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

BRIEF OF NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC., PARALYZED VETERANS OF AMERICA, AND VETERANS OF FOREIGN WARS OF THE UNITED STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Veterans Court have authority to certify class actions seeking injunctive relief when the class includes veterans whose individual claims are not yet exhausted, in cases where the court has jurisdiction over a named representative's claim?

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INTEREST OF AMICI CURIAE[1]

Amici are several of the Nation's leading veteran-advocacy organizations. Each has extensive experience dealing with the Department of Veterans Affairs (VA), both in administrative proceedings and before the federal courts. This case is of interest to amici because its resolution will shape their work and the work of veterans-focused organizations around the country. Given amici's collective wealth of experience with VA, they are well-positioned to explain the importance of class-wide proceedings before the Court of Appeals for Veterans Claims. And amici have a strong interest in ensuring that the Veterans Court remains able to address system-wide problems at VA on a class-wide basis.

The National Organization of Veterans' Advocates, Inc. (NOVA) is a not-for-profit educational membership organization comprising hundreds of attorneys and other qualified members who represent our Nation's veterans and their families before VA and federal courts. NOVA works to develop high standards of service and representation for all persons seeking veterans' benefits.

Paralyzed Veterans of America (PVA) is a national, nonprofit veteran service organization founded in 1946 and chartered by the Congress of the United States. *See* 36 U.S.C. §§ 170101-170111. The organization has approximately 15,000 members,

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[1] Amici curiae provided timely notice of their intention to file this brief to counsel for all parties. No counsel for a party authored this brief in whole or in part, and no such counsel, any party, or any other person or entity—other than amici curiae and its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

each of whom is a veteran of the United States Armed Forces who lives with an injury, disease, or other dysfunction of the spinal cord. PVA's mission includes public education concerning the difficulties and needs of those with spinal-cord injury and dysfunction; promoting medical research and education related to injuries and diseases of the spinal cord; and legislative and legal advocacy on behalf of its members. To fulfill its mission, PVA provides a wide array of programs and services to its members and veterans of any era, regardless of the nature of their disabilities, as well as to their families and caregivers. These include assistance and representation without charge in their pursuit of benefits and healthcare administered by VA and other federal agencies, as well as pro bono legal representation before the federal courts. Further, as an organization concerned with the civil rights of all persons with disabilities, PVA advocates before Congress and the courts to enhance the quality of life of its members and all Americans with disabilities.

Veterans of Foreign Wars of the United States (VFW) is the Nation's oldest and largest combat veterans' organization, advocating on behalf of all veterans, and, with its Auxiliary, is comprised of nearly 1.7 million members and 2,037 skilled VA-accredited VFW representatives. The VFW's assistance extends from providing financial, social, and emotional support to members of the United States Armed Forces, veterans, and their dependents, to being leaders in the local community, and to having a direct impact on national policy.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises important questions about the authority of the Court of Appeals for Veterans Claims (Veterans Court) to carry out its statutory mandate of ensuring that the Department of Veterans Affairs (VA) complies with the law. VA operates one of the Nation's largest systems of mass adjudication, and the Veterans Court hears all appeals arising from it. In just 2021, the Veterans Court resolved over 9,000 VA appeals—more than all Article III courts of appeals' administrative dockets combined. Here, the Federal Circuit "effectively eliminate[d] class actions in the veterans context," thereby severely limiting the Veterans Court's ability to manage its sprawling docket. App. 5a (Dyk, J., dissenting from denial of rehearing en banc). It did so based on misunderstandings of both the Veterans Court's statutory authority and this Court's precedents. The Federal Circuit's ruling will severely impair veterans and their advocates' efforts to ensure VA's accountability and compliance with the law. Certiorari is warranted.

As the Federal Circuit held in 2017, one key tool the Veterans Court has to manage its docket is the authority to resolve challenges to VA's unlawful conduct on a class-wide basis. *Monk v. Shulkin*, 855 F.3d 1312, 1322 (Fed. Cir. 2017). In so holding, the Federal Circuit explained that this authority should play a core role in ensuring the rational resolution of issues affecting many VA claimants in similar ways, "promoting efficiency, consistency, and fairness, and improving access to legal and expert assistance by parties with limited resources." *Id.* at 1320.

Since then, the Veterans Court has adopted formal rules for hearing class actions, and it has adjudicated many class proceedings. In this case, the Veterans Court certified a class of U.S. Air Force veterans, like petitioner Victor B. Skaar, who were exposed to radiation when cleaning up a nuclear accident in Palomares, Spain. VA denied Skaar's benefits claim based on a methodology he claims vastly underestimates the radiation to which he was exposed at Palomares. To ensure uniform treatment of all (virtually identical) claims that continue to arise from the same course of conduct, the court certified a class including not only those Palomares veterans who had already been denied benefits by VA, but also those who would be denied in the future. The Veterans Court then held VA had failed to justify the flawed methodology it relied upon to deny Palomares benefits claims, and remanded the case for VA to reconsider its radiation-estimation methodology on a class-wide basis.

The Federal Circuit rejected this sensible approach to managing litigation, holding that jurisdictional limits on the Veterans Court's authority prevent it from certifying appellate class actions when the class includes any veteran who has yet to receive a decision of the Board of Veterans Appeals (BVA). Instead, the court held that veterans cannot be included in a class appeal unless they have completed the (on average) *seven-years-long* process of obtaining a BVA decision. As five members of the Federal Circuit explained dissenting from denial of rehearing, that holding is wrong. The Veterans Court has clear authority under the All Writs Act to certify injunctive classes including veterans who have filed claims for benefits, but not yet fully exhausted the VA process.

Amici file this amicus brief to emphasize two points. *First*, the elimination of veteran class appeals will cause serious hardship to the Veterans Court and those before it. Class actions have many advantages over the Veterans Court's precedential decisions. Such actions allow greater access to courts and provide better mechanisms to enforce compliance with Veterans Court rulings on key questions of law. And they give the Veterans Court an important tool for efficiently resolving many claims presenting similar or identical issues.

Second, as the dissent below explained, the Federal Circuit's effective elimination of veteran class appeals rests on fundamental misunderstandings of the Veterans Court's statutory authority, the way class actions challenging government misconduct usually work, and this Court's precedents. The All Writs Act and other authority make clear that class actions challenging agency action can include unnamed claimants who have begun, but not fully exhausted, an administrative process like VA's.

For both these reasons—along with those set forth in Skaar's petition—certiorari should be granted.

ARGUMENT

I. VETERAN CLASS APPEALS ARE CRUCIAL TO ENSURING VA ACCOUNTABILITY AND COMPLIANCE WITH THE LAW

A. The Veterans Court Has Clear Authority To Hear Class Appeals

The Federal Circuit has held—and VA agrees—that the Veterans Court, an Article I court established in 1988, can resolve class-wide issues on a class-wide basis. Its authority to do so is rooted in longstanding

doctrines that apply to all courts, Article I and III alike. That authority is broad, flexible, and can vastly improve the Veterans Court's ability to carry out its statutory duty of ensuring that VA lawfully adjudicates veterans' claims.

1. Until 1988, most VA decisions could "not be reviewed by . . . any court." 38 U.S.C. § 211(a)(1) (1988); *see Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 432 (2011); *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (noting the agency's long period of "splendid isolation" (citation omitted)). Even so, some court challenges to VA misconduct were permitted, many of which proceeded as class actions. *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361, 373 (1974) (class-wide constitutional challenge).

In 1988, the Veterans' Judicial Review Act (VJRA) ended VA's period of "splendid isolation" by "creat[ing] the Veterans Court" and "authoriz[ing] that court to review Board decisions adverse to veterans." *Henderson*, 562 U.S. at 432. The VJRA expanded judicial review of VA action by channeling challenges to VA adjudications to the Veterans Court and giving it "exclusive jurisdiction to review decisions of the" BVA. 38 U.S.C. § 7252(a).

Soon after its creation, the Veterans Court held, in a sparse decision, that it "lack[ed] the power to adopt a rule . . . for class actions" to manage such appeals because Section 7252(a) "limits [its] jurisdiction . . . to the review of [BVA] decisions." *Harrison v. Derwinski*, 1 Vet. App. 438, 438 (1991) (en banc) (per curiam), *overruled in part by Monk v. Shulkin*, 855 F.3d 1312, 1320 (Fed. Cir. 2017). As a result, neither the Veterans Court nor the Federal Circuit considered the scope of the Veterans Court's ability to hear class claims in the decades that followed.

2. Things changed in 2017, when the Federal Circuit's *Monk* decision rightly overruled *Harrison*. *See* 855 F.3d at 1320 (challenging massive delays in VA's resolution of BVA appeals). There, VA affirmatively "concede[d] that the Veterans Court has authority to certify a class." *Id.* at 1318. The Federal Circuit agreed.

The Federal Circuit first turned to the All Writs Act, which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *See id.* (quoting 28 U.S.C. § 1651(a)). It began by explaining that under the Act, "the authority of the Veterans Court 'is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.'" *Id.* (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943)). In other words, the Act "permits federal courts to fill gaps in their judicial power where those gaps would thwart the otherwise proper exercise of their jurisdiction." *Id.* And, the court recognized, other circuits have relied on the All Writs Act to authorize class actions even when Rule 23 did not so provide. *See id.* at 1318-19 (citing *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125-26 (2d Cir. 1974)). As a result, the Veterans Court could rely on the All Writs Act "to aggregate claims in aid of" its authority. *Id.* at 1319.

The Federal Circuit next recognized the extensive pre-VJRA history of veteran class actions, and held that nothing in the text of the VJRA suggested that "Congress intended [the Veterans Court's] review authority to not include class actions." *Id.*

Third and key here, the Federal Circuit directly confronted *Harrison*'s holding that Section 7252(a) "limits the jurisdiction of [the Veterans Court] to the review of [BVA] decisions." *Id.* at 1320. The Federal Circuit read this passage to "reflect[] a concern"—much like the one reflected in the decision below—"that the Veterans Court would exceed its jurisdiction if, for example, it certified a class that included veterans that had not yet received a Board decision." *Id.* But the Federal Circuit "disagree[d] that the Veterans Court's authority is so limited," holding that Section 7252(a) did not pose any barrier to the certification of veteran class actions. *See id.*

Finally, the Federal Circuit explained how class actions could advance the work of both the Veterans Court and those appearing before it. "Class actions can help the [court] . . . by promoting efficiency, consistency, and fairness, and improving access to legal and expert assistance by parties with limited resources." *Id.* They may also "help the [court] consistently adjudicate cases." *Id.* at 1321. And they can help "'reduc[e] the delays associated with individual appeals,'" allowing the court to "compel correction of systemic error and . . . ensure that like veterans are treated alike." *Id.* (citation omitted).

B. Class Actions Provide Important Tools For Enforcing Veterans' Rights

The Federal Circuit in *Monk* was right: Class actions are crucial to enforcing veterans' rights before VA. Without them, veterans and those advocating on their behalf will have to litigate even broadly applicable, system-wide issues one by one, against an agency with a long history of dysfunction and intransigence. And contrary to VA's arguments

throughout this case, and the panel's suggestion below, the Veterans Court's ability to issue "[p]recedential decisions" is "no substitute for the class mechanism." App. 5a (Dyk, J., dissenting).

1. For challenges to the administration of benefits programs like VA's, class actions provide access to justice for those who often lack the means to bring their own lawsuits, let alone to fully understand the complex web of "bureaucratic red tape" and "duplicative review" that pervades the VA system. 163 Cong. Rec. H4457, H4464-65 (May 23, 2017). Indeed, "[t]he class action was developed" for just this purpose: "to permit unsophisticated parties to band together to bring small claims when they otherwise lack counsel, resources, or certainty that the government will be able to adhere to a court order." Adam S. Zimmerman, *The Class Appeal*, 89 U. Chi. L. Rev. 1419, 1442 (2022).

The VA system is "slow, cumbersome, frustrating, and full of bureaucratic red tape." 163 Cong. Rec. at H4464. VA itself has acknowledged that "veterans, '[w]hen they appeal [a BVA decision]—whether they know it or not—will enter into a process that takes years, sometimes decades, to complete,'" requiring them to "'jump through hoops, absorb dozens of letters, fill out confusing paperwork, and learn to live with waiting.'" *Monk v. Wilkie*, 978 F.3d 1273, 1278 (Fed. Cir. 2020) (Reyna, J., writing separately) (alterations and citation omitted). In short, "the VA process is sprawling and Kafkaesque." Adam S. Zimmerman, *Exhausting Government Class Actions*, U. Chi. L. Rev. Online (Oct. 20, 2022), https://lawreviewblog.uchicago.edu/2022/10/20/zimmerman-exhausting-class-actions/.

Making matters worse, many servicemembers have little education, *see, e.g.*, *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1070 (N.D. Cal. 2008), *rev'd in part sub nom. Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012), and suffer from serious mental illnesses, *see* Matthew S. Brooks et al., *Long-Term Effects of Military Service on Mental Health Among Veterans of the Vietnam War Era*, 173 Military Medicine 570, 570 (2008); Michael E. Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 Neb. L. Rev. 388, 397 (2011).

Most veterans will also lack legal counsel to guide them through the VA morass. In 2021, less than a quarter of veterans appealing to the BVA had legal counsel. *See* Dep't of Veterans Affs. Bd. of Veterans Appeals, *Annual Report Fiscal Year (FY) 2021* at 39 (2021), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2021AR.pdf. Many remain uncounseled even before the Veterans Court. *See* U.S. Court of Appeals for Veterans Claims, *Fiscal Year 2021 Annual Report: October 1, 2020, to September 30, 2021* ("*2021 Report*") 1, http://www.uscourts.cavc.gov/documents/FY2021AnnualReport.pdf (last visited Mar. 28, 2023). Usually, that is simply "because they are unable to afford" legal support. Patricia E. Roberts, *From the "War on Poverty" to Pro Bono: Access to Justice Remains Elusive for Too Many, Including Our Veterans*, 34 B.C.J.L. & Soc. Just. 341, 349 (2014).

2. Class proceedings help veterans secure effective review and relief without imposing the burden on each individual claimant of navigating this complex process alone, or securing costly counsel to help do so. *See* 7 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 1:9 (6th ed. 2022

update, Westlaw). And importantly, they do so in ways that precedential decisions of the Veterans Court cannot.

To begin, BVA decisions are not binding in future cases. *See* 38 C.F.R. § 20.1303 ("Nonprecedential nature of Board decisions"). Even decisions of the Veterans Court have limited use outside an individual veteran's case. Vanishingly few are precedential, because the Veterans Court resolves most cases through single-judge summary orders, which purport to rest on "clear authority already known." *Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992); *see Monk*, 855 F.3d at 1321 n.6 (in 2018, 2% of Veterans Court decisions were precedential); *2021 Report* 3 (similar for 2020-2021). Such dispositions bind VA "in that case," but "carr[y] no precedential weight" and are "not binding in another case before a single judge or a panel," or in other VA cases. *Bethea*, 2 Vet. App. at 254. That means that future claimants cannot rely on these summary orders even for basic stare decisis purposes.

And even in the tiny fraction of cases in which the Veterans Court *does* issue a precedential decision, the Federal Circuit has recently suggested that such a decision "is not binding on . . . the government outside of that individual case except as a matter of stare decisis at the Veterans-Court level of review." *Wolfe v. McDonough*, 28 F.4th 1348, 1358 & n.6 (Fed. Cir. 2022). If that is right, then even in cases ostensibly controlled by a precedential decision, the only way for a veteran to make use of such a decision is to persuade adjudicators at a VA regional office (RO) or the BVA that the decision is sufficiently on point to govern the outcome of their case. If VA adjudicators misapply, misunderstand, or refuse to heed such decisions,

veterans must relitigate the issue again and again in subsequent appeals—unable to rely on any estoppel effects from the first case, or enforcement mechanisms like contempt. *See infra* at 13-15.

Depending on stare decisis seriously disadvantages unrepresented and unsophisticated claimants. *See* 2 Charles H. Koch, Jr., *Administrative Law and Practice* § 5:67[4] (3d ed. Feb. 2023 update, Westlaw). Even when the Veterans Court issues a precedential decision—which, again, is "rare," App. 5a-6a (Dyk, J., dissenting)—veterans applying to VA for benefits are unlikely to know of it, let alone be equipped to use it. To do so, a veteran first needs notice of the decision. She then needs to understand its relevance to her case and, in the first instance, persuade RO adjudicators of that relevance. If the RO disagrees, she has to pursue an appeal through the seven-years-long BVA appeals process—and then potentially up to the Veterans Court.

Class actions, on the other hand, allow class members to rely on class counsel to monitor VA compliance with class orders, ensure proper implementation of those rulings, and enforce class members' rights under them in subsequent proceedings. *See Monk*, 855 F.3d at 1320. Aggregate proceedings can also produce notice requirements and other programmatic relief that precedential decisions cannot.

For example, in one recent case the Veterans Court held that VA had wrongly told those caring for wounded combat veterans that VA's decisions denying their requests for financial assistance were immune from appellate review. *See Beaudette v. McDonough*, 34 Vet. App. 95, 99 (2021). In deciding that class relief would be superior to a precedential

decision, the court determined "that a precedential decision would not effectively inform past program claimants of their appellate rights or ensure that VA honored them." *Id.* at 107-08. Indeed, VA itself admitted that "were the Court to deny class certification," it could not "guarantee [it would] find *and* inform each past claimant" of their rights under a precedential decision. *Id.* (noting VA's "admirable candor" in making this concession).

3. Class actions also provide better enforcement tools than do precedential decisions. As noted, the Federal Circuit has suggested that the latter do not bind VA outside the subject case; if stare decisis is their only value, and if VA adjudicators buck, ignore, or misapply such a ruling, then the only option is yet another appeal. *See Wolfe*, 28 F.4th at 1358. Rulings in class actions, on the other hand, are directly enforceable for *all* unnamed veterans in a certified class, including through contempt proceedings. *See, e.g.*, *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113, 119 (N.D. Cal. 1987).

These enforcement tools are especially important in the VA context, where agency adjudicators—whether by dysfunction or intransigence—often fail to follow judicial decisions. As one judge of the Veterans Court has worried, even when "a precedential decision is issued by the Court, VA provides little transparency regarding how it is effecting" that decision, leaving the court often "to wonder whether its decisions are actually applied quickly, correctly, and uniformly." *Rosinski v. Shulkin*, 29 Vet. App. 183, 197 (2018) (Greenberg, J., dissenting). Seeming to confirm those concerns, the Veterans Court later found, in a case addressing VA's rules governing reimbursements for emergency care, that VA had

"essentially readopted a position we have authoritatively held inconsistent with Congress's command." *Wolfe v. Wilkie*, 32 Vet. App. 1, 12 (2019) (describing this as "startling"), *rev'd on other grounds sub nom. Wolfe v. McDonough*, 28 F.4th 1348 (Fed. Cir. 2022).

None of this is new. Indeed, VA has a long history of failing to implement relief even after courts (and Congress) have ordered it. Take the decades-long litigation over VA's treatment of veterans exposed to Agent Orange during the Vietnam War. In the 1980s, a certified class of Vietnam veterans successfully challenged a rule imposing an "erroneous standard for determining which diseases were associated with" Agent Orange. *Nehmer v. U.S. Dep't of Veterans Affs.*, 494 F.3d 846, 849 (9th Cir. 2007). Two years later, Congress passed a new law creating a presumption of service connection for certain ailments linked to that toxin. *See id.* at 851-52. VA and the class soon entered a consent decree providing for re-adjudication of claims covered by those judicial and legislative decrees. *See id.* at 852.

Yet VA, in a move that the Ninth Circuit characterized as having "contributed substantially to our sense of national shame," *id.* at 849, then turned around and refused to make good on that agreement, *see id.* at 854-55. Affirming the district court's order requiring VA to do so as "compelled by the clear language" of the relevant authorities, the Ninth Circuit lamented VA's conduct: "The answer to the legal question on this appeal is quite apparent." *Id.* at 863-64. "What is difficult for us to comprehend is why [VA], having . . . agreed to a consent order some 16 years ago, continues to resist its implementation so vigorously." *Id.* Even worse, the Ninth Circuit

could not understand why VA continued "to resist equally vigorously the payment of desperately needed benefits to Vietnam war veterans who fought for their country and suffered grievous injury as a result of our government's own conduct." *Id.* at 864-65.

Luckily, the *Nehmer* plaintiffs could use the tools facilitated by the class-action device—there, contempt proceedings and a "clarification and enforcement order" requiring VA to provide class-wide retroactive relief. *Id.* at 849, 852-55. For veterans litigating in the Veterans Court, however, the decision below will eliminate these crucial protections.

4. Finally, class actions can produce efficiencies that precedential decisions cannot. "[T]he class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every" class member "to be litigated in an economical fashion." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). Class actions may lead to the grant of program-wide relief, or they may allow courts to clear up their docket through the dismissal of repetitive claims en masse. *See, e.g.*, *Schweiker v. Wilson*, 450 U.S. 221, 236-39 (1981) (rejecting class-wide social-security claim). But in any event, they can save time, ensure uniformity, and preserve judicial resources—all especially crucial for the Veterans Court given its massive caseload. *See 2021 Report* 3 (in FY 2021, Veterans Court resolved 9,303 appeals); Zimmerman, *The Class Appeal*, *supra*, at 1449 n.145 (discussing comparable administrative docket across all thirteen federal courts of appeals).

5. The advantages detailed above are not just theoretical. They are reflected in the class actions the Veterans Court has certified since *Monk*, and the

salutary effects they have already had for thousands of our Nation's veterans.

In *Beaudette*, for example, the Veterans Court certified a class action challenging VA's conclusion that its denials of financial assistance to 20,000 people caring for badly injured combat veterans were immune from further review. *See* 34 Vet. App. at 99-101 (explaining that VA simply ignored requests for review of its initial denials). After certifying the class, the court held that VA had wrongly deprived claimants of their appeal rights and ordered class relief allowing claimants to appeal VA's denials. *See id.* at 99-100. Since then, the *Beaudette* parties submitted a plan providing for both class notice and Board review of the class's denied applications; the Veterans Court approved that plan; and VA has begun implementing it. *See* Order, *Beaudette*, 34 Vet. App. 95 (Aug. 19, 2021) (No. 20-4961). As noted above, the Veterans Court recognized that such relief would not have been possible—VA, at least, would not have provided it—without class treatment. *See Beaudette*, 34 Vet. App. at 107-08.

Similarly, in *Godsey v. Wilkie* the Veterans Court certified a class action challenging VA's unexplained average delay of roughly *three years* to complete the ministerial task of certifying and transferring appeals from ROs to the BVA. *See* 31 Vet. App. 207, 214 (2019). Within 120 days, VA reported that it had certified and transferred (or resolved) 2,106 of the 2,544 appeals at issue, and would soon address the rest. *See* Respondent's 120-Day Status Update, *Godsey*, 31 Vet. App. 207 (Oct. 9, 2019) (No. 17-4361). Without a class action, the court could only have granted relief to the few veterans able to petition for their own relief, and would have only allowed those

individuals to jump to the front of the line, leaving the rest to continue waiting.

Here, too, the Veterans Court exercised its class-action authority to provide rational, effective relief. As VA conceded below, the complex scientific questions in this case were common to the class. *See* App. 148a-49a. Rather than leave every Palomares veteran to litigate that question alone, often without counsel, the Veterans Court streamlined proceedings "through an orderly and consistent process amenable to judicial supervision, rather than through piecemeal litigation." *Id.* at 163a. Class counsel, not each veteran alone, could also have ensured VA's proper implementation of any decision on that question.

II. THE FEDERAL CIRCUIT'S ELIMINATION OF VETERAN CLASS APPEALS WAS CONTRARY TO LAW

As the discussion above makes clear, VA often engages in unlawful conduct affecting many veterans in similar ways. In those circumstances, the All Writs Act empowers the Veterans Court to aggregate claims seeking injunctive relief against VA. *See supra* at 7-8. The Federal Circuit's decision below effectively eliminates that authority in the appeal context, precluding the Veterans Court from resolving these common issues fairly and effectively. And its reason for doing so is legally unsupportable. Certiorari is warranted to reverse this erroneous curtailment of the Veterans Court's authority.

1. The Federal Circuit's decision below, as Judge Dyk noted, will "effectively eliminate class actions in the veterans context." App. 5a. *First*, it will preclude class *appeals* in all meaningful respects. Because VA takes an average of *seven years* to resolve an appeal,

see George v. McDonough, 142 S. Ct. 1953, 1968 (2022) (Gorsuch, J., dissenting), it is unlikely that it will decide enough contemporaneous appeals raising similar issues to support class certification at any given time. And even in the few cases where, against the odds, enough similar appeals emerge from VA to meet the numerosity threshold, class relief will only be available to the handful of veterans who happen to satisfy the Federal Circuit's strict jurisdictional test at the right time. So for practical purposes, the decision below means the end of class appeals.

Second, it is true, as Judge Dyk also noted, that the decision below, by its terms, applies only to class *appeals*, not class-wide mandamus *petitions*. *See* App. 5a n.1 ("The only exception would seem to be class actions for petitions for writs of mandamus, for example, challenging undue delay in processing claims . . . [like] in *Monk* itself."). But that remaining class avenue is of little use in most cases. Even where VA makes "clear and indisputable" errors affecting large classes of veterans, the Federal Circuit has strictly enforced the rule that mandamus is not available when "there is an adequate remedy by appeal." *Wolfe*, 28 F.4th at 1357. In *Wolfe*, for example, the court reversed the grant of mandamus relief to a class of hundreds of thousands of veterans on this basis, even though VA had clearly flouted a prior precedential decision of the Veterans Court in denying those veterans' requests for reimbursements of emergency medical care. *See id.* at 1357-60. So, too, in most important cases—including where VA adjudicators consistently misapply statutes or regulations, adopt positions at odds with Veterans Court precedent, or repeatedly make the same type of factual error—appeals will be the only option. And

when that is so, the decision below will preclude meaningful class relief in nearly all instances.

2. The Federal Circuit held that this result was required because, contrary to *Monk*, Section 7252(a) imposes a jurisdictional exhaustion requirement blocking the Veterans Court from certifying classes including veterans who have not yet obtained a Board decision. *See* App. 30a-36a. As Skaar explains, the premise of that decision—that Section 7252(a) is jurisdictional—is wrong. Pet. 14-17. But even if that holding were correct, the Federal Circuit's analysis is unsupportable for several other reasons. The Court should grant certiorari to make clear that the Veterans Court can certify classes that include not only veterans whose claims the BVA has already denied, but also those still waiting (and waiting) for a decision on their administrative claim.

First, and as the dissent below explained, the All Writs Act—which authorizes the Veterans Court to "issue all writs necessary or appropriate in aid of [its] . . . jurisdiction[] and agreeable to the usages and principles of law," 28 U.S.C. § 1651(a)—provides ample authority for the Veterans Court to certify classes including veterans with claims still pending before VA, *see* App. 6a-7a (Dyk, J., dissenting). *Monk* rightly held that the All Writs Act gives the Veterans Court authority to certify class actions in the first place. *See* 855 F.3d at 1318. And here, the Veterans Court's class-certification order complied with the plain text of the Act: The court had jurisdiction over Skaar's appeal, and certifying a class of veterans whose cases involved the same question as his, but had not yet reached the court, was "in aid of" that jurisdiction, "appropriate," and "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

The fact that some members of the class did not yet have a BVA decision does not preclude that result. As this Court has explained, the Act "is not confined to the issuance of writs in aid of a jurisdiction already acquired but extends to those cases which are within [a court's] appellate jurisdiction although no appeal has been perfected." *Roche*, 319 U.S. at 25; *see FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966) ("Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action." (citation omitted)). Here, that means that once a veteran files a claim with VA, the All Writs Act empowers the Veterans Court to include that veteran in a class action affecting her pending claim where it would "aid" the court's jurisdiction.

The courts of appeals have recognized that the All Writs Act authorizes such "prospective jurisdiction" in other cases. The Federal Circuit, for example, has held it can exercise All Writs Act jurisdiction over pending administrative matters whenever a party "has 'at least [taken] the first preliminary step that might lead to appellate jurisdiction in the future.'" *Mylan Laboratories Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1380 (Fed. Cir. 2021) (citation omitted), *cert. denied*, 142 S. Ct. 874 (2022). The D.C. Circuit has also explained that "[o]nce there has been a proceeding of *some* kind instituted before an agency . . . that might lead to an appeal, it makes sense to speak of the matter as being 'within [our] appellate jurisdiction,'" and therefore within the scope of the All Writs Act. *In re Tennant*, 359 F.3d 523, 529 (D.C. Cir. 2004) (Roberts, J.) (petitioner did not meet this "first preliminary step" rule because he did not even "initiate[] a proceeding with the" agency).

Here, class members with pending VA claims have clearly "taken the first preliminary step"—and, for those with pending *appeals*, many more steps—"that might lead to" the Veterans Court's later jurisdiction. As a result, the Veterans Court can exercise prospective jurisdiction, for purposes of class certification, over veterans with claims pending before VA. The panel did not even attempt to explain why this was impermissible here.

Second, the question should have been especially easy here because it is undisputed that the Veterans Court had jurisdiction over Skaar's individual claim: He *received* a final decision from the BVA. App. 17a-18a. The only question is whether the Veterans Court, once it has jurisdiction over the claim of a named appellant like Skaar, can certify a class including those who have not completed the review process. It can.

When courts have jurisdiction over the claims of a named plaintiff, they often certify classes including unnamed members whose claims might, outside a class action, present jurisdictional problems. Doing so is permissible because the representative nature of class actions means that "[n]onnamed class members . . . may be parties for some purposes and not for others." *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002). That is true even for subject-matter jurisdictional requirements. "[N]onnamed class members," for example, "cannot defeat complete diversity." *Id.* at 10. And for a "Rule 23(b)(2) class action advancing a uniform claim and seeking uniform injunctive and declaratory relief," only the named plaintiff needs to show Article III standing. *See, e.g.*, *J.D. v. Azar*, 925 F.3d 1291, 1324 (D.C. Cir. 2019). So at least in class actions (like all those in the Veterans Court) seeking

"uniform injunctive and declaratory relief," *id.*, jurisdiction over a named appellant's exhausted claim allows certification of a class of similarly situated claimants, even if they do not independently satisfy all jurisdictional exhaustion requirements.

Finally, the Federal Circuit wrongly concluded that this Court's precedents forbid including veterans with pending VA claims in a class. *See* App. 31a-32a (citing *Weinberger v. Salfi*, 422 U.S. 749, 753 (1975), and *Yamasaki*, 442 U.S. at 701). As Judge Dyk's dissent explained, the panel's reading of those cases "is clearly mistaken": Again, they require only that class members *initiate* agency proceedings—not that they obtain a final decision. 442 U.S. at 701-02; *see* App. 7a-8a (Dyk, J., dissenting); Pet. 21-24. The D.C. Circuit has reached a similar conclusion: Although, "[a]s to future claimants, the Supreme Court has sent mixed signals," *Yamasaki* "appeared to approve a class including persons who had not yet satisfied [a jurisdictional exhaustion requirement] but would ultimately do so." *Tataranowicz v. Sullivan*, 959 F.2d 268, 272 (D.C. Cir. 1992). Whether the panel's mistakes were "clear[]" or resulted from these "mixed signals," certiorari is warranted: Only this Court can clarify its own precedents, *see Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1652 (2018), and it should grant the petition to do so here.

* * *

Without class appeals, the Veterans Court will have to churn through appeals—even those raising identical issues best resolved together—one by one. That is a recipe for delay and inconsistent results, and it disserves servicemembers who have done so much to serve our country. This Court should review the

Federal Circuit's erroneous decision and confirm that the Veterans Court can certify classes including veterans with claims still pending before VA.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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