No. 22-815

In the Supreme Court of the United States

VICTOR B. SKAAR, PETITIONER

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The United States Court of Appeals for Veterans Claims (Veterans Court) is an Article I appellate court with "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." 38 U.S.C. 7252(a). The question presented is as follows:

Whether the Veterans Court may certify a class that includes veterans whose benefits claims have not been decided by the Board of Veterans' Appeals, as well as veterans who have never filed benefits claims with the Department of Veterans Affairs, even though the Veterans Court lacks jurisdiction over the claims of such individuals.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (Fed. Cir.):

Skaar v. *McDonough*, No. 21-1757 (Sept. 8, 2022)

Skaar v. *McDonough*, No. 21-1757 (Jan. 17, 2023) (denying rehearing and rehearing en banc)

United States Court of Appeals (Vet. App.):

Skaar v. *Wilkie*, No. 17-2574 (Dec. 6, 2019) (class-certification decision)

Skaar v. *Wilkie*, No. 17-2574 (Dec. 17, 2020) (merits decision)

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OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (Pet. App. 16a-38a) is reported at 48 F.4th 1323. The orders and opinions of the Court of Appeals for Veterans Claims (Pet. App. 39a-94a, 95a-215a) are reported at 32 Vet. App. 156 and 33 Vet. App. 127. The order and opinions of the Board of Veterans' Appeals (Pet. App. 216a-229a, 230a-248a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2022. A petition for rehearing and rehearing en banc was denied on January 17, 2023 (Pet. App. 1a-15a). The petition for a writ of certiorari was filed on February 24, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal statutes establish a comprehensive framework for the adjudication and review of veterans' benefits claims. "[I]n order for benefits to be paid or furnished," a veteran must file a claim in the form prescribed by the Department of Veterans Affairs (VA). 38 U.S.C. 5101(a)(1)(A). The VA then uses a two-step process to adjudicate the claim. *Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011). First, a VA regional office makes a decision. 38 U.S.C. 511, 5104. Second, "if a veteran is dissatisfied with the regional office's decision, the veteran may obtain *de novo* review by" the Board of Veterans' Appeals (Board), the entity within the VA that makes the agency's final decision in cases appealed to it. *Henderson*, 562 U.S. at 431; see 38 U.S.C. 7101 (2018 & Supp. II 2020); 38 U.S.C. 7104(a).

Until 1988, judicial review of Board decisions was generally unavailable. 38 U.S.C. 211(a) (1982); see *Henderson*, 562 U.S. at 432 n.1 (noting instances in which Section 211(a) did not foreclose judicial review). That changed when the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, Div. A, § 301(a), 102 Stat. 4113-4121, created the Court of Appeals for Veterans Claims (Veterans Court), an Article I tribunal that reviews Board decisions. 38 U.S.C. 511(b)(4). The Veterans Court has "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." 38 U.S.C. 7252(a). Congress has limited the court's review to "the record of proceedings before the Secretary and the Board," and has authorized the court "to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." 38 U.S.C. 7252(a) and (b).

The VJRA further authorized the Federal Circuit to review Veterans Court decisions on all relevant questions of law. 38 U.S.C. 7292; see VJRA § 301(a), 102 Stat. 4113-4121. It also granted the Federal Circuit exclusive authority to review direct challenges to VA rules and regulations, *i.e.*, challenges made outside the context of an appeal of a Board decision. 38 U.S.C. 502; see VJRA § 102(a), 102 Stat. 4106.

2. a. Petitioner is a U.S. Air Force veteran. Pet. App. 17a. In 1966, petitioner and approximately 1400 other servicemembers were sent to Palomares, Spain, to assist in the cleanup of released plutonium dust after a midair aircraft collision. *Id.* at 19a. At the site, and for 18 to 24 months afterwards, petitioner and other servicemembers were "monitored for signs of radiogenic conditions." *Ibid.* In December 1967, the Air Force found that potential radiation exposure had not jeopardized petitioner's health. *Ibid.*

In 1998, petitioner was diagnosed with leukopenia, a blood disorder characterized by a decrease in white blood cell count. Pet. App. 19a-20a. Petitioner filed a claim for disability compensation. *Id.* at 20a. A veteran applying for such benefits generally must establish, among other requirements, that his disability is "service-connected," meaning that it was "incurred or aggravated" in the "line of duty." 38 U.S.C. 101(16) (Supp. III 2021); see 38 U.S.C. 1110. The VA denied petitioner's claim in 2000, and petitioner did not appeal. Pet. App. 20a.

b. In 2011, petitioner sought to reopen his claim. Pet. App. 20a; see 38 U.S.C. 5108 (2006). In accordance with the process for radiation-exposure claims set forth in 38 C.F.R. 3.311, the VA obtained a radiation-exposure opinion. That opinion, which was based on a radiation-dose estimate provided by the U.S. Air Force, found it

"unlikely" that petitioner's leukopenia was attributable to radiation exposure in service. Pet. App. 20a. The VA again denied the claim. *Ibid.*

Petitioner appealed to the Board. While the appeal was pending, the Air Force decided to reevaluate the dose estimates in its radiation-dose methodology, and it provided a new dose estimate for petitioner. Pet. App. 20a-21a. The Board found that the revised dose estimate amounted to "new and material evidence" warranting a new radiation-exposure opinion, and it remanded the claim. *Ibid.* But the new opinion again found it unlikely that petitioner's leukopenia was attributable to radiation exposure in service. *Ibid.* Relying on the new opinion, the Board denied petitioner's claim. *Ibid.*

3. Petitioner appealed to the Veterans Court. Pet. App. 21a. As relevant here, petitioner argued that the VA's reliance on the Air Force dose estimate violated the requirement that radiation-exposure determinations be based on "sound scientific and medical evidence." 38 C.F.R. 3.311(c)(1)(i); see Pet. App. 21a. Petitioner sought to make this argument "on behalf of" a class of "veterans who were present during the Palomares cleanup." Pet. App. 22a.

a. In December 2019, the en banc Veterans Court certified a class of all U.S. veterans who were present at the 1966 Palomares cleanup, and whose applications for service-connected disability compensation the "VA has denied or will deny" based at least in part on post-2001 Air Force dose estimates, except for those veterans whose time to appeal a denial had expired. Pet. App. 166a (emphasis omitted). The certified class thus included not only those veterans who had obtained adverse decisions from the Board, but also those whose

claims remained pending before the VA, and those who had "not yet even filed disability compensation claims." *Id.* at 124a.

The Veterans Court acknowledged that the latter groups of individuals—*i.e.*, those without final Board decisions—"pose[d] a unique jurisdictional issue." Pet. App. 124a. Specifically, the court observed that, as a court created by statute, it has "only one source of jurisdiction: 38 U.S.C. § 7252," *id.* at 125a, which provides it with "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." 38 U.S.C. 7252(a). The court explained that "a final Board decision operates as the jurisdictional 'trigger' that gives [the court] the authority to hear a particular appeal." Pet. App. 125a. The court nonetheless determined that, because petitioner, "as class representative, has obtained a final Board decision pursuant to section 7252, the jurisdictional door has been opened" and the court could "aggregate [his] claims with those of the remaining class members" who had not received (or in some cases sought) their own Board decisions. *Id.* at 127a; see *id.* at 135a (stating that the court could "waive the exhaustion requirement" for veterans who had not received a Board decision on a radiation-exposure claim, or who had not filed such a claim, and include such veterans in the class). The court announced that this approach would "herald[] the beginning of an era" in which it would be "the only Federal appellate court in the Nation" to certify "class actions in the first instance." *Id.* at 165a-166a.

Senior Judge Schoelen filed an opinion concurring in part and dissenting in part. Pet. App. 167a-181a. As relevant here, Judge Schoelen would have excluded from the class those veterans who had not yet filed

claims with the VA. *Id.* at 168a-170a. Judge Falvey filed a dissenting opinion, in which two other judges joined. *Id.* at 181a-215a. The dissenting judges expressed the view that the class-certification decision "exceed[ed] [the Veterans Court's] jurisdiction and offer[ed] no more benefits than a precedential decision, but with significant manageability and preclusion problems." *Id.* at 215a.

b. In December 2020, a panel of the Veterans Court issued a decision remanding the "class claim" back to the Board for a fuller explanation as to whether the Air Force dose estimates constituted "sound medical or scientific evidence." Pet. App. 65a-66a. The court noted that VA counsel had provided a detailed defense of the estimates at oral argument, but it held that it was ultimately the Board's "prerogative" to provide such an explanation. *Id.* at 65a.

4. The court of appeals vacated the class-certification order. Pet. App. 16a-38a.

As relevant here, the court of appeals held that "[t]he Veterans Court exceeded its jurisdiction when it certified a class to include veterans who had not received a Board decision and veterans who had not yet filed a claim." Pet. App. 31a. The court of appeals observed that Section 7252 limits the Veterans Court's jurisdiction to individuals who have received Board decisions on their claims. *Id.* at 32a-33a. The court further explained that "[c]lass certification is merely a procedural tool that allows [a] court to aggregate claims," but cannot be used to enlarge a court's jurisdiction. *Id.* at 31a-32a. The court of appeals therefore determined that "the Veterans Court cannot invoke its authority to certify a class action in the appeal context unless the court

has 'jurisdiction over the claim of each individual member of the class.'" *Id.* at 32a (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979)). The court concluded that the Veterans Court "exceeds its jurisdiction when it certifies a class to include, as it did here, veterans who have not yet filed a claim—over whom even the Board would not have jurisdiction, * * * —and veterans who have not received a Board decision." *Id.* at 34a (citations omitted).

5. The court of appeals denied petitioner's request for panel rehearing and rehearing en banc. Pet. App. 1a-2a. Judge Dyk filed an opinion dissenting from the denial of rehearing en banc, in which four other judges joined. *Id.* at 3a-15a. The dissenting judges took the view that securing a final Board decision "is not a jurisdictional requirement * * * even for named plaintiffs," and that precedential opinions of the Veterans Court are "no substitute for the class action mechanism." *Id.* at 5a, 10a; see generally *id.* at 3a-15a.

ARGUMENT

The court of appeals correctly held that the Veterans Court exceeded its jurisdiction by certifying a class that includes veterans who have not presented claims to the Board or who have not yet received Board decisions. That conclusion does not conflict with any decision of this Court. Further review is not warranted.

1. The court of appeals correctly held that the Veterans Court exceeded its jurisdiction in certifying the class at issue here.

a. As the Veterans Court acknowledged, that court has "only one source of jurisdiction: 38 U.S.C. § 7252." Pet. App. 125a. That provision—which is entitled "Jurisdiction; finality of decisions"—grants the Veterans Court "exclusive jurisdiction to review decisions of the

Board of Veterans' Appeals." 38 U.S.C. 7252(a) (emphasis omitted). It further provides that the Veterans Court "shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate," *ibid.*, and it specifies that "[r]eview in the [Veterans] Court shall be on the record of proceedings before the Secretary and the Board," 38 U.S.C. 7252(b).

Section 7252 "prescribes the jurisdiction of the Veterans Court." *Henderson* v. *Shinseki*, 562 U.S. 428, 439 (2011) (contrasting Section 7252's jurisdictional limitations with the non-jurisdictional time limit in 38 U.S.C. 7266 (2006)). Section 7252 specifies "the classes of cases [the] court may entertain" and "the persons over whom the court may exercise adjudicatory authority." *Fort Bend Cnty.* v. *Davis*, 139 S. Ct. 1843, 1848 (2019). As a court "created by statute[,]" the Veterans Court has no jurisdiction beyond what "the statute confers." *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (quoting *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 449 (1850)).

The Veterans Court's jurisdiction is thus limited to "review[ing] decisions of the Board of Veterans' Appeals." 38 U.S.C. 7252(a). The court's jurisdiction may not be invoked by individuals who have not yet received Board decisions on their claims for benefits, or by those who have not yet presented claims to the agency. See, *e.g.*, *Maggitt* v. *West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000) ("[A] veteran must first present a request for a benefit to the Board, then receive a decision on that request, in order to vest jurisdiction in the Veterans Court."); *Ledford* v. *West*, 136 F.3d 776, 779 (Fed. Cir. 1998) (explaining that the Veterans Court's jurisdiction is "premised on and defined by the Board's decision concerning the matter being appealed"). As a jurisdictional

prerequisite, this limitation "can never be waived or forfeited." See, *e.g.*, *Gonzalez* v. *Thaler*, 565 U.S. 134, 141 (2012).

That petitioner sought to represent a class of veterans does not alter that analysis. A class action is a procedural device used to aggregate claims in court. In district court proceedings, "[t]he class action is a creature of the Federal Rules of Civil Procedure." *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018). And because the Veterans Court "ha[d] no rule of procedure governing class actions" at the time it decided this case, it "adopt[ed] Rule 23 as a guide." Pet. App. 142a-143a. But procedural rules and devices cannot enlarge a court's jurisdiction. See, *e.g.*, *Hamer* v. *Neighborhood Hous. Servs.*, 138 S. Ct. 13, 17 (2017); *United States* v. *Sherwood*, 312 U.S. 584, 589-590 (1941). Nor can they "abridge, enlarge or modify any substantive right." 28 U.S.C. 2072(b); see *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997). Accordingly, the court of appeals correctly held that, although the Veterans Court may aggregate claims that are properly before it, it cannot include within the class any individuals or claims that are otherwise beyond its jurisdiction. See Pet. App. 31a-33a.[1]

Petitioner suggests (Pet. 14-17) that Section 7252's requirement of a Board decision is not jurisdictional, at

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[1] Class members who have not filed claims for benefits would also appear to lack Article III standing because the VA's dose-estimate methodology has not injured them in any concrete way. See *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("Every class member must have Article III standing in order to recover individual damages. Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.") (citation and internal quotation marks omitted).

least with respect to absent class members. Pet. 15; see Pet. App. 10a (Dyk, J., dissenting from the denial of the petition for rehearing en banc) (suggesting that obtaining a Board decision "is not a jurisdictional requirement * * * even for named plaintiffs"). That is incorrect. Section 7252 clearly speaks in jurisdictional terms. See 38 U.S.C. 7252(a) ("The [Veterans Court] shall have exclusive jurisdiction to review decisions of the Board."); *Henderson*, 562 U.S. at 439; Pet. App. 187a (Falvey, J., dissenting) ("[I]t's hard to imagine that the English language could produce a more clearly jurisdictional provision."). Because Section 7252 uses the term "jurisdiction" and delineates the Veterans Court's adjudicatory capacity, it is in both form and substance a paradigmatic jurisdictional provision. *Henderson*, 562 U.S. at 435; see *Fort Bend Cnty.*, 139 S. Ct. at 1848.

Petitioner cites no support for the suggestion that Section 7252 could be considered jurisdictional for ordinary appellants, but not for absent class members. Section 7252 is not "a chameleon, its meaning subject to change depending on the presence or absence" of class allegations "in each individual case." *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005). Rather, it is jurisdictional in *every* case—and the class-action procedural tool cannot override its requirements.

b. This Court's precedents strongly support the court of appeals' decision.

In *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), this Court considered a class action concerning duration-of-relationship eligibility requirements for surviving wives and stepchildren of deceased wage earners under the Social Security Act (Act), ch. 581, 49 Stat. 620 (42 U.S.C.

301 *et seq.*). *Salfi*, 422 U.S. at 752-753. The Court explained that Section 205(g) of the Act, codified at 42 U.S.C. 405(g), specified three

> requirements for judicial review: (1) a final decision of the Secretary made after a hearing; (2) commencement of a civil action within 60 days after the mailing of notice of such decision (or within such further time as the Secretary may allow); and (3) filing of the action in an appropriate district court.

Salfi, 422 U.S. at 763-764. The Court determined that the "second and third of these requirements * * * are waivable by the parties," but that the first is "central to the requisite grant of subject-matter jurisdiction." *Id.* at 764; see *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1773 (2019); *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976). The Court further held that the named plaintiffs "satisf[ied] the requirements for [district court] jurisdiction," but that the unnamed putative class members did not. *Salfi*, 422 U.S. at 764; see *id.* at 764-767. Specifically, "the complaint" included "no allegations that [the putative class members] ha[d] even filed an application with the Secretary, much less that he ha[d] rendered any decision." *Id.* at 764.

Four years later, the Court reaffirmed its understanding of class actions under the Social Security Act. See *Califano* v. *Yamasaki*, 442 U.S. 682 (1979). *Yamasaki* concerned the availability of nationwide injunctive relief in two district court actions with respect to recoupment of benefits from beneficiaries who had been overpaid. The Court explained that class actions were available in cases under the Social Security Act, but provided a critical caveat: "Where the district court has jurisdiction over the claim of each individual member of the class, Rule 23 provides a procedure by which the

court may exercise that jurisdiction over the various individual claims in a single proceeding." *Id.* at 701; see *ibid.* (class relief available "at least so long as the membership of the class is limited to those who meet the requirements of § 205(g)"). The Court went on to hold that, although the named plaintiffs satisfied the jurisdictional requirement of Section 205(g), "the classes certified were plainly too broad." *Id.* at 704. In particular, the Court found "well taken" the "Secretary's objection" that class members "who ha[d] been subjected to recoupment but who had not sought either reconsideration of overpayment determinations or waiver of recovery" fell outside the district courts' jurisdiction because they had "failed to obtain a 'final decision' from the Secretary as required by § 205(g)." *Id.* at 703-704 (citation omitted). The Court nonetheless concluded that, because the district courts had not actually ordered relief as to such claimants, but had only announced their right to a hearing upon satisfaction of the jurisdictional requirement, the improper class certification "provide[d] no basis for altering the relief actually granted." *Ibid.*

Between *Salfi* and *Yamasaki*, the Court held in *Matthews* that Section 405(g)'s requirement of a final decision by the Secretary "consists of two elements": "the requirement that the administrative remedies prescribed by the Secretary be exhausted," and "the requirement that a claim for benefits shall have been presented to the Secretary." 424 U.S. at 328. The Court determined that the former requirement was "waivable," but that the latter was not, because "[a]bsent such a claim there can be no 'decision' of any type," and "some decision by the Secretary is clearly required by the statute." *Ibid.* In *Bowen* v. *City of New York*, 476

U.S. 467 (1986), the Court applied *Salfi* and *Mathews* when considering a class whose members had not exhausted their administrative remedies. The Court determined that, because every class member had met the jurisdictional presentment requirement of Section 405(g), the class was proper. *Id.* at 473, 475 n.6, 482-486.

Petitioner suggests (Pet. 22) that Section 7252 might similarly be read to include a jurisdictional presentment requirement and a non-jurisdictional Board-decision requirement. See Pet. App. 10a (Dyk, J., dissenting from the denial of the petition for rehearing en banc). But Section 7252's plain language does not support that interpretation. In *Salfi*, this Court observed that the requirement of a "final decision" in Section 405(g) of the Social Security Act is "left undefined by the Act," and "its meaning is left to the Secretary to flesh out by regulation." 422 U.S. at 766. By contrast, Section 7252(a) grants the Veterans Court "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals," 38 U.S.C. 7252(a), and Section 7104 establishes requirements for "[d]ecisions of the Board," 38 U.S.C. 7104. There is consequently no basis for interpreting Section 7252 as a non-jurisdictional exhaustion rule. Cf. *Henderson*, 562 U.S. at 439. Rather, the fundamental lesson of *Salfi* and its progeny is clear: A class may include only individuals who satisfy applicable jurisdictional requirements—and here, the relevant jurisdictional requirement is a Board decision.

The Court has recognized this principle in other contexts as well. In *Mathews* v. *Diaz*, 426 U.S. 67 (1976), the Court considered a class action challenging the constitutionality of a statute that limited eligibility for enrollment in the Medicare Part B supplemental-insurance

program for certain noncitizens. The Court explained that the district court's "class certifications [were] erroneous" insofar as they included claims of individuals who "'will be denied'" enrollment, because the Secretary of Health, Education, and Welfare had not taken "any action with respect to such persons that [was] tantamount to a denial," and the district court therefore "lacked jurisdiction over their claims." *Id.* at 71 n.3. Similarly in *Zipes* v. *TWA*, 455 U.S. 385 (1982), the Court considered whether a statutory time limit for Equal Employment Opportunity Commission filings was jurisdictional. The Court observed that, in two prior decisions, it had *not* held that the district court lacked jurisdiction over class members who had not met the time limit. *Id.* at 397. The Court reasoned that the time limit was not jurisdictional, because if it were, the district court "would have been without jurisdiction to adjudicate the claims of those [class members] who had not" complied. *Ibid.*; see, *e.g.*, *Zahn* v. *International Paper Co.*, 414 U.S. 291, 301 (1973) (stating that a putative class member who is beyond the court's jurisdiction "may not ride in [to court] on another's coattails") (citation omitted), superseded by statute as recognized by *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 566-567 (2005); see also *Blackmon-Molloy* v. *United States Capitol Police Bd.*, 575 F.3d 699, 704-705 (D.C. Cir. 2009) (holding that the doctrine of "vicarious exhaustion"—that each class member "need not exhaust his or her administrative remedies individually so long as at least one member of the class has" done so—does "not apply" to jurisdictional requirements).

2. Petitioner's reliance on other legal authorities lacks merit.

a. Petitioner faults (Pet. 17) the court of appeals for "ignor[ing]" the All Writs Act, 28 U.S.C. 1651(a), which petitioner contends (Pet. 17-19, 22-24) provides authority for the Veterans Court's class-certification decision. See Pet. App. 6a-8a (Dyk, J., dissenting from the denial of the petition for rehearing en banc). But petitioner never requested a writ, and the Veterans Court did not ground its decision in the All Writs Act. Instead, the court recognized that the case before it involved "an appeal" under Chapter 72 (38 U.S.C. 7251-7299), rather than "a petition" for an extraordinary writ. Pet. App. 119a.

In any event, the All Writs Act does not permit the Veterans Court to enlarge its jurisdiction to include individuals who are not impeded from pursuing and receiving Board decisions. Petitioner relies (Pet. 18) on *Monk* v. *Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017), in which a veteran complaining of delay sought a writ of mandamus that would require the VA "to promptly adjudicate both his disability benefits application and the applications of similarly situated veterans." *Id.* at 1314. The Federal Circuit observed that the All Writs Act permitted the Veterans Court to issue a writ of mandamus in "those cases which are within its appellate jurisdiction although no appeal has been perfected." *Id.* at 1318 (quoting *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943)). The Federal Circuit further held that the Veterans Court's "jurisdiction extends to 'compel action of the Secretary unlawfully withheld or unreasonably delayed,'" and that the court could "rely on the All Writs Act to aggregate claims in aid of that jurisdiction." *Id.* at 1319 (quoting 38 U.S.C. 7261(a)(2)).

Monk does not apply to this case. Petitioner never sought a writ of mandamus, and the issuance of such a

"drastic and extraordinary remedy," *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 380 (2004) (citation and internal quotation marks omitted), would have been inappropriate in the absence of any evidence that putative class members are being thwarted from pursuing and receiving final Board decisions. Although writs of mandamus may issue to prevent lower courts from "defeat[ing]" appellate jurisdiction or "obstructing the appeal," *Roche*, 319 U.S. at 25—for example, by failing to issue an appealable decision—an appellate court cannot exercise its mandamus authority under Section 1651 simply because a case could one day come before it.

"The traditional use of the writ in aid of appellate jurisdiction" is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche*, 319 U.S. at 26. The writ is available when, *inter alia*, the party seeking it has "'no other adequate means to attain'" the desired relief; it is not "a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380-381 (citation omitted); see *Roche*, 319 U.S. at 27-28, 30; see, *e.g.*, *Pennsylvania Bureau of Corr.* v. *United States Marshals Serv.*, 474 U.S. 34, 41, 43 (1985). Here, each putative class member has an "adequate means to attain the relief he desires" by following the congressionally prescribed appeal process. *Cheney*, 542 U.S. at 380-381 (citation omitted).

Moreover, while the All Writs Act permits a court to issue writs "'in aid of'" "its existing statutory jurisdiction[,] the Act does not enlarge that jurisdiction." *Clinton* v. *Goldsmith*, 526 U.S. 529, 534-535 (1999) (quoting 28 U.S.C. 1651(a)). Here, the Veterans Court's Chapter 72 authorities permitted it to review petitioner's Board decision and to issue a precedential decision that would

declare the law for all pending and future veterans' claims. See pp. 19-22, *infra*. Neither the All Writs Act nor this Court's precedent supports petitioner's theory that the Veterans Court may pluck potential claimants out of the statutory appeal process, call them "class members," and provide immediate judicial supervision of their claims.

b. Petitioner further suggests (Pet. 19) that, because "Article III district courts regularly certify classes of government benefits claimants that include claimants with unexhausted claims," the Veterans Court must be permitted to do so as well. See Pet. 16-17, 19-21. As the court of appeals explained, however, "[e]ach court is limited to the jurisdiction bestowed upon it by Congress." Pet. App. 35a. Decisions concerning "the scope of district court jurisdiction are inapplicable where, as here, the Veterans Court has its own jurisdictional statute." *Ibid.*

District courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331. By contrast, the Veterans Court's jurisdiction is limited "to review [of] decisions of the Board." 38 U.S.C. 7252(a). District courts also possess supplemental jurisdiction over certain claims related to those properly within their jurisdiction, 28 U.S.C. 1367(a), while Congress has not provided the Veterans Court with a comparable jurisdictional grant.[2] And district courts may review evidence

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[2] Petitioner contends (Pet. 20-21) that Section 1367(a) is irrelevant to this case and to class-action authority more generally. But Section 1367(a)—and the absence of any similar provision for the Veterans Court—demonstrates that Congress has treated the courts differently for jurisdictional purposes. Section 1367(a) also undermines the Veterans Court's theory that its power to review

and make factual findings in the first instance, while the Veterans Court may only review the "record of proceedings before the Secretary and the Board." 38 U.S.C. 7252(b); see 38 U.S.C. 7261(c) ("In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the [Veterans] Court."). In light of these differences, the fact that district courts may sometimes entertain class actions that include "future" class members—*i.e.*, those who have not yet received decisions from the relevant agency—does not suggest that the Veterans Court may do so.

Petitioner also contends (Pet. 19) that district courts' class-action authority is derived from "their inherent power to manage and control their own dockets," and that the Veterans Court must have the same authority. Pet. 19-21. But the Veterans Court's class certification in this case did not manage the court's own docket. Rather, it *expanded* the court's docket to encompass individuals otherwise ineligible to seek relief in that court. Petitioner cites no authority suggesting that the Veterans Court has "inherent power" to take such action. See *Christianson*, 486 U.S. at 818.

Petitioner further asserts (Pet. 17) that, because district courts occasionally certified veterans class actions before 1988, Congress must have intended for the Veterans Court to certify class actions including "future[]" claimants. That argument fails for several reasons.

First, petitioner's argument ignores that class actions remain available at the Veterans Court. The decision below simply requires that, in Chapter 72 appeals,

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petitioner's claim authorizes it to adjudicate purportedly related benefits claims that are otherwise beyond its jurisdiction. See Pet. App. 127a.

the class must be limited by Chapter 72's jurisdictional statute, 38 U.S.C. 7252. See Pet. App. 36a n.4. Second, petitioner's argument disregards this Court's instruction that "the review opportunities available to veterans before the VJRA was enacted are of little help in interpreting" the VJRA. *Henderson*, 562 U.S. at 441. The VJRA did not merely tinker with an existing review scheme; it created a new court and review framework that did not exist before. Third, and related, petitioner's contention depends on the assertion (Pet. 16) that "the purpose of the VJRA" was "to expand judicial review for veterans and to afford them access to court comparable to civilians challenging agency action." But Congress vested the Veterans Court with the powers of an appellate court, including the ability to issue precedential decisions, rather than those of a district court. And as the Veterans Court recognized, no other appellate court in the Nation certifies class actions in the first instance. Pet. App. 142a.

3. The court of appeals correctly grounded its decision in the governing statute and this Court's precedents. Petitioner's policy arguments (Pet. 24-32) provide no basis for further review.

a. Petitioner suggests (Pet. 25) that the court of appeals' decision will "require that veterans rely on precedential opinions by the Veterans Court," which in petitioner's view "are no substitute for class-wide injunctive orders." See Pet. 25-28. But class-wide relief remains available in the appeals context so long as the Veterans Court has jurisdiction over every class member's claim. Pet. App. 36a n.4. And where class actions are inappropriate or limited, precedential decisions may produce efficient and uniform resolution of common questions.

When the Veterans Court reviews an individual's Board decision, the court is authorized to issue a precedential decision "hold[ing] unlawful and set[ting] aside" the relevant VA regulation or policy. 38 U.S.C. 7261(a)(3); see 38 U.S.C. 7269. That precedent then binds all levels of the VA with respect to all pending and future veterans' claims. A Veterans Court decision, "unless or until overturned" by the en banc court, the Federal Circuit, or this Court, therefore is "binding * * * and [is] to be considered and, when applicable, * * * followed by VA agencies of original jurisdiction, the Board of Veterans' Appeals, and the Secretary in adjudicating and resolving claims." *Tobler* v. *Derwinski*, 2 Vet. App. 8, 14 (1991) (per curiam); see Pet. App. 160a ("When [the Veterans] Court issues a favorable precedential decision, it certainly binds VA in all pending and future claims.").

Petitioner asserts that Veterans Court decisions are "not binding on the government." Pet. 26 (citation omitted). Although the dissent from the denial of rehearing en banc relied on *Wolfe* v. *McDonough*, 28 F.4th 1348 (Fed. Cir. 2022), for that proposition, see Pet. App. 5a-6a (Dyk, J., dissenting from the denial of the petition for rehearing en banc), that assertion reflects a misunderstanding of *Wolfe*. The court of appeals there held only that "mandamus is not available to enforce the principle of stare decisis," *Wolfe*, 28 F.4th at 1358—not that a precedential decision of the Veterans Court lacks binding effect.

Petitioner further asserts (Pet. 26) that the Veterans Court issues "few" precedential decisions. But the court may convene a panel and issue a precedential decision in any case that involves a legal issue or reasonably debatable outcome. See *Frankel* v. *Derwinski*, 1

Vet. App. 23, 25-26 (1991). In 2020, the court issued 148 panel or en banc dispositions.[3] And, given the effect of a precedential Veterans Court decision, one such decision can resolve a legal issue for all pending and future claimants. See Pet. App. 170a (Schoelen, J., concurring in part and dissenting in part). In addition, under Section 502, an individual or organization can challenge a VA regulation, policy, or practice immediately in the Federal Circuit, without first utilizing the VA appeal process.

Petitioner also suggests (Pet. 26) that the "VA has a well-known practice of strategically mooting cases appealed to the Veterans Court, which prevents the Veterans Court from issuing precedential decisions in high-impact cases." Petitioner relies on *Monk*, in which the court of appeals recounted the statement of two Veterans Court judges that the "VA's delay in adjudicating appeals evades review because the VA usually acts promptly to resolve mandamus petitions." *Monk*, 855 F.3d at 1320-132 (citing *Young* v. *Shinseki*, 25 Vet. App. 201, 214 (2012) (Lance, J., dissenting)). Contrary to petitioner's suggestion (Pet. 26), there is nothing nefarious about such action, which accords with the veteran's desire to receive a decision. In any event, the decision below does not affect the availability of class certification in the context of unreasonable-delay petitions. See, *e.g.*, Pet. App. 5a n.1 (Dyk, J., dissenting from the denial of the petition for rehearing en banc).

As to the class of cases relevant here, petitioner does not identify a single case in which the VA has unilaterally mooted a Chapter 72 appeal of a Board decision. In

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[3] Vet. App., *Fiscal Year 2020 Annual Report* 2, http://www.uscourts.cavc.gov/documents/FY2020AnnualReport.pdf.

fact, the VA cannot unilaterally moot a Chapter 72 appeal, because it takes both parties to settle such a case. Nor has petitioner identified a single Veterans Court precedent that the VA "fail[ed] to implement" when required to do so. Pet. 26. Petitioner focuses (Pet. 26-27) on *Staab* v. *McDonald*, 28 Vet. App. 50 (2016), but there the VA simply promulgated a new regulation after the Veterans Court's decision, as it is authorized to do. See *Wolfe,* 28 F.4th at 1360.

b. Petitioner speculates (Pet. 28-29) that the court of appeals' decision will exacerbate delay in the VA system. To be sure, delay was a serious problem in the VA appeals system that predated the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), Pub. L. No. 115-55, 131 Stat. 1105. But the AMA has dramatically reduced processing times. In 2016, the average time between a notice of disagreement and a Board decision was 1698 days; now it is 319 days.[4] Every putative class member in this case either is subject to the AMA or had an opportunity to opt-in to the AMA. See *Monk* v. *Wilkie,* 978 F.3d 1273, 1276 (Fed. Cir. 2020); 38 C.F.R. 19.2(b) and (d). And a proliferation of class

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[4] See U.S. Dep't of Veterans Affairs, *Board of Veterans' Appeals: Quarterly Reports for Fiscal Year 2023* (last updated Apr. 25, 2023), https://www.bva.va.gov/quarterly_reports.asp (AMA average days to complete for direct review); U.S. Dep't of Veterans Affairs, *Board of Veterans' Appeals: Annual Report: Fiscal Year 2016*, at 22, https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2016AR.pdf (sum of average elapsed processing times from (1) notice-of-disagreement receipt to statement of the case (480 days); (2) statement-of-the-case issuance to substantive-appeal receipt (38 days); (3) substantive-appeal receipt to certification of appeal (644 days); (4) certification of appeal to Board receipt of certified appeal (288 days); and (5) receipt of certified appeal to issuance of Board decision (248 days)).

litigation could jeopardize the improvements that the AMA has produced. For example, if the Veterans Court (as part of its monitoring and supervision of the class, see Pet. App. 160a-163a) ordered the VA to solicit, prioritize the processing of, and file status reports on class-member claims, that would reduce the resources for, and increase the delay in, the processing of other veterans' claims. See, *e.g.*, *Ebanks* v. *Shulkin*, 877 F.3d 1037, 1040 (Fed. Cir. 2017) (observing that moving certain veterans to the front of the queue "may result in no more than line-jumping without resolving the underlying problem of overall delay").

Class actions may be particularly inefficient in Chapter 72 appeals, where Veterans Court review is confined to the "record of proceedings before the Secretary and the Board" and does not include initial fact-finding. 38 U.S.C. 7252(b); see 38 U.S.C. 7261(a)(4) and (c). Thus, class certification at the Veterans Court will often require a preliminary remand to the Board to find facts or to incorporate information relevant to class certification into the record of proceedings. See Pet. App. 197a (Falvey, J., dissenting). The limitations on review and fact-finding help explain why appellate courts generally do not "aggregate actions in the first instance." *Id.* at 142a; see *id.* at 181a-182a (Falvey, J., dissenting) ("There are sound reasons why no other appellate court has undertaken this innovation.").

This case illustrates the potential inefficiency of class actions in Veterans Court appeals. In 2017, when petitioner appealed his Board decision to the Veterans Court, the median time for disposition via precedential

decision was 180 days after panel assignment.[5] Petitioner's claim, however, was not decided until 1053 days after panel assignment—and that decision was a remand, providing no final resolution to any veteran. At the merits and class-certification stages, several Veterans Court judges observed that the class aspect of the litigation had delayed the court's issuance of a precedential decision that might have resolved the radiation-dose-estimate issue for all veterans. See Pet. App. 81a (Meredith, J., concurring in part in the result and dissenting in part) (noting that "the parties and the en banc Court expended considerable time and resources" on the class-certification request "without bringing the appellant any closer to receiving a decision that adequately addresses" the dose-estimate issue); *id.* at 208a (Falvey, J., dissenting) (absent the request for class certification, "a panel might have, months ago," issued a "nationwide precedent, [that] would have fixed any * * * systemic dose estimate problem" and that the VA "would have been required to apply * * * consistently to all veterans' cases").

c. Petitioner contends (Pet. 30) that this Court's review is warranted because the decision below "leaves veterans as one of the only groups of benefits recipients in the country without meaningful access to the class action mechanism." That is incorrect. The Veterans Court may certify classes in the petition context, and it may do so in Chapter 72 appeals so long as it has jurisdiction over all class members' claims. Pet. App. 36a n.4.

Petitioner's argument also ignores that Congress designed the Veterans Court as an appellate court with

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[5] Vet. App., *Annual Report (Fiscal Year 2017)* 3, http://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf.

powers that render class actions generally unnecessary. A primary purpose of the class-action device is to avoid inconsistent decisions on the same issue across different courts. James Wm. Moore et al., *Moore's Federal Practice: Civil* § 23.02, at 23-32 (3d ed. 2023). That is not a concern in veterans' law, as the Veterans Court has exclusive jurisdiction to review Board decisions, and its precedential decisions bind the VA nationwide. See p. 20, *supra.*

Petitioner asserts (Pet. 23) that class certification will have no effect until a "future" class member receives a Board decision. But see Pet. App. 160a, 163a (stating that class certification entitles class members to "judicial supervision" of their claims and "prompt remedial enforcement" at the court in lieu of "fully exhausting agency review"). But if each class member must still obtain a Board decision, then class certification will not solve petitioner's concerns that Palomares veterans (or the other groups he invokes, see Pet. 30-31) will be deterred by backlogs, case complexity, or age from completing the Board appeal process. In all events, petitioner's policy arguments in favor of broader Veterans Court class actions should be directed to Congress, not this Court.[6]

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[6] Even if review were otherwise warranted, this case would be a poor vehicle for addressing the class-certification issue. On August 10, 2022, after the Veterans Court issued its decision, Congress enacted the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 (PACT Act), Pub. L. No. 117-168, 136 Stat. 1759. Section 402 of the PACT Act defined participation in the Palomares response as a "radiation-risk activity," such that Palomares veterans who contract one of 21 enumerated types of cancer are now presumed service-connected for that cancer and need not rely on 38 C.F.R. 3.311 to obtain benefits. See 38 U.S.C. 1112(c)(1)-(3)(i). Petitioner's disease (leukopenia) is

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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not a cancer, and the PACT Act's presumption does not apply to his benefits claim. Nonetheless, because many class members are now covered by the PACT Act's presumption, it is unlikely that the class certified by the Veterans Court would meet the numerosity requirement for class treatment. See Pet. App. 147a.