IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

NYNA S. MURRAY,	)	
individually and on behalf of others	)	
similarly situated,	)	
	)	
Petitioner,	)	
	)	
v.	)	Vet. App. No. _____
	)	
DENIS MCDONOUGH,	)	
in his capacity as	)	
Secretary of Veterans Affairs,	)	
	)	
Respondent.	)	

REQUEST FOR CLASS CERTIFICATION AND CLASS ACTION

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INTRODUCTION

Every claimant for benefits administered by the Department of Veterans Affairs ("VA") must submit her claim on the correct application forms. Without the right forms, she cannot take even the first step to receiving VA benefits, which are often a lifeline to those who need this aid. For that reason, both a statute and its implementing regulations require the Secretary of Veterans Affairs ("Secretary") to furnish a claimant with the necessary forms to apply for benefits when the claimant informs VA of her interest in benefits.

The Secretary systematically has failed to live up to this charge. Instead of mailing or otherwise delivering to claimants paper copies of the forms, the Secretary's policy and practice is to send claimants a template letter telling them where they can find those forms online. In so doing, he shifts the burden of obtaining forms to claimants, leaving those seeking VA's care without a means to obtain the assistance that they need. Like those numerous claimants whom the Secretary has failed, Petitioner Nyna S. Murray has been injured by the Secretary's unlawful policy and practice. She therefore requests that this Court certify a class comprising those individuals whose communications triggered the Secretary's furnishing requirements but who did not receive the forms they needed.

Pursuant to this Court's Rules 22 ("CAVC Rule 22") and 23 ("CAVC Rule 23"), and *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017), Petitioner, on behalf of herself and those similarly situated (collectively, the "Class"), timely submits this Request for Class Certification and Class Action ("RCA"). Petitioner requests that the Court certify the following Class: claimants or prospective claimants from whom the Secretary has received

or will receive an intent to file a claim as defined by 38 C.F.R. § 3.155(b) ("Intent to File") or a request for an application for VA benefits as defined by 38 C.F.R. § 3.155(a) ("Request for Application"), to whom VA has not sent each relevant application form prescribed by the Secretary, and from whom VA has not received a completed application for benefits. This request is accompanied by a Petition seeking injunctive relief and a writ of mandamus ("Petition") compelling the Secretary to mail paper copies of the appropriate benefits application forms to the proposed Class members.

Aggregate relief in this case is both appropriate and necessary. *First*, this case satisfies the prerequisites for class certification. Petitioner, representing potentially thousands of similarly situated claimants, raises a single, shared question of law: whether the Secretary's obligations to "furnish" application forms mandate that he mail or otherwise deliver paper copies of those forms to claimants. Irrespective of whether a given claimant submitted an Intent to File or a Request for Application, the Secretary owed that claimant a duty to "furnish" the appropriate application forms, and he failed in that duty.

Second, without a decision from this Court that requires the Secretary to mail forms to the Class, this issue will not be resolved on a systemic level. Even if the Court grants Mrs. Murray individual relief in a precedential decision, few, if any, other claimants may invest the resources to vindicate their right to paper forms. This case thus presents the quintessential dilemma necessitating the class action device.

For the following reasons, this Court should grant Petitioner's RCA.

STATEMENT OF THE CASE

According to 38 U.S.C. § 5102(a), "[u]pon request made by any person claiming or applying for, or expressing an intent to claim or apply for, a benefit," the Secretary "shall furnish such person, free of all expense, all instructions and forms necessary to apply for that benefit." Pursuant to his authority under this statute, the Secretary promulgated 38 C.F.R. § 3.155, describing two mechanisms by which to initiate this process.

First, 38 C.F.R. § 3.155(a) sets forth the Request for Application mechanism, whereby a claimant who "indicates a desire to file for benefits" by a "communication or action" that is not a complete claim is deemed to have submitted a request for an application form. That request triggers 38 C.F.R. § 3.150(a), mandating that the claimant be "furnished" an application form by the Secretary.[1]

Second, 38 C.F.R. § 3.155(b) establishes the Intent to File mechanism. In this provision, the Secretary specifies three methods by which a claimant may communicate an Intent to File: (1) saving an application for benefits (even if incomplete) on VA's website; (2) submitting a signed and dated hard copy of VA Form 21-0966; or (3) making an oral statement of intent to a designated VA employee that is documented by the employee. 38 C.F.R. § 3.155(b)(1). Once the Secretary receives an Intent to File, he must "furnish the claimant with the appropriate application form prescribed by the Secretary." *Id.* § 3.155(b).

[1] "Upon request made in person or in writing by any person applying for benefits under the laws administered by the Department of Veterans Affairs, the appropriate application form will be furnished." 38 C.F.R. § 3.150(a).

If VA receives a completed application within one year, VA "consider[s] the complete claim filed as of the date the intent to file a claim was received." *Id.*

As discussed in the accompanying Petition, Petitioner Nyna S. Murray is 88 years old, lives alone, has suffered a stroke, and is paralyzed on the left side of her body. In February 2020, a family member assisted Mrs. Murray in traveling to a VA Regional Office to seek help with requesting benefits. She submitted VA Form 21-0966—one of the options prescribed by the Intent to File mechanism. But instead of furnishing application forms, the Secretary sent Mrs. Murray a template letter stating: "[VA] will take no further action until [it] receive[s] your completed application. To locate the appropriate form(s), please visit the following website: **www.va.gov/vaforms**." Exh. A (Secretary's response to Petitioner's Intent to File). The template letter was not accompanied by any forms.

Mrs. Murray is not alone in receiving these template letters. VA's M21-1 Adjudication Procedures Manual ("Manual") describes the Secretary's policy and practice of sending template letters rather than furnishing claimants with the proper application forms. The Manual states that when VA receives an Intent to File, it "generates and mails to the claimant a letter . . . informing the claimant of . . . the form(s) that must be completed to apply for benefits." *See* Manual § III.ii.2.C.2.m (June 1, 2020) (Exh. B). Similarly, another section of the Manual requires that VA staff, upon receiving a Request for Application, generate a "request for application letter." *Id.* § III.ii.2.C.6.a.

Older versions of the VA Manual show that the Secretary has employed the same policy for responding to an Intent to File or a Request for Application since the relevant revisions to 38 C.F.R. § 3.155 took effect on March 24, 2015. *See* Manual § III.ii.2.D.1.h

(Mar. 24, 2015) (Exh. C) (Intent to File); *id.* § III.ii.2.D.2.c (Request for Application). As a result, the Secretary has systematically failed to fulfill his furnishing obligations to claimants since March 24, 2015.

As discussed further in the accompanying Petition, the Secretary's policy and practice does not comply with the statute and regulations. The plain meaning of "furnish" requires the Secretary to deliver actual forms to claimants—not just instructions on how to obtain the forms. In common usage, to "furnish" means to "[t]o supply, provide for (needs, occasions, expenses)," or "[t]o provide or supply with (something necessary, useful, or desirable, either material or immaterial)." *Furnish, Oxford English Dictionary* (2d ed. 1989). The Secretary's practice also contradicts this Court's case law. In *Montalvo v. Brown*, 7 Vet. App. 312 (1995), this Court considered whether VA had failed to abide by its circular that required VA to "furnish" an election card to claimants. *Id.* at 312–13. Noting that to "furnish" means "'to supply, provide, or equip with whatever is necessary or useful,'" this Court "construe[d] this definition to mean that the circular required more than mere mailing and that the election cards must have been actually received in order to have been 'furnished,'" *id.* at 314 (quoting *Webster's New World Dictionary* 547 (3d Coll. ed. 1988)).

The Secretary's statements about the regulation also show that he understood the term to require hard-copy delivery. In the preamble to the promulgated 38 C.F.R. § 3.155, the Secretary states that, when VA receives a Request for Application, that request "clearly triggers VA's obligation to send the correct form." Standard Claims and Appeals Forms, 79 Fed. Reg. 57659, 57667 (Sept. 25, 2014) [hereinafter Final Rule]. Further, during the

same time that he was revising 38 C.F.R. § 3.155, he also revised a different regulation, 38 C.F.R. § 20.201 (now § 19.21), and specified an obligation to "provide" forms "electronically, whether by email, hyperlink, or other direction." Final Rule, 79 Fed. Reg. at 57698. This contrasting approach in a single promulgation of updated regulations demonstrates that if the Secretary intended to require only electronic dissemination of forms in § 3.155, he knew how to do so. Moreover, the Secretary's method of implementing the Intent to File process is irreconcilable with the very reason offered for its creation. When the Secretary initially proposed to modify § 3.155 to favor electronic submissions, the Secretary received numerous complaints that favoring electronic submissions would deny access to veterans or survivors who did not have ready access to the Internet. *See, e.g.*, Am. Legion at 2 (Dec. 30, 2013), https://bit.ly/3bW5Or1 ("VA could be potentially eliminating millions of veterans an appropriate effective date simply by virtue of whether the veteran has access to the internet."). As a result, the Secretary admitted that some "continued reliance on non-electronic submissions" was warranted. *See* Final Rule, 79 Fed. Reg. at 57664.

The Secretary has failed to comply with his statutory and regulatory obligations under the law to "furnish" claimants with the appropriate application forms upon receiving an Intent to File or Request for Application. Instead, the Secretary's policy and practice is to send claimants a template letter telling them where they can find forms on VA's website without providing the actual forms. The Secretary thereby has injured potentially thousands of claimants similarly situated to Mrs. Murray, hindering their ability to apply for VA benefits.

LEGAL FRAMEWORK

As recognized by the Federal Circuit in *Monk*, this Court possesses the authority to certify the proposed Class and to adjudicate this case as a class action. *See* 855 F.3d at 1320–22 (citing the All Writs Act (28 U.S.C. § 1651(a)), 38 U.S.C. § 7264(a), and 38 U.S.C. § 7261(a)(2)). Since *Monk*, this Court has used this authority to grant class certification on three occasions. *See Godsey v. Wilkie*, 31 Vet. App. 207, 225 (2019); *Wolfe v. Wilki*e, 32 Vet. App. 1, 34 (2019); *Skaar v. Wilkie*, 32 Vet. App. 156, 201 (2019). In two of those three cases, petitioners sought writs of mandamus and/or injunctive relief. *Godsey*, 31 Vet. App. at 225; *Wolfe*, 32 Vet. App. at 23. And in all three, the Court used Rule 23 of the Federal Rules of Civil Procedure ("FRCP 23") "as a guide for class certification" decisions. *E.g.*, *Skaar*, 32 Vet. App. at 189.

This Court recently promulgated CAVC Rules 22 and 23, providing an express procedure for requesting, and a framework for determining whether to grant, class certification for actions brought in this Court. *See* Misc. Order 12-20, *In re Rules of Prac. & Proc.* (Vet. App. Nov. 10, 2020). Petitioner meets the requirements set out in CAVC Rule 22(a) in the following sections of this RCA.

CLASS DEFINITION

Petitioner seeks class certification for the following proposed Class, on whose behalf this RCA is filed: claimants or prospective claimants (1) from whom the Secretary has received an Intent to File as defined by 38 C.F.R. § 3.155(b) or a Request for Application as defined by 38 C.F.R. § 3.155(a), or from whom the Secretary receives an Intent to File or a Request for Application in the future; (2) to whom the Secretary has not

mailed or otherwise delivered a paper copy of each appropriate application form; and (3) from whom the Secretary has not received a corresponding and complete VA application form for benefits (in the case of an Intent to file, for each category of benefit selected thereon).

DISCUSSION

Petitioner, the proposed Class, and proposed Class counsel satisfy the substantive standards by which this Court evaluates an RCA, as articulated in CAVC Rules 22 and 23. *First*, Petitioner and the proposed Class meet the Court's prerequisites of numerosity, commonality, typicality, adequacy of representation, and appropriateness of relief to the class as a whole. *See* U.S. Vet. App. R. 22(a)(2), 23(a). *Second*, class action relief would "serve the interests of justice to a greater degree than would a precedential decision granting relief on a non-class action basis" in this action, which is especially ill-suited to individual adjudication. *See id.* R. 22(a)(3). *Third*, the undersigned counsel is experienced in class action matters before this Court and elsewhere, and will continue to vigorously prosecute this Petition and will "fairly and adequately represent the interests of the class" as class counsel. *See id.* R. 23(a)(4), 23(f)(1), (4). The Court therefore should certify the Class proposed herein.

I. Petitioner and the Proposed Class Satisfy the Prerequisites Stated in CAVC Rule 23(a).

CAVC Rule 23(a) lists five prerequisites that a representative party must show to be eligible for class certification:

> (1) the class is so numerous that consolidating individual actions in the Court is impracticable;

(2) there are questions of law or fact common to the class;
(3) the legal issue or issues being raised by the representative parties on the merits are typical of the legal issues that could be raised by the class;
(4) the representative parties will fairly and adequately protect the interests of the class; and
(5) the Secretary or one or more official(s), agent(s), or employee(s) of the Department of Veterans Affairs has acted or failed to act on grounds that apply generally to the class, so that final injunctive or other appropriate relief is appropriate respecting the class as a whole.

U.S. Vet. App. R. 23(a). Mrs. Murray and the proposed Class satisfy the five requirements listed in CAVC Rule 23(a) for the reasons set forth below.

A. The Proposed Class Is So Numerous That Consolidating Individual Actions in the Court Would Be Impracticable.

The proposed Class satisfies the numerosity requirement of CAVC Rule 23(a)(1). While Petitioner does not and cannot know the exact number of similarly situated individuals, that information should be readily available to the Secretary, and "reasonable inferences drawn from available facts" suggest that there are thousands of such similarly situated people. *Skaar*, 32 Vet. App. at 191. The Secretary has adopted a policy and practice not to "furnish" claimants with paper copies of the application forms. *See* Part I, *supra*. A conservative estimate therefore would suggest that the Class likely far exceeds the 40 members generally required to satisfy the numerosity factor. *See Skaar*, 32 Vet. App. at 191; *see also id.* (recognizing that "the numerosity requirement is relaxed for classes seeking injunctive relief").

Information available to Petitioner indicates that there are likely thousands of claimants who are similarly situated to Mrs. Murray. In the first 30 months after the Secretary implemented the Intent to File option, VA "reported receiving more than one

million claims." Off. of Inspector Gen., Dep't of Veterans Affs., No. 17-04919-210, Processing Inaccuracies Involving Veterans' Intent to File Submissions for Benefits at 1 (2018), https://bit.ly/399Losz. At that rate, in the nearly six years since the Intent to File system was put into place, there are likely two million or more claims with an associated Intent to File. This shows that Intent to File submissions are commonplace, and it stands to reason that some fraction of Intent to File submitters ultimately, for whatever reason, did not file a completed claim—especially given the Secretary's practice of adding a hurdle to the process by not furnishing paper application forms to those claimants. Indeed, even if 99.9% of Intent to File submitters ultimately complete their claims, that still leaves thousands of submitters who did not receive the requisite application form and did not submit a completed application—that is, Class members in the same position as Mrs. Murray.

B. The Proposed Class Shares a Common Question of Law.

Because this case turns on a single, shared question of law, and because any differences in the individual Class members' circumstances do not affect the resolution of that question of law, the "commonality" requirement is satisfied.

1. This Case Turns on a Single, Shared Question of Law.

Satisfying the commonality factor "requires a 'common contention . . . of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Wolfe*, 32 Vet. App. at 28 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). "'Even a single [common] question' will do." *Wal-Mart*, 564 U.S.

at 359 (alteration in original); *accord Wolfe*, 32 Vet. App. at 28 ("The existence of even one such question is sufficient to satisfy the [FRCP] Rule 23(a)(2) commonality requirement."). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Skaar*, 32 Vet. App. at 192 (quoting *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014)).

This Class presents a common question that satisfies these requirements: whether the Secretary's obligation to "furnish" claimants with the appropriate application forms—set forth in 38 U.S.C. § 5102(a), 38 C.F.R. §§ 3.150, 3.155(a), and 3.155(b)—requires the Secretary to deliver paper copies of those forms to the claimants. Although the proposed Class encompasses two nominally distinct groups—the claimants who have submitted an Intent to File and those who have submitted a Request for Application—to determine what obligation the Secretary owes both groups this Court need answer only one question: what the applicable statute and regulations mean by the word "furnish."

Both § 3.155(b) and § 3.155(a) impose a duty on the Secretary to "furnish" application forms. Section 3.155(b) directs that, "[u]pon receipt of [an Intent to File], VA will furnish the claimant with the appropriate application form." Similarly, § 3.155(a) incorporates § 3.150(a), which provides that "[u]pon request made in person or in writing . . . , the appropriate application form will be furnished." The Secretary promulgated all of these regulations based on his authority and duty from 38 U.S.C. § 5102(a), which mandates that, "[u]pon request made by any person claiming or applying for, or expressing an intent to claim or apply for" benefits, the Secretary "shall furnish [claimants], free of all

expense, all instructions and forms necessary to apply" for such benefits. *See* 38 C.F.R. § 3.150 (citing 38 U.S.C. § 5102); Final Rule, 79 Fed. Reg. at 57667 (describing the new Intent to File procedure, noting that "[w]hen VA receives [VA Form] 21-0966 or an oral intent to file a claim, . . . as statutorily required pursuant to 38 U.S.C. 5102, VA will furnish the claimant with the appropriate application form(s) as claimant indicates on the 21-0966 or orally to VA personnel"). Given that these subsections rely on the same underlying authority, and recognizing the "presumption of consistent usage" canon of interpretation, the word "furnish" must have the same meaning in one subsection as it has in the very next, related subsection. *See, e.g.*, *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.").

The proposed Class members, whether they are part of the Class due to their submission of an Intent to File or of a Request for Application, are drawn together by a single common contention—that the Secretary has construed "furnish" incorrectly across the applicable statute and regulations. As a corollary, Class members have all "suffered the same injury," *Wal-Mart*, 564 U.S. at 350 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)), or "a common harm . . . as a result of a policy or practice that affects each class member," *DL v. District of Columbia*, 713 F.3d 120, 128 (D.C. Cir. 2013). That injury is straightforward to describe: the Secretary's failure to "furnish" application forms as required by statute and regulations deprived proposed Class members the benefit of a mandatory facilitating step in the claims application process.

Once this Court defines "furnish," its disposition of the case will resolve every proposed Class member's injury. This one answer will "drive the resolution of the litigation" for claimants under § 3.155(a) and § 3.155(b) alike. *Wal-Mart*, 564 U.S. at 350. And, as discussed in the Statement of the Case, *supra*, and the accompanying Petition, the answer can be resolved by a straightforward statutory and regulatory analysis common to each plaintiff. For that reason, "resolution of each plaintiff's claim turns on a common question," and the Court should find the commonality requirement satisfied. *Brown v. District of Columbia*, 928 F.3d 1070, 1081 (D.C. Cir. 2019); *see also Wal-Mart*, 564 U.S. at 352; *Wolfe*, 32 Vet. App. at 28; *Godsey*, 31 Vet. App. at 220–22.

2. Differences in Class Members' Individual Circumstances Do Not Affect the Resolution of That Question of Law.

The Secretary's obligation to "furnish" does not vary depending on Class members' individual circumstances—including the particulars of how each member triggers a furnishing requirement. Critically, any "[f]actual and legal differences among class members' claims" would not "'have the potential to impede the generation of common answers' to the questions proposed by the class." *Godsey*, 31 Vet. App. at 221 (quoting *Wal-Mart*, 564 U.S. at 350). While the *consequences* of individual Class members' injuries may vary, that difference is not relevant for the commonality analysis in this action, because the *injury* to each Class member—the Secretary's failure to furnish them the required application forms—is the same, arising from the same policy and practice of the Secretary. This case does not concern damages or monetary relief—only a request on

behalf of all Class members that the Secretary be ordered to provide to Class members the forms he is legally required to furnish.

Finally, the Court need not engage with situational differences among Class members that might influence the degree of hardship experienced by each. As discussed in Argument Part I.E of the accompanying Petition, the burden of the Secretary's current practice may fall disproportionately on the many Class members who lack Internet access, relevant equipment, or computer skills needed to locate and fill out electronic forms. While such issues should highlight to the Court the importance to veterans and their families of resolving this defect in VA's processes, the resolution of the issues of law in this case—whether the Secretary's practice violates regulations and statute, and what the remedy for that should be—does not depend on those particular issues at all.

In *Wolfe*, this Court was similarly presented with a proposed class that raised only one question—whether or not 38 C.F.R. § 17.1005(a), a regulation pertaining to VA reimbursement for certain emergency medical expenses promulgated by the Secretary ostensibly to conform to 38 U.S.C. § 1725, was consistent with the statute. 32 Vet. App. at 28. Noting that "[t]here [were not] any factual or legal differences among" the class members' claims "that [would] potentially impede the common answer to the validity question," the Court deemed the issue "a pure question of law." *Id.* The Court certified the class and also ruled in favor of the petitioner on the merits, invalidating the regulation. *Id.* at 41. As in *Wolfe*, this case involves a Class bound together by a single, discrete question of law: the validity of a policy of the Secretary evaluated against its underlying governing legal authority. *Wolfe* and this case exhibit none of the types of commonality

issues in *Wal-Mart*, where proposed class members worked at different stores, were overseen by different managers, and experienced individualized employment decisions, posing questions rife with important differences among class members. *See* 564 U.S. at 349–54. Here, by contrast, the question of whether VA's practices align with the meaning of "furnish" can be determined without reference to any proposed Class member at all. Therefore, the "commonality" requirement is met.

C. Petitioner Raises the Legal Issue of Defining "Furnish," Which Is Typical of the Legal Issues That Could Be Raised by the Class.

For the same reasons that the proposed Class satisfies the commonality factor, Petitioner raises a legal issue typical of the legal issues that could be raised by the Class.

The typicality requirement depends on "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named [petitioner], and whether other class members have been injured by the same conduct." *Skaar*, 32 Vet. App. at 193 (quoting *Wolin v. Jaguar Land Rover N.A., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010)); *see also Godsey*, 31 Vet. App. at 222. "This inquiry focuses on whether 'in pursuing [her] own claims, the named [Petitioner] will also advance the interests of the class members.'" *Skaar*, 32 Vet. App. at 192 (quoting *In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996)). In addition to confirming that "'[t]he typicality prong of [FRCP] Rule 23(a) sets a relatively low threshold,'" *id.* at 193, this Court has noted that "[t]ypicality is also easier to satisfy where classes seek injunctive relief," *id.*

The Petitioner raises the same issue that is central to the Class claims: whether the Secretary has failed to meet his obligations to "furnish" application forms by sending

claimants template letters containing instructions for locating the forms online instead of sending the appropriate application form. The legal issue that Petitioner raises therefore is typical of the issues that the Class may raise. *See id*. at 192.

D. Petitioner Will Fairly and Adequately Protect Class Interests.

Petitioner meets the adequacy of representation requirement in CAVC Rule 23(a)(4). Per this requirement, "class representatives must possess the claim asserted on behalf of the class, have interests otherwise aligned with and not antagonistic to those of the class, and be able to advocate vigorously and competently for the interests of the class." *Skaar*, 32 Vet. App. at 194 (citing *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987)). For the same reasons why commonality and typicality are met here, Petitioner will fairly and adequately protect the Class' interests. She shares a singular interest with her fellow proposed Class members: to vindicate the obligation that the Secretary owes her and all claimants to "furnish" application forms. Petitioner and Class members all would benefit from a class-wide injunction requiring the Secretary to comply with his statutory and regulatory obligations to "furnish" forms.

E. The Secretary Has Failed to Act on Grounds that Apply Generally to the Class, so That Final, Class-Wide Injunctive Relief Is Appropriate.

Because the Secretary's failure to "furnish" application forms applies generally to the Class, final injunctive relief is appropriate respecting the Class as a whole under CAVC Rule 23(a)(5). This Court's Rule overlaps in significant respects with the language and substance of FRCP 23(b)(2). *Compare* U.S. Vet. App. R. 23(a)(5), *with* Fed. R. Civ. P. 23(b)(2) ("[T]he party opposing the class has acted or refused to act on grounds that apply

generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.").

"The key to the [FRCP 23](b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart*, 564 U.S. at 360. A proposed class meets this requirement when "a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* Here, Petitioner requests that this Court provide injunctive relief by defining "furnish" to require mailing or otherwise delivering paper application forms. This relief "'perforce affect[s] the entire class at once' and therefore is precisely the type of relief contemplated by [FRCP] Rule 23(b)(2)." *Godsey*, 31 Vet. App. at 223 (quoting *Wal-Mart*, 564 U.S. at 361–62).

* * *

In sum, Petitioner and the proposed Class meet the requirements of numerosity, commonality, typicality, and adequacy of representation, as well as the conditions under which final injunctive relief would be appropriate. The proposed Class therefore meets all the requirements identified in CAVC Rule 23.

II. Class Relief Is Superior to a Precedential Decision Granting Relief on an Individual Basis.

Here, "a decision granting relief on a class action basis would serve the interests of justice to a greater degree than would a precedential decision granting relief on a non-class action basis." U.S. Vet. App. R. 22(a)(3). This Court has recognized that for "traditional [FRCP] 23(b)(2) class actions" seeking injunctive relief, "'superiority [of the class action

device] [is] self-evident.'" *Skaar*, 32 Vet. App. at 196 (quoting *Wal-Mart*, 564 U.S. at 363) (second alteration in original). But given this Court's ability to issue precedential decisions, even when not directly exercising its appellate jurisdiction, it has elected to evaluate the benefits of a class action over a precedential decision in each individual case.

In class action cases arising from petitions for relief, the Court has emphasized common-sense, practical reasoning in weighing the superiority of proceeding as a class action. *See Godsey*, 31 Vet. App. at 224 (noting advantages of class action resolution to address systemic process issues); *Wolfe*, 32 Vet. App. at 32–34 (weighing superiority of class action device using practical and prudential considerations). And in *Skaar*, a case that arose in an appellate posture, the Court set forth a "non-exhaustive set of factors" it considers when assessing the superiority of class adjudication. 32 Vet. App. at 196–99 (stating and applying a four-factor test). Petitioner submits that the approach taken in *Godsey* and *Wolfe* remains more useful in the petition context, but nevertheless applies the *Skaar* approach as well in the alternative. Under either method of analysis, the Court should certify the Class proposed in this case.

A. Certification of This Class Is Consistent with the Court's Reasoning in *Godsey* and *Wolfe*.

This case aligns well with the common-sense reasoning about superiority that this Court has applied in the two cases where it has certified classes associated with petitions filed under CAVC Rule 21. In *Godsey*, the Court noted that "petitions alleging systemic delay" are well suited for class relief to ensure that claimants are treated alike, and that issuing a single order simplifies monitoring and enforcement burdens on the Court. *See* 31

Vet. App. at 224. And in *Wolfe*, the Court noted that "a need for prompt remedial enforcement" can militate in favor of class certification. *See* 32 Vet. App. at 32–33.

Here, time is of the essence. When the Secretary fails to send forms to claimants in a prompt manner that enables their timely completion and return, additional potential injury inures to the Class member for every day of delay (and indeed, a failure to send forms may end up being functionally equivalent to, or worse than, a very long delay). Non-furnishing of application forms has the likely effect of delaying, or preventing entirely, the filing of a formal claim. For claimants who submit an Intent to File, this increases the likelihood they will be unable to complete the claim within the one-year lookback window established in 38 C.F.R. § 3.155(b), resulting in a later effective date and potentially the loss of a year's worth (or more) of benefits. And for prospective claimants who submit a request for an application for benefits, that interaction does not set an effective date at all, so every day of delay in filing causes the effective date to drift a day later.

These concerns are particularly acute for Mrs. Murray and other claimants who are similarly advanced in age and suffering from declining health and mobility. Had Mrs. Murray not had assistance from a family member, she would not have been able to visit the VA Regional Office for help in submitting an Intent to File in the first place. *See* Statement of the Case, *supra*. Now, having submitted an Intent to File, all she has from VA is a template letter telling her to find the forms online—but Mrs. Murray does not know how to use a computer and cannot travel outside her home on her own to attain the forms. *See id*. The ongoing pandemic has further exacerbated these barriers to access. Only class

certification can offer the "prompt remedial enforcement" necessary to provide particularly vulnerable claimants like Mrs. Murray everything they need to begin seeking benefits.

Common sense also demonstrates the superiority of a class remedy in this case. As a practical matter, a precedential decision by this Court provides little to no benefit to the veteran community, as it is implausible that any claimant would individually litigate to enforce that decision. A class remedy is far more useful and protects those claimants who are unaware of the Secretary's failure to comply with his legal obligation and/or do not have access to counsel. Moreover, the nature of this issue exacerbates the problem, as it is fundamentally an "information" issue. Claimants who lack the ability to obtain claim forms from a website are similarly unlikely to be able to research applicable laws and regulations to determine that the Secretary is failing to meet his legal obligation and thus even to recognize that there would be reason to bring an action in this Court.

B. The Factors Articulated by This Court in *Skaar* Likewise Support Certification.

In the context of appeals from the Board of Veterans' Appeals, in *Skaar v. Wilkie*, this Court adopted a formal multifactor test to determine whether a class action is superior to individual adjudication. *See* 32 Vet. App. at 197–98.[2] In addition to evaluating (a) the overall "manageability" of a class action under FRCP 23(b)(3)(D), this Court went on to enumerate specific factors favoring certification: whether (b) "the challenge is collateral to

[2] In *Skaar*, this Court noted its "unique appellate nature" and did not expressly state whether its factors for assessing superiority would also apply in the context of a petition arising outside the appellate context. 32 Vet. App. at 197. While Petitioner's case does not involve review of a decision of the Board of Veterans' Appeals, it nonetheless satisfies the requirements laid out in *Skaar*, as discussed in this section.

a claim for benefits," (c) "litigation of the challenge involves compiling a complex factual record"; (d) "the appellate record is sufficiently developed to permit judicial review of the challenged conduct"; and (e) "the putative class has alleged sufficient facts suggesting a need for remedial enforcement." *Id.* at 196–97. Two of these factors—those assessing the complexity and development of the record—are not as relevant to this case, as a petition arising outside the appellate context. Nevertheless, class certification here would be consistent with the reasoning underlying the overall *Skaar* framework.

1. This Class Action Would Be Manageable.

This case does not suffer from any manageability concerns that weigh against certifying the proposed Class. In *Skaar*, this Court pointed to FRCP 23(b)(3)(D), which "addresses 'the likely difficulties in managing a class action,'" as a "useful starting point" for determining whether the class action device would be superior to other adjudicative methods. *Id.* at 196 (quoting Fed. R. Civ. P. 23(b)(3)(D)). Surveying the case law of other courts, this Court identified several characteristics that led those courts to deny class certification, such as when:

> individual class members brought claims in different states under different state laws; communication with some class members would be unduly difficult; individual damages calculations would be too complex; the class required too many individualized determinations; and the sheer size of the class made effecting notice and providing opt out rights unmanageable.

Id. at 196–97 (citations omitted).

This case does not possess any of the characteristics that might make a class action unmanageable. Petitioner's request—that this Court define the Secretary's obligation to "furnish" application forms to mean delivering paper copies of those forms—does not

require consideration of any state laws; and this Court and the parties need not communicate with other Class members, compute damages calculations, or make any individualized determinations. As discussed earlier in this RCA,[3] this Court can answer the one question of law at issue without considering individual circumstances.

Nor should the Court be concerned about the feasibility of ascertaining membership in the proposed Class. If the Court grants Petitioner's requested relief, the Secretary should possess the necessary electronic records for identifying Class members—those whom the Secretary has recorded as having submitted an Intent to File or Request for Application, but from whom the Secretary has not received corresponding completed applications for benefits. The Secretary has established detailed procedures describing the mechanisms by which "the corporate record is updated to reflect receipt of . . . an [Intent to File]," covering all three routes of Intent to File submission (saved online application, telephone call, and VA Form 21-0966). *See* M21-1 § III.ii.2.C.3.a (June 1, 2020) (Exh. B). Similarly, the Secretary has a process to document Requests for Applications through the "end product (EP) system" and its Veterans Benefits Management System (VBMS). *See id.* § III.ii.2.C.6.a (describing the recording procedure); M21-4 app. B (Nov. 9, 2020) (Exh. D) (describing "end products"). Moreover, that the Secretary has in his sole possession all the records necessary for readily determining the members of the proposed Class weighs further in favor of class certification. *See In re Nassau County Strip Search Cases*, 461 F.3d 219, 229 (2d Cir. 2006) (explaining that defendants' exclusive possession of records

[3] *See supra* Part I.B.

that would make class membership "simple" to determine weighs in favor of class certification).

Further, this Court may forgo notice to Class members under CAVC Rule 23(c)(2), which states: "For any class certified under [CAVC Rule 23], the Court need not, but may, direct notice to the class." Notice and opportunity for opt-out would not have been necessary under FRCP 23 either, as that rule does not require providing mandatory notice or the right to opt out to members of an injunctive relief class certified under FRCP 23(b)(2). *See, e.g.*, *Wal-Mart*, 564 U.S. at 362; *Skaar*, 32 Vet. App. at 200. This is consistent with common sense in this case; the proposed remedy (mailing application forms) places each Class member in a better position than they are in currently and has no negative effect.

2. Petitioner's Challenge Is Not Essentially a Claim for Benefits.

Petitioner's challenge satisfies this first *Skaar* factor, as the challenge is "'essentially to the policy itself, not its application to [claimants], nor to the ultimate substantive determination of their benefits.'" *Skaar*, 32 Vet. App. at 197. Indeed, because the policy at issue impedes the filing of a claim, and because the Class is composed of persons who have not completed such filing, no substantive examination of benefits claims is required or even possible. Petitioner's claim in this action is thus "not essentially a claim for benefits" and does "'not merely challeng[e] the merits of the' agency's ultimate benefits determination," since Petitioner has not even reached that stage of the benefits process. *Id.* Adjudicating this case as a class action therefore will not "constitute 'interference with agency process.'" *Id.* (quoting *Johnson v. Sullivan*, 922 F.2d 346, 353 (7th Cir. 1990)).

3. Litigating the Challenge Would Not Involve Compiling a Complex Factual Record, and Class Certification Would Best Serve Individual Class Members' Interests and Judicial Economy.

No complex factual record is required to resolve this case, but this should not militate against class certification in these circumstances. While *Skaar* gives particular solicitude to challenges where the factual record is "complex," the Court also emphasizes that "[n]o one of these factors is more or less important than the others" and that "a case-by-case balancing" is required. 32 Vet. App. at 197. Furthermore, in the context of a petition (rather than appellate review of a substantive Board decision), and especially in a case that involves barriers to filing a claim (and thus precedes even beginning to assemble a record), the relevance of this factor should be sharply diminished. This Court has not yet applied the *Skaar* factors outside of the appellate context, but Petitioner respectfully suggests that if the Court were to do so, this factor, developed for the Court's "unique appellate nature," *id.* at 197, ought to have less weight in this context. Otherwise, applying an appeals-oriented mechanism to petitions would prevent this Court from addressing systemic but straightforward process failures by the Secretary that inflict tangible harms.

In fact, certifying the Class in this case would be consistent with *Skaar*'s recognition that class certification may be particularly helpful in cases with a "complex record": a concern that "many claimants could find it extraordinarily difficult to litigate" where relevant information reaches "beyond the class representative's individual benefits claim." *Id.* at 197–98. For an individual claimant to litigate an individual claim here, she would need to possess highly non-individualized information and be aware: (a) that the non-

furnishing of application forms is unlawful; (b) that such unlawfulness is not driven by any individual claimant's circumstances (*e.g.*, lack of Internet access); and (c) that non-furnishing is the Secretary's systemic policy and practice. Certifying this Class would sidestep this information-gathering hurdle and would allow a claim to be brought that vindicates the rights of the very claimants who would otherwise be the least able to do so. And to the extent the Court is concerned with judicial economy, *cf. id.* at 197–98, centralizing this action into a single class claim, yielding a single class-wide disposition, is far more efficient than repetitively litigating such a straightforward issue.

4. This Court Need Not Develop the Record Further to Review the Challenged Conduct.

Unlike *Skaar*, this case does not come before the Court in an appellate posture, so this factor for "considering whether the record is sufficiently complete for adjudication" is not directly applicable. 32 Vet. App. at 198. However, there is no need to further develop a record to decide this case, as the central question to be determined is whether the Secretary's conduct violates the statutory and regulatory furnishing requirements—a pure question of law. Nor is there any factual record development required to determine what the Secretary's practice is, as that practice is well documented in VA's M21-1 Adjudication Procedures Manual, as discussed in the accompanying Petition. The Court thus should have no cause for concern that this case would strain the "unique limitations on [CAVC's] factfinding ability above and beyond those of a federal district court." *Id.*

5. Petitioner Has Alleged Sufficient Facts Suggesting a Need for Remedial Enforcement on Behalf of the Proposed Class.

Prompt remedial enforcement is needed to prevent further harm from accruing to veterans and their family members. This Court stated in *Skaar* that class certification may be superior to a precedential decision where claimants have "a need for prompt remedial enforcement" and would benefit from class-wide relief as opposed to individual enforcement of a precedential decision. 32 Vet. App. at 198. The Court noted, for example, that "a special need for remedial enforcement might be the result of the class members' age or some similar factor suggesting the need for especially timely relief." *Id.*

Such a special need exists here. As discussed above in Part II.A, *supra*, every day of the Secretary's continued failure to send application forms to claimants as required by law can cost a claimant a day, or in some instances a full year, of benefits. The timeliness concerns that the Court recognized in *Skaar*, therefore, are salient in this case as well.

* * *

Taken together, the *Skaar* factors support a determination that class relief is superior to a precedential decision. As an initial matter, the genesis of the *Skaar* factors is the question of "manageability"—that is, "'the likely difficulties in managing a class action.'" 32 Vet. App. at 196 (quoting Fed. R. Civ. P. 23(b)(3)(D)). As discussed above, this case poses few challenges in that regard, given that the proposed Class is well-defined and readily ascertained from VA records, and that the proposed remedies do not demand notice or an opportunity for opt-out. Analysis of *Skaar*'s "non-exhaustive" list of specific factors, *id.* at 197, further supports certification. As discussed above, two of those factors squarely

favor certification: that this claim is "collateral to a claim for benefits," and the need for remedial enforcement. One factor, the appellate record development, is largely inapplicable. And the last factor, complexity of the factual record, should be of diminished importance outside the appellate context.

III. Class Counsel Is Suitable Under the Standards of CAVC Rule 23(f)(1)(A).

Under CAVC Rules 22(a)(4) and 23(f)(1)(A), the Court "must consider" the following factors relating to the suitability of class counsel:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
> (iii) counsel's knowledge of the applicable law; and
> (iv) the resources that counsel will commit to representing the class.

U.S. Vet. App. R. 23(f)(1)(A).

The undersigned counsel is experienced in representing claimants and litigating class action claims generally and before this Court. Petitioner's counsel represented the petitioners, either independently or as co-counsel, in *Godsey* and *Wolfe*—two of the three cases in which this Court has granted class certification. *See* Exh. E ¶ 6 (Declaration of Kathryn E. Cahoy); Exh. F ¶ 6 (Declaration of Barton F. Stichman). And they have served as counsel in numerous other class action cases as well. *See* Exh. E ¶ 6; Exh. F ¶ 6. Co-counsel has also dedicated his entire legal career to representing veterans in administrative proceedings and federal court litigation. Exh. F ¶ 6.

In addition, counsel already has devoted substantial resources to researching relevant law and developing this Request and the accompanying Petition and is prepared

to continue its representation with similar diligence throughout the pendency of this proceeding at no charge to Petitioner and the Class. *See* Exh. E ¶ 4; Exh. F ¶ 4.

RELIEF REQUESTED

CAVC Rule 22(a)(5) requires that the RCA "state the precise relief sought on behalf of the class, the reasons why such relief should be granted, and the legal authorities that support the requested relief." As stated in the accompanying Petition, Petitioner respectfully requests the following relief from the Secretary's failure to mail her and Class members paper copies of the appropriate VA benefits forms following VA's receipt of either an Intent to File or a Request for Application:

First, that the Court certify this case as a class action pursuant to Rules 22 and 23 and grant Petitioner's request to represent the Class, composed of claimants or prospective claimants (1) from whom the Secretary has received an Intent to File as defined by 38 C.F.R. § 3.155(b) or a Request for Application as defined by 38 C.F.R. § 3.155(a), or from whom the Secretary receives an Intent to File or a Request for Application in the future; (2) to whom the Secretary has not mailed or otherwise delivered a paper copy of each appropriate application form; and (3) from whom the Secretary has not received a corresponding and complete VA application form for benefits (in the case of an Intent to file, for each category of benefit selected thereon).

Second, that the Court declare that the Secretary's failure to send the proposed Class members paper copies of the application forms violates the Secretary's duty: (1) under 38 U.S.C. § 5102(a), to "furnish [claimants], free of all expense, all instructions and forms necessary to apply" for benefits "[u]pon request made by any person claiming or applying

for, or expressing an intent to claim or apply for, a benefit under the laws administered by the Secretary"; and (2) under 38 C.F.R. § 3.155(b), to "furnish" claimants with the appropriate application form upon receipt of an Intent to File, or under 38 C.F.R. § 3.155(a), to furnish forms per 38 C.F.R. § 3.150 in response to Requests for Application.

Third, that the Court order the Secretary to mail the appropriate application forms to Petitioner and all applicable current Class members within 30 days of the Court's order, and to mail such forms to future Class members promptly upon the Secretary's receipt of an Intent to File or a Request for Application.

Fourth, that the Court toll—for any Class member from whom the Secretary has received an Intent to File satisfying the requirements of 38 C.F.R. § 3.155(b) within one year prior to the date of this Petition—the one-year period afforded by 38 C.F.R. § 3.155(b), during which the Secretary considers a complete application form to have been filed on the date the Secretary received the Intent to File, until a date no earlier than 180 days after the Secretary mails the applicable paper application forms to such Class member; *provided*, however, that such tolling shall not apply to a Class member for any category of benefit where such tolling would result in a reduction of benefits payable.

Fifth, that the Court appoint Petitioner's undersigned counsel as Class Counsel pursuant to this Court's Rule 23(f).

Sixth, that the Court order such other relief as may be appropriate in the interest of justice and in aid of the Court's jurisdiction.

* * *

This Court should grant Petitioner and the Proposed Class the above relief for the reasons discussed in this RCA, *see* Statement of the Case, *supra*, and the accompanying Petition. That disposition is supported by the legal authorities identified in the Petition and this RCA, including 38 U.S.C. §§ 7261(a)(2), 7264(a), 7252(a); 28 U.S.C. § 1651(a); 38 U.S.C. § 5102(a); 38 C.F.R. §§ 3.150, 3.155; and this Court's inherent authority, *see Monk*, 855 F.3d at 1318.

Other than facts regarding the number and identity of Class members, it is unlikely that the disposition of this RCA will turn on facts known only to the Secretary. *See* U.S. Vet. App. R. 22(a)(6). Indeed, there is little factual record needed at all to adjudicate the simple question whether the Secretary's policy and practice of declining to automatically mail paper claim forms to a claimant submitting an Intent to File or a Request for Application is in violation of the Secretary's statutory and regulatory obligations.

CONCLUSION

For the foregoing reasons as well as those in the accompanying Petition, Petitioner respectfully requests that this Court certify the proposed Class; appoint the undersigned as class counsel; and issue an order directing the Secretary to comply with his statutory and regulatory furnishing requirements by mailing paper claim forms to current and future Class members, and to toll the one-year period for each applicable claimant until a reasonable time after the Secretary has properly furnished forms to such claimant.

DATED: February 9, 2021

Respectfully submitted,

/s/ Kathryn E. Cahoy

Barton F. Stichman
NATIONAL VETERANS LEGAL SERVICES PROGRAM
1600 K Street N.W., Suite 500
Washington, D.C. 20006-2833
(202) 621-5672

Kathryn E. Cahoy
COVINGTON & BURLING LLP
3000 El Camino Real, 10th Floor
5 Palo Alto Square
Palo Alto, CA 94306-2112
(650) 632-4700

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2021, the foregoing Request for Class Certification and Class Action was filed with the Court by attaching the document to an email sent to esubmission@uscourts.cavc.gov consistent with the Court's E-Rule 2(c). The Court's electronic case filing system will send notification of the foregoing petition's filing to Denis McDonough, in his capacity as Secretary of Veterans Affairs, pursuant to the Court's E-Rule 6(b).

/s/ Kathryn E. Cahoy
Counsel for Petitioner