UIC School of Law
UIC Law Open Access Repository

Court Documents and Proposed Legislation

2023

Brief of Amicus Curiae the National Law School Veterans Clinic Consortium in Support of the Petitioner, Skaar v. McDonough Docket No. 22-815 (2023)

Yelena Duterte

Jenny Vanacker

Follow this and additional works at: https://repository.law.uic.edu/courtdocs

Part of the Law Commons

https://repository.law.uic.edu/courtdocs/106

This Brief is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in Court Documents and Proposed Legislation by an authorized administrator of UIC Law Open Access Repository. For more information, please contact law-reference@uic.edu.

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 Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

BRIEF OF AMICUS CURIAE THE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM IN SUPPORT OF THE PETITIONER

ANGELA K. DRAKE
Counsel of Record for Amicus Curiae
Director
THE VETERANS CLINIC
UNIVERSITY OF MISSOURI SCHOOL OF LAW
203 Hulston Hall
Columbia, Missouri 65211
(573) 882-7630
drakea@missouri.edu

YELENA DUTERTE
Assistant Professor
VETERANS LEGAL CLINIC
UNIVERSITY OF ILLINOIS CHICAGO SCHOOL OF LAW

JENNY VANACKER
Staff Attorney
VETERANS LEGAL CLINIC
UNIVERSITY OF ILLINOIS CHICAGO SCHOOL OF LAW

JUDY CLAUSEN
Professor and Supervising Attorney
VETERANS AND SERVICEMEMBERS LEGAL CLINIC
UNIVERSITY OF FLORIDA, LEVIN COLLEGE OF LAW

March 29, 2023

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. The question presented is worthy of review, given widespread, systemic problems within VA which are best addressed through class-wide injunctive relief 3

A. Class-wide injunctive relief is necessary to address current, widespread, and systemic problems within VA 5

B. The Federal Circuit's holding is antagonistic to long-standing congressional solicitude for veterans, who stand to benefit most from the class action device 14

II. The writ of certiorari should be granted in this case because there is an intra-circuit conflict and the Federal Circuit's decision cannot be reconciled with other class action cases involving veterans and public benefits 15

A. The denial of rehearing *en banc* illustrates an intra-circuit conflict which can only be remedied by the grant of certiorari 15

B. The Federal Circuit's decision cannot be reconciled with the historical use of class actions in vindicating veterans rights and in public benefits cases 19

TABLE OF CONTENTS—Continued

Page

1. Class actions involving veterans rights 20
   a. Class actions relating to compensation benefits prior to the VJRA 20
   b. Class actions relating to military separations 23
2. Class actions in public benefits cases do not require exhaustion of administrative remedies 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Cannon v. University of Chicago, 441 U.S. 677 (1979) 22

Davis v. Astrue, 250 F.R.D. 476 (N.D. Cal. 2008)..... 25, 26

Dixon v. Bowen, 673 F. Supp. 123 (S.D.N.Y. 1987) 25

Gerardo v. Quong Hop & Co., No. C 08-3953 JF (PVT), 2009 U.S. Dist. LEXIS 60900 (N.D. Cal. July 6, 2009) 14

Godsey v. Wilkie, 31 Vet. App. 207 (2019)..... 5, 6, 10, 13

Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008)......17, 18

Haas v. Peake, 544 F.3d 1306 (Fed. Cir. 2008)...........18

Haas v. Peake, 555 U.S. 1149, 129 S. Ct. 1002 (2009) 18

Henderson ex rel. Henderson v. Shinseki, 131 S. Ct. 1197 (2011) 14

Hodge v. West, 155 F.3d 1356 (Fed. Cir. 1998).............5

Jackson v. Foley, 156 F.R.D. 538 (E.D.N.Y. 1994).......14

Joseph v. United States, 135 S. Ct. 705 (2014)...........15

Kennedy v. Esper, 2018 WL 6727353 (D. Conn. 2018) 23, 24

Manker v. Spencer, 329 F.R.D. 110 (D. Conn. 2018) 23, 24

Martin v. O'Rourke, 891 F.3d 1338 (Fed. Cir. 2018) 6

TABLE OF AUTHORITIES—Continued

Page

Matal v. Tam, 137 S. Ct. 1744 (2017) 3

Metzinger v. Department of Veterans Affairs, 20 F.4th 778 (Fed. Cir. 2021)...16

Monk v. Shulkin, 855 F.3d 1312 (Fed. Cir. 2017).......13

Nat'l Ass'n of Radiation Survivors v. Walters, 111 F.R.D. 595 (N.D. Cal. 1986) 21, 22

Nehmer v. United States Veterans' Admin., 118 F.R.D. 113 (N.D. Cal. 1987) 20, 21

Nehmer v. Veterans' Admin. of Gov't of the United States, 284 F.3d 1158 (9th Cir. 2002) 21

Nehmer v. United States Dep't of Veteran Affairs, No. C 86-06160 WHA, 2020 U.S. Dist. LEXIS 207458 (N.D. Cal. Nov. 5, 2020) 21

Nehmer v. United States Dep't of Veterans Affairs, No. C 86-06160 WHA, 2021 U.S. Dist. LEXIS 218075 (N.D. Cal. Nov. 10, 2021) 21

Procopio v. Wilkie, 913 F.3d 1371 (Fed. Cir. 2019) 18

Sherman v. Griepentrog, 775 F. Supp. 1383 (D. Nev. 1991)..14

Shinseki v. Sanders, 129 S. Ct. 1696 (2009) 14

Small v. Sullivan, 820 F. Supp. 1098 (S.D. Ill. 1992)..25

Tataranowicz v. Sullivan, 959 F.2d 268 (D.C. Cir. 1992)...24, 25

United States v. McDonald, 78 M.J. 376 (C.A.A.F. 2019)..22

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND RULES

5 U.S.C. § 553(e) 20, 22

38 U.S.C. § 1116 17

38 U.S.C. § 7292(c) 15

Fed. R. Civ. P. 23 6

Fed. R. Civ. P. 23(a) 7

Fed. R. Civ. P. 23(b)(2) 6

Vet. App. R. 23 4

Vet. App. R. 23(a)(5) 5, 6

OTHER AUTHORITIES

Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1775 (3d ed. 1998) 6

Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 Nw. U. L. Rev. 1619 (2007) 19

Daniel Kazhdan, *The Federal Circuit Should Be More Tolerant of Intra-Circuit Splits*, 26 Fed. Cir. B.J. 105 (2016) 16

H.R. Rep. No. 100-963, pt. 1 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782 18

Judicial Review Legislation: Hearing on S. 11 and S. 2292 Before the Committee on Veterans' Affairs, 100th Cong. (1988) 22

TABLE OF AUTHORITIES—Continued

Page

Office of Inspector General: Vision, Department of Veterans Affairs, Office of Inspector General, https://www.va.gov/oig/pubs/VA-OIG-Mission-Vision-Values.pdf 8

U.S. Gov't Accountability Off., GAO-21-105305, VA DISABILITY BENEFITS: Actions Needed to Better Manage Appeals Workload Risks, Performance, and Information Technology (2021), https://www.gao.gov/assets/gao-21-105305.pdf 7

U.S. Gov't Accountability Off., GAO-22-104488, VA DISABILITY BENEFITS: Compensation Program Could Be Strengthened by Consistently Following Leading Reform Practices (2022), https://www.gao.gov/assets/gao-22-104488.pdf...7

VA OIG, *Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma*, Rep. No. 17-05248-241 (Aug. 21, 2018), https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf.........8

VA OIG, *Improvements Still Needed in Processing Military Sexual Trauma Claims*, Rep. No. 20-00041-163 (Aug. 5, 2021), https://www.va.gov/oig/pubs/VAOIG-20-00041-163.pdf.................8, 9, 10

VA OIG, *Systemic Technical Accuracy Review Program Has Not Adequately Identified and Corrected Claims-Processing Deficiencies*, Rep. No. 19-07059-169 (July 22, 2020), https://www.va.gov/oig/pubs/VAOIG-19-07059-169.pdf...11, 13

TABLE OF AUTHORITIES—Continued

Page

VA OIG, *The Office of Field Operations Did Not Adequately Oversee Quality Assurance Program Findings*, Rep. No. 20-00049-122 (May 18, 2021), https://www.va.gov/oig/pubs/VAOIG-20-00049-122.pdf..11

VA OIG, *VA Prematurely Denied Compensation for Conditions That Could Be Associated with Burn Pit Exposure*, Rep. No. 21-02704-135 (July 21, 2022), https://www.va.gov/oig/pubs/VAOIG-21-02704-135.pdf..................................12, 13

VA OIG, *VBA Could Improve the Accuracy and Completeness of Medical Opinion Requests for Veterans' Disability Benefits Claims*, Rep. No. 22-00404-207 (Sept. 7, 2022), https://www.va.gov/oig/pubs/VAOIG-22-00404-207.pdf 12, 13

VETERANS' JUDICIAL REVIEW ACT, 1988 Enacted S. 11, 100 Enacted S. 11, 102 Stat. 4105 22

INTEREST OF AMICUS CURIAE[1]

The National Law School Veterans Clinic Consortium (NLSVCC) submits this brief in support of the Petitioner. The Board of the NLSVCC, a 501(c)(3) organization, authorized the filing.

NLSVCC is a collaborative effort of the nation's law school legal clinics and pro bono service providers dedicated to addressing the legal needs of veterans. NLSVCC's mission is to gain support and advance common interests with the Department of Veterans Affairs, U.S. Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans.

NLSVCC exists to promote the fair treatment of veterans under the law. Members of the NLSVCC work daily with veterans, advancing benefits claims through the arduous VA appeals process. NLSVCC is keenly interested in the important procedural issue in this case in light of the need for systemic change in a delay filled and error laden system.

SUMMARY OF THE ARGUMENT

The Federal Circuit's decision making class inclusion contingent on veterans' exhaustion of

[1] The parties were provided timely notice of the intent to file this brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

administrative remedies fails to provide veterans with much-needed injunctive relief.

Class-wide injunctive relief would resolve widespread, systemic problems within the Department of Veterans Affairs ("VA"). Both the VA Office of Inspector General ("OIG") and the Government Accountability Office ("GAO") routinely identify systemic deficiencies in VA processes, yet VA fails to implement their recommendations. Judicial oversight is imperative.

By limiting the members of the class to only those who have received Board decisions, relief is limited only to those who have the means, access, and time to perfect an appeal. The veterans in the *Skaar* class served in the 1960s and were exposed to radiation which is related to many terminal illnesses. Because of their age and disabilities, the Palomares Veterans may not have the time and ability to challenge VA's flawed dosage methodology in a lengthy appeals process. Injunctive relief is necessary for this class of veterans.

The intra-circuit split, denying *en banc* review, can only be remedied by a grant of certiorari. The Federal Circuit is the only circuit that reviews Court of Appeals for Veterans Claims ("Veterans Court") opinions. If the Federal Circuit decision remains as is, the practical reality is that it may be decades, if ever, until another case is either reviewed *en banc* by the Federal Circuit or by this court. Veterans need a remedy now to ensure that injunctive relief is available to veterans impacted by VA's systemic problems.

In the past, class definitions have included individuals who have yet to exhaust administrative proceedings against VA and other federal agencies. Before the Veterans Judicial Review Act ("VJRA"), courts certified class actions to ensure VA properly researched and adjudicated claims associated with Agent Orange exposure in Vietnam, including veterans who had yet to file claims. More recently, courts have certified classes in other public benefits contexts and future claimants, who had not exhausted administrative processes, were included as members of the class for purposes of injunctive relief.

We respectfully request that the Court grant certiorari.

ARGUMENT

I. The question presented is worthy of review, given widespread, systemic problems within VA which are best addressed through class-wide injunctive relief.

This court has granted certiorari in cases arising from the Federal Circuit, even without an inter-circuit conflict, because of the importance of the question presented. *See*, *e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1754–55 (2017). Often, Federal Circuit decisions present issues of "special importance" that warrant review by this Court. *Supreme Court Practice* § 4.21. This is especially true here where the health and welfare of our nation's veterans is at stake.

Unless this Court intervenes, certifying any class in the Veterans Court in the future will be especially difficult because the vast majority of potential class members have not filed appeals with the Board and, as a result, do not have a Board decision. Class certification requires a class to be "so numerous that joinder of all members is impracticable." Vet. App. R. 23. But this numerosity requirement is difficult to establish when so many of the potential class members lack the resources to even effectuate a Board appeal in the first instance.

Veterans are often unaware their disabilities are traceable to toxic exposures in military service, like the radiation exposure suffered by the Palomares Veterans. Further, even if they are aware, most veterans are ill-equipped to present specialized scientific evidence to the Board demonstrating entitlement to benefits. Mr. Skaar is 86 years old and suffers from leukopenia; his fellow veterans are similarly elderly and sick. Petitioner's counsel included motivated counsel from a top-tier law school, able to find and navigate complex reports relating to radiation exposure. *See*, *e.g.*, Appellant's Br. 12 (Apr. 6, 2018) (discussing various radiation reports). Without these resources, individual Palomares Veterans would be at a loss to challenge the flawed radiation dose methodology. Importantly, VA's methodology relating to dosage estimates is a systemic issue in the adjudication of the Palomeres Veterans' claims—applicable to each veteran like Mr. Skaar. It is an issue uniquely suited to injunctive relief as applied

to the class of Palomares Veterans as a whole. *See* Vet. App. R. 23(a)(5).

A. Class-wide injunctive relief is necessary to address current, widespread, and systemic problems within VA.

When considering the widespread and systemic errors, delays, and limitations within VA, the conclusion that class-wide, injunctive relief is especially important for veterans is inescapable. In creating the Veterans Court, Congress explicitly "intended to preserve the pro-claimant system" while providing enhanced judicial review and affording veterans additional options for review of unsatisfactory VA decisions. *See Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998). It is unlikely that, in doing so, Congress simultaneously intended to strip veterans of the ability to use the class action as a procedural device. Neither pro-veteran considerations embedded in the jurisprudence of the Veterans Court, nor judicial considerations of efficiency, accuracy, and justice, are served by severely limiting the Veterans Court's ability to aggregate claims and provide class-wide, injunctive relief.

Class-wide injunctive relief has served veterans well when it comes to systemic issues. For example, in *Godsey v. Wilkie*, the Veterans Court certified a class of veterans who waited over three years for VA to perform a simple, ministerial act: the "certification" of their appeal to the Board. 31 Vet. App. 207, 214–15 (2019). The certification at issue in *Godsey* involved "checking that

the file is correct and completing a two-page form which could take no more than a few minutes to fill out." *Martin v. O'Rourke*, 891 F.3d 1338, 1349–50 (Fed. Cir. 2018) (Moore, J., concurring). Veteran Godsey petitioned the Veterans Court for injunctive relief compelling the Secretary to certify and transfer cases on a timely basis. *Godsey*, 31 Vet. App. at 214–15. The *Godsey* court held that VA delays in the appeals certification process are "per se unreasonable" and ordered VA to conduct pre-certification review and certify, where appropriate, the pending appeals of all class members within 120 days. *Id.* at 228, 231. *Godsey* is an excellent example of the necessity and feasibility of resolving systemic issues through injunctive relief on a class-wide basis.

While it is ultimately VA's duty to bear the burden of correcting its errors and expediting delays where its actions harm veterans, judicial intervention provides the necessary hammer to create the change. The Veterans Court class action rule, Vet. App. R. 23, is akin to Fed. R. Civ. P. 23 and specifically includes reference to injunctive relief. Vet. App. R. 23(a)(5). Indeed, Fed. R. Civ. P. 23(b)(2) is the procedural tool that provides class-wide, injunctive relief where an agency's systemic failures have caused harm "generally applicable to the class." Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1775 (3d ed. 1998). Specifically with regard to Palomares Veterans, VA's long-term miscalculation of radiation exposure exemplifies the importance of the Veterans Court's ability to

employ its procedural toolbox, including its Rule 23(a), in furtherance of justice.

The levels at which VA-error is reported, the excruciating lengths at which VA delays justice, and VA's failure to course-correct upon government recommendations conclusively establish that injunctive relief on an aggregate basis is necessary for our nation's veterans. Prior to 2018, veterans, like Mr. Skaar, who appealed decisions for benefits often experienced long waits for resolution of their appeals—up to seven years on average.[2] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-105305, VA DISABILITY BENEFITS: ACTIONS NEEDED TO BETTER MANAGE APPEALS WORKLOAD RISKS, PERFORMANCE, AND INFORMATION TECHNOLOGY 1 (2021), https://www.gao.gov/assets/gao-21-105305.pdf. Even prior to this lengthy appeal process, having a claim decided in the first place can take time. GAO recently reported the claims backlog has more than doubled during COVID. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104488, VA DISABILITY BENEFITS: COMPENSATION PROGRAM COULD BE STRENGTHENED BY CONSISTENTLY FOLLOWING LEADING REFORM PRACTICES 2 n.6. (2022), https://www.gao.gov/assets/gao-22-104488.pdf (reporting 71,500 backlogged claims prior to February 2020, and an increase to 182,000 backlogged claims in June 2022).

---

[2] The 2012 denial of Mr. Skaar's original claim and adverse Board decision in 2017 reflect this agonizing delay as reported by GAO. *See* Appellant's Br. 1–3 (Apr. 6, 2018).

VA's operations are monitored by its OIG. OIG performs audits, investigations, and reviews of VA, and reports on the improvements necessitated by its findings. *Office of Inspector General: Vision*, Department of Veterans Affairs, Office of Inspector General, https://www.va.gov/oig/pubs/VA-OIG-Mission-Vision-Values.pdf. However, OIG lacks the enforcement power necessary to effectuate the changes it recommends.

OIG's reporting on VA's management of Military Sexual Trauma (MST) Claims demonstrates its limited ability to effectuate change and highlights the need for injunctive relief. In 2018, OIG initially reported that VA was processing MST claims at an alarming 49% error rate. VA OIG, *Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma*, Rep. No. 17-05248-241, page ii (Aug. 21, 2018), https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf. OIG made six discrete recommendations to VA, and in turn, VA created six action plans. *Id.* at 14–15. These recommendations included mass review of denials, re-focusing the processing of claims into specialized groups, requiring second-level accuracy review, conducting special-focused quality improvement reviews, updating and monitoring training, and revamping claims development checklists to ensure accordance with applicable regulations. *Id.* at 14.

Three years later, OIG followed up. VA OIG, *Improvements Still Needed in Processing Military Sexual Trauma Claims*, Rep. No. 20-00041-163 (Aug. 5, 2021), https://www.va.gov/oig/pubs/VAOIG-20-00041-163.pdf. The results were again alarming. OIG found VA failed

to rectify the problems based on the actions plans; *all six* of its recommendations were either unimplemented or implemented in a flawed manner. *Id.* at 17–18.

The unimplemented recommendations included straightforward requests, such as reviewing denied MST claims and taking appropriate corrective action where needed, or simply conducting quality improvement reviews. *Id.* These recommendations were simply not done. *Id.* As a result, OIG integrated these same recommendations into its 2021 report. *Id.*

As to those recommendations which OIG originally marked as implemented, OIG later found significant procedural flaws in VA's implementation. *Id.* For example, VA accepted the recommendation that MST claims would be the subject of "focus processing" by specially trained raters, but after OIG "closed" the recommendation, OIG found nondesignated claim processors worked these claims. *Id.* at 17. Similarly, VA agreed with the recommendation that additional reviews of denied MST claims would be conducted, but after OIG closed this recommendation, OIG found that "many claims subject to second reviews did not receive them." *Id.* Finally, while VA agreed to update the development checklist of MST claims with specific steps for adjudicators, OIG later found the checklists and worksheets were not consistently completed. *Id.* at 18.

The sad result of VA's noncompliance with the recommendations in OIG reports is not surprising: the

error rate in processing MST claims *increased* from 49% to 57%. *Id.* at ii.

In a July 2022 letter to the House of Representatives Committee on Veterans' Affairs, GAO reported on these pervasive deficiencies. *See* GAO-22-104488, *supra*. Noting that VA's workloads have remained on GAO's "High-Risk List" for almost twenty years, the study determined that VA still had "not adequately responded to longstanding management challenges" in the processing of MST claims previously identified by the OIG. *Id.* at 1, 30–36.

Again, neither OIG nor GAO have enforcement powers. VA's failure to self-correct leaves a gaping hole which must be filled by class-wide injunctive relief, as the Veterans Court properly provided in *Godsey*. 31 Vet. App. at 231. In the MST context, a court order directing VA to timely comply with discrete recommendations identified by OIG would advance the adjudicative process for veterans victimized by MST. As reflected in the OIG auditing of MST cases specifically, more is needed to protect the rights of veterans when VA's adjudication processes are marred by systemic problems like failures in training, quality reviews, and the completion of checklists.

MST claims are not the only cases which fare poorly in the VA system. Other OIG reports highlight systemic problems which would benefit from injunctive relief if recommendations are ignored in the same manner as with the MST recommendations above. A few recent OIG reports are discussed below,

illustrating the scope of the problems which would benefit from injunctive relief where VA fails to self-correct.

In 2020, OIG reported that VA's Systemic Technical Accuracy Review program (STAR) had not adequately identified and corrected claims-processing deficiencies. VA OIG, *Systemic Technical Accuracy Review Program Has Not Adequately Identified and Corrected Claims-Processing Deficiencies*, Rep. No. 19-07059-169 (July 22, 2020), https://www.va.gov/oig/pubs/VAOIG-19-07059-169.pdf. OIG found that an estimated *82% of claims requiring corrective action were not corrected properly*. *Id.* at ii–iii. This report was one in a series of five OIG reports regarding VA's quality assurance program. *Id.* at i. All five reports culminated in a 2021 summary report premised on "*systemic issues affecting VA's quality assurance program for disability compensation benefits.*" VA OIG, *The Office of Field Operations Did Not Adequately Oversee Quality Assurance Program Findings*, Rep. No. 20-00049-122, page ii–iii (May 18, 2021), https://www.va.gov/oig/pubs/VAOIG-20-00049-122.pdf. One of the issues identified in this report is that "STAR staff did not have nationally mandated claims-related training." *Id.* at ii. A court order directing VA to require analysts and reviewers to complete minimum training provides necessary course correction. Such an order is the proper use of the class action rule and would benefit veterans who count on VA to provide accurate and timely benefits.

Other OIG reports tie VA error rates to similar *systemic limitations*, including minimal processing

guidance, failure to follow established procedures, and lack of specific controls to ensure accuracy. Specifically, in 2022, OIG reported that an estimated 68% of medical opinion requests processed by VA did not follow established procedures. VA OIG, *VBA Could Improve the Accuracy and Completeness of Medical Opinion Requests for Veterans' Disability Benefits Claims*, Rep. No. 22-00404-207, page i–ii (Sept. 7, 2022), https://www.va.gov/oig/pubs/VAOIG-22-00404-207.pdf. One of the deficiencies identified in this report is that the "electronic systemics that claims processors use to submit medical opinion requests do not have adequate controls to help ensure the request's validity, completeness, and accuracy before submission." *Id*. at iii. This issue was coupled with failure in mandatory training and monitoring. *Id*. VA's senior advisor concurred with the recommendations and provided responsive action plans. *Id.* at iv. If VA does not implement improvements in these areas, as it failed in the MST context, an injunction ordering corrective behavior is proper.

Claims related to burn pit exposure, like claims involving MST, are adjudicated at an abysmal rate. In 2022, OIG reported dramatically high error rates for these claims. VA OIG, *VA Prematurely Denied Compensation for Conditions That Could Be Associated with Burn Pit Exposure*, Rep. No. 21-02704-135 (July 21, 2022), https://www.va.gov/oig/pubs/VAOIG-21-02704-135.pdf. This report estimated VA *incorrectly processed 87% of denied conditions claimed as burn pit-related. OIG found that 97% of denied conditions which, though not claimed as burn pit-related, should*

have been noted as burn pit related. *Id.* at ii–iii (recommending that VA review the cases of all veterans who were denied compensation for burn pit-related conditions within the past year and correct all identified errors). These high-error rates resulted from lack of guidance and training. *Id.* at ii–iii. Again, guidance and training are systemic issues, suitable for injunctive relief.

The sampling of reports mentioned above highlight the need for class-wide injunctive relief. The reports rest upon systemic problems, noting that "[t]hese shortcomings undermine VA's ability to ensure timely and accurate disability claims decisions for veterans." VA OIG Rep. No. 19-07059-169, *supra*, at iii. They assert that "these issues occu[r] because of [VA] systemic limitations." VA OIG Rep. No. 22-00404-207, *supra*, at 8.

Under the All Writs Act, the Veterans Court has authority to certify class actions and maintain aggregate resolution procedures. *See Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017). It has done so successfully as demonstrated in *Godsey*. 31 Vet. App. at 225. It needs to do so in the future as demonstrated by the reports highlighted above. Where the class of claimants is narrowed as the Federal Circuit did in *Skaar*, the substantial benefits of an important judicial tool are destroyed.

B. The Federal Circuit's holding is antagonistic to long-standing congressional solicitude for veterans, who stand to benefit most from the class action device.

The Federal Circuit's holding contravenes Congressional intent to tip the scales in veterans' favor. In the VJRA, Congress for the first time authorized judicial review of "the adjudication of veterans' benefits claims," and it did so in a way that is "decidedly favorable to veterans." *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2011). The *Skaar* exhaustion requirement flies in the face of Congress's desire to "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Id.* at 1205 (quoting *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009) (Souter, J., dissenting)).

This solicitude is especially important in cases like this where elderly-and-cancer-impacted veterans seek to claim their benefit. Courts find class certification proper in these circumstances. *See*, *e.g.*, *Jackson v. Foley*, 156 F.R.D. 538, 541–42 (E.D.N.Y. 1994) (class certification appropriate where class members came from low-income households, greatly decreasing their ability to bring individual lawsuits); *Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D. Nev. 1991) (joinder impracticable because the proposed class consisted of poor, elderly, and disabled plaintiffs who could not bring individual lawsuits without hardship); *Gerardo v. Quong Hop & Co*., No. C 08-3953 JF (PVT), 2009 U.S. Dist. LEXIS 60900, at *6 (N.D. Cal. July 6, 2009)

(certifying class where "potential class members are not legally sophisticated," making it difficult for them to bring individual claims).

II. The writ of certiorari should be granted in this case because there is an intra-circuit conflict and the Federal Circuit's decision cannot be reconciled with other class action cases involving veterans and public benefits.

This Court should grant the writ of certiorari to remedy an intra-circuit split. Further, absent relief from this court, many veterans are unable to benefit from a procedural tool—class-wide injunctive relief—available to other litigants.

A. The denial of rehearing *en banc* illustrates an intra-circuit conflict which can only be remedied by the grant of certiorari.

The Federal Circuit denied Mr. Skaar's request for rehearing *en banc* by a polarized 7-5 vote, demonstrating a pronounced intra-circuit split. This Court typically allows courts of appeals to resolve internal divisions "because their doing so may eliminate any conflict with other courts of appeals." *Joseph v. United States*, 135 S. Ct. 705, 707 (2014) (cert. denied). Here, however, because the Federal Circuit is the *only* circuit with the authority to hear statutory VA claims, *see* 38 U.S.C. § 7292(c), there is no chance of competing circuit

court judgments. This Court's review is particularly important here, where the Federal Circuit's veterans benefits jurisprudence is insulated from the scrutiny of other federal courts of appeals and also contains a robust intra-circuit division. The Federal Circuit's internal disagreement is tantamount to a classic inter-circuit conflict and supports the grant of the writ of certiorari.

Given the Federal Circuit's *exclusive* jurisdiction over appeals from the Veterans Court, further percolation of this issue in the judicial branch is unlikely. Federal Circuit panels are bound by prior panel decisions unless and until overturned *en banc*. *Metzinger v. Department of Veterans Affairs*, 20 F.4th 778, 781 (Fed. Cir. 2021). Practically speaking, if the Federal Circuit's *Skaar* panel decision remains, it is highly unlikely that a future Federal Circuit panel will uphold a certification of a class of veterans that includes claimants who lack a Board of Veterans' Appeals decision. In light of this reality, the Veterans Court will never certify such a class in the first place. Thus, absent this Court's grant of the writ of certiorari, "the first panel to encounter a new legal issue is likely to settle the question for good"—to the disadvantage of veterans here. *See* Daniel Kazhdan, *The Federal Circuit Should Be More Tolerant of Intra-Circuit Splits*, 26 Fed. Cir. B.J. 105, 106 (2016) (the "Federal Circuit's jurisprudence is too easily calcified . . . " and the prior-panel rule is "particularly problematic at the Federal Circuit given its exclusive jurisdiction."). This reality is especially harsh

given that the Federal Circuit hears very few cases *en banc*.[3]

Acknowledging this fact, veterans and their attorneys are unlikely to spend years slogging through the system in an effort to challenge systemic problems, particularly when class certification is merely a preliminary battle in the larger war. When it comes to correcting systemic problems like the dosage estimate at issue here, veterans and their attorneys are understandably reluctant to spend resources urging courts to overturn precedents, given courts' disinclination to entertain such arguments when presented. It seems apparent that even if a similar class certification issue were to reach the Federal Circuit again, the circuit is unlikely to revisit its holding in *Skaar* via *en banc* review when it has refused to do so now.

There is a remote possibility the Federal Circuit could conceivably reverse its decision later and on its own accord, but this possibility is not quick, easy, or likely within the lifetime of aging Palomares Veterans. The plight of Blue Water Navy Vietnam Veterans is a good example of this reality.

In 2008, the Federal Circuit decided the phrase "served in the Republic of Vietnam" contained in 38 U.S.C. § 1116 was ambiguous and placed its judicial imprimatur on VA's interpretation of the phrase. *Haas v.*

---

[3] For the five calendar years from 2018-2022, the Federal Circuit heard just eleven cases *en banc*, averaging 2.2 per year. Federal Circuit Blog, https:fedcircuitblog.com/en-banc/ (last visited March 16, 2023).

Peake, 525 F.3d 1168, 1172 (Fed. Cir. 2008). It held that the Agent Orange Act applied only to veterans who had served on the landmass or inland waters of Vietnam. *Id.* at 1197. Veteran Haas, who served in the "Blue Water" as a Navy Veteran, requested *en banc* review in the Federal Circuit. *Haas v. Peake*, 544 F.3d 1306 (Fed. Cir. 2008). Rehearing was denied. *Id.* at 1310. Thereafter, he petitioned this Court for certiorari. *Haas v. Peake*, 555 U.S. 1149, 129 S. Ct. 1002 (2009). The writ of certiorari was denied. *Id.*

Over a decade later, sitting *en banc*, the Federal Circuit overturned *Haas*, finding that the phrase "served in the Republic of Vietnam" was unambiguous and included the blue water within twelve miles of the country of Vietnam. *Procopio v. Wilkie*, 913 F.3d 1371, 1375, 1380–81 (Fed. Cir. 2019). This correct result came five decades after the Vietnam War and after VA denied countless claims. For decades, Blue Water Navy Veterans did not receive appropriate healthcare and compensation from the agency charged with their care. The *Haas* Federal Circuit's refusal to hear the matter *en banc*, coupled with this Court's denial of a writ, prolonged the wayward journey of Blue Water Veterans.

Palomares Veterans should not suffer the same fate. Absent a grant of the writ, VA will once again enjoy its "splendid isolation," insulated from judicial review as it was before the establishment of the Veterans Court in 1988 through the VJRA. H.R. Rep. No. 100-963, pt. 1 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5791.

For those seeking fairness and justice, like the Palomares Veterans here, the stakes are high in courts of exclusive jurisdiction.

> "[I]f the appellate decisionmaker is centralized into a single institution, society has a great interest in making sure that the decisionmaker 'gets it right.' Yet that single decisionmaker is at a disadvantage because even wrong decisions may not be challenged. Placing such a considerable degree of trust in one court has risks. . . ."

Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 Nw. U. L. Rev. 1619, 1633 (2007). Despite the Federal Circuit's deep division over *en banc* review, the panel's flawed decision remains unchallenged absent this Court's grant of the writ of certiorari. Review in this Court is the only effective recourse for Palomares Veterans.

B. The Federal Circuit's decision cannot be reconciled with the historical use of class actions in vindicating veterans rights and in public benefits cases.

Class actions protect rights where the defendant's conduct is generally applicable to the class as a whole, as VA's dosage methodology is here. The procedural device has been used successfully in the past as discussed below and included members in the class who had not exhausted administrative procedures. In short, the restrictive approach used by the Federal Circuit is

contrary to other class actions involving veterans and public benefits.

1. Class actions involving veterans rights

Class actions have been effectively used in veterans benefits compensation cases, as well as in challenges to military separations.

a. Class actions relating to compensation benefits prior to the VJRA.

Before the VJRA, veterans had the right to file class actions against VA in district court through the Administrative Procedure Act (APA). *See* 5 U.S.C. § 553(e). *Nehmer v. United States Veterans' Admin.* is a notable case in this regard. 118 F.R.D. 113 (N.D. Cal. 1987). In *Nehmer*, Vietnam veterans and survivors sought class certification challenging a VA regulation relating to Agent Orange. *Id.* at 115. The proposed class included not only those who had filed claims, but also those who were eligible to apply to VA for claims. *Id*. at 116. Rejecting the defendant's argument that the proposed class lacked commonality, the court found that the class members all "share a threat of future harm." *Id*. at 117. Veterans were *not* required to have filed a claim before the VA to be part of the class. *Id*. The court understood that some of the class members *had not yet filed* for benefits because their condition had yet to be diagnosed but future harm to those veterans was imminent, nonetheless. *Id*.

Over the last thirty-five years, class members have come back to the *Nehmer* court to enforce the consent decree to ensure VA is following the court order. *Nehmer v. Veterans' Admin. of Gov't of the United States*, 284 F.3d 1158 (9th Cir. 2002); *Nehmer v. United States Dep't of Veteran Affairs*, No. C 86-06160 WHA, 2020 U.S. Dist. LEXIS 207458 (N.D. Cal. Nov. 5, 2020); *Nehmer v. United States Dep't of Veterans Affairs*, No. C 86-06160 WHA, 2021 U.S. Dist. LEXIS 218075 (N.D. Cal. Nov. 10, 2021). As demonstrated by the successful *Nehmer* case, future claimants must continue to be recognized as class members to ensure VA complies with court precedent, through class action enforcement mechanisms. Future claimants obviously do not have adverse Board decisions as required by the *Skaar* panel decision. Ironically, veterans have less rights after the passage of the VJRA, than they did pre-VJRA when cases like *Nehmer* existed and continue beneficial effects to this day.

Similarly, in 1986 and pre-VJRA, a federal court certified a class relating to nuclear radiation. *Nat'l Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595 (N.D. Cal. 1986). The class included veterans and widows. *Id.* at 598–600. The outer limits of the class included 233,000 individuals whose lives were impacted by exposure to nuclear radiation from atomic bomb tests. *Id.* at 598. The suit challenged the constitutionality of a statutory fee limitation for attorneys representing claimants pursuing ionizing radiation claims. *Id*. at 597. The court explained that the rule requiring plaintiffs seeking class certification to establish

questions common to the class did not require all members to be identically situated; they must only identify common issues. *Id*. at 600–01. The court certified the class for all past, present, and *future* radiation claimants who have, or *will have*, some form of "active" claim relating to VA death and disability benefits. *Id*. at 598.

In passing the VJRA, Congress explicitly used the APA as a framework, citing § 553(e). *VETERANS' JUDICIAL REVIEW ACT*, 1988 Enacted S. 11, 100 Enacted S. 11, 102 Stat. 4105, 4106. Congress envisioned that the Veterans Court would have the same jurisdiction as a district court reviewing regulations in appeals from the Board, outside the direct petitions to the Federal Circuit. *Id*. In his testimony before the Senate Committee on Veterans' Affairs, VA's General Counsel explained that VJRA would statutorily subject the agency to the APA. *Judicial Review Legislation: Hearing on S. 11 and S. 2292 Before the Committee on Veterans' Affairs*, 100th Cong. (1988). Throughout the VJRA congressional hearings, veterans advocates and VA discussed class actions ongoing at the time and challenged regulations. *Id*. To be sure, when passing the VJRA, Congress understood the widely publicized *Nehmer* class action and took no action to expressly exclude class actions from the Veterans Court's jurisdiction. *See United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019) (citing *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) ("Thus, we must 'take into account contemporary legal context' at the time the statute was passed.")).

This Court should consider the history of class actions against VA, and the adoption of the APA in the VJRA, as evidencing Congressional intent that class action relief be provided in the Veterans Court.

b. Class actions relating to military separations

Outside of the veterans benefits context, class actions have also been important in vindicating veterans rights where systemic problems occur in the military separation process. In *Manker v. Spencer*, a district court certified a class of Navy and Marines veterans who alleged they were wrongly denied discharge upgrades by the Naval Discharge Review Board ("NDRB") in violation of the APA and the Fifth Amendment. 329 F.R.D. 110, 114, 123 (D. Conn. 2018); *see also Kennedy v. Esper*, 2018 WL 6727353 (D. Conn. 2018) (companion case on behalf of Army veterans). The Court certified the *Manker* class, rejecting defendant's administrative exhaustion argument that plaintiffs' proposed class definition improperly included veterans who had never applied for discharge upgrades. *Id.* at 123. The *Manker* court emphasized that plaintiffs did not challenge any individual discharge upgrade case outcome, but instead were challenging the NDRB's unfair adjudication process. *Id.* at 119.

Here, the Veterans Court properly certified the class of Palomares Veterans seeking injunctive relief to include those whose claims were not yet exhausted. Class certification was appropriate because a question

"generally applicable to the class" predominated, i.e., is the exposure methodology flawed? As in *Manker* and *Kennedy* where the question concerned the process for adjudicating upgrade applications that had been or *will be* denied, here, the question concerns VA's methodology for calculating radiation exposure for veterans whose claims have been or *will be* denied. It is a common question deserving of class-wide relief.

2. Class actions in public benefits cases do not require exhaustion of administrative remedies.

In the public benefits context, courts routinely certify classes of claimants seeking injunctive relief which include those who have not exhausted the administrative process. Several cases are surveyed in this section and include individuals who had not yet applied for benefits, and/or had not yet been denied ("future claimants").

For example, in the Medicare context, courts have certified classes seeking injunctive and declaratory relief including future claimants where an issue is presented concerning contested agency statutory interpretation. *Tataranowicz v. Sullivan*, 959 F.2d 268, 270 (D.C. Cir. 1992). In *Tataranowicz*, the HHS Secretary argued class members failed to satisfy presentment and exhaustion prerequisites. *Id.* 271. The D.C. Circuit held, however, that future claimants fulfilled the presentment requirement. *Id.* at 272. The court excused

exhaustion based on the futility of further appeals. *Id.* at 274.

In the Social Security context, the *Small v. Sullivan* court granted plaintiffs' motion for class certification where the class definition included future claimants. 820 F. Supp. 1098, 1112 (S.D. Ill. 1992). Plaintiffs sought injunctive and declaratory relief alleging bias of a particular Administrative Law Judge. *Id.* at 1103. Rejecting the government's argument that the court lacked jurisdiction over members without a final decision from the Secretary, the court waived exhaustion as immensely practical. *Id.* at 1104–06.

Similarly, in *Dixon v. Bowen*, another social security case, the court determined that future claimants were properly included in a class seeking injunctive relief. 673 F. Supp. 123, 127 (S.D.N.Y. 1987). The class challenged a continuing agency practice of denying insufficiently "severe" conditions. *Id.* at 124, 127. The court found that "[i]nclusion of future claimants in the plaintiff class presents no problem of 'presentment' " because "such individuals will not actually be covered by any order or judgment until they do make a claim for benefits in some form, thus satisfying the presentment requirement." *Id.* at 127.

Especially when the action challenges agency policies, as is the case here, the class definition properly may include future claimants. In *Davis v. Astrue*, the court held that a class including future claimants suffering from a mental disability met the class action certainty requirement. 250 F.R.D. 476, 479–80, 485 (N.D.

Cal. 2008). Responding to the government's argument challenging inclusion of future claimants, the court emphasized the lack of any requirement that each class member be "identified at the commencement of an action." *Id.* at 485. The court further noted this result was proper because the plaintiffs contested agency "policies and procedures" rather than agency conduct applied to specific circumstances. *Id.* at 484–85.

CONCLUSION

Widespread, systemic problems within VA cause immense harm to veterans. VA's failure to self-correct upon identification of systemic issues, along with the lack of enforcement power held by OIG and GAO, leaves veterans stuck in an error-laden, delay-filled system with no hope for real change.

Judicial intervention is necessary to vindicate the rights of veterans who served our nation and are now entitled to benefits arising from disabilities incurred by military service. Class-wide injunctive relief is necessary and proper. The Federal Circuit's requirement that a class may only include claimants with Board decisions wrongly limits the number of veterans to whom relief is available. It undermines the stated purpose and powers of the Veterans Court and compounds existing systemic problems and backlogs within VA.

VA's long-term miscalculation of its radiation dose methodology for Mr. Skaar and the Palomares Veterans exemplifies the type of systemic issue generally

applicable to the class as a whole and ripe for class-wide injunctive relief. Without such relief, veterans will be left to suffer through the VA processes described in OIG and GAO reports above. Accordingly, we respectfully request that the Court grant certiorari.

Respectfully submitted,

ANGELA K. DRAKE
Counsel of Record for Amicus Curiae
Director
THE VETERANS CLINIC
UNIVERSITY OF MISSOURI SCHOOL OF LAW
203 Hulston Hall
Columbia, Missouri 65211
(573) 882-7630
drakea@missouri.edu

YELENA DUTERTE
Assistant Professor
VETERANS LEGAL CLINIC
UNIVERSITY OF ILLINOIS CHICAGO SCHOOL OF LAW

JENNY VANACKER
Staff Attorney
VETERANS LEGAL CLINIC
UNIVERSITY OF ILLINOIS CHICAGO SCHOOL OF LAW

JUDY CLAUSEN
Professor and Supervising Attorney
VETERANS AND SERVICEMEMBERS LEGAL CLINIC
UNIVERSITY OF FLORIDA, LEVIN COLLEGE OF LAW

March 29, 2023