLSP) has worked to ensure that the government delivers to our nation's veterans the benefits to which they are entitled based on injuries incurred during their military service. NVLSP also publishes the Veterans Benefits Manual, the authoritative guide for veterans advocates, and provides pro bono representation to veterans across the country. NVLSP has also filed class action lawsuits challenging the legality of various VA rules and policies, and its expertise bears directly on the issues before the Court.

Iraq and Afghanistan Veterans of America (IAVA) is a national nonprofit veterans service organization dedicated to serving post-9/11 veterans. IAVA's mission is to unite, empower, and connect its over 425,000 members through education, advocacy, and community. Through its Quick Reaction Force, IAVA leverages best-in-class research, data, and partnerships to empower veterans and assist them in navigating VA health care, benefits, and other programs. Given

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[1] No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. Counsel of record for the parties were notified of NVLSP's intent to file this brief on March 17, 2023.

IAVA's expertise and mission of advocating for its members, the organization has an interest in protecting the rights of veterans to seek class-based relief.

Vietnam Veterans of America (VVA) is a national nonprofit organization and is the only national veterans service organization congressionally chartered and exclusively dedicated to Vietnam-era veterans and their families. VVA has played a leading role in advocating for the creation of judicial review for veterans and championing the rights of veterans to challenge VA decisions in court. Throughout its advocacy, VVA has sought systemic solutions to widespread problems facing veterans. Depriving veterans of class actions greatly diminishes VVA's ability to help bring widespread justice to our Nation's veterans.

SUMMARY OF THE ARGUMENT

"We Stand Alone Together." *Motto*, Easy Company, 506th Parachute Infantry Regiment (1942-45). Unity and teamwork have been the foundation of every regiment ever fielded in this nation's history. Yet when American servicemen and women return home and seek help for the injuries they sustained together, they are broken off single file and made to confront their own government alone. The veteran's class action served as a rallying flag for these veterans with the same claims to seek the same redress. The decision below would cripple it.

In the six years since *Monk v. Shulkin*, the Veterans Court has aggregated exhausted and pending claims to provide essential relief to disabled veterans and their families. 855 F.3d 1312, 1315 (Fed. Cir. 2017). It has disciplined government defiance of its precedents, *Wolfe v. Wilkie*, 32 Vet. App. 1, 11 (2019), dredged out bureaucratic logjams, *Beaudette v. McDonough*, 34

Vet. App. 95 (2021), and, in this case, warded off unfounded testing criteria for service connection, *Skaar v. Wilkie*, 32 Vet. App. 156 (2019) (en banc). The judgment of the court of appeals would walk back these strides by severely constricting the number of veterans that can ever be eligible for class certification. It seizes the reins of power from the Veterans Court and grants the government *carte blanche* to moot important cases. *See infra*, § I.C.1. It invites the VA to ignore precedent, § I.C.2, produces disparate outcomes for the same injury, § II.A, and wastes resources for the agency, the veteran, and the Veterans Court, § II.B.

Given the system's pro-veteran commission, there is no way to justify such a scheme. This Court should right this wrong by granting certiorari and reversing the judgment below.

ARGUMENT

I. Without class actions, veterans suffer.

A. The decision below all but eliminates class actions for disabled veterans.

The decision below severs class eligibility for veterans (1) who had filed a claim that was still pending either before a VA regional office or the Board and those (2) who have not yet filed a claim. *See Skaar v. McDonough*, 48 F.4th 1323, 1328 (Fed. Cir. 2022). Now, the only veterans who may qualify for class eligibility are "present claimants," or those with a ripe Board decision *presently in hand.* Pet. App. 22-23a. As a result, class-based relief for veterans is on life support. *See* Pet. App. 3a (Dyk, J., dissenting) ("The panel decision here effectively eliminates such class actions for veterans[.]").

These "present claimants" are veterans who "had appealed or were still able to timely appeal, Board decisions denying their . . . claims." Pet. App. 19a. The window to appeal a Board decision to the Veterans Court is 120 days. 38 U.S.C. § 7266(a). To illustrate how few veterans could ever fall into the 120-day window of the Federal Circuit's "present claimant" subgroup, consider the VA's annual report for FY 2021. Over 1,000,000 claims are processed per year, and only between 85,000 and 100,000 of them were the subject of a Board decision.[2] Only 20-30% of those decisions are denials—the rest are remanded on at least one issue and generally would not give rise to class eligibility under the framework announced below. *See Skaar*, 48 F.4th at 1327-28.

Assuming an even annual distribution of Board decisions, only about 7,000-10,000 appealable decisions—at most 1% of the total number of yearly claims—will fall within the 120-day appeal window of 38 U.S.C. § 7252(a) at any given moment. This handful of decisions contains thousands of disparate issues and fact patterns, effectively eradicating the class-eligible population on any isolated issue.

Even if thousands of veterans were to intentionally file claims on the same issue on the same day, there is no guarantee that the Board would issue decisions for each of those veterans within the same 120-day window. Veterans who seek Board review may wait between five to seven years from the day a claim is

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[2] *See* Dec. 9, 2019 Press Release, VA.GOV, https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5371; *Board of Veterans' Appeals Annual Report Fiscal Year (FY) 2021* at 16, BVA.gov, *available at* https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2021AR.pdf (last accessed March 15, 2023) (hereinafter "Board FY 2021").

filed to the day the Board issues a decision. *How long does it take VA to make a decision?*, VA.gov, https://www.va.gov/decision-reviews/legacy-appeals/ (last accessed March 15, 2023); *see* Adam S. Zimmerman, *The Class Appeal*, 89 U. Chi. L. Rev. 1419 (2022) ("The few common claims with counsel almost never reach appellate courts at the same time."). And any differences in strategy among veterans will vary the time even further. *See Decision Wait Times*, BVA.gov https://www.bva.va.gov/decision-wait-times.asp (last accessed March 15, 2023) (describing the Board's compounding delays for each of several "Veteran choices" such as seeking "Higher-Level Review" or a "Supplemental Claim").

The "present claimant" class is no class at all. Veterans will find it difficult, and likely impossible, to meet the numerosity requirements for class relief if their claims may only be aggregated with other veterans with the exact same issue who happen to have exhausted Board review within the same 120-day period or have a pending judicial appeal. Even if they do, thousands of veterans with the same issue in cases pending before the VA will be excluded from class participation unless they are fortunate enough to be able to reproduce this process in a separate 120-day period. This remote possibility provides no meaningful relief to veterans struggling to navigate a system already rife with waste and delay. *See Martin v. O'Rourke*, 891 F.3d 1338, 1349-53 (Fed. Cir. 2018) (Moore, J., concurring). The decision below rolls back years of progress for veterans, further damaging an already deeply flawed system.

B. Class actions allow courts to police systemic wrongdoing by the VA.

The decision below halts recent progress in achieving procedural justice for veterans. In the years following *Monk v. Shulkin*, the Veterans Court used its class certification powers to rein in systemic illegal conduct by the VA. For example, in *Staab v. McDonald*, the Veterans Court struck down a VA regulation that prevented the reimbursement of emergency medical expenses incurred at non-VA facilities to veterans whose private health insurance covered only part of the incurred expenses. *Staab v. McDonald*, 28 Vet. App. 50, 53-55 (2016). Following *Staab*, the VA adopted 38 C.F.R. § 17.1005(a)(5), "purportedly to implement *Staab*." *Wolfe*, 32 Vet. App. at 11. But when it adopted that new regulation, the VA "excluded from reimbursement nearly every type of expense a veteran could have incurred if he or she had insurance covering the non-emergency [sic] VA medical service at issue." *Id.*; *see also* 38 C.F.R. § 17.1005(a)(5). The Veterans Court was baffled:

> So, after *Staab*, VA adopted a regulation that functionally creates a world indistinguishable from the world *Staab* authoritatively held impermissible under the statute . . . . The Agency has effectively rolled back the clock and, with no transparency, essentially readopted a position we have authoritatively held inconsistent with Congress's command.

Wolfe, 32 Vet. App. at 11. What's more, the VA "was affirmatively informing veterans that they were not entitled to reimbursement for non-VA emergency medical care if they had any insurance covering the service at issue." *Id.* at 12. In other words, the VA "was

telling veterans that the law was exactly opposite to what a Federal court had held the law to be." *Id.*

The solution was class relief. The Veterans Court held the VA regulation unlawful as in *Staab*, but it also certified a class of "[a]ll claimants whose claims for reimbursement of emergency medical expenses incurred at non-VA facilities VA has already denied or will deny" under its regulation. *Wolfe*, 32 Vet. App. at 23.[3] After certifying the class, the court ordered the VA to stop sending letters containing its erroneous reading of the law, to notify class members that they were eligible to be reimbursed for their emergency room benefits, and to give these claimants new hearings. *Id.* at 20-21.

The Veterans Court has also used class certification to dislodge illegal VA blockades that prevent veterans from ever receiving a Board decision in the first place. Take *Beaudette v. McDonough*. There, the VA stripped petitioners Mr. and Mrs. Beaudette of their benefits under the Caregiver Program. 34 Vet. App. 95. The petitioners appealed to the Board in August 2019, but had received no response by April 2021. *Id.* at 100. The Board ignored their appeal because "VA has concluded that benefits decisions under the Caregiver Program may not be appealed to the Board." *Id.* (citing Caregivers Program, 80 Fed. Reg. 1357, 1366 (Jan. 9, 2015)) ("The Secretary doesn't dispute this.").

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[3] Years later, the Federal Circuit reversed the *Wolfe* court on its application of the "clear and indisputable right" standard for issuance of a writ, not its class certification. *Wolfe v. McDonough*, 28 F.4th 1348, 1360 (Fed. Cir. 2022) ("[W]e need not and do not reach the issue of class certification."). It also affirmed the Veterans Court's core finding that the VA's regulation in *Wolfe* was invalid. *Kimmel v. Sec'y of Veterans Affs.*, No. 2022-1754, 2022 WL 14319044, at *2 (Fed. Cir. Oct. 25, 2022).

The VA was wrong. The Board *did* have jurisdiction to review decisions under the Caregiver Program. *Id.* at 102 ("The plain language of section 1720G(c)(1) does not insulate the Caregiver Program from judicial review."). The Veterans Court granted Mr. and Mrs. Beaudette's petition for writ of mandamus, and certified a class of veterans who received adverse Caregiver Program decisions, but "have not been afforded the right to appeal to the Board of Veterans' Appeals." *Id.* at 108. [4] For these class members, the VA needed to provide notice of its mistake:

> [H]ere, VA affirmatively prevented Caregiver Program claimants from exercising their appellate rights at all. VA erred in setting up this adjudicative blockade, and it bears some responsibility in advising claimants that it has been lifted. A precedential decision cannot guarantee that sort of remedial action, since it would bind VA only in pending or future claims.

Id. at 107-08.

The VA's obstruction of Caregiver Program review was especially cruel. All Caregiver Program veterans necessarily suffered a "serious injury . . . in the line of duty" and are in need of immediate care. 35 U.S.C. § 1720G(a)(2)(B). Mr. Beaudette, for example, was rendered legally blind after suffering multiple concussions on combat tours in Iraq and Afghanistan. *Beaudette*, 34 Vet. App. at 99. These veterans were thankfully given the due process they were owed under the law—all because the Veterans Court

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[4] The VA has appealed the Veterans Court's decision to the Federal Circuit. *See Beaudette v. McDonough*, Case No. 22-1264, Dkt. No. 1 (Fed. Cir. 2021). The case is pending.

certified their class of veterans with related pending claims and ordered class-wide relief.

The Veterans Court has cleared up VA obstruction using class relief in other contexts, including to address the type of delay at issue in *Monk v. Shulkin* itself. *Godsey v. Wilkie*, 31 Vet. App. 207, 222 (2019) (certifying class of veterans suffering extended delays waiting for VA regional offices to certify their appeal to the Board).

Before the Veterans' Judicial Review Act (VJRA), district courts took up the same mantle—certifying classes of veterans who were each harmed by the same VA misconduct. *See Bedgood v. Cleland*, 521 F. Supp. 80 (D. Minn. 1981) (pre-VJRA) (certifying class of veterans whose benefits have been or may be reduced, terminated, or suspended without notice or hearing); *Nat'l Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595 (N.D. Cal. 1986) (certifying class of veterans challenging a regulation limiting the recovery of fees charged by veterans service organizations (VSOs)).

District courts have also historically issued class certification to remedy systemically wrong outcomes. In 1986, NVLSP attorneys brought a class action lawsuit challenging the VA's 1985 Agent Orange compensation regulation on the ground that it violated the 1984 statute requiring the VA to promulgate a rule governing claims based on exposure to Agent Orange. In 1987, the Northern District of California certified the class—including veterans with unexhausted claims—and in 1989, the district court found the regulation unlawful. *See Nehmer v. U.S. Veterans' Admin.*, 712 F. Supp. 1404, 1406 (N.D. Cal. 1989). In 1991, NVLSP attorneys negotiated a consent decree with the VA in *Nehmer* that has, to date, resulted in the delivery of at least $3.2 billion in VA retroactive compensation to

Vietnam veterans and their survivors. *See* Declaration of Margarita Devlin, *Nehmer et al. v. U.S. Department of Veterans Affairs*, Case No. 3:86-cv-06160 (N.D. Cal., Aug. 13, 2020).

Class wrongs demand class relief. The VA offers no shortage of systemic mistakes and roadblocks to veterans, but—if the Veterans Court's hands are not tied—it may police those errors as they arise.

C. Precedential decisions are no substitute for class actions.

Precedential decisions of the Veterans Court cannot fill the gap left by the effective elimination of class relief. The Veterans Court issues only a few precedential decisions on appeals every year. An average Article III court of appeals will render a precedential opinion in about 13.7% of its cases decided by opinion.[5] By comparison, the Veterans Court rendered precedential opinions in just 0.5% of cases resolved on the merits in FY 2021.[6] Those few precedential decisions the Veterans Court does render cannot fill the gap left by the decision below, especially because the VA may ignore the Veterans Court's precedents.

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[5] *See* 2022 Annual Report of the Statistics Division of the Administrative Office of U.S. Courts, Table B-12, *available at* https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2022.pdf. (last accessed March 15, 2023).

[6] *See Fiscal Year 2021 Annual Report* at 3, CAVC.gov, *available at* http://www.uscourts.cavc.gov/documents/FY2021AnnualReport.pdf (last accessed March 15, 2023) (hereinafter "CAVC FY 2021") (44 out of 8,276 decisions).

1. The VA strategically moots individual cases that could help veterans.

To render a precedential decision, the Veterans Court must enjoin a three-judge panel; a single-judge decision does not have precedential value. *See Bethea v. Derwinski*, 2 Vet. App. 252, 254-55 (1992). But when it sees the court assembling a panel, the VA often moves to avoid a precedential decision by "mooting out" the appeal—i.e., by quickly settling the case and essentially buying the appellant off. *C.f. Godsey*, 31 Vet. App. at 219 ("[P]etitioners' claims are not only unavoidably time-sensitive, but are also acutely susceptible to mootness due to the Secretary's history of mooting petitions before judicial resolution." (internal quotes omitted)).

Take, for example, the case of *Johnson v. Principi*. In November 2003, the Veterans Court convened a panel and set oral argument to hear the appeal of Mrs. Andrea Johnson, the surviving spouse of a Blue Water Navy veteran who was denied service-connected death benefits (DIC) by the Board on the ground that her deceased husband, who died of an Agent Orange-related cancer, served on the coastal waterways, rather than the landmass, of Vietnam. *See Johnson v. Principi*, U.S. Vet. App. No. 01-0135 (Order, Nov. 7, 2003). Mrs. Johnson challenged the legality of the 2002 Manual M21-1 provision denying veterans the presumption of Agent Orange exposure based on service on the coastal waterways of Vietnam. *See* Appellant's Brief, July 3, 2002; Appellant's Reply Brief, April 9, 2003. The Veterans Court assembled a panel, and in doing so signaled that it would likely issue a precedential decision deciding the legality of VA's set-foot-on-land requirement.

The VA did not hesitate. Six days before the oral argument, the Secretary's Office of General Counsel offered the widow full DIC benefits retroactive to the date of her husband's death—the maximum award she could possibly receive. *See id.*, *Joint Motion of Parties to Terminate the Appeal*, filed Dec. 3, 2003. Once Mrs. Johnson signed the VA's settlement agreement, the oral argument was cancelled and the appeal was dismissed. *See Johnson v. Principi*, U.S. Vet. App. No. 01-0135 (Order, Dec. 5, 2003). Mooting out the widow's case allowed the VA to continue denying coverage for other Navy veterans and survivors for the next *16 years*. Only in 2019 did the Federal Circuit finally hold that the Agent Orange Act of 1991 required the VA to presume that the tens of thousands who served on the territorial seas of Vietnam were entitled to the presumption of Agent Orange exposure. *See Procopio v. Shinseki*, 913 F.3d 1371 (Fed. Cir. 2019) (en banc) (overruling *Haas v. Peake*, 544 F.3d 1306 (Fed. Cir. 2008)).[7]

Cases like *Johnson* illustrate why class actions matter. Class actions thwart the VA from engaging in gamesmanship because any "mooted out" class representative may still represent the class, and the case is not dismissed. *See Monk*, 855 F.3d at 1316-17 (citing *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980)).

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[7] The VA plays by the same book in writ of mandamus cases. When the Veterans Court orders the Secretary to respond to a petition for extraordinary relief, "the great majority of the time the Secretary responds by correcting the problem within the short time allotted for a response, and the petition is dismissed as moot because the relief sought has been obtained." *Young v. Shinseki*, 25 Vet. App. 201, 215 (2012).

2. The VA ignores precedential decisions.

When the Veterans Court does issue a precedential decision, the VA often simply ignores it. *Staab v. McDonald* described in Section I.B above, is one example; *Harris v. McDonough* is another. 33 Vet. App. 269, 276 (2021). In *Harris*, the Veterans Court held that the VA's "refusal to issue a [character of discharge determination] frustrates judicial review." *Id.* (issuing writ of mandamus ordering the VA to make such a determination).

As of today, the VA still fails to adjudicate requests to reopen character of discharge determinations. Veterans who should be able to rely on *Harris* before the agency must instead expend needless resources (and years) to get an individualized order from the Veterans Court in their own case. *See, e.g.*, *Hamill v. McDonough*, Dec. 22 Order, Vet. App. No. 22-7344 (2022).

Without class relief, the calculus for the VA is simple: it need not bother to police itself. As the *Wolfe* court reflected when it certified Wolfe's class,

> Here, though another precedential decision would undoubtedly bind VA, Petitioner Wolfe's allegations uniquely highlight the inferiority of a precedential decision under the facts before us. VA could circumvent another decision—as it allegedly did [in] *Staab*—without concern about enforcement beyond another appellate proceeding. If we award the *Wolfe* Class's requested relief, any class member (particularly those who are absent) who suffers VA's noncompliance could enforce it. This case's allegations about VA's post-*Staab* conduct demand a means for prompt collective enforcement.

Wolfe, 32 Vet. App. at 33.

Whether the Veterans Court can or cannot bind the VA through precedent,[8] the practical reality is that the VA may pay no heed to the court even when it "authoritatively correct[s] VA's misunderstanding[.]" *Id.* at 31. The decision below risks returning to a world where the VA may do so unchecked. *See* Nicholas R. Parillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 Harv. L. Rev. 685, 691-92 (2018).

3. Practical reform springs from class actions.

By their nature as class actions, *Wolfe* and *Beaudette* gave counsel and the Veterans Court the tools to broadly monitor VA compliance and take steps to ensure that the agency was obeying and implementing the court's mandates. As discussed above, the *Wolfe* court ordered the VA to stop sending letters that misinformed veterans of their rights and to notify affected claimants that they were eligible for new hearings on reimbursement for emergency medical expenses. *Wolfe*, 32 Vet. App. at 41.

But the VA failed (again) to comply with these orders. It delayed the corrected notices, it continued to misinform veterans of their rights, and it failed to keep track of which veterans needed new hearings. *See* Petitioner's Opposed Motion for Enforcement of the Court's Order of September 9, 2019 and Other Relief at 9, *Wolfe v. Wilkie*, (No. 18-6091) (noting that six months after *Wolfe*, the VA's website *still* told veterans

[8] Mr. Skaar notes that certain judges of the Federal Circuit have suggested in dicta that the VA *cannot* be bound by Veterans Court precedent. *See* Pet. 26. If the VA agrees with those judges, it may decide it can ignore precedential opinions with impunity.

that they could not be reimbursed). These problems "only came to light after class counsel reviewed the VA's status reports, interviewed and responded to complaints from class members, and raised concerns with the VA's own data." *The Class Appeal*, 1463-64.

In March 2021, the court appointed retired Judge Thomas Griffith to monitor VA compliance with its orders. *See Wolfe v. McDonough*, 34 Vet. App. 162, 167 (2021); *The Class Appeal*, 1464 (noting that this "solution . . . would not have been practical in individual adjudication"); *see id.* at 1443-46 (tracing the limits of "piecemeal relief"). The purpose of the appointment was "information-gathering" and "facilitation" to ensure that veterans' rights were being protected—*not* to punish the VA. *Wolfe*, 34 Vet. App. at 168 ("We stress that we are not appointing the special master as some sort of roving commissioner of justice.").

Beaudette, on the other hand, shows how VSOs managing class actions can provide practical resources to class veterans. NVLSP, Public Counsel, and *pro bono* counsel established a website to provide information to seriously disabled *Beaudette* veterans and their family caregivers about how to navigate appeals of benefits decisions under the Department of Veterans Affairs' Program of Comprehensive Assistance for Family Caregivers (PCAFC or Caregiver Program). *See VA Caregiver Program Class Action*, https://www.vacaregiverclassaction.com/ (last accessed March 16, 2023).

Class actions help ensure compliance. This is particularly true for veterans—often *pro se*—challenging opaque practices administered by many different officers in a government bureaucracy. *See The Class Appeal*, 1443-46. Without class counsel available to interpret and enforce a new judicial decision before the

agency, the court's mandate may be misinterpreted or ignored.

II. Class actions are particularly well-suited to help disabled veterans.

A. Veterans are often injured together.

By the nature of military service, many claims by veterans arise out of the same or similar circumstances. Servicemembers work together, fight together, and, regrettably often, are injured together. Mr. Skaar and his 1,400 brothers and sisters-in-arms worked together to clear nuclear waste from the Spanish countryside—and all were bombarded every day with the same radioactive plutonium. *See* Pet. App. 40a. And the case of the Palomares veterans suffering together is one of many. *See, e.g.*, *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113, 119 (N.D. Cal. 1987) (hundreds of thousands of Vietnam veterans injured by exposure to Agent Orange); *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (Agent Orange); *Taylor v. McDonough*, 3 F.4th 1351, 1358 (Fed. Cir. 2021) (thousands of Edgewood veterans prevented from disclosing human experiments performed on them during service).

Veterans injured the same way should receive the same relief. But with individual adjudication in an enormous and sprawling VA system, consistency can be impossible. The VA's practice of "mooting out" important cases by buying off those claimants (typically those who are represented), is one way that inconsistency festers. *See*, *e.g.*, *Johnson v. Principi* (discussed in Section I.C.1, *supra*).

Decisions on the merits also vary widely among veterans suffering the same injury. Non-attorney adjudicators at Regional Offices must untangle a

decades-old skein of statutes and regulations in order to render initial decisions. *See* James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. Ann. Surv. Am. L. 251, 283-84 (2010). Perhaps unsurprisingly, the Veterans Court vacates, reverses, or orders some other form of relief from the VA in nearly 80% of cases that it hears. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 432, (2011). And even at the Veterans Court, any two judges may offer starkly contrasting views of the same regulatory rating criteria. *See, e.g.*, James D. Ridgway, "*Not Reasonably Debatable": The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 Stan. L. & Pol'y Rev. 1, 28-30 (2016) (discussing the variance in single-judge adjudication of suicidal ideation cases).

For unrepresented veterans, the disparity is even worse. *Pro se* claimants often lack the ability to hold the VA accountable to a controlling judicial decision *at all*. The VA is prone to mishandling records, misinterpreting precedent, losing track of claimants, and suffering from chronic delays as they hear large numbers of individual cases without lawyers. *See, e.g.*, *Review of Claims-Related Documents Pending Destruction at VA Regional Offices*, Oversight.gov (2016), *available at* https://www.oversight.gov/sites/default/files/oig-reports/VAOIG-15-04652-146.pdf (describing poor document retention related to veterans' claims).

Without class relief, a thousand veterans injured in the same way at the same time may receive a thousand different outcomes. The decision below will exacerbate the existing backlog of pending appeals

within the VA and lead to inconsistent outcomes for veterans with the same injury.

B. Concentrating costs helps pro se veterans face a sprawling VA bureaucracy.

"The class action suit, almost by definition, arises when potential benefits can be dispersed and potential costs are concentrated." P.A. Paul-Shaheen et al., *Class Action Suits and Social Changes: The Organization and Impact of the Hill-Burton Cases*, 57 Ind. L.J. 385, 389 (1982). Veterans are prime candidates for cost concentration through class actions, and Mr. Skaar's case is an excellent example. Bolstered by "expert testimony from distinguished nuclear physicists," Mr. Skaar led the charge to topple the VA's unsound dosage measurements—and won. Pet. 2. But expert scientific analysis cannot be afforded to every veteran in every individual case.

Even when experts are not involved, the claims process can cost a veteran countless hours of work. Veterans who file a claim receive an initial administrative decision from 1 of 56 regional offices after approximately 102 days.[9] If a veteran disagrees with an initial decision, that veteran may either seek review by a senior adjudicator, which takes 125 days,[10] or appeal directly to the Board, which takes, on average, another 440 days to render a decision.[11] Only

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[9] *How to File a Claim*, VA.gov, https://www.va.gov/disability/how-to-file-claim/ (last accessed March 16, 2023). During this period, veterans are statutorily barred from paying a lawyer to represent them. *See* 38 U.S.C. § 5904(c)(1).

[10] *Higher-Level Reviews*, VA.gov, https://www.va.gov/decision-reviews/higher-level-review/ (last accessed March 16, 2023).

[11] *Decision Wait Times*, VA.gov, https://www.bva.va.gov/decision-wait-times.asp (last accessed March 16, 2023).

when veterans have worked their way through all of those internal procedures can they finally appeal to the Veterans Court—a step that may take another 1-3 years.[12] But claims can be remanded for more factual development at every stage, "forcing claims to revolve up and down through the system on what some on the Veterans Court have called a 'hamster wheel' of justice." Adam S. Zimmerman, *Exhausting Government Class Actions*, U. Chi. L. Rev. Online (Oct. 20, 2022).

The process is long and time-consuming, and, when the VA does not abide by precedent, *see* Section I.C.2, must be pursued to the bitter end. Consistent legal representation is rarely practicable for benefits claims, especially given the relatively low sums at stake and the resources required to mount serial VA challenges. *See The Class Appeal*, 1439-43. Veterans are also older than non-veterans and more likely to bring their claims *pro se*. *See* 2017 Profile of Veterans, p. 3 ("Veterans are significantly older than non-Veterans. Veteran median age is around 64 compared with 44 for non-Veterans[.]"), *available at* https://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_2017.pdf (last accessed March 22, 2023); CAVC FY 2021 at 1 (noting 20% of veterans are *pro se* at the timing of filing their appeals, and 42% are *pro se* when filing petitions).

These factors produce a claimant class that is (1) elderly, (2) seeking relatively small awards on an individual basis, and (3) more likely than usual to be *pro se*. The VA, on the other hand, employs nearly 400,000 employees and has an annual budget that has

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[12] *Court Process*, USCOURTS.gov, *available at* http://www.uscourts.cavc.gov/documents/CourtProcessFull.pdf (last accessed March 16, 2023).

increased from $98 billion in 2009 to a (requested) $325.1 billion for 2024.[13]

The class action was built to correct for disparities like this. It permits unsophisticated parties to band together to bring small claims when they otherwise lack counsel, resources, or certainty that the government will be able to adhere to a court order. *See Geraghty*, 445 U.S. at 402-03 (noting that class actions provide "economical means for disposing of similar lawsuits, and . . . the spreading of litigation costs among numerous litigants with similar claims"); *see also The Class Appeal*, 1442. These actions specifically "enable unidentified class members to enforce court orders with contempt proceedings, rather than relying on the *res judicata* in a subsequent lawsuit." *Nehmer*, 118 F.R.D. at 119. Without class relief, it will be wasteful—for all parties involved—for veterans to spend years pursuing smaller claims on an individual basis.

III. Depriving veterans of class actions is at odds with the veterans benefits scheme.

That the decision below effectively singles out veterans to lose access to class-based relief is backwards. "The solicitude of Congress for veterans is of long standing." *United States v. Oregon*, 366 U.S. 643, 647 (1961); *see also Henderson*, 562 U.S. at 440-41 (finding this solicitude to be "plainly reflected in the VJRA" and the "long applied" construction canon "that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries'

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[13] *See President's Budget Request – Fiscal Year 2024*, VA.gov, https://department.va.gov/administrations-and-offices/management/budget/#:~:text=The%20U.S.%20Department%20of%20Veterans,for%20the%20Secretary's%20top%20priorities (last accessed March 16, 2023).

favor"). Throughout its history, Congress has paid special care to "those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

As Justice Scalia once memorably noted, solicitude toward veterans is "more like a fist than a thumb" on the scale, which, Justice Scalia commented, is "as it should be." Justice Scalia Headlines the Twelfth CAVC Judicial Conference, Veterans L.J. 1 (Summer 2013), *available at* https://tinyurl.com/y5lkblqx. But the Federal Circuit's evisceration of veteran class actions embodies the very opposite of solicitude. It amounts, in fact, to a fist on the scale in the government's, not the veteran's, favor.

The government *can* ask the Veterans Court to aggregate claims when it wants to avoid paying out. *See Ribaudo v. Nicholson*, 21 Vet. App. 137 (2007) (en banc); *Ramsey v. Nicholson*, 20 Vet. App. 16 (2006). The Secretary may file a motion to stay the veteran-friendly effect of any binding precedential decision on similarly situated VA claimants who are not parties to the appeal, but who have claims pending before the VA, while the VA pursues an appeal to the Federal Circuit. If the Veterans Court grants the Secretary's motion—as it did in *Ribaudo v. Nicholson*—the court provides the Secretary the right to both aggregate the claims of non-parties and deny these non-parties their right under *Tobler v. Derwinski* to the immediate binding effect of the precedential decision on their claims. 2 Vet. App. 8, 14 (1991). The aggregation thus "pauses" any beneficial effect for similarly-situated veterans while the Secretary seeks review.

The net result of the decision below and the *Ribaudo* and *Ramsey* principles is that on one hand, the Secretary may successfully petition the Veterans

Court to aggregate claims when it serves the Secretary's interests, but on the other hand, the Secretary's opponent in these adversarial proceedings is barred from aggregating claims when it serves the interests of veterans. This disparate treatment of veterans and the government turns Congress's solicitude for the former on its head. *Oregon*, 366 U.S. at 647.

CONCLUSION

Since its renaissance in *Monk v. Shulkin*, the veteran's class action has been a vehicle for veterans of disparate means to seek the same ends. The Federal Circuit's decision bars class eligibility on appeal for all but a select few claimants. It will depress claims, curb the power of precedent, and prevent veterans like Mr. Skaar from pooling the resources needed to challenge systemic government abuse. This cannot be the correct result. It is in this Court's province to right this wrong, and *amici curiae* NVLSP, IAVA and VVA urge the Court to do so without delay.

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