No. 22-815

IN THE

Supreme Court of the United States

VICTOR B. SKAAR,

Petitioner,

v.

DENIS R. 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 OF CIVIL PROCEDURE AND ADMINISTRATIVE LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONER

Melanie L. Bostwick
Counsel of Record
Jonas Q. Wang
Anne W. Savin
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400
mbostwick@orrick.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

Other Authorities

INTERESTS OF AMICI CURIAE[1]

Amici specialize in administrative law and civil procedure. Their scholarship has addressed the availability of the class-action device, injunctive relief, and administrative adjudication. Amici's interests are in the orderly development of class-action doctrine and administrative law. Amici believe this case raises important questions regarding the scope of aggregate adjudication and principles underlying the role of administrative exhaustion, and they offer this perspective from their study of class-action doctrine, civil procedure, and administrative law. A full list of amici is attached as an appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to provide a historical and doctrinal history of the class-action vehicle and to urge this Court to take up review of the Federal Circuit's decision and correct the fundamental misapprehensions of the principles underlying the class-action device.

The Court of Appeals for Veterans Claims (Veterans Court) in this case certified a class of Air Force veterans who cleaned up radioactive plutonium in Palomares, Spain, in 1966 and whose applications for

---

[1] The parties were notified of the intention to file this brief per Rule 37.2(a). 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 curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

service-connected disability compensation have been or will be denied based in part on the uniform, erroneous methodology for radiation dose estimates. Pet. 7, 10. Mr. Skaar satisfied the Veterans Court's jurisdictional requirement by exhausting agency review of his individual benefits claim. Pet. 9. The Veterans Court certified a class that included claimants who, like Mr. Skaar, had exhausted agency review of their benefits claims and claimants whose claims had been presented to the agency but were still undergoing administrative review. Pet. 10. The Federal Circuit reversed, holding that a class certified by the Veterans Court can include only claimants who presently satisfy the Veterans Court's jurisdictional requirements. Pet. App. 31a.

The Federal Circuit's decision in this case stands in stark contrast to the history and tradition of class-action litigation in the context of Federal Rule of Civil Procedure 23, which the Veterans Court relied on by analogy. *See Monk v. Shulkin* (*Monk II*), 855 F.3d 1312, 1318-19 (Fed. Cir. 2017) (concluding that the Veterans Court has authority to certify class actions under the All Writs Act, 28 U.S.C. § 1651(a), referring to Federal Rule of Civil Procedure 23 as guidance). Amici are unaware of another decision similarly holding that a court, here the Veterans Court overseeing the Board of Veterans' Appeals, lacks jurisdiction to certify a class that includes claimants who have presented their claims to the agency but have not completed administrative review.

This case falls in the heartland of aggregation principles. In recent years, there has been a turn toward revisiting the appropriate breadth of court

rulings in the context of nationwide injunctions and class actions more generally. But, despite holding differing views of the merits and faults of these broader currents in aggregate litigation, amici agree that class-wide injunctive relief is an appropriate remedy for the systemic government misconduct in this case. The Federal Circuit's ruling injects a major doctrinal inconsistency into the realm of class-action litigation, in a context where certification may be most warranted, and sharply curtails the Veterans Court's ability to streamline its own decisionmaking through class certification. Amici therefore urge the Court to grant the petition for certiorari and reverse the judgment of the Federal Circuit.

This brief proceeds in three parts. First, it shows that the class relief sought here is part of a long tradition of aggregate litigation providing efficient redress to those collectively wronged. Second, it demonstrates that the class Petitioner seeks is consistent with the classes of claimants routinely certified by federal courts, including claimants who have exhausted their administrative remedies and claimants who have not. Finally, it explains that the exclusive jurisdictions of the Veterans Court and the Federal Circuit enhance the traditional benefits of aggregate litigation while minimizing potential abuses.

ARGUMENT

I. The History Of Aggregate Litigation Demonstrates That Collective Relief Is Appropriate In This Case To Address Wrongful Government Conduct.

The history of aggregate litigation shows that this case, which concerns wrongful governmental action that applies across the board to a class of individuals, can be dealt with efficiently through class certification. This section first addresses the history of the class-action device as a means to efficiently resolve multiple claims at once, then turns to explaining the longstanding role of aggregate litigation in redressing wrongful governmental conduct.

A. Aggregate litigation has long been a valuable tool for efficiently resolving numerous claims while avoiding a profusion of lawsuits. "[O]ne of the recognized bases for an exercise of equitable power" in the English system of equity that existed before the United States' founding "was the avoidance of 'multiplicity of suits.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring). The English Court of Chancery used a device known as a "bill of peace" to consolidate suits—whether involving one plaintiff against multiple defendants or multiple plaintiffs suing a single defendant. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 426 (2017). Cases where representative tenants acted in chancery for all of a landlord's tenants were "a kind of proto-class action" involving "small and cohesive" groups with common interests—much like the surviving Air Force veterans

here, a relatively small, cohesive group that worked for several months to clean up radioactive debris in Palomares, Spain. *Id.*; *see also* Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 Colum. L. Rev. 866, 869-71 (1977) (describing early group litigation arising from cohesive manor and parish communities).

Early American equitable procedures grew from these English antecedents. *Id.*; *see also Hansberry v. Lee*, 311 U.S. 32, 42 (1940) (collecting cases dating to *Brown v. Vermuden*, 1 Ch. Cas. 272 (1676)). By 1853, when this Court decided *Smith v. Swormstedt*, the appropriateness of such representative suits was "well established." 57 U.S. 288, 302 (1853) (permitting representative action on behalf of 1,500 Methodist ministers); 7A Wright & Miller, Fed. Prac. & Proc. Civ. § 1751 (4th ed. 2022) (Justice Story "buil[t] upon the doctrines developed by Lord Eldon for the English Courts" to develop standards for class suits). Thus, while the "usual rule" in American civil procedure requires that "litigation [be] conducted by and on behalf of the individual named parties only," *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979), there exists a long tradition of permitting representative collective action where practicality, commonality, and numerosity warrant a departure from that rule.

Against this background of historic equitable traditions, this Court promulgated Federal Rule of Civil Procedure 23 to govern class actions in federal courts. First taking effect in 1938, Rule 23 was, in the words of the reporter to the Advisory Committee that drafted it, designed to "join[] parties quite freely" with the aspiration of "settling at one time all the disputes

of whatever kind which exist between opposing parties." Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 449 (1936). But this first effort, which categorized classes based on "the abstract nature of the rights involved," proved difficult to administer. Fed. R. Civ. P. 23 advisory committee's notes to 1966 amendment. The 1966 revisions to Rule 23 were aimed at "craft[ing] a cleaner, more flexible rule that better reflected how some courts had begun to use the class action device." David Marcus, *The History of the Modern Class Action Part I, Sturm und Drang, 1953-1980*, 90 Wash. U. L. Rev. 587, 604 (2013).

B. The history of the class-action rules underscores the importance of the injunctive class action for addressing unlawful governmental action. The lead drafters of the modern Federal Rule of Civil Procedure 23 undertook revision with a "keen[] interest" in ensuring that Rule 23 would be able to address the pressing constitutional issues of their time. Letter from Charles Alan Wright, Professor of Law, Univ. of Texas, to Benjamin Kaplan, Professor of Law, Harvard Law Sch. (Feb 16, 1963), microformed on CIS-7004-34 (Jud. Conf. Records, Cong. Info. Serv.). Specifically, the Advisory Committee members who authored the 1966 revision were attuned to attempts to thwart class actions in the civil rights context. Although *Brown v. Board of Education*, 347 U.S. 483 (1954), had outlawed *de jure* segregation, *de facto* segregation persisted. Southern states, forced to abandon blunt segregationist policies, turned instead to facially neutral, individualized school-assignment policies that purported to comply with desegregation requirements while preserving *de facto* segregation.

David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 Fla. L. Rev. 657, 678-91 (2011). The purportedly individualized nature of these school assignments often derailed attempts to bring class-action challenges. In particular, courts concluded that the proposed classes lacked commonality and adequacy on the theory that "[t]he stated reason[] [for a] school['s] den[ial] [of] a particular black student's petition to attend a white school varied from student to student." *Id.* at 685-86.

To strengthen class actions as a tool against such practices, the authors of Rule 23's 1966 amendment drafted Rule 23(b)(2) to provide relief against parties who "ha[ve] acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). Moreover, they clarified both that "various actions in the civil-rights field" had motivated the revision and that classes could be maintained "even if [the action or inaction] has taken effect or is threatened only as to one or a few members of the class." Fed. R. Civ. P. 23(b)(2) & advisory committee's notes on Subdivision (b)(2) to 1966 Amendment (citing *Potts v. Flax*, 313 F.2d 284, 290 (5th Cir. 1963)). As one example, the Advisory Committee cited a Fifth Circuit decision that addressed whether Texas statutes required a review that "must first be administratively exhausted." *Potts*, 313 F.2d at 290. The court rejected that requirement and held that "[e]xhaustion of internal school system administrative remedies [for a class action] is not required so long as racial segregation is the authoritative accepted policy." *Id.*

Consistent with these equitable traditions and statutory history, class actions have proved an effective and enduring tool to rectify unlawful government conduct. Federal courts have routinely certified class actions to remedy a broad array of asserted ills of governmental policies. That includes deprivations related to Social Security benefits, veterans benefits, Covid-19 vaccine mandates, and food stamps.[2] *See, e.g., Sullivan v. Zebley*, 493 U.S. 521 (1990) (Social Security); *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113 (N.D. Cal. 1987) (pre-Veterans' Judicial Review Act challenge to veterans' benefits regulation); *U.S. Navy SEALs 1-26 v. Austin*, 594 F. Supp. 3d 767 (N.D. Tex. 2022) (Covid-19 vaccines); *Garnett v. Zeilinger*, 301 F. Supp. 3d 199 (D.D.C. 2018) (food stamps). These cases reflect the appropriateness of the class-action vehicle to obtain injunctive relief against systemic, unlawful government action. Viewed against the backdrop of the history on aggregate litigation, this case is especially appropriate for aggregate resolution, as it implicates the need for efficient resolution

[2] A notable exception is immigration. There, 8 U.S.C. § 1252 authorizes courts to "enjoin or restrain the operation" of applicable statutes, but only "with respect to the application of such provisions to an *individual* alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1) (emphasis added). This Court has held that this language plainly bars "injunctive relief on behalf of an entire class of aliens" because it would not be "limited to remedying the unlawful 'application' of the relevant statutes to 'an individual alien.'" *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2065 (2022). By contrast, there is no statutory prohibition against the class relief Petitioner seeks here.

of a harm shared by numerous veterans in the face of wrongful governmental action.

II. Federal Courts Have Routinely Certified Classes That Include Those Who Have Not Exhausted Administrative Remedies.

Consistent with the historical foundations of class actions as a tool to redress governmental wrongs, courts have routinely certified classes on behalf of groups threatened by the same unlawful policy. This is equally true in the context of claims arising out of administrative review. In the ordinary course of proceedings, when benefits claimants are aggrieved by adverse agency decisions, they may seek judicial review of those decisions. Before seeking this judicial review, however, claimants typically must exhaust their agency remedies. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). For example, a veteran seeking to challenge a decision on a benefits claim must appeal an adverse decision by a Department of Veterans Affairs (VA) Regional Office to the Board of Veterans' Appeals, to which the VA Secretary has delegated authority to issue a "final decision." 38 U.S.C. §§ 511, 7104. Requiring claimants to exhaust these remedies prioritizes agency experience and expertise, gives the agency an opportunity to correct its own errors before they are subjected to judicial scrutiny, and ensures an adequate record exists for effective judicial review. *Weinberger*, 422 U.S. at 765.

The Federal Circuit here referred to the Veterans Court's exclusive jurisdiction to review Board decisions as imposing a strict jurisdictional limit preventing the Veterans Court from certifying a class

including claimants who had yet to complete administrative review. Pet. App. 18a, 31a. But Mr. Skaar had met the Veterans Court's jurisdictional requirements and could serve as a class representative. Pet. App. 31a. The Veterans Court therefore could, consistent with basic class-action principles, include those claimants who had presented a claim but had not yet exhausted agency review.

That is because courts take a practical approach to assessing the jurisdictional limits on class members with unexhausted administrative claims. First, the administrative exhaustion requirement is not jurisdictional unless Congress uses "sweeping and direct language" mandating exhaustion. *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1248 (D.C. Cir. 2004). Non-jurisdictional exhaustion inquiries often turn on the centrality of the issue to the administrative claim, *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976), or the futility of further efforts to exhaust, *Weinberger*, 422 U.S. at 765-66. This Court has adopted an "intensely practical approach" to weighing these factors. *Mathews*, 424 U.S. at 331 n.11. For example, in *Mathews*, the Court recognized not only that Eldridge's due process challenge was "entirely collateral" to his substantive claim for continued social security disability benefits but also that he raised "a colorable claim" that complete exhaustion would defeat the prompt resolution his case warranted. *Id.* at 330-31.

Second, even when the rare statute has been read to impose jurisdictional requirements, it does not present an obstacle to class certification. As set forth in Part B, *infra,* this Court, as well as other federal

courts, have had no problem with class definitions that expressly include those who, at the time of class certification, are not yet (but may later be) in a position to benefit. Federal courts have long certified injunctive relief classes while making clear that the class definition includes both those who have exhausted administrative remedies and those who will in the future exhaust their administrative remedies sufficient to satisfy the court's jurisdiction.

In this case, the Federal Circuit misapplied this "intensely practical approach" in declining to certify claimants who had not yet received a final decision of the Board of Veterans' Appeals. Contrary to the opinion of the Federal Circuit, this Court's precedents authorize classes including members whose claims are still pending final decision, such as the veterans in this case whose claims are still awaiting decisions by a VA regional office (the primary level of agency adjudication) or the Board (the appellate level of agency adjudication). As shown below, this Court's early decisions on class actions in the agency context demonstrate how evaluations of jurisdictional limits to class definition have been intentionally flexible. Whether or not a statute is jurisdictional, the class can include not just those who have already completed administrative review, but those who will.

A. This Court began shaping the parameters of this "intensely practical approach" in *Weinberger* and *Mathews*.

In *Weinberger v. Salfi*, the Court reviewed a claim that the Social Security Administration's statutory "duration-of-relationship" requirement for survivors'

benefits, 42 U.S.C. § 416(c) (1970), was unconstitutional. 422 U.S. at 754. Before addressing the merits of this claim, the Court first confronted "a serious question" about the district court's jurisdiction. *Id.* at 756. Specifically, the Court questioned whether the Secretary of Health, Education, and Welfare had made "a final decision" on the claim for benefits as required for the district court to have jurisdiction. *Id.* at 763-64.

The Court concluded that a denial of benefits based on the statute at the agency's regional level satisfied the secretarial "final decision" requirement. *Id.* at 764. It reasoned that the duration-of-relationship statute was "beyond the power of the Secretary to affect," and thus the denial of benefits on that basis was sufficient "for the[] purposes" of evaluating a final decision. *Id.* Because the named plaintiffs had alleged such "partial exhaustion of remedies with regard to their personal claims," the district court had jurisdiction to hear their judicial challenge. *Id.* at 755. Plaintiffs' class claims fared less well. The complaint failed to make any "similar allegations [about exhaustion of remedies] with regard to other class members." *Id*. Indeed, the complaint failed even to allege that the class members "have even filed an application with the Secretary, much less that he has rendered any decision." *Id.* at 764. In the absence of such allegations, the district court should have dismissed the class claims. *Id.*

The following term, this Court recognized explicitly in *Mathews v. Eldridge* what had been "implicit" in *Weinberger*—that jurisdiction over challenges to agency action consists of waivable and non-waivable elements. 424 U.S. at 328. "The waivable element is

the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary." *Id.*

The petitioner satisfied the non-waivable element by "specifically presenting the claim that his [social security disability] benefits should not be terminated because he was still disabled." *Id.* at 329. As to the waivable element, the petitioner "concedes that he did not exhaust the full set of internal-review procedures provided by the Secretary," but the Court concluded the exhaustion requirement should be waived. *Id.* at 330. The petitioner's demand for a pretermination hearing was "entirely collateral to his substantive claim" for uninterrupted disability benefits. *Id.* Further, he had made "a colorable claim" that his injuries from improper termination of benefits could not be remedied by retroactive payments. *Id.* at 331. He had satisfied both the waivable and non-waivable elements of the jurisdictional inquiry, and the Court could therefore turn to the merits of his due process challenge. *Id.* at 332.

B. Against this background, this Court validated classes with members who *will* satisfy the non-waivable jurisdictional element.

Building on *Weinberger* and *Mathews*, in 1979, this Court made class-action relief available to benefits claimants who had not satisfied all the jurisdictional requirements for judicial review of an agency's action. *Califano v. Yamasaki*, 442 U.S. 682, 704

(1979). In other words, those class members who would in the future satisfy the jurisdictional elements were eligible for class relief.

In the 1970s, the Social Security Administration sought to recoup overpayments made to old-age and disability benefit recipients. Objecting to the process by which the agency waived repayment, plaintiffs filed a class action seeking pre-recoupment hearings. The Ninth Circuit had expressed "some doubts" about whether class actions seeking injunctive relief were permissible under the statute that authorized judicial review of secretarial decisions, 42 U.S.C. § 405(g). *Id.* at 691. This Court concluded the statute encompassed class certification and that such classes could permissibly include all beneficiaries who had requested waiver of recoupment or who would in the future request such waiver. *Id.* at 698-701.

The Court highlighted that the statute contained no "express limitation of class relief" and, "[i]n the absence of a direct expression by Congress" to limit class relief, the Court would not read one into the statute. *Id.* at 699-700. The fact that the authorizing statute spoke in terms of "individual" litigants did not undermine that conclusion because the use of "individual" was default terminology in a legal system operating by "the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Id.* at 700-01.

In addition to holding that § 405(g) authorized class actions, the Court also ruled that "class members who have been subjected to recoupment but who have not sought either reconsideration of

overpayment determinations or waiver of recovery" could permissibly be included in the class. *Id.* at 703. The crucial factor was whether those beneficiaries would claim a waiver. If a beneficiary "had not filed requests for reconsideration or waiver in the past *and would not do so in the future*," the beneficiary would never satisfy the jurisdictional requirement of a "final decision." *Id.* at 704 (emphasis added). But as to beneficiaries who had or would claim a waiver by filing a written request with the Secretary, the jurisdictional requirement of filing a claim had been or would be satisfied, and so they were proper members of the class. *Id.* "In other words, it was proper for the district court to have ordered relief as to those people who had not yet filed waivers, as long as they would do so in the future." Adam S. Zimmerman, *Exhausting Government Class Actions*, Univ. Chi. L. Rev. Online (Oct. 20, 2022), https://tinyurl.com/4fpjt6j7.

Since *Califano*, federal courts have routinely certified or affirmed classes including beneficiaries who will—but have not yet—satisfied the jurisdictional prerequisites. *J.D. v. Azar*, 925 F.3d 1291, 1305 (D.C. Cir. 2019) (affirming class of "pregnant [unaccompanied alien children] who are or will be in the legal custody of the federal government"); *Tataranowicz v. Sullivan*, 959 F.2d 268, 272-73 (D.C. Cir. 1992) (finding presentment requirement satisfied by class members who have already presented claims and those "who will in the future satisfy [the] presentment requirement"); *Scott v. Quay*, 338 F.R.D. 178, 192 (E.D.N.Y. 2021) (certifying class including incarcerated individuals "who have or will in the future have satisfied the exhaustion requirement imposed by 28 U.S.C. § 2675"); 1 Newberg and Rubenstein on Class

Actions § 3:15 (6th ed. 2022) (individuals who will only face the challenged condition "at a later time" "pose little problem" under Rule 23); *see supra* 8 (classes include claimants who have not yet exhausted their administrative remedies).

Those class actions strike the appropriate balance between the needs of judicial review, representative litigation, and the jurisdictional limits of courts in injunctive relief cases. *Califano*, 442 U.S. at 705 (observing that "surely Congress did not intend" to craft the Social Security jurisdictional requirement to "provide reluctant federal officials with a means of delay in the remote eventuality that they might not feel bound by the judgment of a federal court"). In such cases, individuals who may later benefit from the result of class adjudication may still need to present their claims to the agency if they want individual relief when a statute clearly requires that they do so. *See* Zimmerman, *supra*. The certification of a class action thus does not alter the administrative exhaustion requirements or jurisdictional prerequisites that apply to individual determinations. But the class-action procedure assures that individuals who will otherwise meet the class definition will have meaningful access to class-wide relief.

C. The Veterans Court appropriately certified a class under the All Writs Act to include individuals who presented claims to the agency but had not yet received a decision.

The foregoing history and principles underlying Federal Rule of Civil Procedure 23 apply in this case

with equal force. Although Federal Rule of Civil Procedure 23 "is unavailable" in veterans benefit appeals, Pet. App. 7a (Dyk, J., dissenting from denial of rehearing en banc); *see also* Fed. R. Civ. P. 1, the All Writs Act fills the gap, supplying a similar mechanism for representative actions in the Veterans Court. 28 U.S.C. § 1651(a); *Monk II*, 855 F.3d at 1318-19.

The All Writs Act authorizes "all courts established by Act of Congress" to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* First enacted as part of the Judiciary Act of 1789, it is part of the "triad of founding documents, along with the Declaration of Independence and the Constitution itself." Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. Cin. L. Rev. 1, 3 (1990). With it, courts may issue all writs necessary and appropriate to the proper exercise of their existing as well as prospective jurisdiction. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 173 (1977).

The All Writs Act is a long-established source of authority to aggregate claims. Since before the Administrative Procedure Act, the All Writs Act has played a critical role in filling gaps to ensure meaningful judicial review of unlawful administrative action. *See Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 9-10 & n.4 (1942). Courts have also relied on the All Writs Act "to fashion for habeas actions 'appropriate modes of procedures, by analogy to existing rules or otherwise in conformity with judicial usage.'" *U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974) (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969));

see also Monk II, 855 F.3d at 1317-18 (the All Writs Act gives the Veterans Court authority to aggregate cases on appeal). In *Sero*, the Second Circuit affirmed the All Writs Act as the basis for "the class action device … appropriately used in this case." 506 F.2d at 1126. The class was represented by three named plaintiffs—two of whom had exhausted their state remedies while the third had not—and the proposed class of "reformatory-sentenced misdemeanants" was so big and "in a state of constant flux" that "an exact figure as to the number of members comprising the class … might well be impossible to arrive at." *Sero v. Oswald*, 351 F. Supp. 522, 528 (S.D.N.Y. 1972). The All Writs Act thus authorizes courts to grant class relief outside Rule 23, and it does so even where administrative remedies remain unexhausted as to some class members and class membership is mutable.

The historical roots and longstanding application of the All Writs Act to aggregate cases soundly support the class certified by the Veterans Court in this case. No one disputes that veterans in procedurally identical circumstances to Mr. Skaar—those who have both filed claims for disability compensation arising from radiological exposure in Palomares, Spain, and been denied by the Board—are appropriate class members. Pet. App. 30a. But it is also unquestionable that veterans who have filed claims that turn on the same 1966 exposure and the same dosing methodology as Mr. Skaar's claim but who have not yet received a Board decision will be injured by the Board's reliance on the flawed methodology. It is therefore entirely impractical to require the Board to decide each claim. Exhaustion will not result in the agency correcting its mistake or improving the

administrative record and will only "provide reluctant federal officials with a means of delay." *Califano*, 442 U.S. at 705. But veterans claiming radiologic exposure in 1966 have, nearly six decades later, an "interest in having a particular issue promptly resolved," *Mathews*, 424 U.S. at 330, before their advancing age renders their claims moot.

III. The Exclusive Jurisdiction Of The Veterans Court And The Federal Circuit Preserves The Traditional Benefits Of Aggregate Litigation While Minimizing Potential Abuses.

Not only are classes properly certified to include individuals with unexhausted administrative claims, but such a class is especially appropriate in the veterans' benefits context because of the exclusive jurisdiction the Veterans Court and the Federal Circuit have in reviewing appeals from those administrative benefits decisions. Accordingly, this Court's review is particularly warranted to bring the law applicable to the Veterans Court in line with longstanding principles of class certification in the federal courts.

A. Class actions promote efficiency, uniformity, and access to justice.

Resolving claims in a single proceeding provides for uniform and efficient application of the law when numerous plaintiffs raise identical challenges to the same organizational misconduct. As discussed above, at 4-6, the efficiencies of aggregating cases have long been recognized. *Compare Smith v. Swormstedt*, 57 U.S. at 302 (describing traditional equity standards

for representative litigation) *with* Fed. R. Civ. P. 23(a) (describing similar standards). Such efficiencies are particularly valuable in the administration of federal benefit programs, which often have thousands or millions of beneficiaries. *See* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992, 2010-12 (2012) (describing agency adjudication procedures that "wast[e] resources in duplicative litigation, requir[e] frequent remands to address common factual errors, and hamper[] the efficient development and enforcement of law.").

Where aggregation tools are used, agency adjudication of mass benefit claims have expeditiously resolved common questions and accelerated resolution of claims. For example, when thousands of parents claimed a particular vaccine additive caused their children's autism, the Vaccine Court organized omnibus proceedings to resolve highly contested questions of general causation. *Cedillo v. Sec'y of Health & Human Servs.*, No. 98-916V, 2009 WL 331968, at *11 (Fed. Cl. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010). Although the Vaccine Act includes no "class action" provisions, these omnibus proceedings were used "to organize the presentation of evidence, in cases with common 'general causation' issues, in order to avoid duplication of effort." *Id.* The court still resolved each claim on its own merits, but "they were resolved far more efficiently than if we had needed a full-blown trial … in each case." *Id.* at *12.

Aggregate procedures can also enhance access to justice. Where prospective class members may be

unable to afford legal counsel, class actions allow the few who do retain counsel to act on behalf of those who cannot. *Sero*, 506 F.2d at 1126; *see also* William B. Rubenstein, Newberg on Class Actions § 4:26 (5th ed. 2018) (government class actions may afford "economies of scale" to attorneys and clients). This is a particularly salient benefit in the veterans' benefits context, where most claimants pursue benefits without attorney representation,[3] and where veterans face extreme delays in agency decisionmaking.[4] Class actions also provide leverage to plaintiffs where agencies strategically moot individual cases that might establish adverse precedents. *See, e.g., Monk II*, 855 F.3d at 1321 (describing VA's habit of "mooting claims scheduled for precedential review" and subject to mandamus petitions); *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 391-92 (S.D.N.Y. 2000) (certifying class challenging food stamp administration in part due to

---

[3] Veterans are barred from paying a lawyer to represent them when filing their initial claim application or during the VA Regional Office's initial adjudication process. 38 U.S.C. § 5904(c)(1). Self-representation and representation by veterans service organization advisors are the norm. U.S. Gov't Accountability Off., GAO-13-643, *VA Benefits* 4 (2013), https://tinyurl.com/c6j5c5aw (as of November 2012, 22% of veterans represented themselves and 76% were represented by veteran service organizations); *see also Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) (noting that veteran service organization representation "is not equivalent to representation by a licensed attorney").

[4] In 2021, for instance, it took VA on average nearly three years to certify a legacy appeal to the Board of Veterans' Appeals and to transfer the appellate record. U.S. Dep't of Veterans Affairs, Board of Veterans' Appeals, *Annual Report Fiscal Year 2021* 33, https://tinyurl.com/uwmtynmx.

"defendants['] … ability to moot the claims of the named plaintiffs").

B. In the unique context of veterans' benefits appeals, class actions exemplify responsible judicial checks on the administrative state.

The Veterans Court's ability to aggregate claims presents a uniquely appropriate context for the use of the class-action device. The Veterans Court's authority to aggregate multiple claims falls squarely within accepted uses of courts to redress alleged wrongs stemming from governmental policy through the use of injunctive class actions.

The Veterans Court has exclusive jurisdiction to review Board decisions. 38 U.S.C. § 7252. The Federal Circuit, in turn, has exclusive jurisdiction to review decisions of the Veterans Court. 38 U.S.C. § 7292(c). This hierarchy minimizes in veterans' benefit class appeals the "multiple chancellor problem" some have identified when federal judges from different districts enjoy power to issue nationwide injunctions, including potential concerns about forum shopping, percolation, or conflicting injunctions. *See, e.g.*, Bray*, supra*, at 460 (forum shopping); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 615, 654 (2017) (percolation); Szymon S. Barnas, *Can and Should Universal Injunctions Be Saved?*, 72 Vand. L. Rev. 1675, 1684 n.51 (2019) (conflicting injunctions).

For example, prospective plaintiffs may choose to file in courts with ideologically sympathetic judges,

resulting in "rampant forum shopping." Bray, *supra*, at 460. But veterans seeking to remedy adverse Board decisions denying them disability benefits have no such flexibility—they may file their proposed class action only in the Veterans Court. 28 U.S.C. § 7252; *see also Zuspann v. Brown*, 60 F.3d 1156, 1159 (5th Cir. 1995).

Others have argued that nationwide classes risk broad rulings that may "arrest[] the development of the law," Bray, *supra*, at 419, by "depriv[ing] the Supreme Court of the opportunity to assess the consequences of competing interpretations of the Constitution or law in different jurisdictions," Morley, *supra*, at 654. But by structuring judicial review of veterans' benefit decisions to run exclusively through the Board, the Veterans Court, and the Federal Circuit, Congress foreclosed this kind of percolation and prioritized uniformity of decisions. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988); 38 U.S.C. §§ 502, 7292(c); H.R. Rep. No. 100-963, at 28 (1988). In other words, the absence of percolation in the veterans' benefits context is foreordained and poses no barrier to aggregate adjudication.

Moreover, veterans class appeals from Board decisions implicate only the Veterans Court, foreclosing the risk of multiple courts issuing conflicting injunctions.

Because veterans' benefits are presented in a uniquely limited forum for judicial review, it is especially appropriate to resort to an injunctive class action as an orderly and efficient means to address a

challenge to unlawful governmental action. In view of the long history of class actions in redressing governmental wrongs and the recognition that a certified class can properly include future streams of litigants, the Federal Circuit's decision stands alone in crafting a limit on the scope of class definitions where none exists. This Court's intervention is needed to afford our nation's veterans the same procedural rights available to other classes under longstanding principles.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

Melanie L. Bostwick
Counsel of Record
Jonas Q. Wang
Anne W. Savin
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400
mbostwick@orrick.com

March 30, 2023

APPENDIX

APPENDIX A

Amici are administrative law and civil procedure scholars. Their titles and institutional affiliations are provided for identification purposes only.

Zachary Clopton
Professor of Law
Northwestern Pritzker School of Law

Brooke Coleman
Fredric C. Tausend Professor of Law
Seattle University School of Law

Seth Katsuya Endo
Associate Professor of Law
Seattle University School of Law

Andrew Hammond
Associate Professor of Law
Indiana University Maurer School of Law

Helen Hershkoff
Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
New York University School of Law

Emma Kaufman
Associate Professor of Law
New York University School of Law

David Marcus
Professor of Law
UCLA School of Law

Luke Norris
Associate Professor of Law
University of Richmond School of Law

Alexander A. Reinert
Max Freund Professor of Litigation & Advocacy
Benjamin N. Cardozo School of Law

Michael Sant'Ambrogio
Professor of Law
Michigan State University College of Law

Adam Zimmerman
Professor of Law
Loyola Law School, Los Angeles