**15-7092, 7106**

---

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

---

CONLEY F. MONK, JR.
*Claimant - Appellant,*

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs
*Respondent - Appellee.*

---

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS
In Case No. 15-1280

Judge Lawrence B. Hagel

---

# BRIEF OF AMICI CURIAE FORMER GENERAL COUNSELS OF THE DEPARTMENT OF VETERANS AFFAIRS (VA), WILL A. GUNN AND MARY LOU KEENER

---

Jonathan M. Freiman
Lora R. Johns (Application pending)
WIGGIN AND DANA LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
(203) 782-2889 (fax)
jfreiman@wiggin.com

*Attorneys for Amici Curiae*

## CERTIFICATE OF INTEREST

Counsel for Amici Curiae Will A. Gunn and Mary Lou Keener certifies the following:

1. The full name of every party represented by me is: Will A. Gunn, Mary Lou Keener

2. The name of the real party in interest represented by me is: not applicable

3. All parent corporations and any publicly held companies that own ten percent or more of the stock of the party represented by me are: not applicable

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are: Law firms: Wiggin and Dana LLP ; Attorneys: Jonathan M. Freiman, Lora R. Johns.

Dated: November 6, 2015

By: /s/ Jonathan M. Freiman

Jonathan M. Freiman
WIGGIN AND DANA LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
(203) 782-2889 (fax)
jfreiman@wiggin.com

TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes and Rules**

**Other Authorities**

## INTEREST OF *AMICI CURIAE*

*Amicus* Will A. Gunn served as the General Counsel of the Department of Veterans Affairs (VA) from May 2009 until July 2014. He has an interest in this case because its outcome will have a significant impact on the men and women who have served in the armed forces and on the VA, which now must process and adjudicate all their claims for benefits. The judgment of this *amicus* is based on his being a 25-year veteran of the Air Force and his acting as VA's senior attorney for five years.

*Amicus* Mary Lou Keener served as the General Counsel of the VA from 1993 to 1998. Her interest and judgment in this case are based on her five years of service as the VA's senior attorney.

While *amici* express no opinion on the merits of appellant's case, and thus file in support of neither party, they submit this brief to urge this Court to hold that the CAVC has the power, in appropriate circumstances, to aggregate claims in order to ensure the fairness and efficiency of VA benefits adjudications.

## INTRODUCTION

The VA benefits system is under increasing pressure. Veterans returning from Iraq and Afghanistan file claims for disability benefits in ever greater numbers. Military members in recent years have come home with newly

diagnosable disabilities, such as traumatic brain injury and illness from environmental hazards. *See* Daniel L. Nagin, *Goals vs. Deadlines: Notes on the VA Disability Claims Backlog*, 10 U. MASS L. REV. 50, 72-73 (2015) [hereinafter Nagin, *Goals vs. Deadlines*]. Advocacy efforts and Agency decisions based on improved science have made veterans of past wars newly eligible to collect benefits. *See, e.g.*, Presumption of Herbicide Exposure and Presumption of Disability During Service for Reservists Presumed Exposed to Herbicide, 80 Fed. Reg. 35,246 (June 19, 2015) (to be codified at 3 C.F.R. § 3) (expanding the presumption of herbicide exposure to post-Vietnam War veterans who worked on contaminated aircraft). The pool of applicants for benefits is getting bigger and sicker than ever.

That backlog of VA claimants has gained national, public attention. While the Agency has made progress in adjudicating veterans' initial claims for disability benefits, veterans in the appeals process must often wait years for a final decision. On average, a veteran waits five to seven years from filing a notice of disagreement with the VA's initial denial of benefits until a ruling from the Court of Appeals for Veterans Claims (CAVC), ordinarily a veteran's court of last resort. Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361, 377 (2009) [hereinafter Allen, *CAVC at Twenty*]. Those are

years when many veterans face grave illness, old age and indigent circumstances. Some die while waiting for a final ruling. The systemic nature of the delays makes it clear that the administrative machinery has been unable to slay the Hydra of backlogged claims appeals—for every petition that ends in a final disposition, more pop up to take its place.

To be sure, the VA and CAVC have limited resources, and limited resources sometimes cause delay. But delays of five to seven years are not merely the result of limited resources. They are the result of a system of adjudication that needlessly hamstrings itself. While the CAVC concluded below that it lacked authority to aggregate claims, class actions have previously been used to address veterans' claims issues. Class actions have also proven their worth in the adjudication of federal benefits programs in other agencies. Both the efficiency and fairness of benefits programs have improved through the aggregation of claims in appropriate circumstances. The CAVC need not lag behind in fairness and efficiency. It can and should address its problem of persistent and systemic delays, within the bounds of its legal authority, by aggregating appropriate cases for swifter, more effective adjudication.

# BACKGROUND

## I. The facts of this appeal

Appellant Conley Monk filed suit in the CAVC on behalf of himself and similarly situated veterans whose appeals have been pending for a year or more and who face financial or medical hardship while waiting for a final determination of benefits. Monk asked the CAVC to exercise its authority under the All Writs Act or its equitable powers to aggregate the claims and issue an injunction compelling the VA to determine the merits of the claims. *See generally Cox v. West*, 149 F.3d 1360 (Fed. Cir. 1998) (holding that the CAVC has power under the All Writs Act to issue writs in aid of its jurisdiction). Without reaching appellant's All Writs Act or equitable-power arguments, the CAVC declared in a brief order that it lacked the power to aggregate claims.

## II. Background on the structure of the VA benefits appeals process

The VA's mission is "To fulfill President Lincoln's promise 'To care for him who shall have borne the battle, and for his widow, and his orphan' by serving and honoring the men and women who are America's Veterans." The VA's Veterans Benefits Administration plays a critical role in fulfilling that mission, providing benefits to veterans for "service-connected" disabilities, or injuries suffered during military service that have caused a present disability. 38 U.S.C. § 1110.

To apply for benefits, an injured or disabled veteran files for disability compensation at a VA Regional Office (VARO). *See* 38 U.S.C. § 5101(a)(1); 38 C.F.R. § 3.155. If the VARO denies benefits and she disagrees with the decision, she has one year to appeal by providing a Notice of Disagreement (NOD) at the Agency of Original Jurisdiction (AOJ). *See* 38 C.F.R. §§ 20.201, 20.300, 20.302. Once she has filed the NOD, the veteran will be asked by the AOJ to select an appeals process: (i) de novo review or (2) an internal traditional appeals process (which is the default process, if the veteran does not choose). *See* 38 C.F.R. §§ 19.24, 19.26. If the AOJ cannot grant the benefit after this appeals process, then the AOJ issues a Statement of the Case. *See* 38 C.F.R. §§ 19.29-.31, 20.200.

The veteran may also administratively appeal to the Board of Veterans' Appeals (BVA). *See* 38 C.F.R. §§ 19.31, 19.35, 19.50, 20.202; *see also* 38 U.S.C. § 7104. Proceedings before the BVA are non-adversarial and *ex parte*. *See* 38 C.F.R. § 20.700. Neither the veteran nor his lawyer is necessarily present for the BVA's deliberations. *Id.* Moreover, BVA decisions are non-precedential and have no bearing on the outcomes of related cases. *See* 38 C.F.R. § 20.1303. Each BVA

decision, in other words, is a one-off decision. A veteran may appeal a BVA final decision to the CAVC. 38 U.S.C. §§ 7252, 7266.[1]

The CAVC is the first independent forum to hear the veteran's claim. While the VARO and the BVA are part of the VA, the CAVC operates outside of the VA. It is an independent Article I Court. *See* 38 U.S.C. § 7253. It is also the first forum where the proceedings are adversarial: both the veteran and the VA are represented by counsel, and the procedures resemble those of an ordinary federal court. *See* 38 U.S.C. §§ 7263-7265. In that sense, it is a bit of a hybrid, exhibiting elements of both a trial court and an appellate court. Like a trial court, it serves as a first forum independent of the agency and the first adversarial setting, but like an appellate court it reviews decisions.

## III. Statistics on the CAVC's caseload and disposition of appeals

The CAVC's caseload is enormous. Each year, the Court is confronted with thousands of appeals, petitions for extraordinary relief, claims for attorney's fees under the Equal Access to Justice Act, and motions for reconsideration. The statistics provided below pertain to the disposition of appeals, which comprise a vitally important majority of the CAVC's work.

[1] This Court has exclusive jurisdiction to review CAVC decisions. 38 U.S.C. § 7292.

In FY 2014, the CAVC disposed of 3,686 appeals. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, Annual Report (Fiscal Year 2014), https://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf. Of those, 1,615 (44 percent) were decided by a single judge. *Id.* Only 35 appeals (less than 1%) were decided by a multi-judge panel or by the full CAVC.[2] Under CAVC rules, only published opinions issued by a panel of three judges or more carry precedential value. *See Bethea v. Derwinski*, 2 Vet. App. 252 (1992). Single-judge dispositions are not binding in another case. *Id.* at 254. In short, less than 1% of the CAVC decisions rendered in 2014 created precedent.

The previous four years showed similar adjudicative trends:

| Fiscal Year | Total appeals decided | Single-judge decisions | Precedential decisions |
|---|---|---|---|
| 2013 | 3,673 | 45.5 percent | 0.007 percent |
| 2012 | 4,355 | 50 percent | 0.005 percent |
| 2011 | 4,620 | 48.5 percent | 0.009 percent |
| 2010 | 4,959 | 39 percent | 0.008 percent |

U.S. COURT OF APPEALS FOR VETERANS CLAIMS, Annual Report (Fiscal Year 2013), https://www.uscourts.cavc.gov/documents/FY2013AnnualReport.pdf; U.S. COURT OF APPEALS FOR VETERANS CLAIMS, Annual Report (Fiscal Year 2012),

[2] The rest (2,036) were disposed of by the Clerk of the Court through alternative dispute resolution methods, such as staff conferencing. *Id.*

https://www.uscourts.cavc.gov/documents/FY2012AnnualReport.pdf; U.S. COURT OF APPEALS FOR VETERANS CLAIMS, Annual Report (Fiscal Year 2011), https://www.uscourts.cavc.gov/documents/FY_2011_Annual_Report_FINAL_Feb_29_2012_1PM_.pdf; U.S. COURT OF APPEALS FOR VETERANS CLAIMS, Annual Report (Fiscal Year 2010), https://www.uscourts.cavc.gov/documents/FY_2010_Annual_report_June_27_2011_.pdf.[3]

## IV. The different kinds of claim aggregation in federal court

While the CAVC has not yet employed class actions to improve the efficiency and fairness of its caseload, federal courts have long used class actions as a means of aggregating claims. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999) (describing common-law history of class actions as equitable devices for combining multiple suits). Class actions serve three essential purposes: (1) to facilitate judicial economy by avoiding multiple suits on the same subject matter, *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974); (2) to provide a feasible means for asserting the rights of those who "would have no realistic day in court if a class action were not available," *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); and (3) to deter inconsistent results, assuring a uniform,

[3] As with the FY 2014 appeals, the remainder of appeals was resolved through Clerk of Court ADR dispositions.

singular determination of rights and liabilities, *First Federal of Michigan v. Barrow*, 878 F.2d 912, 919 (6th Cir. 1989).

Federal courts recognize three different types of class action. All three require plaintiffs to show certain prerequisites: that the members of the putative class are so numerous that joinder is impractical; that there are questions of law or fact common to the class; that the plaintiffs' claims are typical of the rest of the class; and that the plaintiffs will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). The types of class action then diverge.

The first type generally applies to suits seeking declaratory or injunctive relief. It allows class certification when individual lawsuits would impede the legal interest of absent class members, or when the threat of multiple suits may subject a defendant to incompatible standards of conduct. Fed. R. Civ. P. 23(b)(1); *see Zimmerman v. Bell*, 800 F.2d 386, 389 (4th Cir. 1986). Such classes facilitate litigation "at the least possible cost and in the least amount of time." *See Nat'l Treasury Employees Union v Reagan*, 509 F. Supp. 1337, 1341 (D.D.C. 1981), *remanded by Nat'l Treasury Employees Union v. Reagan*, 663 F.2d 239 (D.C. Cir. 1981). As such, they represent an attractive tool for the CAVC.[4]

[4] Rule 23(b)(1) class actions are generally not appropriate in actions for money damages. *See Green v. Occidental Petroleum, Inc.*, 541 F.2d 1335, 1340 (9th Cir. 1976).

The second type is the so-called "injunction" class actions. Fed. R. Civ. P. 23(b)(2). This type is used "when a single injunction or declaratory judgment would provide relief to each member of the class" or to none of them. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011). The determination of the applicability of a single policy to many people is a "prime example[]" of what Rule 23(b)(2) covers. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Like the (b)(1) class action, the injunction class action could, in appropriate circumstances, allow the CAVC to act more efficiently.

Finally, Rule 23(b)(3) provides a catch-all provision allowing a class action in circumstances where the need for aggregation is less obvious than in a 23(b)(1) or (b)(2) class. "In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable." Fed. R. Civ. P. 23 advisory committee's note to Subdivision (b)(3); *see also Amchem*, 521 U.S. at 615. Accordingly, the putative class members under this section have a greater need to show why a class action should be permitted, including that "the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). Additionally, potential class members have the right to notice and an

opportunity to opt out. Fed. R. Civ. P. 23(c)(2)(B). Unlike the other two sorts of class action, Rule 23(b)(3) class actions often seek actual damages, which must be susceptible of measurement across the entire class to survive judicial scrutiny. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013).

This appeal asks whether the CAVC has the power to aggregate claims *at all*, not whether it has every power to aggregate claims that the Article III federal courts have. This Court could conclude, for instance, that the CAVC's inherent power or power under the All Writs Act allows it to aggregate claims in a manner similar to (b)(1) class actions or (b)(2) class actions, without needing to address whether the CAVC also has the broader power of (b)(3)-style aggregation.

## ARGUMENT

### I. The aggregation of claims would facilitate administration of benefits in cases raising the same legal issue.

Courts have long recognized that class actions are indispensable for resolving cases that repeatedly raise the same issues among large groups of people. *See, e.g.*, *Ortiz*, 527 U.S. at 832; *see also* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2000 (2012) [hereinafter Sant'Ambrogio & Zimmerman, *Agency Class Action*].

Monk asked the CAVC to aggregate a (b)(2)-type set of claims, i.e., an aggregation of claims where "the party opposing the class [the VA] has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The aggregation of such claims would benefit both the CAVC and veterans for three major reasons.

First, a claim-aggregating rule permitting the CAVC to dispose of cases raising legally identical claims would promote faster adjudication and relieve some of the strain of its immense caseload. Under the current system, if the CAVC in an individual case creates a rule that affects a large group of veterans, each individual veteran must find the decision and ask the VARO to re-adjudicate his claim. Because more than 99% of CAVC dispositions are non-precedential, the VARO is likely not bound by the previous CAVC decision, and is free to follow or reject it. Veterans applying for benefits thus often lack guidance as to what the relevant rule is, and the VA itself may be wracked by competing determinations of VAROs or contradictory rulings by the CAVC. If affected veterans could form a class, the CAVC—subject to this Court's review—could clarify benefits rules for all relevant veterans at the same time, allowing it to cut through overwhelming backlogs and provide a consistent standard for both veterans and the VA. *See Dukes*, 131 S. Ct. at 2557. In short, the CAVC could "address important legal issues in a number of

cases at the same time," thus "reducing the delays associated with individual appeals." Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J. L. REFORM 483, 522 n.231 (2006) [hereinafter Allen, *Significant Developments*].

Second, claim aggregation has already proven its worth in the veterans' benefits context. In 1986, a group of Vietnam veterans filed a class action in federal district court on behalf of themselves and others eligible to claim VA disability based on a disease caused by exposure to Agent Orange during the Vietnam Era. *See Nehmer v. U.S. Dept. of Veterans Affairs*, 494 F.3d 846, 850 (9th Cir. 2007) ("*Nehmer III*"); *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113 (N.D. Cal. 1987) ("*Nehmer I*") (granting class certification); *see also* Diseases Associated with Exposure to Certain Herbicide Agents, 75 Fed. Reg. 14,391 (proposed Mar. 25, 2010) (to be codified at 3 C.F.R. § 3), at 14,393 (discussing *Nehmer* lawsuit). In 1989, the Court ruled in favor of the class, invalidating a VA regulation that imposed an impermissible burden on individual claimants to prove that their diseases were caused by herbicides. *See Nehmer v. U.S. Veterans' Admin.*, 712 F. Supp. 1404, 1406 (N.D. Cal. 1989) ("*Nehmer II*"); *see also Nehmer III*, 494 F.3d at 849.

After the district court invalidated the VA regulation, Congress passed the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (1991), entitling Vietnam veterans to a presumption that certain later-manifesting diseases are connected to their exposure to Agent Orange in Vietnam. *Nehmer III*, 494 F.3d at 851. Shortly after the Agent Orange Act was passed, the district court approved a consent decree signed by the VA and the plaintiff class requiring the VA to reassess class members' previously denied claims under the new, proper standard. *Id.* at 852. When the VA refused to reassess the prior claims and refused to pay retroactive benefits, the district court ordered the VA to apply the legal standard established by the stipulation to all class members, *id.* at 855, and the Ninth Circuit affirmed. *Id.* at 864-65. In holding that the VA was bound to the terms of the consent decree, the Court noted that "[t]he answer to the legal question on this appeal is quite apparent." *Id.* at 864. It concluded:

> What is difficult for us to comprehend is why the Department of Veterans Affairs, having entered into a settlement agreement and agreed to a consent order some 16 years ago, continues to resist its implementation so vigorously, as well as 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. Whether the Vietnam war was just or not, whether one favored or opposed it, one thing is clear. Those young Americans who risked their lives in their country's service and are even today suffering greatly as a result are deserving of better treatment from the Department of Veterans Affairs than they are currently receiving. We would hope that this litigation will now end, that our government will now respect the legal obligations it

> undertook in the Consent Decree some 16 years ago, that obstructionist bureaucratic opposition will now cease, and that our veterans will finally receive the benefits to which they are morally and legally entitled.

*Id.* at 864-65.

*Nehmer* is a prime example of a case that raised a clear common legal question: whether the VA was obligated to adjudicate the claims of Vietnam veterans suffering from particular diseases. While the extent of the injury caused by the disease differed among veterans, that factual difference did not hinder the court from determining the VA's legal duty with respect to all class members.

Third, the power to aggregate appropriate claims does not carry with it the burden to aggregate inappropriate claims. Former Chief Judge Kasold has opposed class actions because it would take too long to do the "fact finding" necessary to identify the members of the class. *Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs* of the H. Comm. on Veterans' Affairs, 112th Cong. 22-23 (2011) (Statement of Hon. Bruce E. Kasold, Chief Judge, U.S. Court of Appeals for Veterans Claims) [hereinafter 2011 House Hearing] . Whatever salience that argument might have in the context of class actions modeled on Rule 23(b)(3), where plaintiffs must prove the "predominance" of common legal and factual issues and the "superiority" of the class action method—as well as provide notice and an opportunity to opt out of the class—it has no relevance to claim aggregation modeled on Rule 23(b)(2) or (b)(1), which allows aggregation of

claims without those requirements. Claims for injunctions against the VA—such as the one in *Nehmer* and the one in the current appeal—would be appropriate class actions under a rule modeled after Federal Rule of Civil Procedure 23(b)(2) because "a single injunction . . . would provide relief to each member of the class" or to none of them. *Dukes*, 131 S. Ct. at 2557. Recognizing the CAVC's power to aggregate claims in such circumstances would give it greater freedom to control its docket and fashion appropriate remedies.

## II. A claim-aggregating rule would promote consistency and *stare decisis*.

The CAVC has resisted establishing a claim-aggregating rule in part because its published cases are precedential and therefore "totally binding" on the Secretary. 2011 House Hearing at 21. Former Chief Judge Kasold has argued that the CAVC's precedential cases obviate the need for aggregation, because they compel "the Secretary [to] take action." *Id.* That is unpersuasive for two reasons.

First, the CAVC creates little binding precedent. It decides the vast majority of cases by non-precedential single-judge opinions or by alternative dispute resolution (ADR). *See supra*; *see also* Allen, *Significant Developments* at 515.[5]

[5] The CAVC's implementation of mediation and other alternative dispute resolution (ADR) methods lead to faster results but do little to clarify the law. *See Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs* of the H. Comm. on Veterans' Affairs, 111th Cong. 5 (2009) [hereinafter 2009 House Hearing] (Statement of Hon. Bruce E. Kasold). Cases addressed through mediation

Despite handling thousands of claims each year, less than one percent of the CAVC's dispositions clarify the law through precedential opinions. *See supra*.[6] As recently as 2011, the CAVC's reversal rate was "about 70 percent." 2011 House Hearing at 22 (testimony of then-Chief Judge Kasold). Yet "if the CAVC were playing an important law-declaring function by clarifying veterans' benefits law, one may reasonably expect that its rulings would lead to lower reversal rates or quicker adjudication rates for the Board of Veterans' Appeals or administrative law judges." Michael Morley, *The Case Against a Specialized Court for Federal Benefits Appeals*, 17 Fed. Cir. B. J. 379, 394 (2008). An overwhelming majority of VA decisions are reversed on appeal, in large part because the law is not adequately clear.

Second, the CAVC's practice of disposing of cases on a piecemeal basis undermines the precedential value of its decisions. It has adopted a "narrowest possible grounds" policy under which it remands a case as soon as it identifies a single error by the BVA—including a factual one—leaving the other alleged errors

---

generally result in a remand to the BVA for further fact-intensive inquiries. *Id.* While ADR has helped the CAVC to resolve cases faster, it does not promote consistent application of the law or the creation of clarifying precedent. *See, e.g.*, Sant'Ambrogio & Zimmerman, *Agency Class Action* at 2034.

[6] While cases state that the CAVC will decide appeals by a single judge only where the legal rule is settled, *see Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990), the CAVC has used the procedure in cases where the legal rule was arguably unclear. Allen, *Significant Developments* at 517.

unaddressed. *See Best v. Principi*, 15 Vet. App. 18, 19-20 (2001); *Mahl v. Principi*, 15 Vet. App. 37, 38 (2001). This policy means that the CAVC will often dispose of cases raising the same legal issue on entirely different grounds, never reaching the common question of law. This process of piecemeal appeals—arguably a consequence of the CAVC's hybrid trial/appellate function—sets it apart from Article III courts. Unlike the CAVC, the nation's Article III appellate courts consistently reject piecemeal appeals. *See, e.g.*, *Ali v. Fed. Ins. Co.*, 719 F.3d 83 (2d Cir. 2013).

Claim aggregation, by contrast, would create "totally binding" precedential rules, reducing the duplicative and piecemeal appeals that plague the CAVC. For example, if the CAVC adopted a claim-aggregating rule modeled on Federal Rule of Civil Procedure 23(b)(1)(A), it could rule on consistent standards of conduct, reducing institutional delay and inconsistency and giving the VA clear guidance on how to treat similarly situated veterans. "[T]he failure to adopt aggregate procedures produces inconsistent judgments, spawns duplicative litigation, and exacerbates barriers to legal representation for people making common claims in agency adjudication. . . ." Sant'Ambrogio & Zimmerman, *Agency Class Action* at 2000. By aggregating claims, the CAVC could avoid these pitfalls.

## III. Class actions have proven useful in other benefits contexts.

Aggregate claim proceedings have proven useful in other benefits contexts. One notable example is the Supplemental Nutrition Assistance Program (SNAP), a federal-state hybrid benefits program, where applications for food stamps must be decided within 30 days. 7 C.F.R. § 273.2(g). An individual applying for food stamps can pursue an administrative appeal. 7 C.F.R. § 273.15. If a state agency fails to comply with the law, recipients may bring a class action seeking an injunction, ordinarily under Rule 23(b)(2). *See Briggs v. Bremby*, No. 3:12CV324 VLB, 2013 WL 1987237, at *5 (D. Conn. May 13, 2013) (certifying Rule 23(b)(2) class); *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 442 (S.D.N.Y. 2006) (same). "Where there are systemic failures by a state or local agency in complying with the thirty-day deadline for deciding SNAP applications, class action litigation can be pursued to enforce the agency's legal duty to decide applications by the deadline set forth in the regulation." Nagin, *Goals vs. Deadlines* at 76-78. Injunctions that impose uniform duties on state agencies with respect to the entire class are the remedy. *See Briggs v. Bremby*, 3:12-cv-324 (VLB), 2012 WL 6026167, (D. Conn. Dec. 4, 2102) (issuing preliminary injunction on behalf of class requiring state agency to comply with federal application processing deadlines); *Booth v. McManaman*, 830 F.Supp.2d 1037 (D. Haw. Nov. 16, 2011) (same); Marc Cohan & Mary R. Mannix, *National Center for Law and Economic Justice SNAP*

*Application Delay Litigation Project,* CLEARINGHOUSE REV.: J. OF POVERTY L. & POLICY 208-17 (Sept.-Oct. 2012); *cf.* Robert E. Scott, *The Reality of Procedural Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725, 732-33 (1972) (in the welfare context, "[t]he . . . quasi-class action [procedure] serves to mitigate . . . the hardship imposed on any individual [welfare] recipient who desires to question fundamental agency policy").

Benefits applicants can bring class actions in other contexts where aggregation has increased efficiency and fairness. In the Social Security context, for instance, an injunctive class action claimed that the Social Security Administration (SSA) had wrongly suspended Social Security benefits and Special Veterans Benefits to persons it believed were felons fleeing prosecution. *See* SOCIAL SECURITY, NOTICE OF FINAL SETTLEMENT IN THE MARTINEZ COURT CASE, https://www.socialsecurity.gov/martinezsettlement/ (last accessed Oct. 9, 2015). The class alleged that the SSA wrongly denied benefits to people who had a warrant for only a minor violation or whose names were similar to those of wanted fugitives. *Id.* As a result of the class action, the SSA agreed to pay retroactive benefits to qualifying class members and announced it would change its policy to remedy the class members' injuries and prevent future individuals from suffering the same harm. *Id.* Each affected individual may not have had the means or ability

to bring his or her own separate case. By certifying a class, the individual members succeeded in obtaining relief from the SSA's error. *See also Sullivan v. Zebley*, 493 U.S. 521 (1990) (holding in favor of class on issue that Social Security regulations violated a Social Security Act provision determining whether a child claimant is disabled); *Heckler v. Edwards*, 465 U.S. 870 (1984) (appeal from judgment in favor of class invalidating Social Security statute establishing gender-based presumption of allocation of income), *on remand*, *Edwards v. Heckler*, 789 F.2d 659, 661 (9th Cir. 1985) (noting three other courts had held the statute unconstitutional).

Naturally, claim aggregation also allows a court to clear a large backlog of claims by rejecting them en masse. *See, e.g.*, *Schweiker v. Wilson*, 450 U.S. 221 (1981) (holding that class of indigent, mentally disabled people fell outside of statutory guidelines for Supplemental Security Income eligibility); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (holding that association of military personnel lacked standing to challenge Armed Forces Reserve membership of members of Congress). *Hercules Inc. v. United States*, 516 U.S. 417 (1996) (affirming dismissal of consolidated action by Agent Orange manufacturers seeking indemnification from government for costs of litigating

veterans' tort claims). A claim-aggregating rule would allow the CAVC to clear its docket of appeals claiming benefits to which the applicants are not entitled.[7]

While claim aggregation in an appellate court like the CAVC may at first seem odd, it makes sense within the statutory scheme that Congress has chosen. Adjudication of veterans' benefits differs sharply from ordinary state or federal court litigation. A veteran usually navigates the initial process of filing for benefits without legal representation because attorneys cannot charge fees to help a veteran

[7] While the CAVC is an Article I court independent of the VA, several agencies have themselves adopted claim aggregation in order to remedy undue delays in adjudication of claims. The Equal Employment Opportunity Commission (EEOC) has created an administrative class action procedure, modeled after Rule 23 of the Federal Rules of Civil Procedure, permitting the aggregation of "pattern and practice" claims of discrimination by federal employees. *See* 29 C.F.R. § 1614.204(c) (2012). Likewise, Medicare's Office of Hearings and Appeals (OMHA), facing a backlog of more than 500,000 cases, has adopted a program allowing administrative law judges to decide large numbers of medical providers' billing claims by statistical sampling. *See* Appellant Forum Regarding the Administrative Law Judge Hearing Program for Medicare Claim Appeals, 79 Fed. Reg. 63,400 (Oct. 23, 2014); Administrative Law Judge Hearing Program for Medicare Claim Appeals, 79 Fed. Reg. 65,662-65,663 (Nov. 5, 2014). Finally, although the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 *et seq.*, does not explicitly provide for class actions, the Vaccine Program's special masters have aggregated claims since 2002, in a manner analogous to federal multidistrict litigation. *See Snyder ex rel. Snyder v. Sec'y of Dep't of Health & Human Servs.*, No. 01-162V, 2009 WL 332044, at *2 (Fed. Cl. Feb. 12, 2009) (explaining the historical development of omnibus proceedings under the Vaccine Act to resolve similar cases "more expeditiously"); *see also Cedillo v. Sec'y of Health & Human Servs.*, 89 Fed. Cl. 158, 163 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst v. Sec'y of Dep't of Health & Human Servs.*, No. 03-654V, 2009 WL 332258, at *1 (Fed. Cl. Feb. 12, 2009) (applying omnibus procedure in cases claiming vaccines caused autism).

file a claim. *See* 38 C.F.R. § 14.636(c). The administrative appeals process is non-adversarial. At each step in the agency proceedings, the VA has the duty to assist the veteran in developing her claim by, *inter alia*, notifying her of missing documents, obtaining necessary evidence, securing records in the custody of a federal agency, and providing medical examinations. 38 C.F.R. § 3.159. The CAVC is thus the *first* forum the veteran encounters independent of the VA; the first forum where proceedings take place before a decision-maker independent of the VA; and the first adversarial proceeding. Veterans lack access to independent judicial review until the CAVC, which is thus the first forum capable of aggregating benefits claims.

## IV. The CAVC has the authority to aggregate claims.

Before Congress transferred jurisdiction over benefits claims from the federal courts to the CAVC by passing the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), district courts resolved class actions brought by veterans challenging VA benefits determinations. *See, e.g.*, *Giusti-Bravo v. U.S. Veterans Administration*, 853 F. Supp. 34 (D.P.R. 1993) (approving settlement of benefits class action initiated in 1988). When the VJRA vested exclusive jurisdiction over veterans' benefits claims in the CAVC, veterans could no longer seek adjudication of benefits claims in federal district court. *See* 38

U.S.C. § 511(b)(4); 38 U.S.C. § 7252. Federal courts now lack subject-matter jurisdiction over benefits-related claims. *See, e.g.*, *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc) (holding federal district court lacked jurisdiction over class action against VA because of the CAVC's exclusive jurisdiction over benefits); *Addington v. United States*, 94 Fed. Cl. 779, 782 (2010) (same); *Beamon v. Brown*, 125 F.3d 965, 972 (6th Cir. 1997) (same). Even a veteran's constitutional due process claims cannot be entertained anywhere but in the CAVC. *See Sugrue v. Derwinski*, 26 F.3d 8 (2d Cir. 1994).

Congress' choice to vest the CAVC with exclusive jurisdiction should not, absent clear statutory language, be read as a choice to *restrict* the procedural tools available to the CAVC in handling veterans' claims. To the contrary, Congress aimed in the VJRA to expand the judicial recourse available to veterans whose benefits claims had been denied. It created an entirely new court to review the previously unreviewable decisions of the BVA. 134 CONG. REC. H10,348 (daily ed. Oct. 19, 1988); *see also* 134 CONG. REC. S16,638 (daily ed. Oct. 18, 1988). In a context in which veterans had never before been able to appeal directly from a VA denial of benefits, Congress sought to provide veterans "what they have been seeking all along: the opportunity for true judicial review of claims." *Id.*

Nothing in the text or legislative history of the VJRA suggests that Congress meant to restrict the procedural mechanisms available to the CAVC to ensure the fair and efficient resolution of veterans' claims. *See generally* 134 CONG. REC. H10,344 (daily ed. Oct. 19, 1988) and 134 CONG. REC. S16,650 (daily ed. Oct. 18, 1988) (joint explanatory statement on the Veterans Judicial Review Act); *see also* 134 CONG. REC. S16,632 (daily ed. Oct. 18, 1988) (text of VJRA). To the contrary, while neither the text nor legislative history say anything about class action or claim aggregation, the legislative history makes plain that Congress intended to give "this new [A]rticle I court . . . the power to issue whatever writs are necessary to conduct its business . . . in order for justice to prevail." 134 CONG. REC. S16,648 (daily ed. Oct. 18, 1988) (citing 28 U.S.C. § 1651 (All Writs Act)). By giving the CAVC the power to issue writs under the All Writs Act, Congress necessarily gave the CAVC the power to aggregate claims.[8] Justice does not prevail when sick and indigent veterans wait five to seven years to learn the results of their appeals. In

[8] While the CAVC rejected the proposed aggregation of claims in this case, its individual judges have recognized in the past that "it is not clear that we [the CAVC] don't already have the authority" to permit claim aggregation. 2009 House Hearing at 9; *see also Harrison v. Derwinski*, 1 Vet. App. 438, 439 (1991) (Kramer and Steinberg, JJ., concurring in the result and recognizing possibility that CAVC "may have the power to entertain class actions in appropriate situations"); *Lefkowitz v. Derwinski*, 1 Vet. App. 439, 440-41 (1991) (same). Three judges of the CAVC have also recognized the possibility of using the doctrine of associational standing as a means of aggregating claims. *See Am. Legion v. Nicholson*, 21 Vet. App. 1, 8-15 (2007) (en banc) (Kasold, Hagel, and Schoelen, JJ., dissenting).

such circumstances, justice delayed is justice denied. Nor does justice prevail when similarly situated veterans can be treated differently in non-precedential decisions or mediations, which account for more than 99% of CAVC appeal resolutions.

Without a class action or claim-aggregating rule, the CAVC is forced to resort to more burdensome methods of adjudication than those that Article III courts have at their disposal. In light of the legislative history of its creation, the CAVC should exercise its inherent power or power under the All Writs Act to adopt a claim-aggregating rule in cases that raise a common legal question, a solution that is both pragmatic and doctrinally sound.

## CONCLUSION

This Court should find that the CAVC has the authority to aggregate claims in appropriate cases. *Amici* offer no opinion as to whether aggregation is appropriate in this case, but the CAVC should not lack a tool that would allow it to clarify legal rules and more expeditiously resolve a backlog of claims appeals that dishonors and harms those who have served in our nation's armed forces.

Respectfully submitted,

AMICI CURIAE
WILL A. GUNN
MARY LOU KEENER

Dated: November 6, 2015

By: /s/Jonathan M. Freiman

Jonathan M. Freiman
Lora Johns (Fed. Cir. application pending)
WIGGIN AND DANA LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
(203) 782-2889 (fax)
jfreiman@wiggin.com

*Their Attorneys*

Jennifer McTiernan (on the brief)

**Federal Rules of Appellate Procedure Form 6.**
**Certificate of Compliance With Rule 32(a)**

**Certificate of Compliance With Type-Volume Limitation, Typeface Requirements and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ This brief contains 6, 060 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), **or**

☐ This brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point type Times New Roman type style, **or**

☐ This brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: November 6, 2015

/s/Jonathan M. Freiman
Jonathan M. Freiman

FORM 30. Certificate of Service

**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

# CERTIFICATE OF SERVICE

I certify that I served a copy on counsel of record on November 6, 2015 by:

- ☐ U.S. Mail
- ☐ Fax
- ☐ Hand
- ☒ Electronic Means (by E-mail or CM/ECF)

| Jonathan M. Freiman | /s/ Jonathan M. Freiman |
|---|---|
| Name of Counsel | Signature of Counsel |


| | |
|---|---|
| Law Firm | Wiggin and Dana LLP |
| Address | One Century Tower, P.O. Box 1832 |
| City, State, Zip | New Haven, CT 06508-1832 |
| Telephone Number | (203) 498-4400 |
| Fax Number | (203) 498-2889 |
| E-Mail Address | jfreiman@wiggin.com |


NOTE: For attorneys filing documents electronically, the name of the filer under whose log-in and password a document is submitted must be preceded by an "/s/" and typed in the space where the signature would otherwise appear. Graphic and other electronic signatures are discouraged.

Reset Fields