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Comments on the Veterans Appeals Efficiency Act of 2025

Subcommittee on Disability Assistance and Memorial Affairs
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I. Introduction

My name is Adam Zimmerman. I am the Robert Kingsley Professor of Law at USC Gould School of Law, where I teach Civil Procedure, Administrative Law, Torts, and Complex Litigation. I've written extensively on the relationship between mass adjudication, class actions, and administrative agencies in essays, amicus briefs, government reports, and law reviews, including *Chicago Law Review*, *Columbia Law Review*, *Duke Law Journal*, *New York University Law Review*, *University of Pennsylvania Law Review*, *Virginia Law Review*, and the *Yale Law Journal*, among others. [1]

I have been invited by the Subcommittee on Disability Assistance and Memorial Affairs to offer my testimony on the Veterans Appeals Efficiency Act of 2025 (VAEA). It is my pleasure to do so. For over fifteen years, I have studied mass adjudication systems and courts like the U.S. Department of Veterans Affairs (VA) benefit system and the Court of Appeals for Veterans Claims (the "Veterans Court.") I'm grateful the Committee is taking the time to consider the important and common-sense reforms contained in this bill.

My testimony focuses on two parts of the VAEA: Sections 2(d) and 2(e). Both are designed around a simple aspiration: Sometimes, fairness and efficiency require that people with the same legal claims get the chance to team up, hire a lawyer, and ask that their cases be heard together.

Section 2(d) allows veterans to do just that in the Board of Veterans Appeals, an administrative tribunal at the VA that, last year, reviewed over 110,000 veteran benefit decisions.[2] Relying on expert guidance from the Administrative Conference of the United States, it authorizes the Board to simultaneously group together and resolve the same common claims brought by many veterans.

Section 2(e) also takes an important step forward, but it should be revised to fulfill these same objectives. It aims to reverse a decision by the Federal Circuit Court of Appeals, which nearly eliminated class actions in Veterans Court, the only federal court with power to review VA benefit decisions. But, in its current form, 2(e) falls short. It contains a technical provision that seems to prevent many vets, with the same claims, from obtaining relief in the same class action. These limits do not exist in other class actions against the government—including those involving similarly large government programs, like Social Security and Medicare. Section 2(e) should clarify the Veterans Court can help *all* veterans with the same claims obtain the same relief that people regularly receive in a class action.

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[1] Portions of my testimony have been previously published in essays, law review articles, and briefs, including principally the Chicago Law Review Online, the Yale Law Journal, and my amicus brief before the Federal Circuit Court of Appeals in *Monk v. Shulkin*. *See* Adam S. Zimmerman, *Exhausting Government Class Actions*, U. Chi L. Rev. Online (Oct. 2022), https://lawreview.uchicago.edu/online-archive/exhausting-government-class-actions; Michael D. Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L. J. 1634 (2017); Amicus Brief of Administrative Law, Civil Procedure and Federal Courts Professors in Support of Appellant (November 2015), Monk v. McDonald, United States Court of Appeals for the Federal Circuit, *cited in sub nom*., *Monk v. Shulkin*, 855 F.3d 1312, 1320 (Fed. Cir. 2017). I collect relevant portions here for the benefit of the Committee.

[2] Department of Veterans Affairs (VA) Board of Veterans' Appeals Annual Report Fiscal Year (FY) 2024, https://department.va.gov/board-of-veterans-appeals/wp-content/uploads/sites/19/2025/04/2024_bva2024ar.pdf

As I explain in more detail below, other administrative agencies—and the federal courts that review them—have long allowed groups of non-veterans to formally and informally bring the same cases and claims together. Such procedures can correct system-wide problems more efficiently and treat like cases alike. They also help people in the same boat retain lawyers and secure relief before they get mired or lost in a big bureaucratic system. Veterans deserve no less in program that promises benefits to "a special class of citizens, those who risked harm to serve and defend their country."[3]

II. Section 2(d)(1) of the Veterans Appeals Efficiency Act: Authority to Aggregate Certain Claims

Section 2(d)(1)(A) of the VAEA authorizes the Board of Veterans Appeals to "aggregate" claims when the Chairman finds that "more than one appeal involves a common question of law or fact." Based on my own review of a large variety government programs, I believe aggregate procedures like this would greatly assist the BVA. Used appropriately, aggregate procedures can reduce caseloads and promise more consistent outcomes, while improving legal access for large groups of veterans raising similar claims.

By way of background, I have spent more than a decade studying the ways that large groups of people petition administrative agencies using aggregate procedures, like ones used in federal and state courts. Aggregate procedures include both *formal techniques* to group together similar cases, like class actions, as well as *informal techniques*, like rules that assign individual cases raising the same issues to the same adjudicator, in the same venue, or on the same expedited docket.[4] The VAEA appropriately authorizes the BVA to use a wide variety of both formal and informal procedures including "joinder, consolidation, intervention, class actions, and any other multiparty proceedings."

In 2016, the Administrative Conference of the United States (ACUS)—a government body that issues guidance and policy recommendations for all federal agencies—invited me and my colleague, Dean Michael Sant'Ambrogio, to study federal agencies that aggregate claims like this. ACUS provided us with unusual access to agency policymakers, staff and adjudicators, giving us with an inside look at how administrative tribunals use mass adjudication in areas as diverse as employment discrimination, mass torts, and health care. After we issued our report, ACUS adopted new guidelines for federal agencies to use aggregate procedures in their own hearings.[5]

Since that time, federal agencies have carefully begun to experiment with them. Those that have used aggregate procedures have generally found that aggregate procedures—when used responsibly—can enhance efficiency, promote consistency, improve the quality of policymaking, and help everyday people obtain legal expertise needed to access and navigate our government institutions.

Below, I'll first explain why I think aggregation rules would benefit the VA by placing it on the same footing as other federal agencies that aggregate cases and claims. Then, I'll

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[3] *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004).

[4] This is consistent with how leading scholars describe aggregate procedure. Principles of the Law of Aggregate Litigation § 1.02 (2010)(types of aggregate proceedings); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 Duke L.J. 381 (2000); Judith Resnik, *From "Cases" to "Litigation," 54 Law & Contemp. Probs.* 5, 22-38 (1991).

[5] See Aggregation of Similar Claims in Agency Adjudication, 81 Fed. Reg. 40,260 (June 21, 2016).

explain how other federal government programs have used aggregate procedures to improve efficiency, consistency, informed decisionmaking, and access to justice.

A. Section 2(d)(1)(A) Gives the VA the Same Power to Aggregate Cases as Other Administrative Agencies

Many, if not most, federal agencies have the power to group together similar cases under their own "organic statutes." Organic statutes are the laws passed by Congress that create a federal agency and that, according to the Supreme Court, generally give them the power adopt procedural rules to hear cases.[6] Congress gave the Board of Veterans Appeals that same broad statutory authority to "prescribe all rules and regulations which are necessary or appropriate" to adjudicate cases.[7] The procedural flexibility Congress generally gives administrative agencies reflects a basic feature of administrative procedure: agencies need authority to shape their own rules and, when appropriate, to adapt them to the types of cases and claims that they hear.

Consistent with that authority, agencies have long adopted class actions and other aggregate procedures. Indeed, over 70 administrative tribunals and legislative courts have adopted procedures to aggregate claims.[8] Nine have adopted class action rules of some kind.[9] Some rules loosely track Rule 23 of the Federal Rules of Civil Procedure, which is the class action rule that federal district courts use, while others are tailored to the specific types of cases and claims that the court or agency hears.

Recently, the Board of Veterans Appeals refused to hear claims brought by a group of veterans sent to decontaminate a site in Palomares, Spain, after a B-52 bomber carrying thermonuclear weapons collided with another aircraft in 1966.[10] Without a group

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[6] The Supreme Court has explained that administrative tribunals "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *F.C.C. v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940). For that reason, agencies may consolidate cases and decide "subordinate questions of procedure," such as "the scope of the inquiry, whether [cases] should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions." *Id.* at 138.

[7] *Compare* 38 U.S.C. § 501(a) *with* 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. § 2000e16(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). 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).

[8] Michael D. Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action,* 126 Yale L.J. 1634 (2017).

[9] Id. at 1659.

[10] *Skaar v. McDonough*, No. 24-2457, 2024 WL 3771697, at *1 (Vet. App. Aug. 13, 2024)(describing the position of the Board).

proceeding, many of these veterans may never obtain consistent relief from a common VA policy or practice that they all say improperly denied them benefits.

Section 2(d)(1)(A) confirms that, just like other agencies, the BVA can hear veteran appeals together. In so doing, Section 2(d)(1)(A) ensures that the BVA will have the same tools long used by other government agencies and courts to adjudicate large numbers of similar claims.

To understand how these kinds of aggregate techniques may specifically benefit the VA, consider four things about the VA benefit system:

First, the VA benefit system is *huge*. The VA benefit system processes roughly one million benefit claims each year. Only two other mass adjudication programs in the United States currently put up those kinds of numbers—US immigration courts and our social security system, "probably the largest adjudicative agency in the western world."[11]

Second, the VA process is breathtakingly *complex*. After veterans apply for their benefits, they receive an initial administrative decision from one of 56 regional offices. Veterans who disagree with those initial decisions can then request review by a senior adjudicator or appeal to the Board of Veterans' Appeals, which in turn hears tens of thousands of claims inside the VA every year. Only when veterans have worked their way through all those hoops can they finally appeal their claims to the Veterans Court, which hears more appeals from administrative agencies than all other federal appellate courts *combined*. At each stage of the benefits process, however, claims can be bounced back to a lower level for more factual development. That means that cases go up, down, and around in a system some Veteran Court judges have called a "hamster wheel" of justice:[12] Decision. Appeal. Remand. Repeat.

Third, the VA is *backlogged*. Up until a few years ago, the average benefit claim could take between five to seven years to be resolved.[13] Congress has tried to modernize and streamline appeals. But delays at the VA haven't gone away. The current VA process can leave veterans waiting more than three years to fully resolve their claims. The BVA maintains a website devoted to explaining its systemwide delays for frustrated veterans.[14]

Fourth, the VA system operates without meaningful access to *precedential decisionmaking and lawyers*. The Veterans Court seldom issues precedential decisions. But even when it does, lawyers are rarely around to interpret and apply them consistently in the VA's own administrative proceedings. This is because of statutory caps on attorney fees, long delays, and constant remands that make individual legal representation extremely challenging. And when you have large numbers of unrepresented claims that only aggravates the problems I've mentioned above. They create more inconsistent outcomes, leading to more remands, which, in turn, cause even more delays.

Against this kind of backdrop, aggregate procedures offer an important tool to combat rising case volumes while promoting more access to justice. They are not the only

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[11] *Heckler v. Campbell*, 461 U.S. 458, 461 (1983).
[12] *Coburn v. Nicholson*, 19 Vet. App. 427 (2006)(Lance, J., dissenting).
[13] *Martin v. O'Rourke*, 891 F.3d 1338 (2018).
[14] BVA, *Decision Wait Times: Why does my appeal at the Board of Veterans' Appeals (Board) take so long, and what is the Board doing about it?,* https://department.va.gov/board-of-veterans-appeals/decision-wait-times/

tool, of course. But with rules to aggregate similar cases or claims, the BVA sits in a far better position to address frequently recurring legal or factual issues in a group proceeding that otherwise would languish in a "hamster wheel" of appeals and remands across 56 different regional offices. Just as important, aggregate procedures offer an important tool for veterans to understand their rights, pool their resources, retain attorneys and experts to assess common legal problems, and obtain consistent relief from the VA.

B. Other Government Programs Have Used Similar Tools to Increase Efficiency, Consistency, and Legal Access

Other agencies have successfully used aggregate procedures to achieve these very same goals. First, in particularly large government benefit programs like the VA, agencies have used group procedures to swiftly process large numbers of claims and address allegations of group-wide harm more efficiently than piecemeal individual adjudication. For example, the Office of Medicare Hearings and Appeals, which hears appeals from Medicare coverage determinations, successfully aggregated claims to address a 600,000 claim backlog that arose in 2016.[15] OMHA has long aggregated similar appeals brought by health care providers against the federal government.[16] Its judges identify, process, consolidate and sometimes sample large numbers of similar cases. But their efforts in 2016 were so successful that medical providers urged OMHA to expand opportunities to aggregate and resolve large numbers of claims.[17]

Another example comes from the National Vaccine Injury Compensation Program. 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.[18] In the words of one Special Master, omnibus proceedings "turned out to be a highly successful procedural device" for the Vaccine Program. They resolved cases "far more efficiently than if we had needed a full-blown trial, with multiple expert witnesses, in each case."[19]

Along similar lines, the EEOC has long used a class action procedure for resolving "pattern and practice" claims of discrimination lodged against the same federal employer, which include hearings before specialized administrative law judges.[20] 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.

Notably, agencies have accomplished these goals *without meaningful increases in budgets or staffing*. In fact, the opposite is true. In the thirty-three years since the EEOC issued its rule for class actions involving public employees, annual FTE staffing has either remained

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[15] *See* Michael Sant'Ambrogio & Adam Zimmerman, Aggregate Agency Adjudication, Report to the Administrative Conference of the United States (Jun. 9, 2016), at 50-59.

[16] *See In re Apogee Health Serv., Inc.*, No. 769 (Medicare Appeals Council Mar. 15, 1999); *Chaves County Home Health Servs. v. Sullivan*, 931 F.2d 914, 919-22 (D.C. Cir. 1991).

[17] Sant'Ambrogio & Zimmerman, *supra* note 1, at 61 & n.185 (describing requests for expansion).

[18] *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).

[19] *Id.*

[20] See 29 C.F.R. § 1614.204.

even or dropped, from 2,796 employees in 1991 to 2,246 in 2024.[21] The OMHA program designated nine of their own administrative law judges to resolve thousands of appeals at a time in aggregate proceedings, while they maintained their regular workload.[22]

Aggregate procedures also help agencies resolve cases more consistently and transparently, particularly when many different people challenge the same organizational misconduct. After the collapse of the Corinthian Colleges, the Department of Education similarly adopted a group process modeled on federal court class actions for students—many of whom were veterans—seeking relief from predatory colleges that commit fraud. A formal group process, the Department later went on to say, would give "students access to consistent, clear, fair and transparent processes to seek debt relief" from the same college program during a specific timeframe.[23] The rules would also protect taxpayers, ensuring that "financially risky institutions … take responsibility for losses to the government" for federal loan discharges, while providing "due process for students and institutions."[24]

Finally, aggregate rules can expand access to legal representation, particularly for widespread problems that are often too costly to be prosecuted through individual claims and appeals.[25] They also help agencies gather information about matters within their regulatory jurisdiction. The EEOC's class action device, for example, allows the agency to pool information about employers' policies and highlights patterns that may escape detection in individual proceedings. According to the EEOC, "class actions … are an essential mechanism for attacking broad patterns" of organizational misconduct and "providing relief to victims of … systemic practices."[26] 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 and corrected them.[27]

Similarly, the Vaccine Court's omnibus proceedings allow all parties alleging vaccine-related injury to benefit from the record developed in test cases qualified experts and experienced legal counsel they otherwise might not be able to afford in individual benefit

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[21] *See* U.S. Equal Employment Opportunity Commission, *EEOC Budget and Staffing History, 1980 to Present*, https://www.eeoc.gov/eeoc-budget-and-staffi ng-history-1980-present.
[22] Sant'Ambrogio & Zimmerman, *supra* note 1, at 1679.
[23] Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 39,330 (June 16, 2016).
[24] *Id.*
[25] *See* 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"). *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (aggregation "may permit the plaintiffs to pool claims which would be uneconomical to litigate individually").
[26] 64 Fed. Reg. 37,644, 37,651 (July 12, 1999).
[27] *See* Press Release, U.S. Dep't of State, *Department of State Reaches Settlement Resolving Longstanding Claims of Disability Discrimination Relating to Its Worldwide Availability Requirement for Career Department of State Foreign Service Applicants* (Jan. 17, 2023), https://2021-2025.state.gov/department-of-state-reaches-settlement-resolving-longstanding-claims-of-disability-discrimination-relating-to-its-worldwide-availability-requirement-for-career-department-of-state-foreign-service-appl/

hearings.[28] In one of the Vaccine Court's first omnibus proceedings, the parties pooled their resources to produce 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 the Department of Health and Human Services as well as Congress.[29] The result did not just benefit victims, but led to systemic reforms across the agency. 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.[30]

Of course, aggregate adjudication poses challenges of its own. Aggregating cases may stretch administrators' capacity to administer justice to many people, undermine the perceived "legitimacy" of a process without individual hearings, and increase the consequences of error. But many programs that I have studied took steps to address these concerns. OMHA has cautiously piloted its statistical sampling program to avoid replacing old backlogs with new ones. The NVICP has relied on panels of adjudicators to reduce concerns about having one decisionmaker decide thousands of cases. Judges at both the EEOC and the NVICP ensure that lawyers in big cases possess the skill to represent large groups and that individuals voluntarily participate in the process.

In that vein, Section (d)(1)(A) follows many of the very best ACUS practices to promote the benefits of aggregate adjudication, while minimizing potential drawbacks. First, it gives the BVA power to aggregate claims based upon a well-known and established standard—whether they raise "a common issue of law or fact"—and encourages the BVA to consider a wide variety of techniques to resolve them. This kind of procedural flexibility is important to ensure VA can tailor its proceedings to the cases it frequently must hear and resolve.[31]

Second, VAEA also follows the ACUS recommendations by calling for the study and use of precedential decisionmaking. ACUS similarly recommends that agencies consider precedential decisionmaking alongside other kinds of aggregate procedures to help adjudicators handle similar subsequent cases more expeditiously and consistently.[32] Aggregate procedures also help parties pool resources to hire lawyers, which is important so that veterans and the BVA receive help interpreting and applying precedent in future cases.

Third, the VAEA tasks the VA with creating tools to track claims, appeals, remands and the the types of cases that frequently raise common issues. As the ACUS recommendations observe, this kind of "information infrastructure" helps agencies devote

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[28] *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).
[29] *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).
[30] See 60 Fed. Reg. 7678 (1995), revised 62 Fed. Reg. 7685, 7688 (1997).
[31] Administrative Conference Recommendation 2016-2: Aggregation of Similar Claims in Agency Adjudication (June 10, 2016) (Rec. 2).
[32] *Id.* (Rec. 2 & 9).

their energies to the cases best resolved in aggregate proceedings, increases equality of outcomes, and reduces the chance of error.[33]

Fourth, the bill calls for periodic review of the use of its aggregate procedures—including the number of times the BVA chose to use them, the number of cases that were resolved through them, and the extent to which the process improved efficiency. ACUS also recommends that agencies review the results of aggregate proceedings and share their results with policymakers and personnel. This is not only important to ensure aggregate procedures work fairly and efficiently, but "so that they can determine whether … codifying the outcome [in any such cases] might be worthwhile" for future claims that raise similar issues.[34]

Finally, aggregate procedures at the BVA also help the Veterans Court, the federal court charged with reviewing the BVA's decisions. Because any decision at the BVA will affect large groups of individuals at the VA, it will be worthwhile (and much easier) for the VA to devote more time and attention to the appeal. For the same reasons, the VA's decision on appeal is likely to be more transparent than final decisions in individual adjudications, which rarely attract much public attention. And, because of the more developed and coordinated fact-finding that can take place at the VA, the Veteran's Court can review a fuller record to consider the systemic aspects of a legal issue that impacts many veterans. I discuss how the VAEA applies to the Veterans Court, below.

III. Section 2(e) of the Veterans Appeals Efficiency Act: Expansion of Jurisdiction of Court of Appeals for Veterans Claims

Section 2(e) of the Act attempts to place veterans in Veterans Court on even footing with other litigants who use class actions in federal courts. Section 2(e) would overturn a recent decision by the Federal Circuit Court of Appeals, called *Skaar v. McDonough*.[35] *Skaar* limited the number of veterans who could participate in a class action so drastically that it virtually eliminated class actions in the Veterans Court—a tool that is crucial to efficiently adjudicate the thousands of claims that court hears every year.

Section 2(e) is a well-intentioned step in the right direction, and I applaud the Committee for taking on an issue that would dramatically improve veterans' opportunities to obtain justice in the Veterans Court. The current language in the bill, however, contains a provision that will create confusion, while unnecessarily limiting classwide relief for veterans with the same legal claims. Section 2(e) should be amended to ensure veterans can participate in Veteran Court class actions like other litigants in any other class action.[36]

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[33] *Id.* (Rec. 3(a)). *See also, e.g.,* Jonah B. Gelbach, David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 Tex. L. Rev. 1097, 1142-45 (2018)(describing data techniques to track delays in social security adjudication).

[34] *Id.* (Rec. 10). *See also id.* (Rec. 3(c)).

[35] *Skaar v. McDonough*, 48 F.4th 1323 (Fed. Cir. 2022).

[36] Large portions of this section were previously published in the Chicago Law Review Online, which specifically addressed the impact of the Federal Circuit's erroneous decision in *Skaar v. McDonough* on the future of veteran class actions and the need for legislative action to correct it. Adam S. Zimmerman, *Exhausting Government Class Actions*, U. Chi L. Rev. Online (Oct. 2022), https://lawreview.uchicago.edu/online-archive/exhausting-government-class-actions

A. Background on Class Actions in the Veterans Court and Section 2(e)

By way of background, for a long time, veterans were one of the few groups of people who could not contest the decision of a government program, which Congress established for their benefit, in a federal court.[37] That changed when Congress passed the Veterans Judicial Review Act. That law created the Veterans Court, a special federal court with exclusive power to hear challenges to veteran benefit decisions. At the time, Congress imagined that the Veterans Court would have the same tools that other federal courts had to hear claims against the federal government, including class actions.[38] But, in a short summary opinion issued only a year after it was formed, the Veterans Court held that it could not hear class actions.[39]

Without class actions, the VA avoided judicial review of cases that impacted large groups of veterans. Facing endless wait times navigating the VA's complex benefit system, many unrepresented veterans simply gave up before ever seeing the Veterans Court. And, for the rare case challenging an unlawful rule or policy that actually reached the Veterans Court, judges observed that the government would frequently pick them off, strategically—quietly resolving petitions just before their hearing dates, ignoring the systemic problems alleged, and forcing courts to dismiss them as moot.[40]

In 2017, the Federal Circuit tried to finally put an end to this. In a groundbreaking decision, *Monk v. Shulkin* confirmed the Veterans Court had power to hear class actions like federal district courts that routinely review government agencies.[41] The Federal Circuit encouraged the Veterans Court to write a formal class action rule to hear class actions more regularly, relying in part, on our amicus brief of Administrative Law, Civil Procedure, and Federal Court scholars.[42] And, after three years of meetings with government attorneys, veteran organizations, and academics, the Veterans Court created a formal rule to hear class actions for injunctive relief against the government and published it on Veterans Day, November 11, 2020. The rule was modeled after Rule 23 of the Federal Rules of Civil Procedure, which is frequently used by federal district courts to hear claims for injunctive relief against government and private institutions.

But in a poorly reasoned opinion in 2022, the Federal Circuit sharply limited future veteran class actions. In *Skaar v. McDonough*,[43] the Federal Circuit held that the only veterans who could benefit from the new formal class action rules—at least those brought outside of the All Writs Act[44]—were those veterans who had exhausted all of their internal appeals with

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[37] Limited exceptions did exist, however. *See Johnson v. Robison,* 415 U.S. 361 (1974); *Wayne State Univ. v. Cleland,* 590 F.2d 627, 628 n.1 (6th Cir. 1978) *Nehmer v. U.S. Veterans' Admin.,* 118 F.R.D. 113 (N.D. Cal. 1987).

[38] H.R. Rep. No. 100-963, pt. 1, at 41–42 (1988) (discussing potential litigation challenges to VA regulations, stating, "Again according to SSA, most challenges to regulations are class actions, involving large groups of beneficiaries or potential beneficiaries.").

[39] *Harrison v. Derwinski,* 1 Vet.App. 438 (1991).

[40] *Monk v. Shulkin*, 855 F.3d 1312, 1321 (Fed. Cir. 2017)(collecting cases and observing that "[c]ase law is replete with such examples.")

[41] 855 F.3d 1312 (Fed. Cir. 2017).

[42] *Id.* at 1319-20.

[43] 48 F.4th 1323 (Fed. Cir. 2022).

[44] The All Writs Act is an infrequently used, but very important law, that allows courts to craft novel procedures to protect their jurisdiction to decide cases, including the use of class actions. *See Monk*, 855 F.3d at 1319 (allowing the aggregation of veteran mandamus petitions under the All Writs Act); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974) (aggregating habeas petitions using the All Writs Act).

the VA at the time that the class was certified. All the other veterans whose claims were still pending with the VA, whose claims had been wrongfully denied and not timely appealed, or whose claims had yet to be filed, were not entitled to the same relief.

The Court reasoned that this was because statute that gave the court "jurisdiction"—which is judicial power—to review the VA's actions had to be read very narrowly. But as a practical matter, this cramped view of the class action will, in the words of Judge Dyk and four other dissenting judges on the Federal Circuit, "effectively eliminate class actions in the veterans' context."[45]

Why? I've already described the endless system of appeals and remands that make reaching the Veterans Court a game of chutes and ladders for many individual veterans. Combined steep backlogs and entrenched obstacles for vets to retain lawyers, this holding means that few veterans would ever amass the numbers necessary to form a class in Veterans Court. Left unchanged by Congress, *Skaar* would leave in place the very administrative wrongs class actions hoped to address—limited access to counsel, picked-off claims, and systemic problems—for thousands of veterans challenging the same unlawful policies at the VA.[46]

B. The Promise and Peril of Section 2(e) in its Current Form

The VAEA attempts to fix *Skaar*'s mistake by making clear that the Veterans Court indeed has "supplemental jurisdiction" to hear class actions of veterans, even when all those veterans haven't jumped through every procedural hoop to reach the Veterans' Court. But it still leaves out many veterans who, in any other federal court, would be able to benefit from classwide relief.

Section (B)(1)(A)(i) starts off the way most class actions work. It says the Veterans Court has "jurisdiction" over any veteran's claim that meets "the definition of a class contained in the request for class certification" of a properly certified class action. That's usually how injunctive relief class actions against the government works. Class actions are a form of what civil procedure scholars call "representative litigation." What that means is that, so long as the court has jurisdiction over the lead plaintiff in the case—and the complaint satisfies the strict requirements of the class action rules—the court can also provide relief to any member of the class who is adversely affected by a government policy.

While this part of the bill represents an important move forward for veterans, the very next provision of the bill quietly walks it back. It says the only veterans who can benefit from that class action are those who have "filed a notice of disagreement" and "for which the agency of original jurisdiction has issued a nonfinal decision." (B)(1)(A)(ii). This provision will generate unnecessary litigation and confusion, while limiting the effectiveness of a class action for many veterans in a way that does not appear in any other government statute.

Why confusion? This section appears to be modeled after Section 405(g) of the Social Security Act. Section 405(g) limits federal judicial review of social security decisions to people who file a claim for benefits with the agency and receive a "final" decision from

[45] *Skaar v. McDonough*, 57 F.4th 1015, 1017 (Fed. Cir. 2023).
[46] *Monk*, 855 F.3d at 1321.

the Commissioner of Social Security.[47] On this score, one could argue this bill should allow for *more generous class actions.* This is because Section 2(e) would allow the Veterans Court to review not just "final," but "non-final" decisions at the VA. The Supreme Court has also said litigants do not have to obtain any decision from the social security when parties challenge the constitutionality of Social Security's procedures, because the agency doesn't review constitutional claims in ordinary benefit decisions.[48] It also has said that once a party files a claim with the Social Security commissioner, that person can represent a class of people "have filed" or "will file" a claim for social security.[49]

But it is unclear whether the provision will be read this way. This is because this subsection seems to explicitly narrow the Veteran Court's *class action jurisdiction*, under (A)(i) to only those who get an erroneous "decision" and appeal it. Under that reading of this statute, the only veterans who could benefit from a *class* challenge to the same systemwide problem at the VA would be those who had filed a claim, received a decision, were alerted to a problem with it, and filed an appeal at the time the class was resolved—regardless of whether their claims concerned the same constitutional, statutory, procedural, or other similar errors as many other veterans.

There is no reason for a jurisdictional statute to apply this way to an injunctive relief class action. Consider why Congress has jurisdictional requirements at all. First, jurisdictional requirements give the government a "first bite" at solving a problem. Second, they assure that parties will fully develop the claim and record for a court to review. Third, in some cases, they save judicial resources; the court only has to devote its limited capacity to claims that demand an answer from a judge—which is particularly important in a mass adjudication system, like the VA, which hears over a million claims a year.

But nothing about a jurisdictional statute requires that a court give the government ten bites—or in a case like *Skaar*, almost 1,400 bites—at the same apple. Nor should it require the same expensive record development to repeatedly disprove the same legal or factual issue, particularly given that many veterans will lack the access and resources necessary to develop that same record. Finally, reading a statute this way makes almost no sense in the context of an injunction; requiring the court to limit the scope of injunctive relief unnecessarily risks countless adjudications, over the same question, involving the same remedy. A hypothetical claimant who perfected a jurisdictional requirement the day before issuance of a classwide injunction might benefit from the judgment, while another claimant who did so the following day would not.

Most importantly, this narrow interpretation could limit the Veterans Court's power to efficiently correct the same systemwide mistakes in the VA benefit system. Imagine a case

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[47] 42 U.S. Code § 405(g)("Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party … may obtain a review of such decision by a civil action … [in federal district court].")

[48] *Matthews v. Eldrige,* 424 U.S. 319, 330 (1976) ("It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context.")

[49] *See Califano v. Yamasaki*, 442 U. S. 682, 705 (1979)(finding it was proper for the district court to have ordered relief to a subset of the class who had not yet filed waivers with the Commissioner, as long as they would do so in the future consistent with a court order). *See also* Adam S. Zimmerman, *Exhausting Government Class Actions*, supra note 1 (explaining confusion over *Califano's* holding and collecting subsequent decisions allowing class actions that provide relief to those who have or will file claims with a federal agency.)

that challenges the way the VA processes claims, before they are even decided by an administrator. Does this rule bar class actions because veterans never "received" a benefit decision?[50] Or a case that argues the VA unlawfully discouraged most veterans from applying for benefits the Veterans Court expressly said they could obtain?[51] Would only the veterans who ignored the VA and applied get to participate in the class action? Or finally, what about a case like *Skaar* itself. Many of the (now elderly) Palomares veterans, who were wrongfully discouraged from applying for radiation benefits, would not file a claim with the VA, unless they were included in a class action and notified about their rights as class members.

For these reasons, this narrow kind of jurisdictional provision would be unlike any one I have ever seen in a government benefit program. There have been hundreds of class action challenges to government benefit programs—including cases involving food stamps, disability benefits, public assistance, farm aid, supplemental security income, Medicare, Social Security, and others.[52] Even for government programs with very strict jurisdictional demands, federal courts have not had a problem certifying injunctive relief classes while making it clear that the class definition includes those who "have filed" and "will file" claims with a federal agency sufficient to satisfy the court's jurisdiction.[53] Subject-matter jurisdiction usually exists as long as one named plaintiff can establish it, the class definition is clear, and the class satisfies the procedural safeguards of Federal Rule of Civil Procedure 23.

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[50] For examples of this problem in the context of systemwide delays and computer malfunctions, *see, e.g., Godsey v. Wilkey,* 31 Vet. App. 207 (2019)(systemwide delays in processing same group of claim to Veterans Court) and Freund v. McDonough, 114 F.4th 1371 (Fed. Cir. 2024)(systemwide computer malfunction that deactivated benefit claims without notice to veterans).

[51] *See, e.g., Wolfe v. Wilke*, 32 Vet. App. 1 (2019).

[52] *See, e.g.*, *Aiken v. Miller*, 442 F. Supp. 628, 657–58 (E.D. Cal. 1977) (certifying a class of all those "whose application for food stamps was denied, delayed, or never made" and "who have been or will be affected by" the agency rule at issue); *Lightfoot v. District of Columbia*, No. 01-cv-1484, 2004 U.S. Dist. LEXIS 22158, at *8–12 (D.D.C. Jan. 14, 2004) (certifying a class of "[a]ll persons who have received or will receive disability compensation benefits . . . and whose benefits have been terminated, suspended or reduced" or "whose benefits *will* be terminated, suspended or reduced in the future" (emphasis added)); *Barry v. Corrigan*, 79 F. Supp. 3d 712, 751 (E.D. Mich. 2015) (certifying a class of "[a]ll past, present, and future applicants for, or recipients of, benefits administered by the Michigan Department of Human Services . . . who have suffered or will suffer actual or threatened denial, termination, or reduction of public assistance benefits"); *Olenhouse v. Commodity Credit Corp.*, 136 F.R.D. 672, 681 (D. Kan. 1991) (certifying a class of farmers in an action to enforce their entitlements under federal grant-in-aid program and defining that class to include those who had not yet exhausted administrative appeals); *Alexander v. Price*, 275 F. Supp. 3d 313, 318 (D. Conn. 2017) (certifying a class of Medicare beneficiaries who "have received or will have received 'observation services'"); *Hill v. Sullivan*, 125 F.R.D. 86, 87 (S.D.N.Y. 1989) (certifying a class of "widows or widowers who have or will apply for disability benefits"); McKenzie v. Heckler, 602 F. Supp. 1150, 1160 (D. Minn. 1985) (certifying a class of "all persons residing in Minnesota whose applications for SSI and RSDI have been or will be adjudicated concurrently"); *Kendrick v. Sullivan*, 784 F. Supp. 94, 104 (S.D.N.Y. 1992) (certifying a class of "all claimants for Social Security benefits whose claims have been or will be assigned to [the Administrative Law Judge] for decision"); *Reed v. Lukhard*, 591 F. Supp. 1247, 1251 (W.D. Va. 1984) (certifying a class of "persons in Virginia whose benefits . . . haxve been, continue to be, or will be denied, reduced, or terminated"); *McDonald v. Heckler*, 612 F. Supp. 293, 299 (D. Mass. 1985) (certifying a class of "[a]ll persons residing in Massachusetts who have filed or will file applications for disability benefits"); *Newkirk v. Pierre*, No. 19-cv-4283, 2020 WL 5035930, at *12 (E.D.N.Y. Aug. 26, 2020) ("[T]hat the class includes future members . . . does not pose an obstacle to certification.").

[53] *See, e.g.*, *Sullivan v. Zebley*, 493 U.S. 521, 527 (1990) (affirming a class of children "who are now, or who in the future will be, entitled to an administrative determination" for children's disability payments); *Scott v. Quay*, 338 F.R.D. 178, 192 (E.D.N.Y. May 25, 2021) (certifying a class comprised of "all those people . . . who have or will in the future have satisfied the exhaustion requirement imposed" by the Federal Torts Claims Act).

Accordingly, I would make clear that Section 2(e) applies to veterans who are members of the same properly certified class and "have filed or will file" those claims with the VA. Such an amendment would ensure that class actions at the Veterans Court are not just more functional and efficient. They would be consistent with the historical reasons for the modern class action.

The modern class action rule aimed to get past exhaustion requirements that limited class action relief. Federal Rule of Civil Procedure 23(b)(2), the inspiration for the Veterans Court's class action rule, was specifically revised in the 1960s to allow courts to review systemwide government misconduct, even when class members had yet to exhaust a lengthy administrative process.

The effort to revise Rule 23 coincided with efforts after *Brown v. Board of Education* to desegregate public schools. By the early 1960s, a number of southern states had jettisoned crude, explicit policies that simply required segregated schools. Instead, school boards gave children a default school assignment but allowed them to individually petition school boards to have that assignment changed. Whether a board would grant any particular child's petition ostensibly depended on a host of individual, facially nondiscriminatory factors specific to each one.

As administered, however, these processes left segregated schools almost entirely intact. Boards made default assignments by race, then systematically deployed a set of pretextual practices to reject individual petitions. When challenged in class actions, governments invoked individualized administrative rules to argue that each student had to exhaust an individualized district application process.

In a case called *Potts v. Flax*, the Fifth Circuit disagreed and affirmed the right to commence a class action: "Insofar as these statutes are advanced as prescribing statutory machinery which must first be administratively exhausted, we repeat what we have so often held. Exhaustion of internal school system administrative remedies is not required so long as racial segregation is the authoritative accepted policy."

The Federal Rules Committee responsible for drafting Rule 23 relied extensively on *Potts* to highlight the importance of using class actions to join together parties who, although ostensibly in different positions, challenged the same government policy. It included *Potts* in the Advisory Committee's note to Rule 23 as an exemplar of the Rule 23(b)(2) class action.

To this day, other federal courts have honored the Advisory Committee's intention that Rule 23 provide a powerful tool to promote legal access, judicial review, and uniform relief, even when individual plaintiffs in a class were impacted in different ways at different stages of a governmental program. Properly amended, Section (e) holds the promise that veterans seeking classwide relief before the Veterans Court would receive the same opportunity.