No. 22-815

IN THE
Supreme Court of the United States

VICTOR B. SKAAR,

Petitioner,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

REPLY IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LYNN K. NEUNER
ANTHONY C. PICCIRILLO
SIMPSON THACHER & BARTLETT LLP
425 Lexington Ave.
New York, NY 10017
(212) 455-2000
lneuner@stblaw.com

MICHAEL J. WISHNIE
Counsel of Record
MEGHAN E. BROOKS
VETERANS LEGAL SERVICES CLINIC
JEROME N. FRANK LEGAL SERVICES ORG.
P.O. Box 209090
New Haven, CT 06520
(203) 432-4800
michael.wishnie@yale.edu

Counsel for Petitioner

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This petition presents the question whether the Veterans Court has statutory or inherent authority to aggregate exhausted and unexhausted claims of disabled veterans in a single class. It is a question of enormous practical importance.

The Federal Circuit decision overturning an *en banc* Veterans Court opinion and rejecting the dissenting views of five judges on petition for rehearing effectively eliminates veterans appeals class actions, as none are likely to satisfy the requirement of numerosity if unexhausted claims are excluded. This is especially true in light of the history of the U.S. Department of Veterans Affairs (VA) strategically mooting claims and its ability to control when each claim becomes ripe for judicial review. The result, contrary to two federal statutes, is to deprive veterans of the opportunity to subject unlawful VA practices to the meaningful judicial scrutiny that only collective action can provide. The decision below also strips the Veterans Court of the power to manage its docket.

In response, the government relies on a cramped construction of the Veterans Judicial Review Act (VJRA), 38 U.S.C. § 7252, while ignoring the Veterans Court's authority under the All Writs Act (AWA), 28 U.S.C. § 1651(a), to aggregate claims in aid of its prospective jurisdiction. The government instead focuses on the law of mandamus, a writ Petitioner did not seek. These are the same legal errors identified by Judge Dyk and four other Federal Circuit judges.

The participation of several of the nation's largest veterans service organizations as *amici curiae* confirms the high stakes of this case.

The Court should grant review.

I. The Veterans Court Has Authority to Certify Classes That Include Exhausted and Unexhausted Claims.

A. The Text and Purpose of Section 7252 Permit Injunctive Class Actions That Include Unexhausted Claimants.

Section 7252 authorizes the Veterans Court to "review decisions of the Board of Veterans' Appeals" and does not, contrary to the government's reading, create a jurisdictional exhaustion requirement that each absent class member must independently satisfy. Opp'n Br. 8-9. Nothing in the plain language of Section 7252 requires more than a Board decision on the legal question on which a class for corresponding injunctive relief is certified. Pet. 14-15. Five Federal Circuit judges agreed. They explained that Petitioner Victor Skaar has fully exhausted his claim, and that absent class members need not exhaust the same question themselves because "[t]he class action will not determine the individual benefit claims—only the common claim regarding the dose estimate methodology for Palomares veterans." Pet. App. 11a n.5; *see also id.* ("[E]xhaustion of the statutorily prescribed procedures is only excused where the class claim is collateral to the merits of any individual benefits determination").

The government nowhere rebuts Mr. Skaar's argument that Section 7252's exhaustion requirement is nonjurisdictional as applied to absent class members. Instead, the government simply points out that 7252 "speaks in jurisdictional terms." Opp'n Br. 10. But that establishes, at most, that the requirement of a "Board decision" is jurisdictional with respect to the legal question and class representative's claim. This Court

recently reaffirmed its view that, absent a clear statement otherwise, "[e]xhaustion is typically nonjurisdictional for good reason." *Santos-Zacaria v. Garland*, No. 21-1436, slip op. at 5 (U.S. May 11, 2023).

The history and purpose of the VJRA confirm Petitioner's reading. Previous statutes barred judicial review of individual VA benefits decisions; review was limited to challenges on collateral issues, including by class action.[1] In the VJRA, Congress established judicial review of individual VA decisions. And, recognizing the longstanding solicitude for veterans, Congress channeled *all* review, on uniquely favorable terms, into the newly-created Veterans Court.[2] The government's contention that the VJRA shrunk the scope of judicial review, by *sub silentio* eliminating veterans' prior ability to bring collateral challenges, including via class actions, finds no support in the history of the act.

Moreover, Congress modeled the VJRA on the Administrative Procedure Act (APA) framework for judicial review of agency action. Pet. 5-6; (*compare* 38 U.S.C. § 7252 *with* 5 U.S.C. § 704, 38 U.S.C. § 7261 *with* 5 U.S.C. § 706). Congress borrowed the APA review structure for the VJRA knowing that class actions that include absent class members with unexhausted claims have long been critical tools in reviewing agency action and ensuring uniform implementation of judicial relief. Pet. 5-6; NVLSP Amicus Br. at 9–10; Law Prof. Amicus Br. at 4.

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[1] Pet. 4-5; NVLSP Amicus Br. at 9.

[2] *See Henderson v. Shinseki,* 562 U.S. 428, 431-432 (2011). The government misunderstands this Court's admonition that pre-VJRA practice should not *limit* the review available to veterans. *Compare* Opp'n Br. 19 *with Henderson*, 562 U.S. at 441.

The government's attempts to distinguish review under the VJRA from district court review are unavailing. *See* Opp'n Br. 17–18. District court review is typically on the record before the agency and deferential to agency factfinding, *see Dep't of Com. v. New Yo*rk, 139 S. Ct. 2551, 2573 (2019), just like that of the Veterans Court. Additionally, district courts need no special jurisdictional grant to certify future-oriented injunctive classes.[3]

B. The All Writs Act and the Veterans Court's Inherent Authority Provide Independent Bases to Include Unexhausted Claims in a Class.

The Veterans Court has the power under the All Writs Act to issue writs in aid of its *prospective* jurisdiction—those claims that are pending within the VA system but not yet exhausted. *See* Pet. 18; *see also F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (AWA extends to "the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected"). This was the basis on which Mr. Skaar sought to certify a class, citing the AWA in the very first sentence of his motion to aggregate.[4] Judge Dyk correctly identified the panel's

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[3] The Federal Circuit panel concluded that district courts have additional authority under 28 U.S.C. § 1367 to certify a class that includes unexhausted claims. Pet. App. 35a. This is a striking misunderstanding of that statute, as Judge Dyk explained, and the government barely defends the error. Opp'n Br. 17 n.2. Section 1367 has no bearing on a court's power to define the scope of a class or the relief to which the class is entitled. *See* Pet. App. 12a-13a.

[4] Motion for Class Cert., *Skaar v. Shulkin*, No. 17-2574 (Vet. App.) (filed Dec. 11, 2017) ("Mot. for Class Cert."), at ¶ 1 ("Pursuant to U.S. Vet. App. R. 27, 28 U.S.C. § 1651(a), 38 U.S.C.

failure to consider the AWA as its chief error. Pet. App. 6a-7a (faulting panel's failure to address AWA authority to enter writs in aid of prospective jurisdiction as basis to include unexhausted claims in class). The government, too, ignores the issue, mustering no response to the century of case law holding that the AWA empowers courts to issue writs in aid of their prospective jurisdiction, Opp'n Br. 16—especially when necessary to intervene in matters pending before executive branch agencies. Pet. App. 18a.

The government instead suggests that the AWA is inapplicable because "[p]etitioner never sought a writ of mandamus." Opp'n Br. 15. This argument is perplexing—nothing in the AWA confines its use to cases where a party seeks a writ of mandamus. In modern times, courts have used the AWA's flexible, gap-filling power to issue writs for everything from a temporary stay of deportation, *Michael v. INS*, 48 F.3d 657, 661-64 (2d Cir. 1993), to aggregating habeas petitions. *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125-26 (2d Cir. 1974).

The AWA, grounded in equity, is a "legislatively approved source of procedural instruments designed to achieve the 'rational ends of law.'" *Price v. Johnston*, 334 U.S. 266, 282 (1948) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)). It is a complement to courts' inherent docket management powers, *see* Law Prof. Amicus Br. at 5-6, and the inherent judicial power to aggregate claims predates

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§ 7264(a), and this Court's inherent powers, Appellant Victor B. Skaar respectfully moves for class certification . . .."). Mr. Skaar also relied on *Monk v. Shulkin*, 855 F.3d 1312, 1318-19, 1321 (Fed. Cir. 2017), which recognized the AWA as the Veterans Court's primary source of authority to aggregate. Mot. for Class Cert. at ¶ 26.

the federal rules. *Id.* at 4. The Veterans Court, like all other Article I courts, may exercise this equitable power. *Freytag v. Comm'r*, 501 U.S. 868, 889 (1991).

Mr. Skaar has never sought mandamus relief. He filed a notice of appeal from a Board decision and then moved to certify a class seeking injunctive relief against VA's unlawful dose estimate methodology. Pet. 2. The government insinuates that Mr. Skaar has foolishly delayed resolution of his own claim by seeking to include unexhausted claims in the class. Opp'n Br. 23-24. Not so. Despite his advanced age and serious disabilities, Mr. Skaar has fought for class status because he recognizes that the scientifically robust record he developed and any injunctive relief he might obtain would, as a practical matter, benefit the veterans with whom he served *only* if a class were certified. His effort to include unexhausted claimants in the class is authorized under Section 7252, the AWA, and the Veterans Court's inherent powers. The Federal Circuit panel opinion erred in concluding otherwise.

II. This Court's Precedent Undercuts the Federal Circuit's Decision.

The Federal Circuit's interpretation of Section 7252 is inconsistent with this Court's precedent. The Veterans Court certified a class that encompassed veterans whose claims "will be denied" based on the VA's erroneous dose estimate methodology. This group includes veterans who have filed a claim with VA but have not yet received a final decision. Pet. App. 166a. *Weinberger v. Salfi*, the case upon which the government principally relies, makes clear that a court may exercise jurisdiction over absent class members who have yet to obtain a final agency decision, even where a statute has a "final decision" requirement interpreted as jurisdictional. 422 U.S. 749, 766-67 (1975).

In *Salfi*, this Court examined the judicial review provisions of the Social Security Act (SSA), which required "a final decision of the Secretary made after a hearing" for district court review. *Id.* at 763 (quoting 42 U.S.C. § 405(g)). This Court construed the requirement as "a statutorily specified jurisdictional prerequisite." *Id.* at 766. Nonetheless, this Court reasoned that the meaning of "final decision" is subject to interpretation, and held that "in particular cases . . . full exhaustion of internal review procedures is not necessary for a decision to be 'final'" within the language of that statute. *Id.* at 767. This Court accordingly found the "final decision" requirement satisfied by absent class members whose claims the Secretary had not decided. *Id.* at 764-66.

Salfi provides that, where an agency has already effectively ruled on an issue, jurisdictional "decision" requirements are satisfied, even before absent class members' complete exhaustion of administrative resources and formal final decisions. *See id*. That principle undermines the Federal Circuit's interpretation of Section 7252 as precluding jurisdiction over veteran claimants who, like the *Salfi* appellees, had filed claims that "will be denied" but have not yet received formal decisions from the Board. The case for interpreting Section 7252's "decision of the Board" requirement to facilitate broader review of agency decisions is even stronger under the uniquely pro-claimant VJRA than for the SSA judicial review statute. *See Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019) ("the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue"). This is especially true because Section 7252 does not even require that a Board decision under review be "final." *See Henderson*, 562 U.S. at 438-41 (holding that the

VJRA's 120-day statutory deadline to appeal a final Board decision, in Section 7266, is non-jurisdictional).

Even if administrative exhaustion were jurisdictional, that would not bar certification of a class encompassing unexhausted claimants solely for purpose of pursuing injunctive relief. In *Califano v. Yamasaki*, this Court clarified that a class action seeking injunctive relief may appropriately include absent class members who have not yet received an agency decision. 442 U.S. 682, 703-06 (1979). In such circumstances, as the government's brief acknowledges, the court does not exercise jurisdiction over the absent class members until they receive an agency decision. *See* Opp'n Br. 12. There is no principled basis for distinguishing the injunctive class relief in *Yamasaki* from the injunctive class relief here. As in *Yamasaki*, the unexhausted claimants in Mr. Skaar's class are within the Veterans Court's *prospective* jurisdiction until they have a Board decision.

The government's remaining Supreme Court authorities primarily reiterate *Salfi*'s holding that administrative exhaustion is not a jurisdictional requirement under the SSA's judicial review statute. *See Berryhill*, 139 S. Ct. at 1773, 1779 (holding SSA contains "a 'jurisdictional' requirement that claims be presented to the agency" but "exhaustion itself is not a jurisdictional prerequisite"); *Mathews v. Diaz*, 426 U.S. 67, 72-73 (1976) (holding SSA's "final decision" prerequisite was met even though "[n]one of the appellees completely exhausted available avenues for administrative review"); *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976) (holding administrative exhaustion of SSA claims is not a prerequisite to review "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate").

Zipes v. TWA is inapposite. 455 U.S. 385 (1982). The claims there arose under a different statutory scheme (Title VII) and the plaintiffs sought damages, not injunctive relief. *See id.* at 390.[5] Injunctive class actions are fundamentally different from damages class actions because in the former, "named plaintiffs are simply not asserting any claims that are not also applicable to the absentees." *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 63 (3d Cir. 1994). *Zipes*'s dicta concerning jurisdiction over a hypothetical damages class under a different statutory scheme has no bearing on the question presented in this petition.

III. Preserving Judicial Authority to Include Unexhauted Claims in Veterans Class Actions Is Vitally Important.

"The panel decision here effectively eliminates [benefits] class actions for veterans. . . ." Pet. App. 3a (Dyk, J., dissenting). The government attempts to downplay the sweeping harm of the decision below by conceding that the Veterans Court has the power to aggregate classes of veterans with individual Board decisions on the same legal question within the Veterans Court's 120-day window of appeal. *See* Opp'n Br. 18, 24. Yet this limitation, together with class numerosity requirements, will effectively ensure that this is the last veterans appeals class certified. *See* Pet. App. 5a; NVLSP Amicus Br. at 5-6. VA's practice of strategically mooting claims, and its ability to determine the timing of when claims become ripe for judicial review compounds the problem. NVLSP Amicus Br. at 11.

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[5] The government's citation to *Zahn v. International Paper Co.*, a damages class action that hinged on the amount-in-controvery requirement of 28 U.S.C. § 1332, likewise misses the mark. 514 U.S. 291 (1973) (abrogated by statute).

This petition thus likely presents the last, best vehicle to correct a decision that shields VA's unlawful practices from meaningful judicial scrutiny.

The government seeks to deprive the Veterans Court of a tool to ensure consistent enforcement of the law and its own rulings where it determines a precedential decision is insufficient. Vet. App. R. 22(a)(3) (movant must demonstrate that class treatment would better "serve justice" than favorable precedential decision). The court's *en banc* decision to certify the *Skaar* class proves the point. Mr. Skaar identified records through Freedom of Information Act litigation and marshaled a nuclear physicist and dose estimate expert to inform the Board's factfinding regarding a methodology that it had twice-before refused to review due to the issue's complexity. Pet. 8; Pet. App. 220a. If the Board reviews on a class basis, it need only do so once. Without a class, the Board will have to readjudicate VA's dose methodology whenever a Palomares veteran challenges it because the Board's decisions are not precedential, 38 C.F.R. § 20.1303.

The tragedy is that few elderly, disabled Palomares veterans, most of whom are unrepresented, are able to recruit experts to build the necessary record before the Board, much less appeal to the Veterans Court if denied. The VA would then be free to use the erroneous methodology to deny other Palomares veterans' claims even if it grants Mr. Skaar's individual claim. Class-wide injunctive relief alleviates this inefficiency and injustice by ensuring that judicial decisions are in practice enforceable at the agency. *See* Pet. App. 155a.[6]

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[6] While the PACT Act of 2022 expanded the presumption of service-connectedness for certain types of cancers, Mr. Skaar and other Palomares veterans still live with radiogenic conditions not

The Veterans Court is the exclusive judicial recourse for veterans subjected to unlawful VA practices. And notwithstanding its disavowal, the VA is purposeful in avoiding judicial rulings in certain cases, Pet. 26, as the Federal Circuit itself has recognized. *Monk*, 855 F.3d at 1320-21 & n.5 (stating "case law is replete with [] examples" of VA's strategic mooting of claims and listing examples); *see also* NVLSP Amicus Br. at 11-12 (providing examples). And as amici detail, VA's insistence that it has solved the appeals backlog is, to say the least, overstated. NVLSP Amicus Br. at 17.

Congress created the Veterans Court to provide judicial review over VA action. To ignore the statutory authority of the AWA, which permits courts to issue necessary writs in aid of their prospective jurisdiction, and to misconstrue Section 7252 as creating a jurisdictional bar to certifying injunctive class actions that include veterans with unexhausted claims, wastes judicial resources, allows agencies to evade meaningful review, and undermines the equal treatment of veterans under the law.

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among the list of diseases covered by the PACT Act. 38 U.S.C. § 1116(a)(2). *Cf.* Opp'n Br. 25 n.6.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LYNN K. NEUNER
ANTHONY C. PICCIRILLO
SIMPSON THACHER & BARTLETT LLP
425 Lexington Ave.
New York, NY 10017
(212) 455-2000
lneuner@stblaw.com

MICHAEL J. WISHNIE
Counsel of Record
MEGHAN E. BROOKS
VETERANS LEGAL SERVICES CLINIC
JEROME N. FRANK LEGAL SERVICES ORG.
P.O. Box 209090
New Haven, CT 06520
(203) 432-4800
michael.wishnie@yale.edu

Counsel for Petitioner

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