# MOTION FOR AGGREGATION

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## I. Introduction

On January 17, 1966, a B-52 bomber carrying four hydrogen bombs crashed during mid-air refueling. The non-nuclear explosives in two of the bombs detonated, releasing radioactive plutonium dust over the Spanish countryside. The U.S. ordered Appellant Edward Feeley and approximately 1,400 U.S. servicemembers to the site to conduct tests and clean up plutonium. The government failed to provide servicemembers with adequate protection in the weeks or months that they worked at the site, test many servicemembers for exposure to harmful radiation, and inform most of those tested of their results. Mr. Feeley and many of his fellow Palomares veterans have suffered from radiogenic illnesses, including cancers and blood disorders, in the decades since.

The Department of Veterans Affairs ("VA") recognizes some radiation events as "radiation-risk activit[ies]." 38 U.S.C. § 1112(c)(3)(b); 38 C.F.R. § 3.309(d)(3)(ii). A veteran present at one of the listed "radiation-risk activit[ies]" who later develops one or more enumerated diseases is presumed to have suffered a service-connected disability. *Id.* § 3.309(d)(1). To date, the Secretary has not acknowledged Palomares as a "radiation-risk activity," even though the Secretary has recognized events at which servicemembers were exposed to significantly less radiation, *id.* § 3.309(d)(3)(ii)(A)-(D), and even though Department of Energy workers who handled sealed drums of Palomares soil months after the clean-up receive presumptive disability compensation for their radiogenic conditions. *Id.* § 3.309(d)(3)(ii)(E). As a result, Palomares veterans such as Appellant Feeley who later develop one of the enumerated conditions in 38 C.F.R. § 3.309 are unfairly and unlawfully *not* presumed to have suffered a service-connected illness. Mr. Feeley has been diagnosed with B-cell non-Hodgkin lymphoma, a condition that would be presumptively service-connected if developed

after exposure to a radiogenic event if Palomares were on the list of radiation-risk activities. *Id.* § 3.309(d)(2)(ii).

The VA wrongfully denies Palomares veterans compensation for their service-connected radiogenic diseases because it has arbitrarily and capriciously failed to recognize participation at Palomares among the "radiation-risk activities" listed in 38 C.F.R. § 3.309(3)(ii) and because it applies a fundamentally flawed dosimetry methodology to calculate Palomares veterans' dose estimates under 38 C.F.R. § 3.311. The CAVC has certified a class regarding the VA's processing of Palomares veterans' claims under § 3.311. *See Skaar v. Wilkie*, 33 Vet. App. 127 (2020), *notice of appeal pending*, No. 21-1757 (Fed. Cir.); *Skaar v. Wilkie*, 32 Vet. App. 156 (2019) (certifying class); *see also id*. at 173 (holding appellant lacks standing to assert 38 C.F.R. § 3.309 claim). This appeal presents an independent challenge – not at issue in *Skaar* – to the VA's exclusion of Palomares from 38 C.F.R. § 3.309(3)(ii) as arbitrary and capricious in violation of the Administrative Procedure Act and contrary to the Due Process Clause of the Fifth Amendment.

## II. Proposed Class

Pursuant to 38 U.S.C. §§ 501(a), 7104, and the Board's inherent powers, Appellant Edward Feeley respectfully moves for class certification or aggregate resolution of claims set forth herein under the Administrative Procedure Act and the U.S. Constitution. The putative class includes all U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, who have filed applications for service-connected disability compensation based on exposure to ionizing radiation at Palomares, whose applications the VA has denied or will deny, and who have a disease specific to radiation-exposed veterans as defined in 38 C.F.R. § 3.309(d)(2). This definition includes claims pending or decided at the Regional Office, *see* 38

C.F.R. § 20.108(a), appeals pending at the Board, and appeals in which the BVA has rendered a final decision, *see* 38 C.F.R. § 7103.

## III. Argument

### A. The Board Has the Power to Aggregate Claims

In recent years, many federal agencies have employed various forms of aggregation to manage their large dockets. Michael Sant'Ambrogio & Adam Zimmerman, *Aggregate Agency Adjudication*, ADMIN. CONF. OF THE UNITED STATES 20 (2016). The Board can do the same. The statutes and regulations governing the BVA confirm its inherent authority to aggregate actions, as the Board has the power to prescribe and execute its own pro-veteran procedures in the interests of efficiency and fairness. The Court of Appeals for Veteran Claims (CAVC) has confirmed that it is "well-settled caselaw that agencies have discretion to develop case management techniques that make best use of their limited resources." *Ramsey v. Nicholson*, 20 Vet. App. 16, 28 (2006). The CAVC has previously determined class adjudication to be efficient and fair for Palomares veterans denied benefits under another regulation, 38 C.F.R. § 3.311, and has now twice remanded that challenge to the board for further factingfinding. Class certification at the Board level would better realize the benefits and maximize the efficiency of CAVC class actions. The authority and utility of aggregation at the Board is confirmed by the use of aggregation in other similar contexts, including analogous agency proceedings.

1. *Aggregation Is Authorized Under the Board's Organic Statute and Regulations.*

The Board's organic statute and governing regulations empower it to manage its own procedures. 38 U.S.C. § 501(a) gives the Secretary the "authority to prescribe all rules and regulations which are necessary or appropriate" to fulfill the department's statutory mission. This power explicitly includes rules about the "manner and form of adjudications and awards." *Id.*

The Board has jurisdiction to hear on appeal all matters "subject to decision by the Secretary" and make decisions "based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation." *Id.* § 7104(a). Nothing in the governing statutes or regulations precludes the creation of rules for aggregate litigation at the Board. Rather, the statutes and regulations demonstrate a commitment to the values that aggregation would further.

Timely adjudication is a priority across the Board's governing statutes. *See, e.g.*, 38 U.S.C. § 7101(a) (providing for staffing sufficient to "conduct hearings and dispose of appeals properly before the Board in a timely manner"); *id.* § 7101(d)(3) (requiring in annual reporting by the Secretary to Congress the Chairman's projections, including "an evaluation of the ability of the Board (based on existing and projected personnel levels) to ensure timely disposition of such appeals"); *id.* at § 7112 ("The Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court of Appeals for Veterans Claims"). Indeed, the statute as initially drafted made no mention of timeliness in these provisions, but the 1988 Veterans' Judicial Review Act inserted multiple references to timeliness in the Board's resourcing rules. 102 Stat. 4110, Pub. L. 100-687 (Nov. 18, 1988) ("(b) Resources To Dispose of Appeals in a Timely Manner. . . . Section 4001(a) [now 7101(a)] is amended— . . . (2) by striking out "necessary, and" and inserting in lieu thereof "necessary in order to conduct hearings and dispose of appeals properly before the Board in a timely manner. The Board shall have"; and (3) by adding at the end the following new sentence: "The Board shall have sufficient personnel under the preceding sentence to enable the Board to conduct hearings and consider and dispose of appeals properly before the Board in a timely manner").

These amendments indicate a commitment to efficiency in the Board's proceedings. The Senate Veterans' Affairs Committee explained its decision to add "in a timely manner" to the Act, stating that "the Committee believes that a timely decision is at the core of a fair and just determination, and, therefore, has added language to make it a statutory requirement." Committee on Veterans' Affairs, 100th Cong., *Rep. on Veterans' Judicial Review Act* (1988); *See also* 134 Cong. Rec. S. 9178 (Jul. 11, 1988) (statement of Frank H. Murkowski, Sen. of AL) ("What matters is that the review is timely, fair, and meaningful"). As Senator Rockefeller explained in introducing the Board of Veterans' Appeals Administrative Procedures Improvement Act of 1994, "a user-friendly system must provide timely and efficient resolution of benefit claims." Cong. Rec. Vol. 140, Part 3 at 4068 (Mar. 8, 1994) ("A critical part of th[e] mission . . . is to make sure veterans and their families receive fair, efficient, and timely adjudication of their benefit claims. Timeliness is simply vital"). *See also Veterans' Compensation COLA Act of 1993, and Oversight of VA Claims Processing and Adjudication: Hearing on S. 616 Before the S. Comm. Vet. Affs.*, 103rd Cong. 1 (1993) (statement of John D. Rockefeller, Chariman, Sen. Comm. Vet. Affs.) ("The timely adjudication of [veterans'] claims for benefits is vital. We know that the claims adjudication process takes too long"). Aggregation would further the statutory commitment to a timely resolution of appeals in an efficient manner.

In addition, the statute allows some claims to be "advanced [on the docket] on motion for earlier consideration and determination." 38 U.S.C. § 7107(b)(1). Among the explicit grounds for advancement is when "the case involves interpretation of law of general application affecting other claims." *Id.* § 7107(b)(3)(A). This provision invites resolution of claims on a class-wide basis, so that issues that arise in multiple claims can be efficiently disposed of in a single proceeding, especially where the same set of facts underlies those claims. Aggregate actions

surely implicate questions of "general application affecting other claims," and would promote the same interest in efficient resolution of issues affecting many veterans that underlies this provision. Further, decisions of the Board are not binding on other BVA adjudicators, so even when one case is advanced on the docket in order to decide a question of general application, the resolution of the issue in that case will not bind the decisionmaker in the next case to raise the identical issue. Only aggregation ensures that decisions on questions of general applicability are acutally applied generally.

Additionally, the House Report accompanying the most recent admendment to this provision notes that "the Board may advance a case for earlier consideration if the veteran is seriously ill, is under severe financial hardship, or for other sufficient cause." H.R. Rep. No. 115-135, at 2 (2017). This highlights the need for the Board to consider the age and health status of veterans—issues that are relevant to the aging class of Palomares veterans—in procedural decisions concerning docket management.

The Board is also authorized to hear claims in a variety of forms, indicating its capacity to develop procedures and channel cases as the circumstances demand. The BVA is required to maintain at least two dockets, one each for cases with and without hearings requested. 38 U.S.C. § 7107(a); *id.* § 7105(3) (permitting the veteran to select whether or not to request a hearing, and thereby select their docket). There is nothing limiting it to these dockets alone or preventing it from creating a docket for aggregate actions—indeed, acting under its own authority the Board has established a third docket for appeals without a hearing request where the appellant nonetheless intends to submit new evidence—or precluding it from hearing aggregate actions in an existing docket. *See id.* § 7107(a)(2) (allowing for establishment of additional dockets if "the Board notifies the Committee on Veterans' Affairs of the Senate and the Committee on

Veterans' Affairs of the House of Representatives . . . , including a justification for maintaining such additional docket"). The Board treats the evidentiary record differently based on the docket and the requests of the veteran, demonstrating its ability to modify procedural rules to fit the context of the appeal. *Id.* § 7113. The statute contemplates that appeals may move between dockets, meaning that the Board currently has the logistical capacity necessary to channel open claims into an aggregate action. *Id.* § 7107(e) ("The Secretary shall develop and implement a policy allowing an appellant to move the appellant's case from one docket to another docket").

Other statutory provisions demonstrate the intent of Congress to give the Board flexibility to adjust its procedures and format to fit the needs of the case before it. For example, 38 U.S.C. § 7102 allows a proceeding to be assigned either to an individual member or to a panel of a size deemed appropriate, which may include the Chairman. This flexibility would allow aggregate actions to be heard by panels and by the Chairman, if the Board thought those procedures necessary.

Further, the Board currently hears simultaneously contested claims under 38 U.S.C. § 7105A, demonstrating its capacity to manage complex sets of facts and law beyond what is presented in an individual claim. Finally, the governing statute indicates a commitment to procedural flexibility in the interest of fairness and justice, allowing for correction of errors in the record and requiring revision of decisions on this basis. *Id.* § 7103(c) ("The Board on its own motion may correct an obvious error in the record, without regard to whether there has been a motion or order for reconsideration"); *id.* § 7111(a) ("A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised"). Read together, these provisions demonstrate the intent of Congress to create an adjudicatory, fact-finding body that could flexibly, efficiently,

and fairly decide claims in the manner best-suited to the facts and issues at hand. Aggregation fits squarely within that authority and furthers the same interests.

The Board's governing regulations further emphasize values that aggregate litigation would serve well. These rules"are to be construed to secure a just and speedy decision in every appeal[.]" 38 C.F.R. § 20.1(b). Affirming the Board's mandate to maximize fair, efficient disposition of appeals, the CAVC has noted that it is "well-settled caselaw that agencies have discretion to develop case management techniques that make best use of their limited resources." *Ramsey v. Nicholson*, 20 Vet. App. 16, 28 (2006). Indeed, VA regulations explicitly provide that "the Chairman may prescribe a procedure which is consistent with" the Board's governing statute and rules without seeking Secretarial or CAVC approval. 38 C.F.R. § 20.2.

The Federal Circuit has held that the CAVC has the power to certify aggregate proceedings through its authority to create its own procedures and rules under 38 U.S.C. § 7264. *See Monk v. Shulkin*, 855 F.3d 1312, 1319 (Fed. Cir. 2017) ("Under 38 U.S.C. § 7264(a), '[t]he proceedings of the [Veterans Court] shall be conducted in accordance with such rules of practice and procedure as the Court pre-scribes.' This express grant authorizes the Veterans Court to create the procedures it needs to exercise its jurisdiction"). This statutory grant of authority is similar to that in 38 U.S.C. § 501(a) (authorizing the Secretary to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department") which applies broadly to the VA and to the Board specifically through the statute's reference to the "manner and form of adjudications." 38 U.S.C. § 501(a)(4). Given the parallel language in these two statutes, the use of aggregate litigation at the Board level is also appropriate.

*2. The CAVC's Use of Class Actions Supports and Necessitates Board Aggregation.*

The CAVC has recognized the utility of class actions as a case management tool in veterans benefits adjudication, following the Federal Circuit's ruling that the CAVC has the authority to certify a class or aggregate action in order "to promote efficiency, consistency, and fairness in its decisions." *Monk v. Shulkin*, 855 F.3d at 1321. The CAVC has since certified four classes, demonstrating the utility of aggregation in addressing questions that affect a large number of veterans by certifying class actions itself. In *Wolfe v. Wilkie*, the court observed that "the class action device here would allow for consistent adjudication of similar claims involving [the] regulation [at issue] and allow the Court to more quickly address [a] systemic issue to reduce delay associated with individual appeals." 32 Vet. App. 1, 27 (2019). In *Skaar v. Wilkie,* the CAVC explained that class actions conserve the resources of both courts and parties when issues and questions of law are common to each member of the class. 32 Vet. App. 156, 195 (2019). Further, the court reaffirmed the Federal Circuit's statement that class actions can serve the interests of justice and efficiency "to compel correction of systemic error and ensure that like veterans are treated alike." *Id.* at 179 (citing *Monk II*, 855 F.3d at 1320-21). The justifications for aggregation at the CAVC apply with equal force to the Board.

Moreover, aggregation at the Board level for veterans with similar claims raising similar questions of law is necessary to complement the CAVC's class action procedures. The CAVC's scope of review is limited to questions of law, meaning it may confront challenges in deciding attendant questions of fact that arise in aggregate actions before it. 38 U.S.C. § 7261. Board-level class actions would allow the BVA to address classwide questions of fact in the first instance. Limitations on the CAVC's fact-finding do not exist for the Board, however, which has fact-finding tools (such as the power to issue subpoenas) and jurisdiction to make complex fact

determinations of the kind that veterans' claims regularly raise—including evaluating scientific and medical evidence, with the assistance of experts as needed. *See Skaar v. Wilkie*, 33 Vet. App. 127, 141 (2020) ("No matter how deferential our standard of review may be, when the Board does not explain its reasons for reaching a factual finding, the Court's ability to review anything is frustrated."); *see, e.g.*, 38 C.F.R. § 20.709 (detailing Board's subpoena authority). Moreover, aggregation at the Board is essential to ensure facts relevant to the class of veterans are included in the Record Before the Agency, which the CAVC may evaluate on appeal. *See* 38 U.S.C. § 7252(b). Aggregation would allow the Board to hear testimony and review evidence that is applicable to all class members only once and would ensure the class record is complete on appeal to the CAVC, rather than on limited remand from the CAVC.

The CAVC class certification decisions do not constrain the Board's independent authority to aggregate claims in an appropriate case. Indeed, in its decision in *Skaar*, the CAVC remanded the case to the BVA for the Board to produce a statement of reasons and bases explaining the scientific evidence used in service-connection determinations, and noted that the decision "applies to the class certified in this matter." *Skaar v. Wilkie*, 33 Vet. App. 127, 149 (2020). This order for the BVA to apply its ruling to all other pending cases by class members demonstrates the need for BVA aggregation to complement aggregation at the CAVC. BVA aggregation would promote efficient resolution of claims by allowing the Board to resolve questions of fact for all affected veterans in a certified class, and reducing the need for repeated appeals to and remands from the CAVC.

3. *Aggregation is an Established Tool for Federal Agency Management of Claims*

Many other federal agencies that, like the Board, confront challenges in managing a large docket have recognized the utility of aggregation. Delays in adjudication have a significant

impact on veterans waiting for decisions from the Board, just as they affect claimants before a number of administrative agencies: "The number of claims languishing on administrative dockets has become a 'crisis,' producing significant backlogs, arbitrary outcomes, and new barriers to justice. Coal miners, disabled employees, and wounded soldiers sit on endless waitlists to appeal similar administrative decisions that frequently result in reversal." Sant'Ambrogio & Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992, 1992 (2012). For decades, commentators have described overcrowded dockets and under-resourced staff in many different administrative courts as "a crisis." *See* Anthony Brino, *Medicare Claims Crisis Pits Hospitals Against Feds, Auditors, Healthcare Finance* (May 27, 2014), http://www. healthcarefinancenews. com/news/growing-claims-appeal-crisis; *see also Veterans for Common Sense v. Shinseki,* 644 F.3d 845, 878 (9th Cir. 2011), *vacated on other grounds*, 678 F.3d 1013 (9th Cir. 2012) ("The current delays therefore constitute a deprivation of Veteran's mental health care without due process, in violation of the Fifth Amendment."). Aggregate adjudication at the Board provides the VA a tool to address this crisis and better serve veterans and its statutory mandate.

The creation of mass adjudication at the BVA would also accord with the Supreme Court's precedent of allowing agencies to develop rules of procedure that best serve their needs in adjudication. The Supreme Court has historically afforded agencies significant levels of flexibility in determining the most appropriate procedural form for decisions that will impact a significant number of people. Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L. J. 1634, 1653 (2017). Agencies can determine their own questions of procedure and "the scope of the inquiry, whether [cases] should be heard contemporaneously or successively, whether parties should be allowed to intervene in one

another's proceedings, and similar questions." *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940). In *CFTC v. Schor*, the Supreme Court found that the broad governing statutes of the Commodity Futures Trading Commision (CFTC) gave the Commission the power to join counterclaims in adjudication before them. 478 U.S. 833 (1985). The statutory language empowered the CFTC to "make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary" to fulfill their statutory mandate. *Id.* (citing 7 U.S.C. § 12a). Because the statutes and regulations that govern the Board are broad enough to accommodate collective adjudication at the agency level, the Board should allow collective actions when it is in appellants' best interests and would promote judicial economy.

The APA and other procedural rules guiding agency adjudication would allow for aggregation in agency proceedings at the Board. The procedural requirements of the APA create no bar to the use of aggregate adjudication in appropriate cases, and any such bar would be at odds with "the substantial flexibility the Supreme Court has granted agencies when choosing the best procedural format for decisions that affect large groups of people." Michael Sant'Ambrogio & Adam Zimmerman, *Aggregate Agency Adjudication*, ADMIN. CONF. OF THE UNITED STATES 20 (2016). In 2016, the Administrative Conference of the United States adopted recommendations urging agencies to use aggregation to resolve similar claims. *Id.* at 67.

This authority to develop procedural rules is even stronger for federal agencies than it is for Article III courts. *Id.* While procedural rules in Article III courts are limited by the Rules Enabling Act and thus cannot "abridge, enlarge or modify any substantive right," administrative agencies are not bound by such limitation. 28 U.S.C. §§ 2071-72 (1988); *see* Sant' Ambrogio & Zimmerman, *Aggregate Agency Adjudication*, *supra,* at 20. Congress intends for agencies to make rules to carry out their mandates. *Id.* No court has found that due process concerns impose

limits on the abilities of agencies to aggregate cases, and this aggregation has been approved by courts in some contexts. *Id.* at 25. For example, federal courts have allowed class actions in challenges to practices by military boards on several occasions.[1] In *Chaves County Home Health Services v. Sullivan,* the D.C. Circuit approved the use of aggregation and statistical sampling in review by the Department of Health and Human Services of overbilling by Medicare providers, in a decision that hinged on the low risk of error that could disadvantage the provider. 931 F.2d 914, 919-22 (D.C. Cir. 1991). Aggregation of claims in front of the Board similarly would increase veterans' access to justice and to the benefits they are rightly owed.

The use of collective adjudication by other administrative agencies demonstrates the feasibility and potential benefits of class actions at the BVA. The Equal Employment Opportunity Commission (EEOC) has long used collective adjudication both formally and informally to resolve and investigate similar complaints against the same employer. Like the BVA, the EEOC's organic statutes make no mention of collective adjudication. *See* 42 U.S.C. § 2000e; 29 U.S.C. § 791; 29 U.S.C. § 621; 29 U.S.C. § 206(d); 42 U.S.C. §2000ff. Despite the lack of explicit statutory authority to do so, courts have held that the EEOC can investigate and adjudicate individual complaints on a classwide basis. *See EEOC v. Caterpillar, Inc.* 409 F. 3d. 831 (7th Cir. 2005). And in 1992 the EEOC promulgated regulations governing class complaints.

[1] *See, e.g., Kennedy v. Esper*, 2018 WL 6727353 (D.Conn. Dec. 21, 2018) (certifying class of veterans with less-than-honorable discharges related to mental health conditions seeking discharge upgrades before the Army Discharge Review Board); *Manker v. Spencer*, 329 F.R.D. 110 (D.Conn. 2018) (same, as to class of veterans seeking discharge upgrades before the Naval Discharge Review Board); *Giles v. Sec. of the Army*, 627 F.2d 554 (D.C. Cir. 1980) (certifying a class of enlisted Army personnel who had received other-than-honorable discharges on the basis of a compelled urinalysis); *Larinoff v. United States*, 365 F. Supp. 140 (D.D.C. 1973) (certifying class of Navy personnel claiming entitlement to a reenlistment bonus despite the Navy's argument that the case should be before the BCNR); *Sabo v. United States*, 102 Fed. Cl. 619 (2011) (certifying class of service members challenging determinations by military's Physical Evaluation Boards that they were unfit to serve due to PTSD); *Berkeley v. United States*, 287 F.3d 1976 (Fed. Cir. 2002) (certifying class of junior officers challenging decision of Air Force Reduction in Funding Board under Equal Protection Clause); *Christensen v. United States*, 49 Fed. Cl. 619 (2001) (certifying class of officers challenging their forced retirement by Air Force Early Retirement Board).

29 C.F.R. § 1614.204 (2012). It relied on the general grant of authority "to enforce the provisions [prohibiting employment discrimination] through appropriate remedies . . . and . . . issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section," 42 U.S.C. § 2000e-16(b). As summarized in the Federal Register, the regulation was intended to "enable quicker, more efficient processing of complaints and promote impartial, fair and early resolution of complaints." 57 FR 12634 (Apr. 10, 1992). In 2004, the Department of Justice confirmed the EEOC's authority to adjudicate claims in aggregate proceedings, even absent express authorization in the agency's governing statutes. Office of Legal Counsel, Legality of EEOC's Class Action Regulations: Memorandum Opinion for the Vice President and General Counsel United States Postal Service 254, 261 n.3 (Sept. 20, 2004). "[A]bsent an express statutory prohibition to the contrary, administrative agencies may use aggregate procedures to handle their cases more expeditiously, consistently, and fairly than would be possible with individual, case-by-case adjudication." Sant'Ambrogio & Zimmerman, *Inside the Agency Class Action, supra,* at 1655.

As such, the use of aggregate litigation is prevalent among a number of administrative agencies. A survey published in 2017 found that 71 agencies had adopted some sort of formal class action rule. *Id.* at 1657. For example, the Provider Reimbursement Review Board has a rule that allows for claimants to proceed with group appeals. 42 C.F.R. § 405.1837 (2016). The Office of Medicare Hearings and Appeals (OMHA) has procedures to allow administrative law judges to consolidate Medicare payment cases that involve the same issues. Sant'Ambrogio & Zimmerman, *Inside the Agency Class Action, supra,* at 1676. In a context similar to that of veterans' benefits, the Department of Education (DOE) now allows federal student loan borrowers raising common facts and claims to consolidate their applications for loan forgiveness.

34 C.F.R. § 685.222(e)(6) (2018). Here too, consolidation operates without an explicit statutory grant of authority; the governing statute states only that "[t]he Director of the Office of Management and Budget shall settle claims not otherwise provided for[.]" 31 U.S.C. § 3702(a)(4). Petitioners in these DOE proceedings seek a government benefit, making them similar to claims at the VA.

Agency rules vary in their scope and use, but demonstrate that collective adjudication in agency proceedings is legally feasible. Though the BVA has no formal rule for collective action at the Board, the lack of formal process does not preclude the Board from deciding aggregate claims. A Board procedure for collective adjudication would accord with the procedures of other agencies that have recognized the benefits of collective adjudication.

**B. The Board Should Order Aggregation in This Case.**

The Board should certify a class of Palomares veterans with radiogenic conditions whose applications for benefits the VA has denied or will deny. Aggregation would allow for efficient resolution of these veterans' claims and would ensure consistent results in all cases. The Board should adopt a permissive standard for class certification based on the VA's statutory pro-veteran orientation. In addition, the proposed class meets the requirements for class certification in the CAVC and federal courts.

1. *Aggregation Would Promote the Interests of Justice and Judicial Economy.*

Appellant asks that the Board certify a class of all U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, who have a disease specific to radiation-exposed veterans, as defined in 38 C.F.R. § 3.309(d)(2), and whose application for service-connected disability compensation based on exposure to ionizing radiation the Secretary has denied or will deny. Appellants request that the Secretary (a) recognize participation in the

cleanup effort at Palomares as a "radiation-risk activity" under 38 C.F.R. § 3.309(3)(ii) and (b) re-adjudicate Palomares veterans' denied benefits claims accordingly.

Resolution through a class proceeding would be the most efficient route to justice for this class of veterans. Although the Board lacks the authority to alter regulations, the BVA could grant the requested relief in part under 38 C.F.R. § 3.309(d)(3)(ii)(E). That provisions states that the presumption of service-connection for radiation-related conditions applies to "[s]ervice in a capacity which, if performed as an employee of the Department of Energy, would qualify the individual for inclusion as a member of the Special Exposure Cohort under section 3621(14) of the Energy Employees Occupational Illness Compensation Program Act of 2000 (42 U.S.C. 7384l(14))." The Board has the authority to determine that Palomares Veterans fall into this category, and should do so here. As Appellant Feeley will show, Palomares veterans' service is sufficiently similar to that of civilian employees of the Department of Energy who, months after the clean-up, handled the debris from Palomares sealed in barrels and shipped to the Savannah River Site in South Carolina for disposal. These employees are included under the analogous civilian compensation program. 77 Fed. Reg. 9250 (Feb. 16, 2012). There is no reason to presumptively compensate civilians exposed to radiation from Palomares while denying presumptive compensation to similarly-situated veterans.

2. *The BVA Should Adopt a Liberal Standard for Class Certification.*

The Board has yet to establish rules for certification of a class of veteran claimants. The Board should formulate a permissive standard for certifying a class in an aggregate action in light of the long-recognized "strongly and uniquely pro-claimant" character of the VA benefits system, evident in Congress's intent to design a "beneficial" and "non-adversarial" compensation process. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). *See* 38 U.S.C. § 5103A(a)(1)

(duty to assist); 38 C.F.R. § 3.159(c)(2) (duty to assist in obtaining evidence); *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004) (affirming duty to assist includes reopening claims in case of clear and unmistakable error). Aggregation would allow for efficient resolution of claims for a large number of veterans, and would therefore support the Secretary's duty to assist claimants and further the VA's non-adversarial, pro-claimant orientation. Employing a liberal class certification standard would facilitate use of this device, increasing the Board's efficiency.

The Board should use a standard similar to that employed by the Department of Education in its procedures for collective resolution of loan forgiveness claims. The Secretary of Education may initiate aggregation based on "consideration of factors including, but not limited to, common facts and claims, fiscal impact, and the promotion of compliance" with program requirements. 34 C.F.R. § 685.222(f)(1) (2018). Further, the Secretary of Education may on its own initiative identify members of the group based on pending or yet-to-be-filed applications with "common facts and claims." *Id.* § 685.222 (f)(1)(i)-(ii). *C.f.* Fed. R. Civ. P. 20(a)(1) ("Persons may join in one action as plaintiffs if: (A) they assert any right to relief . . . arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action").

Like the Department of Education, the BVA should adopt a liberal standard focused on commonality of facts and claims in considering aggregated claims for benefits. Aggregation under such a standard is appropriate with respect to the proposed class of Palomares veterans. The claims at issue all arise out of the Palomares incident and concern the treatment of Palomares under the VA's regulations. The claims are thus virtually identical with respect to both law and fact. The commonality standard is in line with the VA's statutory duty to assist and its established pro-claimant mission.

3. *In the Alternative, Aggregation Is Appropriate Under the Federal Rules of Civil Procedure and the Rules of the CAVC.*

If the Board chooses to use a class certification rule parallel to that of the CAVC and Federal Courts, the proposed class also meets such a standard. The CAVC recently promulgated a rule for class certification largely analogous to the Federal Rule, requiring plaintiffs to establish numerosity, commonality, typicality, adequacy of representation, and appropriateness of class-wide relief. Fed. R. Civ. P. 23; Vet. App. R. 23. The CAVC Rule also requires that if the Secretary does not concede numerosity, it must produce "a statement of the actual or estimated number of putative class members" or else explain why it cannot do so. Vet. App. R. 23(b)(2)(A)(ii). If the Board chooses to use this model of class certification standards, it should also follow a similar numerosity rule.

The proposed class meets the requirements of the CAVC's class certification rule. The U.S. ordered approximately 1,400 military personnel to Palomares during the cleanup process—a figure that easily satisfies the numerosity requirement of Vet. App. R. 23(a)(1). Veterans in the proposed class raise common questions of law and fact: the propriety of their radiation dose estimates and their exclusion from presumptive service connection as provided in § 3.309. *See* Vet. App. R. 23(a)(2). Appellant Feeley's claim regarding the propriety of exclusion from the presumption of service connection is typical of the class. The Appellant and his counsel would fairly and adequately protect the interests of the proposed class.[2] Mr. Feeley has no interest antagonistic to the putative class. Undersigned counsel is qualified and experienced in handling

[2] Mr. Feeley currently has a 100% disability rating for service connection from other conditions, not related to his exposure at Palomares. Under the rule in *Roebuck v. Nicholson* this does not make his claims for service connection from radiation exposure at Palomares moot, because the conditions at issue are unrelated. 20 Vet. App. 307, 313 (2006). Pursuing service connection for radiogenic conditions related to Palomares may also help with future eligibility for Dependency and Indemnity Compensation claims filed on Mr. Feeley's behalf. Thus, his claims in this matter are not moot and he is an adequate representative.

veterans' benefits cases in the veterans' courts, *see*, *e.g.*, *Monk v. Shulkin*, No. 15-1280 (Vet. App.), and supervising law student interns in a class action litigation. *See, e.g.*, *Skaar v. Wilkie,* 33 Vet. App. 127 (2020).[3]

The VA has "acted or failed to act on grounds that apply generally to the class" by failing to recognize Palomares as a radiation-risk activity. Vet. App. R. 23(a)(5). Aggregate resolution would ensure that the claims of all Palomares veterans for disability compensation related to their radiogenic illnesses are fairly and consistently adjudicated. Classwide adjudication is the most efficient procedural means available to resolve Palomares veterans' claims, as simultaneously contesting the claims of all members of the putative class is impracticable. *See* 38 C.F.R. §§ 20.400-407. The Board has the authority to order injunctive relief to resolve the claims of the proposed class as a whole, and a ruling by the Board in an aggregate action would be most efficient to resolve the issues for the class.

## IV. Conclusion

For the foregoing reasons, Mr. Feeley respectfully requests that the Board grant his motion for aggregation and certify a class of Palomares veterans as defined above to proceed with the instant appeal.

[3] *See also Kennedy v. Esper*, 2018 WL 6727353 (D.Conn. Dec. 21, 2018) (appointing undersigned counsel to represent class of Army veterans with less-than-honorable discharges related to mental health conditions); *Manker v. Spencer*, 329 F.R.D. 110 (D.Conn. 2018) (same, as to nation-wide class Navy and Marine Corps veterans); *Savino v. Souza*, 453 F. Supp. 3d 441 (D. Mass. 2020) (same, as to class of immigration detainees challenging their detention due to COVID-19); *Batalla-Vidal v. Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. 2018) (same, as to nation-wide class of DACA recipients and DACA-eligible young persons); *Reid v. Donelan*, 297 F.R.D. 185, 194 (D. Mass. 2014) (same, as to class of longterm immigration detainees).

Respectfully Submitted,

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[†] This brief does not purport to state the views of Yale Law School, if any.