IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CONLEY F. MONK, JR.	)	
	)	
Appellant,	)	
	)	
v.	)	No. 15-7092
	)	
ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs	)	
	)	
Appellee.	)	

On appeal from the United States Court of Appeals for Veterans Claims
In Case No. 15-1280, Judge Lawrence B. Hagel

CORRECTED *AMICUS CURIAE* BRIEF OF THE AMERICAN LEGION, THE HISPANIC AMERICAN VETERANS OF CONNECTICUT, THE IRAQ AND AFGHANISTAN VETERANS OF AMERICA, MILITARY ORDER OF THE PURPLE HEART, NATIONAL VETERANS LEGAL SERVICES PROGRAM, STETSON UNIVERSITY'S VETERANS LAW INSTITUTE, AND VIETNAM VETERANS OF AMERICA, INC. IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTEREST

Counsel for amici curiae The American Legion, The Hispanic American Veterans of Connecticut, The Iraq and Afghanistan Veterans of America, Military Order of the Purple Heart, National Veterans Legal Services Program, Stenson University's Veterans Law Institute, and Vietnam Veterans of America, Inc., certifies the following:

1. The full name of every party represented by me is:

   The American Legion
   The Hispanic American Veterans of Connecticut
   The Iraq and Afghanistan Veterans of America
   Military Order of the Purple Heart
   National Veterans Legal Services Program
   Stenson University's Veterans Law Institute
   Vietnam Veterans of America, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   The real parties in interest are named.

3. All parent corporations and any publicly held corporations that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

   Barton F. Stichman, National Veterans Legal Services Program

December 4, 2015

/s/ Barton F. Stichman

Barton F. Stichman

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INTEREST OF AMICI CURIAE

Amici are organizations devoted to representing the interests of veterans in a broad array of matters including claims before the Department of Veterans Affairs. *Amici* have received the consent of both parties to file their brief in this matter. Specific, brief statements concerning each *amici* follow:

The American Legion

The American Legion was chartered by Congress in 1919 as a patriotic, mutual-help, war-time veterans' organization. *See* 36 U.S.C. § 41. It now is a community-service organization with nearly 2.5 million members, many of whom have filed a claim for benefits with the U.S. Department of Veterans Affairs. The American Legion serves military veterans in a myriad of ways, including providing assistance and representation to veterans before the VA. As a VA-recognized veterans service organization, each year The American Legion's accredited service officers and post service officers represent tens of thousands of veterans before the VA regional offices and the Board of Veterans' Appeals.

The Hispanic American Veterans of Connecticut, Inc.

The Hispanic American Veterans of Connecticut, Inc. (HAVOCT, Inc.) is a non-profit organization dedicated to providing bilingual services to any active service-members and veterans in Connecticut. HAVOCT seeks to help veterans and their families on a range of issues, including discharge upgrade applications,

counseling services, as well as case-by-case assistance with housing, educational and health care access. HAVOCT is committed to promoting veterans' quality of life once they have returned home from service, and has observed how important access to disability benefits and prompt claims adjudication is to that mission.

Iraq and Afghanistan Veterans of America

The Iraq and Afghanistan Veterans of America (IAVA) is a non-profit organization, incorporated in the District of Columbia, dedicated to serving veterans of Iraq and Afghanistan. Since its founding eleven years ago, IAVA has provided a range of services to over 183,000 veterans and their families, including peer-to-peer and professional transition support, career programs, as well as access to education benefits and mental health resources. IAVA also conducts its own research and on veterans' issues and engages in policy advocacy on critical issues, such as innovative health care for veterans, mental health care, and veteran homelessness. Through its work, IAVA seeks to end the VA backlog and recognizes the importance of efficient and fair claims adjudication for veterans' access to the benefits they have earned through service.

Military Order of the Purple Heart

The Military Order of the Purple Heart ("MOPH") was formed in 1932 for the protection and mutual interest of all who have received the Purple Heart. The Purple Heart is a combat decoration awarded to members of the armed forces of

the United States who are wounded by an instrument of war by the hands of the enemy. Composed exclusively of Purple Heart recipients. MOPH is the only veterans' service organization comprised strictly of combat veterans. Nonetheless, MOPH exists to assist all veterans in working with the VA and in filing claims for available benefits. The MOPH Service Program's benefits experts process veterans' claims for compensation, pension, medical care, education, job training, employment, veterans' preferences, and housing, death, and burial benefits.

National Veterans Legal Services Program

The National Veterans Legal Services Program is an independent, nonprofit, veterans service organization founded in 1980 dedicated to ensuring that the U.S. government honors its commitment to veterans. Attorneys from NVLSP have served as counsel for a certified class of veteran- plaintiffs in numerous cases.

Stetson University's Veterans Law Institute

Stetson University is a private liberal arts educational institution. A part of Stetson's College of Law is the Veterans Law Institute. The Institute serves veterans through various means including representing veterans concerning claims for veterans' benefits.

Vietnam Veterans of America, Inc.

Founded in 1978, Vietnam Veterans of America (VVA), Inc. is the only national Vietnam veterans organization congressionally chartered and exclusively

dedicated to Vietnam-era veterans and their families. VVA is organized as a not-for-profit corporation and is tax-exempt under Section 501(c)(19) of the Internal Revenue Service Code. VVA has over 75,000 individual members, 48 state councils, and 650 local chapters. In furtherance of VVA's guiding principle that *"Never again will one generation of veterans abandon another,"* VVA provides broad assistance to all veterans and their families, both members and non-members. VVA assists veterans in the prosecution of claims for benefits by providing them with pro bono legal representation for claims concerning veterans' benefits.

FED. R. APP. P. 29(c)(5) STATEMENT

Amici state that: (1) no counsel for any party in this appeal authored this brief in whole or in part; (2) no party or party's counsel contributed money to *amici* in connection with the preparation or submission of this brief; and (3) no person other than *amici* contributed money to *amici* in connection with the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amici advance three principal points in support of Appellant Conley Monk. First, the history pre-dating the adoption of the Veterans' Judicial Review Act of

1988 (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), makes clear that Congress could not have intended to preclude the United States Court of Appeals for Veterans Claims (CAVC) from utilizing devices to aggregate claims for resolution upon a veteran's request. Second, there are important practical consequences for veterans resulting from the CAVC's determination that it lacks such aggregate issue resolution authority. As *amici* explain, in the absence of a device to resolve claims on an aggregate basis similarly-situated veterans will be treated in dramatically different ways and the Secretary of Veterans Affairs will have largely unconstrained control over which cases are subject to judicial review. Third, given the CAVC's case law providing a means for the Secretary to aggregate claims in CAVC proceedings, it is contrary to the pro-veteran provisions of the VJRA to bar veterans from this same ability. The men and women who have served this nation are entitled to the full benefit of what Congress created in the VJRA. This Court should reverse the judgment of the CAVC in this case.

ARGUMENT

I. THE COURT OF APPEALS FOR VETERANS CLAIMS HAS THE AUTHORITY TO ENTERTAIN AGGREGATE ACTIONS

A. Prior to the VJRA, District Courts Exercised Jurisdiction Over Challenges To VA Rules And Policies And Certified Class Actions Pursuant To Fed. R. Civ. P. 23

Prior to the VJRA, judicial review of decision-making by the then Veterans Administration[1] was subject to a general bar set forth in 38 U.S.C. § 211(a) in force before 1988. Despite this general bar, exceptions to the ban on court review of VA decision-making evolved during the twentieth century. Significantly, in *Johnson v. Robison,* 415 U.S. 361 (1974), the Supreme Court held that Section 211(a) did not bar federal courts from entertaining constitutional challenges to veterans' benefits legislation.

The Supreme Court's reasoning led to the development of a body of case law in the federal courts allowing district courts to entertain actions brought under the Administrative Procedure Act challenging a variety of VA actions. For example, courts ruled that VA regulations, policies, and other actions affecting the adjudication of claims for benefits were reviewable in district courts to determine whether the challenged action was constitutional. *See, e.g., Marozsan v. United States,* 852 F.2d 1469 (7th Cir. 1988) (en banc); *Devine v. Cleland,* 616 F.2d 1080, 1083-85 (9th Cir. 1980); *Zayas v. Veterans Administration,* 666 F. Supp. 361 (D.P.R. 1987); *Plato v. Roudebush,* 397 F. Supp. 1295 (D. Md. 1975). Challenges to VA regulations were also allowed to determine whether they were arbitrary and capricious or otherwise violated statutory authority. *See, e.g., Evergreen State College v. Cleland,* 621 F.2d 1002, 1007-08 (9th Cir. 1980);

[1] The Veterans Administration is today the United States Department of Veterans Affairs. *Amici* generally refer to the Department as the "VA."

University of Maryland v. Cleland, 621 F.2d 98, 100-01 (4th Cir. 1980); *Merged Area X (Education) v. Cleland*, 604 F.2d 1075, 1078 (8th Cir. 1979); *Wayne State University v. Cleland*, 590 F.2d 627, 631-32 (6th Cir. 1978); *but see Roberts v. Walters*, 792 F.2d 1109 (Fed. Cir. 1986). The only lawsuits that were consistently dismissed as barred by statute were non-constitutional challenges to the VA's decision on an individual's claim for benefits. *See, e.g., Wickline v. Brooks*, 446 F.2d 1391 (4th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); *Fritz v. Director of Veterans Administration*, 427 F.2d 154 (9th Cir. 1970); *Redfield v. Driver*, 364 F.2d 812 (9th Cir. 1966); *Barefield v. Byrd*, 320 F.2d 455 (5th Cir. 1963). In sum, prior to the enactment of the VJRA, veterans had avenues by which to pursue comprehensive challenges to VA regulatory behavior even though they were (absent a constitutional claim) barred from challenging their individual denial of benefits.

Significantly for purpose of the present appeal, in some of these challenges, not only did the district court resolve issues affecting large numbers of veterans, it formally certified the case as a class action on behalf of similarly situated VA claimants. For example, in a challenge to the validity of the VA's Agent Orange compensation rules, the district court certified the case as a class action on behalf of Vietnam veterans and their survivors pursuant to Fed. R. Civ. P. 23(b)(2). *See Nehmer v. U.S. Veterans Administration*, 118 F.R.D. 113 (N.D. Cal. 1987). The

district court ultimately invalided the challenged VA regulation and voided all VA decisions that denied benefits under the invalidated regulation, a decision affecting thousands upon thousands of veterans. *Nehmer v. U.S. Veterans Administration*, 712 F. Supp. 1404 (N.D. Cal. 1989).

Similarly, in *Guisti-Bravo v. U.S. Veterans Administration*, 853 F. Supp. 34 (D.P.R. 1993), the district court approved a class action settlement after conducting a fairness hearing. That case concerned a challenge to a mass review conducted by the VA in the early 1980s of all veterans residing in Puerto Rico and the U.S. Virgin Islands who were rated by the VA as 100% disabled for a mental disorder to determine whether each class member's 100% rating should be reduced pursuant to the standards contained in an unpublished directive that allegedly violated published VA regulations. The settlement the court approved invalidated the unpublished directive, voided all of the rating reductions made in any class member's case, and required VA to re-adjudicate whether the class member's 100% rating should be reduced under the criteria contained in published VA regulations. *See id.* at 35. The decision affected many hundreds of claimants.

The takeaway from this history of judicial review prior to the VJRA is that veterans enjoyed the ability to have certain claims resolved in federal court on an aggregate basis even when a court's decision affected thousands of claimants. As the Appellant explains, Mr. Monk fundamentally seeks to do no more than that

available to him before the VJRA. *See generally* Opening Brief of Claimant-Appellant ("Appellant's Opening Brief"). As the next Section explains, it would be exceedingly odd if that opportunity for aggregate resolution of issues Mr. Monk seeks was extinguished in the VJRA, a statute designed to *increase* veterans' access to the federal courts.

B. In Enacting the VJRA, Congress Intended to *Expand* A Veteran's Right to Judicial Review of VA Decision-Making

In the VJRA, Congress transferred jurisdiction over challenges to VA rules and policies from U.S. district courts to the newly created CAVC and, in certain limited situations, this Court. Congress provided in the scope of review section of the VJRA – today codified at 38 U.S.C. § 7261(a) – that the CAVC has authority to "interpret constitutional, statutory, and regulatory provisions" and to "hold unlawful and set aside . . . rules and regulations issued or adopted" by the VA. In addition, and as described at length in Appellant's Opening Brief, the CAVC is endowed with both authority under the All Writs Act, 28 U.S.C. § 1651(a), as well as equitable powers inherent in all federal courts. Appellant's Opening Brief at 30-32 (discussing the All Writs Act); 45-49 (discussing inherent equitable powers).

The statutory language of the VJRA, as well as its legislative history, are silent as to whether Congress explicitly authorized the CAVC to entertain class actions. However, the nature of the system Congress sought to create through the VJRA suggests that the statute should not be interpreted to close off the pre-existing ability for aggregate resolution of appropriate matters. After all, Congress sought to enhance veterans' opportunities for access to judicial review of VA decisions. Indeed, the propriety of such aggregate resolution at the CAVC derives from the very purpose of the veterans' benefits scheme and the role of the CAVC within it. *See, e.g., Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1349 (Fed. Cir. 2003) (referring to the "uniquely pro-claimant character of the veterans' benefits system" created by Congress); *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (Michel, J., concurring) (The CAVC "is an Article I court set in a sui generis adjudicative scheme for awarding benefit entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign."); *see also* 38 C.F.R. § 3.103(a) ("[I]t is the obligation of VA . . . to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government."). And if there were any doubt about this point, the canon of statutory construction that veterans' benefits statutes are to be construed in the veteran's favor resolves the doubt. *See, e.g., Brown v. Gardner*,

513 U.S. 115, 118 (1994); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)).

The VJRA placed the CAVC atop a uniquely pro-claimant structure as the national statutory court of review of VA decisions on veterans' benefits. In doing so, Congress emphasized that the administrative system was to remain "a beneficial non-adversarial system of veterans benefits" in which VA "fully and sympathetically develop[s] the veteran's claim to its optimum before deciding it on the merits." H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5795 ("1988 House Report"); *Hodge v. West,* 155 F.3d 1356, 1363 (Fed. Cir. 1998) ("even in creating judicial review in the veterans context, Congress intended to preserve the . . . pro claimant system"). In other words, Congress sought to provide veterans with *additional* options for the review of administrative decisions while preserving the uniquely pro-claimant nature of VA system. It simply makes no sense given this purpose that Congress would have simultaneously – and silently – taken away a veteran's ability in an appropriate case to utilize an aggregate issue-resolution device.

If the VJRA is interpreted as precluding aggregate resolution of issues before the CAVC, the result would be exceedingly odd in the context of the uniquely pro-claimant system Congress sought to maintain. Under such a view of

the VJRA, veterans (often acting alone without the advice of counsel) would need to monitor actions at the CAVC, determine whether a pending appeal in another veteran's case could affect their claims, and file protective pleadings to preserve their rights. Doing so would spawn a multiplicity of appeals further stressing an already over-burdened system.[2] Section II turns to a detailed consideration of why this is the case. The serious practical consequences of the CAVC's decision on appeal strongly indicate that the CAVC's decision should be reversed.

II. THE PRACTICAL CONSEQUENCES OF THE CAVC'S DECISION SUGGEST THAT AGGREGATE RESOLUTION OF ISSUES IS AVAILABLE BEFORE THE CAVC

The CAVC regularly interprets statutes and VA rules in a way that affects large groups of VA claimants. *See, e.g., Haas v. Nicholson*, 20 Vet. App. 257 (2006) (addressing whether the presumption of service-connection for certain diseases related to exposure to Agent Orange for veterans having "service in the

[2] Ironically given the result before the CAVC, that court has recognized the impact duplicative appeals can have on the veterans' benefits system. Sitting *en banc*, the court indicated that, in the matter before it, it must consider "the risk that processing [similar] claims while the lead case is on appeal will result in a waste of resources that further burdens the veterans benefits system . . . . [in that] limited . . . resources . . . may be consumed by VA's adjudication of a large number of claims that may later have to be re-adjudicated after a judicial decision . . ." *Ribaudo v. Nicholson*, 21 Vet. App. 137, 143-44 (2007) (en banc). The court further recognized that such a diversion of resources would inevitably delay VA adjudication of other veterans' cases. *Id.* at 142. The same concerns the CAVC confronted in the context it faced in *Ribaudo* counsel in favor of interpreting the VJRA in Appellant's favor in this case.

Republic of Vietnam" under 38 U.S.C. § 1116(f) includes service on ships near the shore of that nation); *Smith (Ellis) v. Nicholson*, 19 Vet. App. 16 (2005) (addressing whether bilateral tinnitus (ringing in both ears) required the VA to assign separate disability ratings for each ear).[3] In the absence of the power to utilize aggregate issue resolution in appropriate situations, veterans face unacceptable consequences. The injustices veterans face are the direct result of the CAVC's determination that the VJRA does not allow that court to entertain collective actions. In the balance of this Section, *amici* use concrete examples of the injustices resulting from the CAVC's position. These real-world consequences strongly suggest that the CAVC's position is incorrect and the CAVC's judgment should be reversed.

A. The Injustice Imposed by the CAVC's Decision in *Tobler v. Derwinski*

The CAVC has long held that VA regional offices and the Board of Veterans' Appeals (Board) are bound to follow a precedential decision of the CAVC beginning *only* on the date such precedential decision is issued. *See, e.g.*, *Tobler v. Derwinski*, 2 Vet. App. 8, 14 (1991). Assume, for example, that Veteran A, in an appeal filed with the CAVC in 2013 challenging a certain VA rule or

[3] This Court reversed the CAVC's decision in both cases. *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008); *Smith v. Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006). These reversals, however, do not undercut the point that the CAVC already issues decisions that have wide impact.

policy as being contrary to law. Further assume that the CAVC issued a precedential decision in 2015 ruling in Veteran A's favor. In this situation, VA would be required by law to follow that decision only in *some* adjudications made after the 2015 date of the precedential decision. Specifically, VA would be required to follow the precedent if the VA makes a future adjudication of an original or reopened claim that was pending on or filed after the 2015 date.

But many veterans who are similarly situated to Veteran A would not be covered by the *Tobler* binding precedent rule. Assume, for example, that Veteran B was denied benefits by a VA regional office in 2013 due to the unfavorable VA rule that the CAVC ultimately invalidated in Veteran A's case in 2015. Assume further that Veteran B did not file a notice of disagreement (NOD) with the 2013 regional office decision. The net effect on Veteran B of the 2015 precedential decision in Veteran A's case would be:

- VA's 2013 denial of benefits in Veteran B's case would have become final in 2014, while Veteran A's case was pending before the CAVC;
- Current law would not have required the VA to notify Veteran B of Veteran A's challenge to the VA rule either before or after the CAVC's precedential decision in Veteran A's case; and
- The only possibility Veteran B would have to be treated in the same manner as the similarly situated Veteran A would be filing a new claim that the

2013 denial of benefits in his case was based on clear and unmistakable error (CUE). *See* 38 U.S.C. § 5109A. But this assumes that Veteran B somehow learned of the disparate treatment of Veteran A. And even if she did, VA would not even be bound by the CAVC's precedential decision to grant this CUE claim.[4]

The effect of the *Tobler* binding precedent rule is that even though Veteran A and Veteran B are in the same legal position and both their claims were pending at the same time, Veteran B will not be entitled to the benefit of the CAVC's ruling about a matter of law. If, however, the CAVC had utilized an aggregate issue resolution procedure in Veteran A's appeal, Veteran B would have been a member of the "class" and, therefore, entitled to the benefit of the CAVC's decision. Veteran B would have been treated fairly and equitably in the pro-claimant system Congress created.

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[4] In numerous cases in which the CAVC invalidated a VA regulation, VA has argued, and the CAVC has agreed, that despite the illegality of the VA regulation, the VA had a reasonable basis in fact and in law to adopt the faulty regulation. *See, e.g.*, *White v. Nicholson*, 412 F.3d 1314 (Fed. Cir. 2005); *Johnson v. Principi*, 17 Vet. App. 436, 441-42 (2004); *Ozer v. Principi*, 16 Vet. App. 475 (2002); *Felton v. Brown*, 7 Vet. App. 276 (1994); *Gregory v. Brown*, 7 Vet. App. 127 (1994). If VA had a reasonable basis in fact and in law to adopt these faulty regulations, it must be that these regulations, and the VA decisions that relied on these regulations, were not the product of CUE. Thus, if a court were to invalidate a VA rule, it is highly doubtful that VA would take the position that decisions denying benefits based on the faulty VA rule were the product of CUE.

This scenario is not an isolated concern; it affects many veterans. There are two principal reasons why a large number of veterans and surviving family members will end up in Veteran B's position in our example. First, many of the similarly situated veterans with claims pending before VA on the date that Veteran A initiated her appeal at the CAVC will have been, or will in the future be, denied benefits based on the unfavorable VA rule. These veterans would be unlikely to file a timely NOD because they would have no reason necessarily to believe that the unfavorable VA rule upon which their benefit denial was based had a legal infirmity. VA would have explained to the claimant in its rating decision why current law requires a denial. And, significantly, VA's explanation would be a correct statement of the law at that time. The only rational reason to file an NOD would be if the claimant knew about Veteran A's case and that filing an NOD and thereafter taking steps to keep his or her claim in non-final status would preserve her right to bind VA to provide the same relief ultimately accorded to Veteran A. But few, if any, claimants are likely to know about Veteran A's case and the novel notion that they should file an NOD to protect their rights based on a different case. After all, fewer than 11% of all VA claimants are represented by counsel at the agency level. *See* Board of Veterans' Appeals Annual Report, Fiscal Year 2014, at 27, *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2014AR.pdf.

In reality, the system Congress created for the resolution of veterans' claims makes it nearly impossible for a claimant such as Veteran B to avoid this unjust result. To begin with, a veteran cannot hire a lawyer to assist him or her until after a NOD has been filed. *See* 38 U.S.C. § 5904(c)(1). Thus, unless a veteran has obtained pro bono services, even if the veteran learns of the fact that a matter is pending at the CAVC, the veteran would be without the legal knowledge to understand the implication of this fact. And even if one assumes a veteran files an NOD, there is no reason to expect that she will seek out a lawyer at that point. After all, she remains in a system designed to assist veterans in a pro-claimant and non-adversarial manner. The upshot is that the scenario outlined above is even more troubling because Veteran B will almost certainly have to navigate these complicated legal waters without the assistance of someone trained to understand the implications of Veteran A's appeal.

In addition, it is inherent in the judicial resolution process that a significant time will likely expire between the filing of Veteran A's challenge to the regulation and the CAVC's issuance of a precedential decision. During fiscal year 2014, the median time from the filing of an appeal at the CAVC to the issuance of a precedential decision was 704 days (23.5 months). *See* Annual Report of the United States Court of Appeals for Veterans Claims for FY 2014 at 3 (available at www.uscourts.cavc.gov/documents/FY_2014_Annual_ report.pdf). The result is

that veterans for this entire two-year period (and recall that appeals could take longer) will be subject to being treated in the same unjust manner as Veteran B.

This situation would be avoided through the use of an aggregate issue resolution mechanism akin to a class action. Utilizing such a device, veterans whose similarly situated claims were pending on the date that Veteran A filed her CAVC appeal would not suffer Veteran B's fate. That is because the long-standing practice of both Article III and Article I courts that have class action rules is to toll the running of statutes of limitations for similarly situated non-parties beginning on the date that the party opposing the class action is put on notice that the lawsuit affects similarly situated non-parties. *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 554-55 (1974); *See also Crown, Cork & Seal Co., Inc. v. Parker,* 462 U.S. 345, 350 (1983) ("[t]he filing of a class action tolls the statute of limitations" and it properly allows class members to "rely on the existence of the suit to protect their rights"); *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010) (same). There simply is no reason why Congress would have created a system in which hundreds or thousands of veterans similarly situated to our Veteran A would receive less favorable treatment in the pro-claimant system maintained under the VJRA.

B. Utilization of Aggregate Issue Resolution Devices Would Avoid The Injustice Caused by VA Gaming of the System to Avoid a Precedential CAVC Decision

As described above, the absence of an aggregate issue resolution mechanism creates an unacceptable disparity in the treatment of similarly-situated veterans with respect to certain precedential decisions of the CAVC. There is a distinct injustice caused by the lack of aggregate resolution at the CAVC that relates to the *avoidance* of issuing a precedential judicial opinion. The absence of aggregate resolution essentially allows the VA to game the system in cases that could result in a precedential CAVC decision. *Amici* provide two examples below of how the VA can engage in such gamesmanship resulting in similarly situated veterans being treated quite differently. In addition, we explain why such VA conduct also undermines the fundamental notion of judicial review Congress implemented through the VJRA.

Example #1

From 1991 to 2002, the VA granted hundreds, if not thousands, of disability claims filed by Navy veterans who served off the coast of the Republic of Vietnam during the Vietnam War ("Navy blue water veterans") for one of the many diseases that VA recognizes as related to Agent Orange exposure. In February 2002, however, the VA issued an unpublished VA MANUAL M21-1 provision stating that a "veteran must have actually served on land within the Republic of Vietnam. . . to qualify for the presumption of exposure to" Agent Orange. M21-1, pt. III,

para. 4.24(e)(1)-(2), change 88 (Feb. 27, 2002). As a result, all pending and new disability claims filed by Navy blue water veterans for an Agent Orange-related disease were denied unless there was proof that that the veteran actually set foot on Vietnamese soil.

In November 2003, the CAVC convened a panel of three judges and set oral argument to hear the appeal of Mrs. Andrea Johnson, the surviving spouse of a Navy blue water veteran who was denied service-connected death benefits (DIC) by the Board on the ground that her deceased husband, who died of an Agent Orange-related cancer, had never set foot on the land mass of Vietnam. *See Johnson v. Principi*, U.S. Vet. App. No. 01-0135 (Order, Nov. 7, 2003). Mrs. Johnson challenged the legality of the 2002 Manual M21-1 provision. *See* Appellant's Brief, July 3, 2002; Appellant's Reply Brief, April 9, 2003. Thus, it appeared that the CAVC would issue a precedential decision deciding the legality of VA's set-foot-on-land requirement. *See Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992) (holding that only a panel or en banc decision of the CAVC has binding precedential value).

Six days before the oral argument, however, the VA Office of General Counsel made the widow an offer she could not refuse: full DIC benefits retroactive to the date of her husband's death – the maximum benefits that she could possibly receive. *See* Joint Motion of Parties to Terminate the Appeal, filed

Dec. 3, 2003. Because Mrs. Johnson could not file a class action or otherwise seek an aggregate resolution of the legal matter at issue with the CAVC, once she signed the VA's settlement agreement, the oral argument was cancelled and the appeal was dismissed. Order, Dec. 5, 2003. Mooting out the widow's case allowed the VA over the next three years to treat other similarly situated Navy blue water veterans and their survivors differently than it had treated Mrs. Johnson by denying their disability and DIC benefit claims based on a failure to step foot on the land mass of Vietnam.

Some Navy blue water veterans and survivors who were denied benefits by a VA regional office based on the 2002 rule gave up and did not appeal the RO's decision. Some appealed the RO's decision to the Board, which affirmed the denial. Some of those who received a Board denial gave up and did not appeal that body's denial to the CAVC.

But one of those who were denied by the RO and the BVA did not give up and in March 2004 appealed to the CAVC -- former Navy Commander Jonathan L. Haas. *Haas v. Nicholson,* U.S. Vet. App. No. 04-0491, March 26, 2004. The CAVC ultimately convened a panel of the court and scheduled oral argument for January 10, 2006, to decide Commander Haas' challenge. Order, Dec. 12, 2005. This time, however, the VA did not offer to settle. On August 16, 2006, a panel of three judges unanimously ruled that VA's 2002 set-foot-on-land requirement was

arbitrary and capricious. *See Haas v. Nicholson*, 20 Vet. App. 257 (2006). The VA appealed the CAVC's judgment to this Court, which ultimately reversed the CAVC's decision. *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008). The point for purposes of this matter is not the result in *Haas*. Rather, this series of events illustrates how, in the absence of a means for resolving questions on an aggregate basis, the VA is able to manipulate which cases the federal judiciary is able to consider. The result is two-fold. First, this allows the VA to treat similarly-situated veterans in a dissimilar matter. Second, it effectively provides the VA with the ability to insulate matters from judicial review, something that is diametrically opposed to the core principle enshrined in the VJRA. Moreover, the VA's conduct concerning the issue in *Haas* actually had a detrimental effect on veterans. If the VA had not been able to selectively settle Ms. Johnson's appeal, the Navy blue water veterans and their survivors who had been finally denied relief after the date of Ms. Johnson's appeal and before the date of the CAVC's 2006 decision in *Haas* would have been in far a far different situation.

Example #2

On February 7, 2011, Brian Mallory appealed a Board decision to the CAVC. *See Mallory v. Shinseki,* U.S. Vet. App. No. 11-0401. On September 30, 2011, Mr. Mallory filed his initial brief challenging the 2004 VA MANUAL M21-1MR provision relied upon by the Board in denying the veteran service-connected

disability benefits for the period from the date of his claim in 2007 to the date the VA rescinded the MANUAL provision in 2011. Mr. Mallory's claim was that the unfavorable 2004 MANUAL provision was arbitrary, capricious, and contrary to law.

On December 5, 2011, Mr. Mallory filed a motion effectively to certify his appeal as a class action. He styled this motion as a motion for an order to protect similarly situated claimants from non-receipt of benefits due solely to delay in the judicial resolution of his appeal. In that motion, Mr. Mallory argued that the CAVC should issue such relief to protect the rights of veterans and survivors of deceased veterans who were similarly situated to Mr. Mallory. In this regard, he requested that the CAVC order the VA to toll the deadlines for NODs, Substantive Appeals, and Notices of Appeal for claimants similar to himself, who could be denied an opportunity to appeal pending the outcome of his case. In other words, Mr. Mallory proactively sought to address the type of problems discussed above that are caused by the lack of an aggregate resolution mechanism.

The Secretary opposed this motion. *See* Appellee's Response, Jan. 25, 2012. On September 28, 2012, a single Judge of the CAVC issued a Memorandum Decision remanding the case to the Board without reaching the merits of Mr. Mallory's challenge to the MANUAL provision. *Mallory v. Shinseki*, 2012 U.S. App. Vet. Claims LEXIS 2068 (Sept. 28, 2012). In that decision, the CAVC also

denied Mr. Mallory's motion concerning aggregate resolution finding that Mr. Mallory did not have standing to represent the interests of other claimants. *Id*.

On October 19, 2012, Mr. Mallory filed a motion seeking panel review by the CAVC. He argued that the merits of his challenge to the MANUAL provision were ripe for review and required panel attention and the merits of his motion for class-type relief needed to be addressed because it was a legal issue of great importance. *Id*.

On May 9, 2013, the CAVC ordered that Mr. Mallory's case be submitted to a panel and scheduled for oral argument. Five days before oral argument, the VA General Counsel's Office made Mr. Mallory an offer he too could not refuse: full disability benefits retroactive to the date of his 2006 claim -- – the maximum benefits that he could possibly receive. Mr. Mallory accepted this offer. *See* Joint Motion to Terminate Appeal and Stipulated Agreement, July 10, 2013. The appeal was dismissed based on the settlement agreement, no precedential decision was issued (*see* Order, July 12, 2013), and the VA continued to deny veterans similarly situated to Mr. Mallory the relief that Mr. Mallory received through the settlement agreement.

Mr. Mallory's case is another illustration of the effect of the CAVC's decision to reject aggregate issue resolution akin to class actions. The VA again successfully insulated a question from judicial review and unilaterally gave itself

the ability to treat veterans in the administrative process differently than it treated Mr. Mallory. If the CAVC operated under a class action rule or its equivalent, the VA would not be able to as easily moot an appeal by unilaterally providing complete relief to the named party.[5] And the presence of such authority would vindicate the VJRA instead of eviscerate that landmark statute.

III. GIVEN THE CAVC CASE LAW PROVIDING VA WITH THE ABILITY TO AGGREGATE CLAIMS IN CAVC PROCEEDINGS, THE CAVC'S DECISION BARRING VETERANS FROM THIS SAME OPPORTUNITY IS UNJUST AND CONTRARY TO THE PRO-VETERAN PROVISIONS OF THE VJRA

Yet another injustice caused by the CAVC's decision to deprive veterans of the ability to aggregate claims before that court derives from the fact that the CAVC has long provided the party who opposes veterans in all CAVC proceedings -- the Secretary of Veterans Affairs – with the ability to aggregate claims. In *Ribaudo v. Nicholson*, 21 Vet. App. 137 (2007) (en banc) and *Ramsey v. Nicholson*, 20 Vet. App. 16 (2006), the CAVC held that when it issues a

[5] While a full discussion of this point is beyond the scope of this appeal, the longstanding rule in class actions is that a party opposing a class cannot moot the matter by unilaterally providing complete relief to the named parties. *See, e.g., Stein v. Buccaneers Ltd. P'Ship*, 772 F.3d 698 (11th Cir. 2014); *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820 (5th Cir. 2014); *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948 (9th Cir. 2013); *Schlaud v. Snyder*, 717 F.3d 451 (6th Cir. 2013); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004). The Supreme Court has granted certiorari in a case in which it will address this issue during the current Term of the Court. *See Campbell-Ewald Co. v. Gomez*, No. 14-857.

precedential decision in the veteran's favor that would benefit a significant number of similarly situated veterans who are not parties before the court, the Secretary has the right to petition the court to aggregate the claims of all similarly situated non-parties.

Specifically, *Ribaudo* and *Ramsey* provide that the Secretary may file, in the matter in which the precedential decision was issued, a motion to stay the beneficial effect of the binding precedential decision on similarly situated VA claimants who are not parties to the appeal, but who have claims pending before the VA, while VA pursues an appeal to this Court. This motion is served on the veteran who prevailed in the precedential decision, but not on any of the similarly situated non-parties. Under *Ribaudo* and *Ramsey*, the CAVC requires the veteran who prevailed in the precedential decision to represent the aggregate claims of the similarly situated non-parties in opposing the Secretary's motion. The motion for a stay is then decided by the CAVC under the framework set forth in *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511 (Fed. Cir. 1990). If the court grants the Secretary's motion -- as it did in *Ribaudo v. Nicholson*, 21 Vet. App. 137 (2007) -- the Court provides the Secretary the right to both aggregate the claims of non-parties and deny these non-parties their right under *Tobler* to the immediate binding effect of the precedential decision on their claims.

The net result of the CAVC's decision in this case and the *Ribaudo* and *Ramsey* principles is that on one hand, the government may successfully petition the CAVC to aggregate claims when it serves the government's interests, but on the other hand, the government's opponent in these adversarial proceedings is barred from aggregating claims when it serves the interests of veterans. This stands in sharp contrast to the VJRA provisions governing who may initiate a CAVC appeal. Under 38 U.S.C. § 7266(a), only a person adversely affected by a Board decision may appeal to the CAVC, and 38 U.S.C. § 7252(a) expressly denies the Secretary the right to seek review of a Board decision. In the final analysis, the CAVC's disparate treatment of veterans and the government with regard to the right to aggregate claims stands the pro-veteran VJRA on its head.

CONCLUSION

Congress took a bold step in 1988 when it enacted the VJRA. It created a new federal court to focus on the review of veterans' benefits decisions. In so doing, Congress expanded the ability of veterans to have an independent review of agency action. It also recognized that the VA should no longer be able to largely operate in an atmosphere of isolation unlike almost every other part of our government. Judicial review was the means by which Congress sought to advance these twin aims.

The CAVC's decision in this case rejecting aggregate issue resolution in any

form is at odds with the core principles of the VJRA.[6] Congress sought to *expand* a veteran's access to the federal courts. It would make no sense for Congress to have silently swept away decades of precedent that had recognized the ability to resolve issues aggregately. And this result seems even less likely when one considers the serious practical consequences of such an interpretation of the VJRA on veterans and their dependents. *Amici* respectfully suggest that these reasons counsel strongly in favor of Appellant's position in this case. The Court should reverse the judgment of the CAVC and remand this matter to the court for further proceedings.

Respectfully submitted,

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[6] *Amici* note that there are many ways in which one could conclude that the CAVC has authority to resolve issues on an aggregate basis. As Appellant notes, both the All Writs Act and the inherent equitable powers of a federal court provide means sufficient to rule in his favor. The failure to discuss other possible means of aggregate issue resolution (such as by adopting a rule of procedure) should not be taken to mean *Amici* believe the grounds advanced in Appellant's Opening Brief are the only bases upon which aggregate issue resolution would be appropriate. They are, however, certainly sufficient to rule in Appellant's favor here.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellant Procedure 29(d) and 32(a)(7)(B). It contains 6,858 words, excluding parts of the brief exempted under the rules, which is no more than one-half the maximum length authorized under the Rules for a party's principal brief.
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 28.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Barton F. Stichman

Counsel for Amici Curiae

PROOF OF SERVICE

I hereby certify under penalty of perjury, that on this 4th day of December, 2015, a copy of the foregoing CORRECTED *AMICUS CURIAE* BRIEF OF THE AMERICAN LEGION, THE HISPANIC AMERICAN VETERANS OF CONNECTICUT, THE IRAQ AND AFGHANISTAN VETERANS OF AMERICA, MILITARY ORDER OF THE PURPLE HEART, NATIONAL VETERANS LEGAL SERVICES PROGRAM, STETSON UNIVERSITY'S VETERANS LAW INSTITUTE, AND VIETNAM VETERANS OF AMERICA, INC. IN SUPPORT OF APPELLANT was filed electronically. This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/ Barton F. Stichman

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