15-7092

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

CORRECTED AMICUS BRIEF AND APPENDIX OF 15 ADMINISTRATIVE LAW, CIVIL PROCEDURE, AND FEDERAL COURTS PROFESSORS IN SUPPORT OF APPELLANT AND REVERSAL

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INTEREST OF AMICI CURIAE

Amici teach and write in the fields of administrative law, civil procedure, and federal courts.[1] Amici support appellant's position that non-Article III courts including the Court of Appeals for Veterans Claims have the power to aggregate claims in appropriate cases. Amici take no position about whether aggregation in this particular case is warranted.

Amici file this in their individual capacity as scholars. They provide institutional affiliation solely for purposes of identification.

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SUMMARY OF ARGUMENT

Amici submit this brief to explain the use of aggregate procedures in non-Article III courts. In contrast to the decision below, a wide variety of non-Article III courts have concluded that they can, and should, in appropriate circumstances, aggregate claims under statutory authority parallel to that which Congress has provided to the Court of Appeals for Veterans Claims (CAVC). *See* Appendix A (collecting aggregation rules). Amici thus make three points in support of Claimant-Appellant Conley F. Monk, Jr.'s position that the CAVC may use either class actions or other informal procedures to aggregate cases.

First, Congress has the power, within constitutional limits, to create special courts whose judges do not receive the salary and tenure protections described in Article III of the Constitution. When doing so, Congress generally grants "non-Article III" courts broad discretion to craft procedures they deem necessary and appropriate to adjudicate the cases and claims that come before them.

Second, non-Article III courts employ a wide range of procedures to aggregate cases and claims at both the "trial" and "appellate" levels. For example, non-Article III courts have adopted rules that permit joinder, consolidation, and class actions. And even in the absence of a specific rule, non-Article III courts have aggregated particular cases and claims. The fact that non-Article III courts deploy a wide range of aggregation procedures reflects an appropriate and effective

division of labor between Congress and the courts. While Congress creates and defines the jurisdiction of non-Article III courts, the courts apply their expertise to determine the procedures necessary and best-suited to exercise that jurisdiction.

Third, non-Article III courts use aggregation to promote efficiency, consistency, and fairness. Aggregation enables courts to pool information about common and recurring problems efficiently, fosters more consistent outcomes in similar cases than is possible through case-by-case adjudications, and improves access to legal and expert assistance for parties who have limited resources and whose claims may appropriately be pursued through collective mechanisms.

Below, Amici provide examples of the use of aggregation by non-Article III courts. As Amici detail, aggregation is especially useful when, as here, a party seeks declaratory or injunctive relief in response to an alleged institutional or system-wide harm.

ARGUMENT

I. CONGRESS GENERALLY GRANTS NON-ARTICLE III COURTS BROAD DISCRETION TO ADOPT THEIR OWN PROCEDURES.

The Supreme Court has long recognized that Congress may create courts in which judges do not receive the salary and tenure protections required by Article III of the Constitution. *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828). When Congress creates such non-Article III courts, it usually employs one

of its enumerated powers in Article I, in combination with the "necessary-and-proper" clause. U.S. Const. Art. I, § 8.[2]

When Congress creates non-Article III courts, it both defines their jurisdiction and grants them the power to prescribe rules of practice and procedure to carry out their statutory mandates. *See, e.g.*, 7 U.S.C. § 12a (authorizing the Commodity Futures Trading Commission (CFTC) "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of" the Commodity Exchange Act); 26 U.S.C. § 7453 ("[T]he proceedings of the Tax Court … shall be conducted in accordance with such rules of practice and procedure … as the Tax Court may prescribe," but consistent with the Federal

[2] Some non-Article III judges, like bankruptcy and magistrate judges, are appointed by Article III judges and work inside the Article III branch. *See, e.g.*, 28 U.S.C. § 151 *et seq*.; § 631 *et seq*. *See generally*, Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 Geo. L.J. 607 (2002). Other non-Article III adjudicators work outside Article III, in bodies sometimes termed "legislative courts" and in administrative agencies. *See, e.g.*, 26 U.S.C. § 7441 *et seq*. (establishing the United States Tax Court as a stand-alone court); 29 U.S.C. §§ 153 & 160 (establishing the National Labor Relations Board as an independent regulatory agency and granting it authority, *inter alia*, to hear complaints regarding unfair labor practices).

Rules of Evidence for bench trials in the United States District Courts for the District of Columbia.).[3]

Non-Article III courts usually enjoy substantial discretion to develop their own procedures under such grants of authority. For example, in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1985), the Supreme Court rejected the lower court's conclusion that the CFTC lacked the power to join counterclaims. *Id*. at 842. The Supreme Court based its holding, in part, on the "the sweeping authority Congress delegated to the CFTC." *Id.* at 842. In particular, the Supreme Court relied on statutory language that permits the CFTC to "make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary" to accomplish the purposes of the statute authorizing its existence. *Id*. (citing 7 U.S.C. § 12a).

In some cases, non-Article III courts enjoy more power to develop procedural rules than Article III courts. Most non-Article III courts are not limited by the Rules Enabling Act, which says that Article III courts may only "prescribe

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[3] *See also* 29 U.S.C. § 156 (granting the National Labor Relations Board "authority … to make, amend, and rescind … such rules and regulations as may be necessary to carry out" its statutory mandate); 42 U.S.C. § 405(a) ("The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions…."); 42 U.S.C. § 2000e-16(b) (empowering the EEOC to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities" with respect to federal employees).

general rules of practice and procedure" that do not "abridge, enlarge or modify any substantive right." 28 U.S.C. §§ 2071-72. By contrast, many non-Article III courts have no such limitation. For example, under its statutory authority, the Tax Court may adopt any procedural rule "as the Tax Court may prescribe," so long as it conducts its proceedings in accordance with the rules of evidence for bench trials in the United States District Courts for the District of Columbia. 26 U.S.C § 7453.

In addition, like their Article III counterparts, non-Article III judges enjoy inherent authority to develop appropriate procedures to "manage their own affairs." *Compare Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962) (observing some powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"), *and United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."), *with Freytag v. C.I.R.*, 501 U.S. 868, 889 (1991) (holding that non-Article III tribunals, in addition to Article III courts, "exercise the judicial power of the United States").

When authorizing the CAVC, Congress granted the CAVC power to conduct hearings "in accordance with such rules of practice and procedure *as the Court*

prescribes." 38 U.S.C § 7264 (emphasis added). That statutory grant is comparable to the authority given to the CFTC, the Tax Court, and the other courts described above, all of which have appropriately used their authority to design their own procedures. Whether promulgating an aggregate rule or not, the CAVC also enjoys inherent authority "to manage its own affairs" and "control court proceedings before it." *In re Bailey*, 182 F.3d 860, 864 n.4 (Fed. Cir. 1999) (citing *Chambers v. NASCO, Inc*., 501 U.S. at 43).

Congress's decision to vest courts and tribunals with procedural flexibility reflects a basic feature of American procedure: courts need power to shape their own rules and, when appropriate, to adapt rules to respond to the issues that come before them.[4]

II. NON-ARTICLE III COURTS USE THEIR STATUTORY AUTHORITY TO AGGREGATE CLAIMS AND CASES IN A VARIETY OF WAYS.

The CAVC statute, which gives it the power to make "rules of practice," encompasses a wide range of procedures, including the power to aggregate cases

[4] *See* William B. Rubenstein, *Procedure and Society: An Essay for Steven Yeazell*, 61 UCLA L. Rev. Discourse 136, 141 (2013) ("[L]itigation is properly structured when its shape is the same as the shape of the underlying societal events."); *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970) ("The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."); *Van Harken v. City of Chicago*, 103 F. 3d 1346, 1351 (7th Cir. 1997) ("The due process clause is not a straitjacket, preventing state governments from experimenting with more efficient methods of delivering governmental services….").

and claims. Non-Article III tribunals may (a) enact formal rules to join, consolidate or certify class actions; (b) aggregate using informal proceedings; and (c) exercise this power at both the "trial" and "appellate" level.

A. Non-Article III courts promulgate rules providing for aggregation.

Relying on general grants of authority to adopt their own procedures, more than forty non-Article III courts have promulgated rules permitting the consolidation of cases to hear claims.[5] Some of these non-Article III courts have promulgated formal class actions rules. Examples include the Bankruptcy Courts, the Equal Employment Opportunity Commission (EEOC), the Consumer Product Safety Commission (CPSC), and the Personnel Appeals Board. *See* Fed. R. Bankr. P. 7023 (providing that Federal Rule of Civil Procedure 23 applies in adversary

[5] Appendix A provides a list of more than eighty rules promulgated by non-Article III tribunals that allow for consolidation, joinder, or class actions. For a sampling of such procedures adopted across the administrative state, *see, e.g.*, 29 C.F.R. § 102.33 (permitting the General Counsel of the National Labor Relations Board (NLRB) to consolidate any proceedings instituted in the same region under section 10(a)-(i) of the Act for the Prevention of Unfair Labor Practices where he "deems it necessary in order to effectuate the purposes of the Act"); 12 C.F.R. § 1081.204 (permitting the Consumer Financial Protection Bureau (CFPB) to consolidate adjudicatory proceedings "for some or all purposes" where there is a material common question of law or fact); 42 C.F.R. § 426.410 (permitting the Department of Health & Human Services to consolidate complaints relating to Medicare Local Coverage Determinations where there is a common question of law or fact); 28 C.F.R. § 68.16 (permitting the Department of Justice to consolidate where the evidence and matters at issue are "substantially similar" in hearings to be conducted regarding allegations of unlawful immigration-related employment practices, and document fraud).

proceedings in the Bankruptcy Courts); 29 C.F.R. § 1614.204 (permitting the EEOC to hear class action claims involving federal employees); 16 C.F.R. § 1025.18 (providing for the CPSC to pursue violations as a class action); 4 C.F.R. § 28.97 (providing employees power to pursue class actions with the Personnel Appeals Board).[6]

The EEOC's experience is illustrative. Congress vested the EEOC with the power to hear discrimination claims brought by federal employees and "to 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). Relying on that language, in 1992, the EEOC adopted a class action procedure. *See* 57 Fed. Reg. 12,634 (Apr. 10, 1992); 64 Fed. Reg. 37,644 (July 12, 1999).

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[6] There have been some cases where non-Article III courts *chose* not to adopt class action rules. In those cases, however, there was no question about whether those courts had the *authority* to adopt class action rules if they had wished to do so. In 1992, after Congress directed the CFTC to study the use of class actions in its own proceedings, the CFTC decided not to adopt a class action rule based largely on the availability of class action reparation claims in federal court. *Rules Relating to Reparation Proceedings*, 59 Fed. Reg. 9631 (Mar. 1, 1994). Last year, the Federal Communication Commission, which has only one full-time judge, similarly rejected a proposal to hear class actions, reasoning that "such suits may be brought in federal court." *In the Matter of Petition of Solvable Frustrations, Inc. to Amend Part 1 of the Commission's Rules to Specify Procedures for Class Action Complaints*, 29 F.C.C. Rcd. 4205 (2014). Of course, unlike those other areas of law, the CAVC is the only court that can review certain decisions of the Board of Veterans' Appeals (BVA). Pub. L. 100–687, § 301, 102 Stat. 4105 (codified at 38 U.S.C. § 7252).

In 2004, the Postal Service challenged that rule. The Office of Legal Counsel (OLC) for the United States Department of Justice rejected that challenge and confirmed the EEOC's broad authority to use class actions to aggregate claims.[7] Observing that class actions were "procedural in nature," the OLC concluded that the EEOC could properly adopt class action rules under its congressional directive to issue "such rules … as it deems necessary and appropriate to carry out its responsibilities."[8]

Indeed, just as class actions fall "within the Supreme Court's mandate to adopt rules of 'practice and procedure' for the district courts, … [t]here is no reason why [other courts] cannot use the same device, if it is appropriate." *Quinault Allottee Ass'n & Individual Allottees v. United States*, 453 F.2d 1272, 1274 (Ct. Cl. 1972) (holding the Court of Claims may certify class actions in appropriate cases). A part of the explanation stems from the function of class actions, which are "procedural technique[s] for resolving the claims of many individuals at one time …, comparable to joinder of multiple parties and

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[7] When two or more Executive agencies cannot resolve a dispute between themselves, OLC may resolve the dispute. Exec. Order No. 12,146, 44 Fed. Reg. 42,657 (1979).

[8] Office of Legal Counsel, Legality of EEOC Class Action Regulations, Memorandum Opinion for the Vice President and the General Counsel of the United States Postal Service 254 & 261 n.3 (Sept. 20, 2004), *available at* http://www.justice.gov/sites/default/files/olc/opinions/2004/09/31/op-olc-v028-p0254.pdf.

intervention." *Id.*; *accord Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) ("Rule 23 … falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.").

B. Non-Article III courts aggregate using informal methods.

Like Article III courts, which aggregate with different levels of formality,[9] many non-Article III courts also aggregate claims and cases without adopting a formal procedure to do so.[10] For example, the Office of Special Masters in the National Vaccine Injury Compensation Program (the "Vaccine Court") has not put forth a rule on aggregation. But, for some two decades, the Vaccine Court has relied instead on its general authority to "determine the format for taking evidence[,] … hearing argument[,]" and to "apply [its] expertise" from one case to

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[9] *See Principles of the Law of Aggregate Litig*., §§ 1.02 (2010) (describing informal aggregation); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 Duke L.J. 381, 386-401 (2000); Judith Resnik, *From "Cases" to "Litigation,"* 54 Law & Contemp. Probs. 5 (1991).

[10] *See, e.g., In re S & G Fin. Servs. of S. Florida, Inc.*, 451 B.R. 573, 582 (Bankr. 42 S.D. Fla. 2011) ("[I]t is well within this Court's equitable powers to allow substantive consolidation of entities under appropriate circumstances, whether or not all of those entities are debtors in bankruptcy."); *Marshall Associated Contractors, Inc. v. United States*, 31 Fed. Cl. 809, 816 (1994) (holding that the court "may either consolidate suits within the court or transfer suits to the appropriate agency board").

another. *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). Thus, when faced with large numbers of claims for compensation, the Vaccine Court developed "omnibus proceedings" to more efficiently process claims involving the same alleged vaccine-related injury. *Cedillo v. Sec'y of Health & Human Servs.*, No. 98-916V, 2009 WL 331968 at *11 (Fed. Cl. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010). In an "omnibus proceeding," a single special master hears evidence and makes a decision on a theory of general causation—for example, whether a rubella vaccine can cause chronic arthropathy and, if so, under what circumstances. *Id.* at *12. The "general causation" evidence is then available for application in individual cases. *Id.* Such "omnibus proceedings" work much like issue class actions in the federal courts.[11]

[11] *See* Betsy J. Grey, *The Plague of Causation in the National Childhood Vaccine Injury Act*, 48 Harv. J. on Legis. 343, 414 n.254 (2011) (stating that "omnibus proceeding[s]" in the Vaccine Court are "treated like a class action"). "Issue class actions" allow parties to achieve the economies of class actions for a part of the case—like whether a defendant lied to investors—even if courts could not manageably try the remaining individual issues of causation and damages as a class. Elizabeth C. Burch, *Constructing Issue Classes*, 102 Va. L. Rev _ (forthcoming 2016) ("[C]ourts have properly separated eligibility components such as plaintiffs' specific and proximate causation, reliance, and damages to facilitate issue classes in employment-discrimination, environmental-contamination, and consumer-fraud litigation." (collecting cases)), *available at* http://ssrn.com/abstract=2600219.

Another illustration of aggregation without a general rule comes from the Court of Claims, which also concluded that it had the authority to certify class actions before it adopted a class action rule:

> We could, of course, refuse to take any steps at all until a general rule is prescribed, but we think the better road to follow, until we are clearer as to the shape of the class-suit needs in this court and the functioning of various class-suit devices, is to proceed on a case-by-case basis, gaining and evaluating experience as we study and decide the class-suit issues presented by individual, concrete cases coming up for resolution. If we ultimately adopt a general rule, it will be in the light of this ad hoc experience.

Quinault Allottee Ass'n, 453 F.2d at 1276.[12]

Yet another example comes from the Office of Medicare Hearings and Appeals (OMHA), which hears Medicare billing disputes. OMHA has long relied on its implied authority to aggregate thousands of similar cases raised by health care providers against the federal government. *See In re Apogee Health Serv., Inc.*, No. 769 (Medicare Appeals Council Mar. 15, 1999); *cf. Chaves Cnty. Home Health Servs. v. Sullivan*, 931 F.2d 914, 919-22 (D.C. Cir. 1991) (finding that mass consolidation and other actuarial tools in Medicare adjudication comports with due process). OMHA adjudicators assert the power to identify, process, consolidate and sometimes sample large numbers of similar cases; when doing so, the OMHA

[12] The Court of Claims did not formally adopt a class action rule until 2002. The class action rule ultimately promulgated by the Court of Claims "adopt[ed] the criteria for certifying and maintaining a class action … set forth in *Quinault*." Committee Notes, 2002 Revision, Rule 23 of the Rules of the Court of Federal Claims.

relies on grants of authority akin to those of many other non-Article III courts. *Compare* 42 C.F.R. § 405.1044 (providing for consolidation of two or more cases where the issues "are the same issues that are involved in another request for hearing" for purposes of "administrative efficiency"), *with* U.S. Vet. App. R. 3(e) ("Appeals may be consolidated by order of the Court on its own initiative or on a party's motion.").

C. Non-Article III courts aggregate at "trial" and "appellate" levels.

The fact that a court may have characteristics of an "appellate court" does not preclude it from aggregating claims or cases through formal or informal processes. First, appellate level tribunals possess similarly broad discretion to aggregate cases. For example, many administrative courts of appeal consolidate cases that raise "common questions of law or fact," including the Civilian Board of Contract Appeals, the HHS Departmental Appeals Board, the Department of Agriculture, OMHA, and the Environmental Appeals Board.[13] Indeed, OMHA is the *third* level of review in the Medicare system. *See* Department of Health and

[13] *See* 48 C.F.R. § 6101.2 (authorizing the civilian board of contract appeals to consolidate contract dispute appeals where there are common questions of law or fact); 7 C.F.R. § 283.16 (authorizing judges in the Department of Agriculture to consolidate appeals by State agencies under the food stamp program); 42 C.F.R. § 426.510 (authorizing the HHS Departmental Appeals Board to consolidate complaints relating to Medicare National Coverage Determinations where there are common issues); 40 C.F.R. § 22.12 (authorizing the "Environmental Appeals Board to consolidate proceedings for civil penalties or revocation of permits where there are common issues of law or fact").

Human Services, Office of Medicare Hearings and Appeals Website, http://www.hhs.gov/omha/glossary/glossary_main.html ("In the Medicare appeals process the ALJ is the adjudicator at OMHA, the third level of the claim appeals process."). It bears mention as well that the Court of International Trade, an Article III court, hears administrative appeals of customs decisions and has allowed class actions since the early 1990s. *See Nat'l Bonded Warehouse Assoc. v. United States*, 14 C.I.T. 856 (1990).

Second, federal district courts may aggregate cases even when functioning in an "appellate" capacity, reviewing an agency's findings of fact and conclusions of law. Federal courts have routinely certified class actions to review systematic practices in Social Security, immigration, and—before 1988—veteran benefits cases. *See, e.g.*, *Bowen v. City of New York*, 476 U.S. 467 (1985) (social security); *Alli v. Decker*, 650 F.3d 1007 (3d. Cir. 2011) (immigration); *Nehmer v. U.S. Dep't of Veterans Affairs*, 118 F.R.D. 113 (N.D. Cal. 1987) (certifying a nationwide plaintiff class consisting of Vietnam veterans and surviving family members of deceased Vietnam veterans eligible to apply to VA for disability and death benefits due to exposure to Agent Orange).

That federal district courts certified class actions in veteran cases prior to the creation of the CAVC is further support for the proposition that the CAVC may aggregate claims. This is so because, when Congress gave the CAVC exclusive

jurisdiction over veterans' claims in 1988, it intended that the CAVC would exercise the same power as federal courts exercised in reviewing agency action.[14] Indeed, the American Bar Association Section on Administrative Law and Regulatory Practice's 2003 Report specifically concluded that Congress did not intend to prevent the CAVC from hearing class actions. *See* Am. Bar Ass'n, Section on Administrative Law and Regulatory Practice, *Report to the House of Delegates* 9-10 (2003).

III. AGGREGATION IS AN INDISPENSABLE TOOL FOR IMPROVING THE EFFICIENCY, CONSISTENCY, AND FAIRNESS OF ADJUDICATION.

Not only do non-Article III courts generally have the power to aggregate large groups of claims, but as illustrated above, many tribunals have relied on class action and other aggregate procedures to promote efficiency, consistency, and

[14] The CAVC's "scope of review" of BVA decisions set forth in 38 U.S.C. § 7261(a)(2) closely tracks a district court's "scope of review" of an agency decision under § 706 the Administrative Procedure Act. *See Henderson v. Shinseki*, 562 U.S. 428, 432 n.2 (2011) (noting that "the Veterans Court's scope of review, § 7261, is similar to that of an Article III court reviewing agency action under the Administrative Procedure Act"); *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007) (observing that federal district courts review challenges to agency action unless Congress says otherwise). Both the CAVC and the district court are directed to "decide all relevant question of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of" agency action, "hold unlawful and set aside" agency findings and conclusions "found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and perhaps most relevant to this case, "compel [agency] action … unlawfully withheld or unreasonably delayed." *Compare* 38 U.S.C. § 7261(a) *with* 5 U.S.C. §§ 706(1).

fairness. Aggregation can provide for the efficient pooling of information about common and recurring problems and for more consistent outcomes in similar cases than possible with case-by-case adjudications. Aggregation, moreover, is an important method to improve access to legal and expert assistance by parties with limited resources, so that individuals can pursue claims that otherwise would be difficult to do on an individual basis. *See, e.g.*, *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (Posner, J.) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." (emphasis in original) (citation omitted)), *cert. denied*, 134 S. Ct. 1277 (2014).

A. Aggregation can resolve group-wide harms more efficiently than can individual lawsuits.

Aggregation can resolve systematic problems and address allegations of group-wide harm more efficiently than piecemeal individual adjudication. Aggregation eliminates the duplicative expenditure of time and money associated with traditional one-on-one adjudications. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 859 (6th Cir. 2013) (citing *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013)); William B. Rubenstein, *Newberg on Class Actions* § 1:9, at 27 (5th ed. 2015) ("Class actions are particularly efficient when many similarly situated individuals have claims sufficiently large that they would each pursue their own individual

cases. In these situations, the courts are flooded with repetitive claims involving common issues.").

The efficiencies afforded by aggregation can be especially helpful in the administration and review of large benefit programs, such as those reviewed by the Court of Appeals for Veterans Claims. *See* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992, 2010-12 (2012) (Without aggregation procedures, large public benefits programs waste resources in "duplicative litigation, requiring frequent remands to address common factual errors, and hampering the efficient development and enforcement of law.").[15] For example, when over 5,000 parents claimed that a vaccine additive called thimerosal caused autism in children, the Vaccine Court used a national Autism Omnibus Proceeding to pool all the individual claims that raised the same highly-contested scientific questions. *Cedillo v. Sec'y of Health & Human Servs.*, No. 98-916V, 2009 WL 331968, at *11 (Fed. Cl. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, , 617 F.3d 1328 (Fed. Cir. 2010). In the words of one Special Master, omnibus proceedings have "turned out to be a highly successful procedural

[15] *See also* S. Rep. No. 111-265, at 35 (2009) (statement of Professor Michael P. Allen) ("[O]ne cannot avoid concluding that the absence of such authority to address multiple cases at once has an effect on system-wide timeliness of adjudication."); American Bar Ass'n, Section on Administrative Law and Regulatory Practice, *Report to the House of Delegates* 9 (2003) (recommending the use of class actions by the CAVC to address system-wide problems in veteran's cases).

device," facilitating settlement of individual cases and allowing those cases that proceed to a hearing to be resolved "*far more efficiently* than if we had needed a full blown trial, with multiple expert witnesses, in each case." *Id.* (emphasis in original).

Similarly, OMHA, which hears appeals from Medicare coverage determinations, expanded aggregation mechanisms to address a significant backlog that arose when the Medicare program stepped up efforts to recover excess billings. Under one initiative, hospitals, medical contractors and others may bundle hundreds of similar appeals at a time to facilitate settlement.[16] Under another, a medical provider may appeal more than 250 similar claims together, try a small sample of those claims before an administrative law judge, and extrapolate the results to the entire universe of claims.[17] Both programs have been so successful that medical providers are urging OMHA to expand opportunities to aggregate and settle large numbers of claims.[18]

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[16] *See* U.S. Dep't Of Health & Human Servs., *Settlement Conference Facilitation,* HHS.GOV (last visited Oct. 20, 2015), http://goo.gl/YSaUOU.

[17] *See* U.S. Dep't of Health & Human Servs., *Statistical Sampling Initiative,* HHS.GOV (last visited Oct. 20, 2015), http://goo.gl/y24gPF.

[18] *See, e.g.*, Letter to Nancy J. Griswold, Chief Administrative Law Judge, OMHA, from Medical Association of Georgia (Dec. 5, 2014) (calling for an expansion of OMHA's Statistical Sampling Initiative), *available at* http://goo.gl/U5NJIS; Letter to Nancy J. Griswold, Chief Administrative Law Judge, OMHA, from American Academy of Home Care Medicine (same), *available at* https://goo.gl/OeqE9n; Letter from Mark D. Polston, Partner, King & Spalding, to Nancy Griswold, Chief

In sum, the ability to experiment with a range of aggregation tools in appropriate cases has enabled non-Article III courts to adjudicate cases involving group harms more efficiently than they could using individual, case-by-case adjudication.

B. Aggregation enables more consistent applications of law.

Aggregate procedures can provide uniform and consistent application of the law. Aggregate proceedings and settlements seek uniformity and distributive fairness—to treat like parties in a like manner. Rubenstein, *Newberg on Class Actions* § 1:10, at 30 ([C]lass actions "reduce[] the risk of inconsistent adjudications. Individual processing leaves open the possibility that one court, or jury, will resolve a factual issue for the plaintiff while the next resolves a seemingly similar issue for the defendant."). And in cases seeking injunctions or declaratory relief, a court may never hear from plaintiffs with competing interests in the final outcome, or over time, subject defendants to impossibly conflicting demands. *See* David Marcus, *The Public Interest Class Action*, 104 Geo. L.J. _ (forthcoming 2015), *available at* http://goo.gl/nMEQev ("Class action procedure

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Administrative Law Judge, OMHA (Dec. 5, 2014) (calling for expansion of settlement conference initiative for a wider range of claims beyond Medicare Part B), *available at* http://goo.gl/bC8G2t; Letter from Robert Sowislo, Chair, Public Policy Committee, American Academy of Home Care Medicine, to Nancy Griswold, Chief Administrative Law Judge, (ALJ), OMHA (Dec. 5, 2014) (observing that the SCF program "provides a more expedient and in some ways straightforward process for [certain providers]").

enables public interest plaintiffs to vindicate policies in the substantive law consistent with broad, systemic remedies ….").

The EEOC, for example, has long utilized a class action procedure for resolving "pattern and practice" claims of discrimination by federal employees, including hearings before specialized administrative law judges and appeals to the EEOC itself. *See* 29 C.F.R. § 1614.204. The EEOC deems the process important in light of the volume of claims it processes each year, the potential for inefficient and inconsistent judgments, and the otherwise limited access to counsel. *See, e.g.*, 57 Fed. Reg. 12,634, 12,639 (Apr. 10, 1992) (describing inconsistent judgments that result in the absence of class actions).

In the past, the CAVC has suggested that it may promote uniform decision making by establishing binding precedent. *See Lefkowitz v. Derwinski*, 1 Vet. App. 439 (1991). Although the doctrine of "stare decisis" aspires to make administrative decisions consistent, stare decisis cannot ensure the kind of uniform outcomes and legal access that aggregate adjudication can provide. First, the challenges that administrative appellate bodies face are well known; for example during the 2014 fiscal year, the Social Security's Appeals Council received 155,352 requests for review, processed 162,280 requests for review, and still had 150,383 requests for review pending at the end of the year. [19] *See* Jerry L.

[19] https://ssa.gov/appeals/appeals_process.html#&a0=6.

Mashaw, Richard A. Merrill, & Peter M. Shane, *Administrative Law: The American Public Law System*, 457 (6th ed. 2009) (discussing why precedent-based decisions are not realistic for ALJs in Social Security disability cases). Even an appellate body itself may not know about all its own prior decisions. *Id.* at 436-37 (collecting cases where administrative tribunals departed from their own precedents).

Second, stare decisis is not responsive to the problems of access to representation. Sant'Ambrogio & Zimmerman, 112 Colum. L. Rev. at 2024-25. Indeed, stare decisis is an aspect of adjudication that *requires* lawyers; lawyers are uniquely suited to find relevant precedents, interpret the significance of rulings to the case at hand, and discuss their application. *See, e.g.*, 2 Charles H. Koch, Jr., *Administrative Law and Practice* § 5:67 (3d ed. 2010) (explaining how stare decisis disadvantages unsophisticated claimants who lack resources to be informed of individual decisions in a mass justice adjudicatory system). Thus, the complexity of a system rooted in case-by-case decision making makes legal representation even more critical.

Of course, aggregation is not a panacea, and decisions to employ it require thoughtful attention to the commonalities of the claimants and their evidence. But when used wisely, aggregate adjudication "may simultaneously improve

uniformity, efficiency, and access to qualified counsel in a single proceeding." Sant'Ambrogio & Zimmerman, 112 Colum. L. Rev. at 2024.

C. Aggregation can facilitate access to justice.

Aggregation can expand access to legal representation. American Law Institute, *Principles of the Law of Aggregate Litig*. § 1.04 (2010) (describing the central "object of aggregate proceedings" as "enabling claimants to voice their concerns and facilitating the rendition of further relief that protects the rights of affected persons"). As is vivid in the context of arbitration, single-file litigation has great costs, and aggregation permits pooling of resources. *Arbitration Study: Report to Congress,* Pursuant to Dodd-Frank Wall Street and Consumer Protection Act § 1028(a), Consumer Fin. Protection Bureau § 1, at 11-14 (2015) (concluding that class actions deliver cash relief to more consumers—especially those with small dollar claims—than individual arbitration), *available at* http://goo.gl/NIarU8. For example, between 2009 and 2014, AT&T, which prohibits its customers from using class arbitrations or class actions, *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), had 85 to 120 million customers yearly. Fewer than thirty filed arbitrations in any of those five years. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in the Courts, and the Erasure of Rights*, 124 Yale L.J. 2804, 2812-13 (2015).

Aggregate procedures can also increase accountability and provide remedies for wide and diffuse harms that are too costly to be prosecuted through individual claims and appeals. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available."). Thus, aggregate procedures can serve an important democratic function, allowing groups of individuals collectively to petition and redress widespread harm. Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 382 (1996).

The EEOC's class action device, for example, allows the pooling of information about employers' policies and highlights patterns that may escape detection in individual proceedings. *See* 64 Fed. Reg. 37,644, 37,651 (July 12, 1999) (observing that "class actions … are an essential mechanism for attacking broad patterns of workplace discrimination and providing relief to victims of discriminatory policies or systemic practices"). In some cases, the scale and visibility of an EEOC class action itself attracts the attention of government agencies, leading to workplace reforms. For example, after an EEOC class of disabled applicants challenged the State Department's "world-wide" availability

requirement for foreign service workers—a policy that rejected candidates for promotion unless they could work without accommodation—the state department was alerted to a systematic problem in its hiring practices.[20]

Additionally, the Vaccine Court's omnibus proceedings allow all parties alleging vaccine-related injury to benefit from the record developed in test cases and general causation hearings by the most qualified experts and experienced legal counsel. *Cedillo*, 2009 WL 331968 at *8 (noting how a select group of petitioners' counsel is charged with obtaining and presenting evidence in the omnibus proceedings). In one of the Vaccine Court's first omnibus proceedings, the parties pooled common scientific evidence on the issue of whether a rubella vaccine caused chronic arthritis. As a result, the Vaccine Court raised the profile of an issue that, up to that time, had not been in focus, for both the Department of Health and Human Services and Congress. *Ahern v. Sec'y of the Dep't of Health and Human Servs.*, No. 90-1435V, 1993 WL 179430 at *3 (Fed. Cl. Spec. Mstr. Jan. 11, 1993). Shortly after the decision, the Vaccine Injury Table was administratively modified, consistent with the decision, to include chronic arthritis as an injury generally associated with the rubella vaccine. *See* 60 Fed. Reg. 7678 (1995), *revised* 62 Fed. Reg. 7685, 7688 (1997).

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[20] Press Release, *U.S. Equal Employment Opportunity Commission Affirms Class Action to Open State Department to Disabled Foreign Service Officers*, MarketWatch, June 14, 2014, *available at* http://goo.gl/GXdHOK.

As these examples illustrate, aggregation procedures are one means of expanding access to non-Article III courts and tribunals and improving the information provided to them.

CONCLUSION

A host of non-Article III tribunals have interpreted their authorizing statutes, with language akin to that of the Veterans Judicial Review Act, to include the authority to consolidate claims, to certify class actions, and to use other forms of aggregate procedures in appropriate cases. For those courts, aggregation has proved to be an indispensable tool for promoting efficiency, consistency, and access to adjudication. Statutes authorizing non-Article III courts to make rules can and should be read to include the authority to create aggregate procedures so as to fulfill statutory mandates to decide disputes.

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APPENDIX A

NON-ARTICLE III TRIBUNALS WITH AGGREGATION RULES

APPENDIX A TABLE OF CONTENTS

List of non-Article III tribunals with aggregation rules..... A-3 – A-29

Non-Article III Tribunal	**Aggregation Rule**	**Description**
Bankruptcy Court	Fed. R. Bankr. P. 7023	"Rule 23 F. R. Civ. P. [class actions] applies in adversary proceedings."
Board of Governors of the Federal Reserve System	12 C.F.R. § 263.22	"On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice."
	12 C.F.R. § 268.204	Provides for Federal Reserve employees to file "class complaint[s]" with the Board of Governors alleging discrimination on the basis of their race, color, religion, sex, national origin, age or disability. Requests for a hearing in front of an administrative judge (AJ) and appeals from the Board's final action will be heard by the Equal Employment Opportunity Commission (EEOC).
	12 C.F.R. § 268.606	"Complaints of discrimination filed by two or more complainants consisting of substantially similar allegations of discrimination or relating to the same matter may be consolidated by the Board or the Commission for joint processing after appropriate notification to the parties." Requests for hearing in front of an AJ and appeals from the Board's final action will be heard by the EEOC.
Board of Immigration Appeals	BIA Practice Manual § 4.10(a)	"The Board may consolidate appeals at its discretion or upon request of one or both of the parties, when appropriate."
Bureau of Indian Affairs	25 C.F.R. § 2.18	Provides for any appeals pending before one official "involving common questions of law or fact may be consolidated by the official conducting such proceedings, pursuant to a motion by any party or on the initiative of the official."

Non-Article III Tribunal	**Aggregation Rule**	**Description**
Civilian Board of Contract Appeals	48 C.F.R. § 6101.2	"When cases involving common questions of law or fact are filed, the Board may: (1) Order the cases consolidated; or (2) Make such other orders concerning the proceedings as are needed to avoid unnecessary costs or delay."
Consumer Financial Protection Bureau	12 C.F.R. § 1072.112	"Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member of that class may file a class complaint."
	12 C.F.R. § 1081.204	"On the motion of any party, or on the hearing officer's own motion, the hearing officer may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice."
Consumer Product Safety Commission	16 C.F.R. § 1025.18	Provides for the agency to pursue enforcement actions as a "class action" proceeding.
	16 C.F.R. § 1025.19	"Two or more matters which have been scheduled for adjudicative proceedings and which involve similar issues may be consolidated for the purpose of hearing or Commission review."
Corporation for National and Community Service	45 C.F.R. § 1225.13	Permits volunteers to file a "class complaint" with the Equal Opportunity Director alleging Equal Opportunity discrimination.
Court of Federal Claims	R.C.F.C. Rule 23	"One or more members of a class may sue as representative parties under certain conditions."
Delaware River Basin Commission	18 C.F.R. § 401.78	"[T]o the extent that the same or similar grounds for objections are raised by one or more objectors, the Executive Director may in his discretion and with the consent

Non-Article III Tribunal	Aggregation Rule	Description
		of the objectors, cause a consolidated hearing to be scheduled."

Non-Article III Tribunal	**Aggregation Rule**	**Description**
Department of Agriculture	7 C.F.R. § 273.15	Permits state agencies to "respond to a series of individual requests for hearings" involving adverse determination under a Department of Agriculture Food Stamp and Food Distribution program "by conducting a single group hearing. State agencies may consolidate only cases where individual issues of fact are not disputed and where related issues of State and/or Federal law, regulation or policy are the sole issues being raised."
	7 C.F.R. § 283.16	"Similar issues involved in appeals by two or more State agencies may be consolidated upon motion by the State agencies, FNS, or at the discretion of the ALJ if it is decided that consolidation would help to promote administrative efficiency."
	7 C.F.R. § 900.56	Permits ALJs to "consolidate[]" hearings where there are two or more petitions to modify or be exempted from the same Marketing Order by the Agricultural Marketing Service.
Department of Commerce	19 C.F.R. § 351.310	"[T]he Secretary may consolidate hearings in two or more cases" challenging preliminary determinations of antidumping and countervailing duties investigations.
	19 C.F.R. § 354.12	Provides for "joinder or consolidation" by the International Trade Administration of hearings for sanctions proposed against more than one party for violation of an antidumping or countervailing duty protective order.
Department of Defense	32 C.F.R. § 199.10	"The Director, OCHAMPUS, or a designee, may consolidate any number of proceedings for hearing when the facts and circumstances are similar[,] and no substantial right of an appealing party will be prejudiced[,]" in cases involving fraud, abuse, or conflict of interest in the Civilian Health and Medical Program of the Uniformed Service.
Department of	20 U.S.C. §	"In all actions under this subsection, the

Non-Article III Tribunal	**Aggregation Rule**	**Description**
Education	7704	Secretary shall have discretion to consolidate complaints involving the same tribe or local educational agency.”

Non-Article III Tribunal	**Aggregation Rule**	**Description**
	34 C.F.R. § 101.55	Provides for proceedings under Title VI of the Civil Rights Act of 1964 "to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies."
Department of Health and Human Services	42 C.F.R. § 431.222	State agencies under the Medicaid program "(a) May respond to a series of individual requests for hearing by conducting a single group hearing; (b) May consolidate hearings only in cases in which the sole issue involved is one of Federal or State law or policy."
	42 C.F.R. § 405.1044	Provides for "consolidated hearing[s]" related to determinations, redeterminations, reconsiderations, and appeals under Original Medicare (Medicare Parts A and B) "if one or more of the issues to be considered at the hearing are the same issues that are involved in another request for hearing or hearings pending before the same ALJ."
	42 C.F.R. § 423.2044	Provides for "consolidated hearing[s]" related to the Voluntary Medicare Prescription Drug Benefit program "if one or more of the issues to be considered at the hearing are the same issues that are involved in another request for hearing or hearings pending before the same ALJ."
	42 C.F.R. § 426.410	Provides for ALJs to consolidate complaints relating to Medicare Local Coverage Determinations complaints if they "contain common questions of law, common questions of fact, or both . . . ."
	42 C.F.R. § 426.510	Permits the HHS Departmental Appeals Board to consolidate complaints relating to Medicare National Coverage Determinations if they "contain common questions of law, common questions of fact, or both[; and c]onsolidating the complaints does not unduly delay the Board's decision."
	42 C.F.R. §	State agencies under the Medicaid

Non-Article III Tribunal	Aggregation Rule	Description
	431.222	program "(a) May respond to a series of individual requests for hearing by conducting a single group hearing; (b) May consolidate hearings only in cases in which the sole issue involved is one of Federal or State law or policy."

Non-Article III Tribunal	**Aggregation Rule**	**Description**
	45 C.F.R. § 205.10	State "agencies may respond to a series of individual requests for hearing" related to public assistance programs "by conducting a single group hearing. Agencies may consolidate only cases in which the sole issue involved is one of State or Federal law or policy or changes in State or Federal law."
	45 C.F.R. § 81.55	Provides for proceedings under Title VI of the Civil Rights Act of 1964 "to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies."
Department of Homeland Security	19 C.F.R. § 174.15	Permits the Customs and Border Protection to consolidate "separate protests relating to one category of merchandise covered by an entry ... whether filed as a single protest or filed as separate protests relating to the same category by one or more parties in interest or an authorized agent."
	49 C.F.R. § 1503.613	Permits the Chief ALJ at the Transportation Security Administration to consolidate "two or more" investigative or enforcement proceedings where there are common questions of law or fact.
	5 C.F.R. § 9701.706	Permits the Merit Systems Protection Board to "consolidate appeals by two or more appellants" regarding adverse employment actions.
Department of Housing and Urban Development	24 C.F.R. § 180.415	"The ALJ may provide for non-Fair Housing Act proceedings at HUD to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies."
	24 C.F.R. § 7.33	"Complaints of discrimination filed by two or more Complainants consisting of substantially similar allegations of discrimination or relating to the same matter may be consolidated by the Department or the EEOC for joint

Non-Article III Tribunal	Aggregation Rule	Description
		processing after appropriate notification to the parties." Requests for a hearing and appeals from the Department's final action will be heard by the EEOC.

Non-Article III Tribunal	**Aggregation Rule**	**Description**
Department of Justice	28 C.F.R. § 68.16	"When two or more hearings are to be held" regarding allegations of unlawful employment of aliens, unfair immigration-related employment practices, or document fraud, "and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Administrative Law Judge assigned may, upon motion by any party, or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings may be made and the evidence introduced in one matter may be considered as introduced in the others, and a separate or joint decision shall be made at the discretion of the Administrative Law Judge."
Department of Labor	20 C.F.R. § 725.460	"When two or more hearings are to be held" regarding claims under Federal Coal Mine Health and Safety Act, "and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings shall be made and the evidence introduced in one claim may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate."
	29 C.F.R. § 18.43	"If separate proceedings before the Office of the Administrative Law Judges involve a common question of law or fact, a judge may: (1) Join for hearing any or all matters at issue in the proceedings; (2) Consolidate the proceedings; or (3) Issue any other orders to avoid unnecessary cost or delay."
Department of the Interior	43 C.F.R. § 4.1113	"When proceedings involving a common question of law or fact are pending before an administrative law judge or the Board,

Non-Article III Tribunal	Aggregation Rule	Description
		such proceedings are subject to consolidation pursuant to a motion by a party or at the initiative of an administrative law judge or the Board."

Non-Article III Tribunal	**Aggregation Rule**	**Description**
	43 C.F.R. § 4.820	"[T]he Secretary may provide for proceedings in the Department" related to nondiscrimination in federally-assisted programs "to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies."
Department of the Treasury	12 C.F.R. § 109.22	"On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice." Provides for ALJs to consolidate adjudicatory proceedings related to Federal savings associations where there is a "material common question of law or fact."
	12 C.F.R. § 509.22	"On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more [Office of Thrift Supervision] proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice."
Department of Transportation	14 C.F.R. § 302.13	In aviation proceedings, "[t]he Department, upon its own initiative or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings that involve substantially the same parties, or issues that are the same or closely related, if it finds that such

Non-Article III Tribunal	**Aggregation Rule**	**Description**
		consolidation or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings."

Non-Article III Tribunal	**Aggregation Rule**	**Description**
Department of Veterans Affairs	38 C.F.R. § 18b.34	Provides for administrative proceedings before the Department of Veterans Affairs under Title VI of the Civil Rights Act of 1964 to be "consolidated" with proceedings in other federal agencies upon agreement by the agencies.
Environmental Protection Agency	40 C.F.R. § 164.32	"The Chief Administrative Law Judge, by motion or sua sponte, may consolidate two or more proceedings" regarding pesticide programs "whenever it appears that this will expedite or simplify consideration of the issues."
	40 C.F.R. § 209.13	"The Administrator or the administrative law judge may consolidate two or more proceedings to be held" under section 11(d) of the Noise Control Act of 1972 "for resolving one or more issues whenever it appears that such consolidation will expedite or simplify consideration of such issues."
	40 C.F.R. § 22.12	"The Presiding Officer or the Environmental Appeals Board may consolidate any or all matters at issue in two or more proceedings subject to these Consolidated Rules of Practice where: there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings."
	40 C.F.R. § 222.11	Provides for the Administrator or Region Administrator to "order consolidation of any adjudicatory hearings [regarding ocean dumping permits] whenever he determines that consolidation will expedite or simplify the consideration of the issues presented."
	40 C.F.R. § 305.11	"The Presiding Officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more proceedings" related to denial of claims against the Hazardous Substance Superfund "where:

Non-Article III Tribunal	**Aggregation Rule**	**Description**
		(1) There exist common parties or common questions of fact or law; (2) Consolidation would expedite and simplify consideration of the issues; and (3) Consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings."

Non-Article III Tribunal	**Aggregation Rule**	**Description**
	40 C.F.R. § 78.8	"The Environmental Appeals Board or Presiding Officer has the discretion to consolidate, in whole or in part, two or more proceedings" under the agency's air programs "whenever it appears that a joint proceeding on any or all of the matters at issue in the proceedings will be in the interest of justice, will expedite or simplify consideration of the issues, and will not prejudice any party."
	40 C.F.R. § 89.513	"The Administrator or the Presiding Officer in his discretion may consolidate two or more proceedings" regarding nonroad compression-ignition engines "for the purpose of resolving one or more issues whenever it appears that consolidation will expedite or simplify consideration of these issues."
	40 C.F.R. § 90.513	"The Administrator or the Presiding Officer in his discretion may consolidate two or more proceedings" regarding production line testing programs for nonroad spark-ignition engines "for the purpose of resolving one or more issues whenever it appears that consolidation will expedite or simplify consideration of these issues."
	40 C.F.R. § 91.513	"The Administrator or the Presiding Officer in his discretion may consolidate two or more proceedings" regarding production line testing programs for marine spark-ignition engines "for the purpose of resolving one or more issues whenever it appears that consolidation will expedite or simplify consideration of these issues."
	40 C.F.R. § 92.514	"The Administrator or the Presiding Officer in his or her discretion may consolidate two or more proceedings" regarding locomotive manufacturer production line testing and audit programs "for the purpose of resolving one or more issues whenever it appears that consolidation will expedite or simplify

Non-Article III Tribunal	Aggregation Rule	Description
		consideration of these issues.”

Non-Article III Tribunal	**Aggregation Rule**	**Description**
	40 C.F.R. § 94.514	"The Administrator or the Presiding Officer in his or her discretion may consolidate two or more proceedings" regarding production line testing programs for marine compression-ignition engines "for the purpose of resolving one or more issues whenever it appears that consolidation will expedite or simplify consideration of these issues."
Equal Employment Opportunity Commission	29 C.F.R. § 1603.206	"The administrative law judge may, upon motion by a party or upon his or her own motion, after providing reasonable notice and opportunity to object to all parties affected, consolidate any or all matters at issue in two or more adjudications docketed under this part where common parties, or factual or legal questions exist; where such consolidation would expedite or simplify consideration of the issues; or where the interests of justice would be served. For purposes of this section, no distinction is made between joinder and consolidation of adjudications."
	29 C.F.R. § 1614.204	Provides for Federal employees to file a "class complaint" with an AJ to adjudicate agency personnel management policy or practice regarding race, color, religion, sex, national origin, age, disability or genetic information.
	29 C.F.R. § 1614.606	"Complaints of discrimination filed by two or more complainants [against a federal employer] consisting of substantially similar allegations of discrimination or relating to the same matter may be consolidated by the agency or the Commission for joint processing after appropriate notification to the parties."
Federal Communications Commission	47 C.F.R. § 1.227	"The Commission, upon motion or upon its own motion, will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing: (1) Any cases which involve the same applicant or involve substantially the same issues, or

Non-Article III Tribunal	**Aggregation Rule**	**Description**
		(2) Any applications which present conflicting claims, except where a random selection process is used.”

Non-Article III Tribunal	**Aggregation Rule**	**Description**
Federal Deposit Insurance Corporation	12 C.F.R. § 308.22	"On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice."
Federal Energy Regulatory Commission	18 C.F.R. § 385.503	"The Chief Administrative Law Judge may, on motion or otherwise, order proceedings pending" before the Federal Energy Regulatory Commission "consolidated for hearing on, or settlement of, any or all matters in issue in the proceedings, or order the severance of proceedings or issues in a proceeding."
Federal Housing Finance Agency	12 C.F.R. § 1209.27	"On the motion of any party, or on the presiding officer's own motion, the presiding officer may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice."
Federal Labor Relations Authority	5 C.F.R. § 2429.2	Provides for regional directors in the Federal Labor Relations Authority to "consolidat[e]" representation proceedings and unfair labor practice proceedings arising in their region where "it appears necessary in order to effectuate the purposes of the Federal Service Labor-Management Relations Statute."
Federal Maritime Commission	46 C.F.R. § 502.79	"The Commission or the Chief Administrative Law Judge (or designee) may order two or more proceedings which involve substantially the same issues

Non-Article III Tribunal	**Aggregation Rule**	**Description**
		consolidated and heard together."
Federal Mine Safety and Health Review Commission	29 C.F.R. § 2700.12	"The Commission and its Judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings [under the Federal Mine Safety and Health Act] that involve similar issues."

Non-Article III Tribunal	**Aggregation Rule**	**Description**
Federal Railroad Administration	49 C.F.R. § 209.13	Permits the Chief Counsel of the Federal Railroad Administration to "consolidate the matter with any similar matter(s) pending against the same respondent or with any related matter(s) pending against other respondent(s) under the same subpart."
Foreign Service Labor Relations Board	22 C.F.R. § 1429.2	"[W]henever it appears necessary in order to effectuate the purposes of the Foreign Service Labor–Management Relations Statute or to avoid unnecessary costs or delay, Regional Directors may consolidate cases within their own region or may transfer such cases to any other region, for the purpose of investigation or consolidation with any proceedings which may have been instituted in, or transferred to, such region."
Government Accountability Office	4 C.F.R. § 22.3	"The [Office Contract Appeal] Board, in its discretion, may consolidate cases involving common issues of law or fact."
	4 C.F.R. § 28.97	Permits employees to file a "class action[s]" with the Personnel Appeals Board.
Maritime Administration	46 C.F.R. § 201.73	"Two or more matters which have been set for hearing by the Administration, and which involve similar issues, may be consolidated for the purpose of hearing. Such consolidation may, at the discretion of the Administration, or Presiding Officer after hearing has been ordered, be ordered upon petition of any party to said hearing or upon the initiative of the Administration."
Merit Systems Protection Board	5 C.F.R. § 1201.27	Permits employees to file "class action" appeal of agency decisions in circumstances where it would be appropriate to treat proceedings as a class action under the Federal Rules of Civil Procedure.
	5. C.F.R. § 1201.36	"A judge may consolidate or join cases on his or her own motion or on the motion of a party if doing so would: (1) Expedite

Non-Article III Tribunal	Aggregation Rule	Description
		processing of the cases; and (2) Not adversely affect the interests of the parties.”

Non-Article III Tribunal	**Aggregation Rule**	**Description**
National Credit Union Administration	12 C.F.R. § 747.22	"On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice."
National Highway Safety Administration	49 C.F.R. § 511.18	"Two or more matters which have been scheduled for adjudicative proceedings" under section 508(a)(2) of the Motor Vehicle Information and Cost Savings Act, "and which involve one or more common questions of law or fact, may be consolidated for the purpose of hearing, appeal or the Administrator's review."
	49 C.F.R. § 535.9	"On the request of a party, or at the Hearing Officer's direction, multiple proceedings [regarding civil penalties assessed for violation of heavy-duty vehicle fuel efficiency program] may be consolidated if at any time it appears that such consolidation is necessary or desirable."
National Labor Relations Board	29 C.F.R. § 102.33	Permits the General Counsel of the National Labor Relations Board (NLRB) to "consolidate[]" any proceedings instituted in the same region under section 10(a)-(i) of the Act for the Prevention of Unfair Labor Practices when he "deems it necessary in order to effectuate the purposes of the Act."
	29 C.F.R. § 102.72	Permits the General Counsel of the NLRB to "consolidate[]" any proceedings instituted in the same region under section 9(B)-(C) of the Act for the Determination of Questions Concerning Representation of Employees when he "deems it necessary in order to effectuate the purposes of the Act."

Non-Article III Tribunal	**Aggregation Rule**	**Description**
National Science Foundation	45 C.F.R. § 672.6	"The Presiding Officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more proceedings docketed [under the Antarctic Conservation Act] where (1) there exists common parties or common questions of fact or law; (2) consolidation would expedite and simplify consideration of the issues; and (3) consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings."
Nuclear Regulatory Commission	10 C.F.R. § 2.317	"On motion and for good cause shown or on its own initiative, the Commission or the presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings [under the Atomic Energy Act], or may hold joint hearings with interested States and/or other Federal agencies on matters of concurrent jurisdiction, if it is found that the action will be conducive to the proper dispatch of its business and to the ends of justice and will be conducted in accordance with the other provisions of this subpart."
Occupational Safety and Health Review Commission	29 C.F.R. § 2200.9	"Cases may be consolidated on the motion of any party, on the Judge's own motion, or on the Commission's own motion, where there exist common parties, common questions of law or fact or in such other circumstances as justice or the administration of the [Occupational Health and Safety] Act require."
Office of the Comptroller of Currency	12 C.F.R. § 19.22	"On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material

Non-Article III Tribunal	**Aggregation Rule**	**Description**
		common question of law or fact, unless such consolidation would cause unreasonable delay or injustice."
Securities and Exchange Commission	17 C.F.R. § 201.201	"By order of the Commission or a hearing officer, proceedings involving a common question of law or fact may be consolidated for hearing of any or all the matters at issue in such proceedings."

Non-Article III Tribunal	**Aggregation Rule**	**Description**
Tax Court	Tax Ct. Rule 141	"When cases involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue, it may order all the cases consolidated, and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs, delay, or duplication."

CERTIFICATE OF INTEREST

Counsel for Amici, Jason L. Lichtman, certifies the following:

1. The full name of every party represented by us is: Janet Cooper Alexander, Michael Asimow, Sergio J. Campos, Erwin Chemerinsky, Robin Effron, Nora Freeman Engstrom, Myriam Gilles, David Marcus, Jerry L. Mashaw, Carrie Menkel-Meadow, Judith Resnik, Michael Sant'Ambrogio, Joan Steinman, Jay Tidmarsh, and Adam S. Zimmerman.

2. The name of the real party in interest represented by us 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 us 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: Not Applicable

Dated: November 9, 2015

/s/ Jason L. Lichtman
Jason L. Lichtman

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and Federal Rule of Appellate Procedure 32(a)(7)(B)(i). It contains 6229 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of FEderla Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). It was prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point type.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing on counsel of record on

December 4, 2015 via CM/ECF, which will serve notice to all counsel of record.

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