IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CONLEY F. MONK, JR., JAMES BRIGGS, TOM COYNE, WILLIAM DOLPHIN, JIMMIE HUDSON, SAMUEL MERRICK, LYLE OBIE, STANLEY STOKES, AND WILLIAM JEROME WOOD II, on behalf of themselves and all others similarly situated,	)	
Petitioners,	)	
v.	)	**Case No. 15-1280**
DAVID J. SHULKIN, M.D.,	)	
Secretary of Veterans Affairs Respondent.	)	

AMICUS CURIAE BRIEF OF SWORDS TO PLOWSHARES, CONNECTICUT VETERANS LEGAL CENTER, NEW YORK LEGAL ASSISTANCE GROUP, VETERAN ADVOCACY PROJECT, AND LEGAL AID SERVICE OF BROWARD COUNTY IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTEREST

Counsel for amici curiae Swords to Plowshares, Connecticut Veterans Legal Center, New York Legal Assistance Group, Veteran Advocacy Project at the Urban Justice Center, and Legal Aid Service of Broward County certifies the following:

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

   Swords to Plowshares
   Connecticut Veterans Legal Center
   New York Legal Assistance Group
   Veteran Advocacy Project at the Urban Justice Center
   Legal Aid Service of Broward County

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 attorneys 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:

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February 8, 2018

/s/ Mario O. Gazzola
Mario O. Gazzola

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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 ("VA"). Amici are authorized to file this brief by the Court's October 26, 2017 Order Inviting Amici. Specific, brief statements concerning each *amici* follow:

Swords to Plowshares

Founded in 1974, Swords to Plowshares ("Swords") is a community-based not-for-profit organization that provides needs assessment and case management, employment and training, housing, and legal assistance to veterans in the San Francisco Bay Area. Swords promotes and protects the rights of veterans through advocacy, public education, and partnerships with local, state, and national entities. The Legal Department targets its services to homeless and other low-income veterans seeking assistance with disability benefits and Character of Discharge determinations for VA eligibility. In 2017, the Legal Department provided free legal services to over 720 veteran clients in the initial and appellate stages of their claims.

Connecticut Veterans Legal Center

Connecticut Veterans Legal Center ("CVLC") helps veterans recovering from homelessness and mental illness overcome legal barriers to housing, healthcare and income. Founded in 2009, CVLC was the first program in the United States to integrate legal services on-site at VA mental health facilities. Through CVLC, hundreds of volunteer attorneys across Connecticut have donated millions of dollars' worth of pro

bono assistance, and helped their veteran clients achieve stability and rebuild their lives. To date, CVLC has assisted over 2,000 veterans with over 3,000 legal issues.

New York Legal Assistance Group

Founded in 1990, the New York Legal Assistance Group ("NYLAG") provides high quality, free civil legal services to low-income New Yorkers who cannot afford attorneys. NYLAG has two distinct projects that focus on veterans' legal needs, the Public Benefits Unit's Veterans Access to Benefits Project and LegalHealth's Veterans Initiative. In 2017, these projects served a combined 1199 veterans with 1761 legal issues. The Veterans Access to Benefits Project at NYLAG helps veterans with VA compensation claims and appeals, and conducts informational sessions to direct veterans toward programs and resources that most appropriately meet their financial, housing, legal, employment and other needs. LegalHealth's Veterans Initiative has medical-legal partnership clinics at three VA medical centers in New York City and Long Island. Using the medical-legal partnership model, attorneys coordinate with medical staff to identify and help veterans with issues including eviction prevention, VA benefits cases, advance planning, and debt collection. LegalHealth's Veterans Initiative includes the nation's first Women Veterans Legal Clinic, the Older Veterans Legal Clinic, and general legal clinics that operate out of VA outpatient behavioral health departments. Through these VA-based legal clinics, LegalHealth's Veterans Initiative improves the health and well-being of veterans by addressing the pressing legal needs that endanger their health or impede their treatment and recovery.

Veteran Advocacy Project

The Veteran Advocacy Project ("VAP") provides free legal services to low-income veterans and their families, with a focus on those living with post-traumatic stress, traumatic brain injury, substance use disorders, and other mental health issues. Founded in 2010 as a part of the Urban Justice Center, VAP has worked on over 4,400 matters, including VA claims and discharge upgrades. The project is partnered with VA hospitals, mental health clinics, and community groups to reach veterans where they are. By removing barriers to housing, health care, and income, the project assists veterans in achieving the stability needed to regain their health and rebuild their lives.

Legal Aid Service of Broward County

Legal Aid Service of Broward County, Inc. ("LAS"), a 501(c)(3) non-profit organization, began providing legal services to residents of Broward County, Florida in 1973. For 31 years, LAS was the only law firm in Broward County providing free civil legal services to the under-privileged. LAS has partnered with United Way of Broward, as part of its MISSION UNITED initiative, to offer free civil legal services to income-eligible military members, veterans, and their families through its Veterans Pro Bono Legal Project ("VPBP"). VPBP utilizes pro bono attorneys in Broward County to provide comprehensive legal services in thirteen different substantive areas of civil, administrative, and military law.

INTRODUCTION

Veterans' disability benefits reflect our nation's fundamental promise to care for those who have served. *See Noah v. McDonald*, 28 Vet. App. 120, 130 (2016). That promise is broken when veterans are required to wait unreasonably long periods of time for resolution of their appeals from decisions denying them these benefits.

Yet that is precisely the circumstance in which hundreds of thousands of disabled veterans find themselves today. Simple ministerial tasks, such as forwarding paperwork from one VA department to another, inexplicably take *years* to complete. While they wait, many disabled veterans face acute financial hardships, homelessness, increased health problems, and other adversities. The delays veterans face are not acceptable.

Nor are they constitutional under the Due Process Clause. First, the delays have a substantial effect on private interests. Amici collectively have represented thousands of veterans before the VA, and they are intimately familiar with the harms veterans experience when their claims for disability benefits are delayed. This brief shares those experiences, setting forth typical examples of the delays and resulting consequences that amici's clients have experienced. Second, in the majority of appeals, the VA ultimately determines that the veteran was eligible for benefits all along, meaning the initial denial of benefits was wrong. Finally, for its part, the VA offers no satisfactory justification for these delays.

All those concerned—including Congress and the VA itself—recognize that the VA's system for processing appeals is broken. Nonetheless, efforts to remedy the problem have thus far proven unsuccessful, with the average delay currently at *six years*

and continuing to grow. This Court now is in an important position to address this systemic problem by using aggregate claim procedures. Through aggregation, this Court can establish a constitutional standard that will aid all involved in the resolution of these delays and help restore our nation's promise to veterans. Amici therefore respectfully request that this Court aggregate a class of all veterans facing unreasonable delays in their appeals and hold that the VA's delays violate the Constitution.

ARGUMENT

I. Current Delays in Veterans Benefits Appeals Violate Due Process.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation omitted). Constitutional requirements of due process have long been held to apply to entitlements, including disability benefits. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970); *see also Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) ("We conclude that such entitlement to [veterans disability] benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution."). There can be no question that veterans have a constitutional right to timely receive disability benefits, which they "have earned and deserve." *See* VA Office of Policy, Planning and Preparedness, *VA Disability Compensation Program: Legislative History* (Dec. 2004) (internal quotation omitted).

In the benefits context, it has long been established that because "[p]rompt and adequate administrative review" is necessary to correct errors in eligibility determinations, "the rapidity of administrative review is a significant factor in assessing

the sufficiency of the entire process." *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975); *see also Gilbert v. Homar*, 520 U.S. 924, 932 (1997) (review of deprivation must be "sufficiently prompt"). Unreasonable delay violates due process because "implicit in the conferral of an entitlement is a further entitlement, to receive the entitlement within a reasonable time." *Schroeder v. City of Chicago*, 927 F.2d 957, 960 (7th Cir. 1991) (Posner, J.). Avoiding undue delay is therefore mandated in the statute governing Board of Veterans Appeals ("BVA") hearings. *See* 38 U.S.C. § 7107(d)(ii)(B)(iii).

It also is required by the courts. In one disability benefits case, the court held that delays in holding disability benefit appeal hearings of 211.8 and 195.2 days deprived claimants of a reasonable opportunity for a hearing. *White v. Mathews*, 559 F.2d 852, 858 (2d Cir. 1977). Another disability case held that delay of nearly four years to review a disability application was "wholly inexcusable." *Kelly v. R.R. Retirement Bd.*, 625 F.2d 486, 490 (3d Cir. 1980). And delay of a year and a half in granting property tax benefits also implicated due process. *Kraebel v. New York City Dep't of Housing Preservation & Dev.*, 959 F.2d 395, 406 (2d Cir. 1992).[1] Evaluating an earlier challenge to delay in reviewing VA disability claims, the Ninth Circuit held that

> This is not a case involving short but justified delays of critical benefits, . . . moderate delays of important benefits caused by a system overload, . . . or long delays of minor benefits due to government interest in efficiency . . . [T]his case involves critical benefits to sustain those incapacitated by mental disability, delayed for an excessive period of time without satisfactory explanation.

[1] Notably, in other contexts, courts have also held that delays of a year or significantly less violate due process. *See, e.g., Tavarez v. O'Malley*, 826 F.2d 671, 673 (7th Cir. 1987) (holding delay of four weeks before allowing grocery store owners access to store violated due process).

Veterans for Common Sense v. Shinseki, 644 F.3d 845, 886 (9th Cir. 2011), *vacated on other grounds on reh'g en banc*, 678 F.3d 1013 (9th Cir. 2012) (holding VA benefits adjudication violated due process; vacated on jurisdictional questions). Even Congress has weighed in, finding the current veterans' benefits appeal process to be "failing" and "unacceptable." 163 Cong. Rec. H4457-01, H4465.

Courts balance three familiar factors when determining whether due process has been afforded in cases of administrative delay: (A) the effect of official actions or delays on private interests, *Mathews*, 424 U.S. at 335; *FDIC v. Mallen*, 486 U.S. 230, 242 (1988); (B) "the justification offered by the Government for delay and its relation to the underlying governmental interest"; and (C) "the likelihood that the interim decision may have been mistaken," *Mallen*, 486 U.S. at 242. As we explain next, those factors weigh heavily in petitioners' favor in this case.

A. The VA's Delays Have Substantial Consequences For Veterans.

Delays of just one year have devastating effects on many veterans. These delays cause veterans to face hardships in accessing the basic necessities of life, experience physical and mental distress, and encounter greater challenges in successfully pursuing meritorious applications for benefits. For many veterans receiving disability benefits, those benefits provide the "means to obtain essential food, clothing, housing, and medical care." *Like v. Carter*, 448 F.2d 798, 804 (8th Cir. 1971). One federal court has even found that "the record before us shows that many veterans perish, after living in want" during the unreasonably protracted VA appeals process. *Veterans for Common Sense*, 644 F.3d at 884-85.

Veterans have a unique and substantial interest in the disability benefits at issue in this case. As this Court recognizes, veteran disability benefits are nondiscretionary benefits that reflect the Nation's indebtedness to veterans for their service. *Noah*, 28 Vet. App. at 130; *see also Sneed v. Shinseki*, 737 F.3d 719, 728 (Fed. Cir. 2013) ("Although benefits cases may not threaten veterans' liberty or persons, veterans risked both life and liberty in their military service to this country."). Review of veterans' benefits claims by the Veterans Benefits Administration therefore has a distinctive, non-adversarial character that is "imbued with special beneficence from a grateful sovereign." *Id.* In this context, "systemic fairness and the appearance of fairness" are heightened, as with "benefit of the doubt" rules that favor veterans and recognize our debt to them. *Id.* at 130-31. This Court also has recognized that interests affected by delays in VA decision-making transcend those of individual veterans: "Quite simply, excessive delay saps the public confidence in an agency's ability to discharge its responsibilities." *Erspamer v. Derwinski*, 1 Vet. App. 3, 10 (U.S. 1990). This substantial interest therefore "weighs heavily in favor of ensuring that an eligible veteran for VA disability benefits receives [procedural protections]," even when Congress has not imposed on the Secretary a specific duty to provide them. *Noah*, 28 Vet. App. at 131.

The degree of deprivation veterans face is also substantial. *See Mathews*, 424 U.S. at 341 (courts assessing the effects of government actions on private interests consider "the degree of potential deprivation" in addition to "the possible length of wrongful deprivation"). For veterans awaiting resolution of their appeals, this deprivation can be measured in the concrete hardships they face in accessing the basic necessities of life—

food, clothing, shelter, and healthcare—as well as less tangible harms from depriving them of the compensation due for their sacrifices and service.

Disability benefits programs are "designed to alleviate the immediate and often severe hardships that result from a wage-earner's disability." *White*, 559 F.2d at 858; *see also Homar v. Gilbert*, 89 F.3d 1009, 1011 (3d Cir. 1995) (retroactive payment of compensation unconstitutionally deprived "cannot serve to cure the due process violation"). Furthermore, "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake." *Telecomms. Research & Action Ctr. V. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984). "This is particularly true when the very purpose of the governing Act is to protect those lives." *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1157-58 (D.C. Cir. 1983). Substantial hardship can result from delays where "many applicants are destitute and seek benefits for the necessities of life." *Blankenship v. Sec'y of Health, Educ. and Welfare*, 587 F.2d 329, 334 (6th Cir. 1978).

This Court has long held that "[c]laims for benefits due to military service clearly implicate human health and welfare concerns." *Erspamer*, 1 Vet. App. at 10. In an earlier case addressing systemic delays in the resolution of veteran benefit claims, a federal court found that many of the then 3.4 million veterans receiving benefits were totally or primarily dependent upon them. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1070 (N.D. Cal. 2008). "A veteran receives no monies from the VA until his claim has been approved, which means that during the initial period of claim

assessment and during the pendency of any appeal he and his family suffer tremendous privation." *Veterans for Common Sense*, 644 F.3d at 859.

Indeed, a member of this Court recently acknowledged that delay in the VA's review of appeals is a problem that exacerbates veteran homelessness, observing that "[t]he difference between receiving a lawful decision at the RO and receiving an erroneous decision requiring an appeal is life changing for many veterans. In that waiting period, how are a disabled veteran's bills to be paid? How are their families going to be cared for?" *Rosinski v. Shulkin*, No. 17-1117 at 13 (Vet. App. Jan. 26, 2018) (order) (Greenberg, J., dissenting). The VA estimated that there were 140,000 homeless veterans in 2010.[2] In 2012, there were more than 1.4 million veterans living in poverty, and more than one million more at risk of slipping into poverty.[3] And in 2017, the number of homeless veterans increased for the first time in several years.[4] Veterans facing potential homelessness and poverty should not have to wait to receive the disability benefits they earned through their service.

These devastating hardships are not the only deprivation caused by excessive delay in processing VA appeals. Significantly, the legislative history of VA disability compensation makes it clear that Congress does not view veteran disability benefits

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[2] Dep't of Veterans Affairs, *Profile of Sheltered Homeless Veterans for Fiscal Years 2009 and 2010* (2012) at 2, *available at* http://www.va.gov/vetdata/docs/SpecialReports/Homeless_ Veterans_2009-2010.pdf.

[3] 4 Legal Servs. Corp., 202 Annual Report 19-20 (2012), *available at* http://www.lsc.gov /about/ annual-report.

[4] U.S. Dep't of Housing and Urban Dev., Office of Community Planning and Development, *The 2017 Annual Homeless Assessment Report (AHAR) to Congress: Part I: Point-in-Time Estimates of* Homelessness (Dec. 2017), *available at* https://www.hudexchange.info/resources/documents/ *2017-AHAR-Part-1.pdf.*

solely in terms of replacing service-impaired earning capacity. Congress also intends for disability benefits to compensate veterans for the reduced quality of life they experience because of their service-related disabilities and provide them support that they earned as a result of their service. *See VA Disability Compensation Program: Legislative History* at 3. Thus, deprivation of benefits also denies veterans fulfillment of the nation's promise to care for those who have served. As described in section I.A.2. *infra*, this betrayal of promised care and support also weighs heavily on veterans' health and wellbeing and many die before this promise is fulfilled. *Veterans for Common Sense*, 644 F.3d at 884-85.

Disabled veterans cannot afford to wait a year, much less the current average of six years for their appeals to be resolved. This is borne out by experience, including that of amici's clients in several ways, which we describe below.

1. Veterans experience financial hardship, homelessness, threats to safety, and increased health problems while they wait long periods for appeals to resolve their entitlement to disability benefits.

Veterans face significant financial challenges, housing and safety issues, and further damage to their health as they await the VA's resolution of their disability benefit appeals. Recent examples from amici's clients include the following: [5]

- As his eventual 100% disability rating reflects, A.H. was unable to work while he waited approximately two years for the VA to correct errors made when denying his claim for mental health disability benefits. He did

[5] All case anecdotes come from current and former clients of amici. Upon request, counsel can provide the Secretary or the Court with VA case numbers for the veterans whose stories are recounted here.

not have enough money to cover his basic needs and became homeless and estranged from his family. He feared for his personal safety as he tried to navigate temporary solutions to his homelessness. His financial, housing, and safety concerns also prevented him from caring for and managing pain caused by a back injury that originated in his service. After winning his appeal and accessing his benefits, A.H. was able to obtain housing and briefly care for his father before his father passed away. Ex. A, Decl. of Barbara Saavedra ¶¶ 10-12.

- E.T. is another veteran who spent years trying to manage severe back and leg pain while waiting 15 years for the VA to resolve his appeals and grant 100% disability payments. E.T. was unable to work because of his disability and spent much of the time homeless. He attempted to pay for additional physical therapy and equipment to manage his pain that the VA did not cover, further deepening his financial difficulties. Ex. A ¶15.

- J.P. has waited two years for a decision on his appeal of his eligibility for VA healthcare and disability benefits. Although the Decision Review Officer ("DRO") acknowledged previous errors during his hearing, a decision on his appeal still has not issued. During this time, J.P. has struggled with substance use and experienced homelessness. Ex. A ¶¶ 20-21.

- C.G. waited for two years for the BVA to grant his mental health claim even though he had advanced on the BVA docket due to his financial

hardship and waived his hearing. During this time, C.G. participated in vocational rehabilitation, but his post-traumatic stress disorder ("PTSD") made it difficult for him to work. Because the VA had not ruled that his disability was service-connected, C.G. also owed significant payments on his prior inpatient treatment for PTSD, adding to his financial difficulties. When his vocational rehabilitation ended, he was unable to find employment, could not afford a safe and stable place to live, and became homeless. He was still homeless in January 2018, when he received word that he would finally receive disability benefits. Ex. A ¶¶ 22-23.

- A.G., a Purple Heart recipient with three combat deployments to Iraq, waited eight months for a DRO hearing on his eligibility for VA healthcare and disability benefits. During this time A.G. was unable to access VA psychiatric care for PTSD so severe he attempted suicide and is unable to maintain fulltime employment. Despite symptoms of traumatic brain injury ("TBI"), A.G. cannot access VA evaluation for the condition, and although he still has shrapnel in his leg, VA physical therapy is out of reach. Ex. A ¶¶ 27-29.

- C.S. is a Vietnam-era Army veteran who has waited over eight years for a decision on his claim for disability benefits related to major depressive disorder ("MDD") and PTSD connected to severe racially motivated assaults during his time of service. His home is in foreclosure, and his pro bono foreclosure counsel wrote the VA pleading for expedited review due

to his imminent homelessness on June 12, 2017. C.S. has received no response to his request, and will likely lose his home. Ex. B, Decl. of Margaret Middleton ¶¶ 4, 6.

- D.V. struggled to survive for three years due to a VA rating error. He was sexually assaulted while serving in the Navy, and suffered from PTSD and related substance abuse after service. The VA found him only 50% disabled after a flawed Compensation and Pension ("C&P") examination. Due to his inadequate disability rating, he was evicted from multiple apartments for non-payment of rent while he awaited his appeal. Ex. B ¶¶ 7-8.

- T.J., an Army veteran, first applied for VA service-connected disability for schizophrenia on March 10, 2011. He timely appealed on April 24, 2013, and eventually had a hearing scheduled via video conference for August 25, 2014. T.J. had a conflict with the date, and requested that the hearing be rescheduled. The hearing was rescheduled for and held on March 25, 2016, 19 months later. T.J.'s case is now on remand, but throughout this period he has not been able to access stable housing due to his limited Social Security Disability income. Ex. B ¶¶ 9-11.

2. Veterans experience hopelessness and emotional strain from the injustice of denials and the indifference to their disabilities delay represents.

In addition to the hardships they face attending to basic financial, housing, health, and safety needs, veterans experience despair and hopelessness over the injustice of errors and the daunting and lengthy process they face to correct them. Some endure mental health crises, some give up on the process entirely, and others die before they access the support owed them.

- While waiting for a decision on his appeal, C.G. pushed himself to look for work he could manage in spite of his PTSD but was turned down repeatedly. Desperate for financial support, C.G. also despaired over clear errors that had been made in evaluating his PTSD—though he had been diagnosed with PTSD and received substantial VA inpatient care for his condition, a C&P examiner reported that C.G. did not have PTSD and did not respond to VA requests for consideration of C.G.'s prior care and diagnosis. As his appeal dragged on, he became suicidal in the face of unrelenting challenges and obstacles and entered emergency inpatient care. Ex. A ¶ 23.

- A.H.'s treatment records show that the VA's errors and appellate delay exacerbated his mental health problems. A.H. focused on the claims process and on thoughts that the government was intentionally trying to harm him to such an extent that he had difficulty engaging in day-to-day activities. After finally winning his appeal, A.H. was devastated when the

VA inexplicably rated his mental health disability at 0%. His Swords attorney successfully challenged the rating and he obtained 100% disability compensation, but only after he endured an additional nine months of overwhelming distress. Once he was finally vindicated and receiving benefits, A.H.'s mental health and social functioning improved. Ex. A ¶¶ 11, 13-14.

- E.T. has had three sets of C&P examinations to evaluate his debilitating back and leg pain over 15 years. On appeal, the BVA has found that each evaluation inadequately described and assessed his disability. E.T.'s claims remain pending to correct over a decade of VA errors. In addition to the significant financial, housing, and health hardships caused by these delays, E.T. experiences ongoing distress over the persistent VA errors, endless procedural processes, and ongoing denial to recognize the disability that robbed him of his livelihood and well-being. Ex. A ¶¶ 15-18.

- The eight year delay in C.S.'s case has caused him significant psychological harm. He was admitted to the VA psychiatric ward in 2015 and in 2017 in large part due to the stresses caused by his delay, despite having diligently gone to therapy for his mental health. Ex. B ¶ 11.

3. Delays in veterans' appeals undermine the effective and accurate adjudication of their claims.

Veterans are also harmed by the deteriorating value of evidence over time and the difficulty of assessing evidence retrospectively after significant appellate delays. This is often compounded by the fact that rating standards may change during the pendency of a claim. *See* Ex. A ¶ 16. Lay and expert witnesses will not remember facts as well or are no longer available to testify. The medical records that veterans originally provided may be out of date. When an appeal addresses an incorrect rating, assessing the correct rating retrospectively after several years is much more burdensome. Furthermore, because many veterans awaiting benefits do not have stable housing and resources, they may find it difficult to maintain contact with the VA through their changing circumstances. Ex. A ¶ 6.

- In S.M.'s case, the VA failed to acknowledge or discuss lay and medical evidence presented in 2015, which showed that she experienced severe symptoms of PTSD and substantial social and occupational impairment. S.M.'s appeal of her 50% rating as too low is currently still pending, over two years later, meaning that one of the easiest and most efficient options for fixing her appeal—requesting an addendum to address overlooked evidence and dysfunction—is now well out of reach. This also makes development on remand much more difficult. Ex. A ¶ 25.

- During the fifteen years that E.T. has waited for appeals to correct errors in describing and rating his disabilities, the BVA found that each of

three different sets of C&P examinations were inadequate. For his most recent C&P examination in 2016, the VA asked the examiner to assess E.T.'s disability back to 2001, the original date of his claim. Because the examiner only evaluated E.T.'s current disability, the VA placed E.T.'s effective date of disability at the 2016 exam, denying him compensation for the years of disability, pain, and unemployment that have remained constant through the life of his appeals. E.T. continues to appeal this denial with the support of over a decade of medical evidence demonstrating the severity of his condition. Ex. A ¶¶ 16-18.

The harm from delay on an appeals decision is compounded by the delay that many veterans experience just getting an initial decision or getting an accurate rating after remand.

- Y.N., an Air Force veteran, was raped while in the military and had an abortion. Y.N. applied for disability benefits due to PTSD caused by her military sexual trauma ("MST"), and submitted opinions from two treating VA clinicians supporting her application. The examiner recognized that the MST had occurred, but did not recognize that it caused PTSD. Instead, the examiner lectured Y.N. on how her life had disintegrated due to her age. Through the persistence and advocacy of a Swords attorney, the VA recognized the flaws in the C&P exam and requested a corrective addendum. To this date, four months have passed and the addendum has yet to be issued. Y.N. submitted her MST claim through the Fully

Developed Claim lane, meaning that her claim in its entirety should have been resolved in the time that has already passed since her flawed C&P exam. Ex. A ¶ 31-32.

- After winning his appeal, A.H. received an incorrect 0% disability rating in July 2016. This normally would have led to another round of appeals and delays, but his Swords counsel requested reconsideration and detailed his treatment history, leading to a corrected 100% disability rating. However, this process added an additional nine months to his delay, which meant nine more months that he remained homeless and unable to provide for himself. Ex. A ¶¶ 13-14.

- The BVA remanded T.J.'s case on July 12, 2017, after three years of delay on appeal, stating that the VA's duty to assist in the development of the claims had not been satisfied and that certain records must be obtained. Although he provided expert medical testimony in the form of a comprehensive psychiatric evaluation by a forensic psychiatrist at Yale Medical School, the BVA requested T.J. undergo yet another VA C&P exam. Ex. B ¶¶ 9-11.

Due to the importance of the disabled veterans' interest in their disability benefits, and the significant harm caused by delay, the first due process factor— "the importance of the private interest and the harm to this interest occasioned by delay"—weighs heavily in favor of the petitioners. *Mallen*, 486 U.S. at 242.

B. The Government Has Offered No Justification for the Delay.

The VA cannot justify years-long delays in adjudicating disability benefit appeals. In 2011, the average veteran waited 3.9 years from the filing of an initial appeal to receiving a decision from the BVA. *Veterans for Common Sense*, 644 F.3d at 859. In *Veterans for Common Sense*, several senior VA officials testified about the extraordinary delays in adjudicating appeals. *Id.* "None of those officials, however, was able to provide the court with a sufficient justification for the delays incurred." *Id.* James Terry, then-Chairman of the BVA, "was unable to explain the lengthy delays inherent in the appeals process before the Board." *Id.* Another official testified that the VA had not "'made a concerted effort to figure out what [wa]s causing' the lengthy delays in its resolution of . . . appeals." *Id.*

The Ninth Circuit found that "[m]uch of the delay appears to arise from gross inefficiency, not resource constraints." *Id.* at 885 ("We are particularly doubtful, for example, that any government interest could justify the 573-day average delay for a Regional Officer to certify an appeal to the BVA after receiving a veteran's form requesting an appeal—a step that we understand to be a ministerial task.").

Since the challenge in *Veterans for Common Sense*, the delays have only gotten worse. In the average appeal decided by the BVA in fiscal year 2016, veterans waited six years from the filing of an initial appeal to receiving a decision. Bd. of Veterans' Appeals, Annual Report Fiscal Year 2016 at 5 (2017), available at https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2016AR.pdf [hereinafter

BVA FY 2016]. This delay is likely to continue increasing as the Board received 86,836 appeals in fiscal year 2016 but only issued 52,011 decisions. *Id.*

It is not enough to recognize that the volume of appeals and expense of adjudication leads to delays, without justifying *why* the delays are occurring. *See Mathews*, 424 U.S. at 348 ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard."); *Harris v. Champion*, 15 F.3d 1538, 1562 (10th Cir. 1994) (delays in adjudicating direct criminal appeals not excused by "lack of funding and, possibly, the mismanagement of resources by the Public Defender"); *see also Veterans for Common Sense*, 644 F.3d at 885 ("[T]he record does not suggest that staffing or funding shortages are responsible for the delays.").

The Secretary attempts to shift the burden of this analysis onto petitioners, arguing that their "case does not identify a unifying theory of delay that could be cured to remedy the claimed violations." Secretary's Resp. 52 (Jan. 24, 2018). This gets it backwards: it is the government's burden to provide a justification for the delay. *See Mallen*, 486 U.S. at 242 ("[T]he justification offered *by the Government* for the delay . . ." (emphasis added)). The Secretary's argument that the delays are caused by the VA's effort to assist every veteran is unsatisfactory. For example, in fiscal year 2016, a veteran waited sixteen months on average to receive a Statement of the Case ("SOC") after filing a Notice of Disagreement. BVA FY 2016, at 20 (showing that the average elapsed processing time was 480 days). After a veteran received her SOC and filed a substantive appeal through a VA Form 9, she waited on average an additional twenty-one months to

receive a certification of appeal. *Id.* (showing that the average elapsed processing time was 644 days). In other words, the average veteran waits sixteen months for the VA to analyze a case and send paperwork to the veteran, and then another twenty-one months for the VA to send the paperwork to the BVA—for a total wait time of over three years without factual development. Yet, the Secretary still attempts to argue that these delays are caused by an abundance of due process afforded to veterans. Secretary's Resp. 61. This Court must not allow the Secretary to use the veteran-friendly intent of the legislative framework to excuse their inability *send papers from the VARO to the BVA in less than twenty-one months on average*.

Because the Secretary has offered no meaningful justification for the delay or its relation to any underlying governmental interest, the second *Mallen* factor ("the justification offered by the Government for delay and its relation to the underlying governmental interest") weighs in the petitioners' favor. 486 U.S. at 242.

C. The Likelihood that the Original Denial of Benefits Was Mistaken Is High Due to Common Errors During the Initial Claim Period.

In fiscal year 2016, only 18.04% of appeals to the BVA were denied. BVA FY 2016 at 25. During the same time period, 31.81% of appeals were granted, and 46.50% were remanded.[6] *Id.* This indicates that the majority of appeals denied by the VA Regional Offices are wrongfully decided. There are various common errors during the

[6] The Secretary attempts to argue that the high percentage of remanded cases should not count as mistaken because it is often due to a veteran's mistake or late submission of new evidence. *See* Secretary's Resp. 73-74. However, in Fiscal Year 2015, 41 percent of the remands were due to VBA error. U.S. Gov't Accountability Off., GAO-17-234, VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions 14 (2017).

initial claim period that lead to the high likelihood of mistake. Amici, through their representation of veterans, frequently see that the initial claim adjudicators have simply overlooked key evidence in the record or failed to recognize and correct inadequate C&P examinations. Ex. A ¶ 7. Furthermore, due to these errors, veterans are often led to believe that they have not submitted sufficient evidence when, in fact, they have. This leads to submission of additional evidence that may not be necessary for a successful claim. The following veteran experiences provide examples of these routine errors in the cases amici handle:

- C.G. supported his application for disability compensation for PTSD related to MST with his own statements and the statements of a friend and family member to whom he reported his MST. He also provided his extended VA treatment record diagnosing his PTSD and confirming his MST. The VA based its denial of C.G.'s claim on a C&P exam that found no evidence of MST and no PTSD diagnosis and did not address the evidence C.G. presented, a result that the BVA recently reversed on appeal. Ex. A ¶¶ 23-24.
- J.D. lost vision in his right eye but a C&P examination neglected to document his entitlement for special monthly compensation ("SMC"). The DRO review did not correct what amounted to a clerical error in the examination, though the DRO acknowledged that the C&P exam had been incorrectly completed. Instead, J.D. has had to pursue correction of this simple error through the appeal to the BVA. Ex. A ¶ 26.

- The medical record in A.H.'s case documented his lengthy history of severe mental health symptoms and homelessness. After winning service connection for his condition on appeal, the VA inexplicably rated his disability at 0% without an examination. On reconsideration, the VA awarded A.H. 100% disability. Ex. A ¶¶ 13-14.
- E.T. has had three sets of C&P exams for his back and leg condition, each of which the BVA has found to be inadequate. Ex. A ¶ 16.
- J.P. submitted a detailed statement about his MST and its role in his discharge during Character of Discharge ("COD") proceedings but the VA denied the COD without addressing this evidence, an error the DRO apologized for during J.P.'s appeal. Ex. A ¶¶ 20-21.
- Y.N.'s evidence in support of her claim for PTSD included the opinions of two of her VA clinicians who both concluded that she suffers from severe PTSD due to her MST. The C&P exam concluded that Y.N. does not have PTSD, without addressing these opinions. Ex. A ¶ 31.
- For his COD hearing, A.G. presented substantial evidence of his PTSD and its role in his discharge after three combat tours, including lengthy testimony and a medical opinion from his treating psychologist, evidence the DRO ignored when denying his COD. Ex. A ¶ 29.
- In rating B.W.'s PTSD, the C&P examiner found no evidence of inpatient treatment, in spite of medical evidence in the record documenting that B.W.

had been placed on a psychiatric hold or hospitalized after emergency room visits on six occasions in the seven months preceding his exam. Ex. A ¶ 34.

- In C.D.'s C&P exam, the examiner found no evidence of kidney disease secondary to his Agent Orange-related diabetes, even though his VA medical records explicitly document that he has chronic kidney disease secondary to type II diabetes. Ex. A ¶ 34.
- The BVA requested T.J. undergo yet another VA C&P exam even though he previously provided expert medical testimony in the form of a comprehensive psychiatric evaluation by a forensic psychiatrist at Yale Medical School. Ex. B ¶¶ 9-11.

Because these common errors lead to a high likelihood of mistake in the initial claim period, the third *Mallen* factor ("the likelihood that the interim decision may have been mistaken") also weighs in petitioners' favor. With all three *Mallen* factors weighing in petitioners' favor, it is clear that the current excessive delays between filing an NOD and receiving a final decision has ripened into an effective deprivation. *See Schroeder*, 927 F.2d at 960 ("Justice delayed is justice denied . . . and at some point delay must ripen into deprivation.").

II. Congress Has Recognized That the Delays Are Unacceptable.

The Court has asked whether "the absence of congressionally mandated VA deadlines factor[s] into the Court's due process determination." Order Inviting Amici ¶ 10 (Oct. 26, 2017). Congressional findings weigh in favor of a due process violation here.

It is not surprising, in light of the experiences of amici's clients, that Congress has determined that the "VA's current appeals process is broken." H.R. Rep. No. 115-135, at 5 (2017); *see also* 163 Cong. Rec. E716-05, 1717 (listing "[m]assive wait times" as one of the "issues that urgently need our attention"). For this reason, it passed the Veterans Appeals Improvement and Modernization Act (the "AMA"), 115 P.L. 55, 131 Stat. 1105 (Aug. 23, 2017). In drafting the AMA, Congress determined that it is "unacceptable that the current process is failing so many veterans," and that the "slow grinding of the appeals process chips away at our veterans' faith that they will ever be fairly compensated for injuries that they sustained in service to our country. 163 Cong. Rec. H4457-01, H4465 (statement of Rep. Esty, Ranking Member, H. Disabilities Assistance and Memorial Affairs Subcomm.). Given the legislative history behind the AMA, it is clear that Congress did not intend the Act to displace constitutional safeguards for a process that they believed to be "broken," and "unacceptable."

It is therefore irrelevant to the constitutional analysis that Congress has not mandated appeal deadlines in the past or in the AMA. "[T]he decision not to impose precise limits should not be interpreted as an endorsement of the delays." *White v. Mathews,* 559 F.2d at 859-60 (holding that lack of legislative history rejecting imposition of precise time limits on SSA did not indicate that delay was reasonable). In drafting the AMA and other related legislation, Congress did not abandon the constitutional requirement of reasonableness. *See id.*

Even without a congressionally mandated deadline, this Court must find that the current delays of an average of six years are "wholly inexcusable," *Kelly,* 625 F.2d at

490 (3d Cir. 1980) ("Although there is no magic length of time after which due process requirements are violated, we are certain that three years, nine months is well past any reasonable time limit, when no valid reason for the delay is given."), and that the substantial deprivation that quickly accumulates upon denials renders delays greater than one year unconstitutional.

All veterans awaiting decisions on benefits appeals that have been delayed over a year have been denied their entitlement to be compensated not only for service-impaired earning capacity, but also for lost quality of life and the sacrifices made in serving their country. The experiences of the veterans served by amici make clear that significant hardships flow from concrete economic deprivations as well as from betrayal of the promise to care for those who have served. Consequently, these delays are unacceptable for all veterans. Veterans may not experience these hardships after initially being wrongfully deprived of their VA benefits, though many do, but they certainly suffer them as time goes by. In order to avoid unnecessary line-drawing, and to vindicate the rights of all veterans facing inexcusable delays, this Court should certify a class for all veterans experiencing delays of over one year.

III. Aggregating Claims in Appropriate Cases Would Benefit Veterans, Veterans Services Organizations, and this Court.

As recognized by the Federal Circuit, the adoption of procedures to aggregate claims in appropriate circumstances would provide significant benefits for stakeholders commonly before this Court. *See Monk v. Shulkin*, 855 F.3d 1312, 1320 (Fed. Cir. 2017) ("Class actions can help the Veterans Court exercise [its] authority by promoting

efficiency, consistency, and fairness, and improving access to legal and expert assistance by parties with limited resources.") First, aggregation would facilitate access to justice by allowing more veterans services organizations ("VSO"), veterans legal service providers, pro bono attorneys, and others to provide legal assistance to veterans with limited resources or knowledge. Second, aggregation would help hold the VA accountable for delays. Third, aggregation would assist this Court by giving it an effective document management tool, allowing it to issue clear and uniform guidance to the VA. It would also benefit the VA to be able to resolve similar issues all at once.

A. Aggregation Can Facilitate Access to Justice.

Aggregating appropriate claims at the CAVC level generally would yield significant benefits for veterans by expanding their access to legal representation. Veterans often need legal assistance to help them "navigate [the] layers of red tape and duplicative review" inherent in the disability benefit appeal system. 163 Cong. Rec. H4457-01, H4465. In another challenge to systemic delays in the resolution of veterans' benefits claims, a federal court found that 82% of the Army personnel and 89% of Marines deployed have a high school diploma or less. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d at 1070. "These figures indicate that many of these soldiers, once they separate and become veterans, may have difficulty navigating complex benefit application procedures unless they are provided with substantial assistance." *Id.* Will Gunn, former VA General Counsel, has stated that "six of [ten] of veterans' most pressing needs are legal problems." Legal Servs. Corp., Annual Report 20 (2016), available at http://www.lsc.gov/about/annual-report.

In spite of their need for legal assistance, many veterans do not obtain it. Most veterans rely on VSOs to assist with advancing their claims, many of which do not have attorneys on staff. Hiring an attorney separately may mean forfeiting benefits compensation, which a veteran may not feel he or she is in a position to do. *See* Patricia E. Roberts, *From the "War on Poverty" to Pro Bono: Access to Justice Remains Elusive for Too Many, Including Our Veterans*, 34 B.C.J.L. & Soc. Just. 341, 349 (2014) ("The majority of [veterans] who refrain from obtaining legal representation do so because they are unable to afford it."). All of this contributes to the large numbers of veterans who appear before this Court pro se; in fiscal year 2016, 28% of appeals and 33% of petitions filed before the CAVC were filed pro se. Ct. App. of Veterans' Claims, Annual Report Fiscal Year 2016 at 1 (2017), available at https://www.uscourts.cavc.gov/documents/FY2016AnnualReport.pdf.

It is well established that aggregation can improve access to legal assistance for individuals with limited resources or knowledge. *See, e.g.*, *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (Posner, J.) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits . . . .") (emphasis in original). Class actions allow low-income individuals like disabled veterans to access lawyers and experts to help them best present their case. James M. Finberg, *Class Actions: Useful Devices That Promote Judicial Economy and Provide Access to Justice*, 41 N.Y.L. Sch. L. Rev. 353, 353-54 (1997). Aggregation provides access to justice in a way that stare decisis cannot, because stare decisis requires lawyers to find and argue precedent on the behalf of veterans who were not parties to the adjudication. *See, e.g.*, 2

Charles H. Koch, Jr., *Administrative Law and Practice* § 5:67 (3d ed. 2010) (explaining how stare decisis disadvantages unsophisticated claimants who lack resources to be informed of individual decisions in a mass justice adjudicatory system).

Increasing veterans' access to legal representation is critical given the complex procedures inherent in the disability appeals process. One of the great benefits of class resolution is its simplicity. For a veteran to take advantage of a precedential decision, he or she must first have notice of the decision, which is not likely for many. *See, e.g.*, Ex. A ¶ 37. Even if veterans know of a decision, they still must file for mandamus, which is procedurally complex and out of reach for veterans and non-lawyer representatives. Without effective legal representation, a veteran likely will not know the best avenue to move his or her case forward.

Currently, even veterans who have been represented by attorneys before VA adjudicators will often not be positioned to benefit from a precedential opinion. Many veterans' legal service non-profits do not have familiarity with CAVC practice and those who do may lack the capacity to operate both before the VA and the CAVC. Ex. A ¶ 38. For example, for Swords to file a petition for a writ of mandamus to enforce an opinion addressing systemic delays for each of their 50-60 clients who would be eligible, they would have to abandon their core practice and close their doors to the veterans who seek their assistance accessing much-needed benefits. *Id.*

Aggregate resolution of delay in VA appeals would allow veterans direct access to justice on this issue, while also freeing amici and other pro bono and non-profit veterans' legal service providers for other critical representation. With aggregate procedures,

veteran advocates could spend their limited resources in a way to reach more veterans who have common issues and help ensure that they all present their cases in the best possible light. For example, because of the resource intensive and protracted timeframe of VA benefit appeals, CVLC is currently able to take in only twenty-five percent of cases that need representation, so they focus on the highest need clients with the most complex claims. Ex. B ¶ 17. Aggregate resolution of delay would ease the burden on their resources, allowing them to offer assistance to the many other veterans who request their services. *Id.*

B. Aggregation Can Increase the VA's Accountability to Veterans.

Aggregate procedures can also help increase the VA's accountability to veterans. Aggregate procedures have long been used as a vehicle to hold large corporations accountable for their practices. *See* James M. Finberg, *Class Actions: Useful Devices That Promote Judicial Economy and Provide Access to Justice*, 41 N.Y.L. Sch. L. Rev. 353, 354-55 (1997) ("[O]ne does not want companies defrauding individuals on the rationale that since the individual only has a fifty dollar claim and it would cost the individual one thousand dollars to sue, he or she will not do anything about the fraud."). Holding powerful actors accountable leads to benefits for more than just those harmed. For example, American "companies are afraid of engaging in fraud because of private class actions." *Id.* at 356. Because of this, consumers "feel confident investing in American companies," which is "[o]ne of the reasons that the American securities markets thrive." *Id.*

This role of aggregation is not limited to private actors—aggregate procedures have played a similar role in the context of holding government agencies accountable. *See, e.g.*, *Briggs v. Bremby*, 3:12-cv-324 (VLB), 2012 WL 6026167, at *20 (D. Conn. Dec. 4, 2012) (issuing preliminary injunction on behalf of class requiring state agency to comply with federal application processing deadlines); *Booth v. McManaman*, 830 F. Supp. 2d 1037, 1046 (D. Haw. 2011) (same); Robert E. Scott, *The Reality of Procedural Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 Wm. & Mary L. Rev. 725, 732-33 (1972) (in the welfare context, "[t]he . . . quasi-class action [procedure] serves to mitigate . . . the hardship imposed on any individual [welfare] recipient who desires to question fundamental agency policy"). This is because "aggregate procedures . . . serve an important democratic function, allowing groups of individuals collectively to petition and redress widespread harm." Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 382 (1996). While there is certainly a larger incentive for individuals to litigate against government agencies than in some consumer contexts, aggregation can allow individuals to access better representation and can achieve similar net benefits for more than just those in a class.

The use of aggregation to hold government agencies accountable is especially relevant given the VA's past practices when faced with mandamus actions. When the CAVC orders the VA to respond to a petition regarding improper delay, "the great majority of the time the Secretary responds by correcting the problem within the short

time allotted for a response, and the petition is dismissed as moot because the relief sought has been obtained." *Young v. Shinseki*, 25 Vet. App. 201, 215 (2012) (en banc) (Lance & Hagel, JJ., dissenting). Through this practice, the VA is able to escape accountability for its delays by quickly resolving the appeals of only those veterans able to secure legal representation and file mandamus actions. The Federal Circuit recognized this in *Monk*, stating that case law is replete with examples of the Secretary quickly addressing claims of parties bringing petitions for unreasonable delay in order to dismiss a petition as moot. *Monk v. Shulkin*, 855 F.3d at 1320-21. The Federal Circuit suggested that "a claim aggregation procedure may help the Veterans Court achieve the goal of reviewing the VA's delay in adjudicating appeals." *Id.* at 1321.

In sum, an aggregation procedure before the CAVC would give more veterans access to the legal representation needed to vindicate their rights, while ensuring that the VA is unable to escape accountability for its errors.

C. Aggregation Would Facilitate Administration of Benefits in Cases with the Same Legal Issue.

The benefits of aggregation in appropriate cases would extend beyond just veterans and VSOs. Aggregation would also benefit this Court and the VA. "The first function [of class actions] is judicial economy." Finberg, 41 N.Y.L. Sch. L. Rev. at 353. When hundreds or thousands of veterans have the same claim or a similar legal issue, "it does not make sense to have the same evidence going in over and over again" before this Court. *Id.*; *see also, Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 647 (C.D. Cal. 1996) (noting that class actions "accomplish judicial economy by avoiding multiple suits").

Other federal courts have recognized the benefits of aggregate litigation as docket management tools for these reasons. *See, e.g., Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) ("The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters . . . . Judge Parker's plan is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art issues with, as that experienced judge says, 'days of the same witnesses, exhibits and issues from trial to trial.'").

Aggregation serves as an effective case management tool because it avoids the "duplicative expenditure of time and money associated with traditional case-by-case adjudication." Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L. J. 1634, 1682 (2017). "Class actions are particularly efficient when . . . the courts are flooded with repetitive claims involving common issues." *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 859 (6th Cir. 2013); *see also* William Schwarzer, *Settlement of Mass Tort Class Actions: Order out of Chaos*, 80 Cornell L. Rev. 837, 837-38 (1995) (explaining how class actions are seen as a remedy to duplicative litigation activity). Where appropriate, aggregation even allows a court to clear a large backlog of cases by rejecting superfluous claims en masse. *See, e.g., Schweiker v. Wilson*, 450 U.S. 221, 239 (1981) (holding that a class of indigent, mentally disabled people fell outside of statutory guidelines for Supplemental Security Income eligibility). Along with saving time, aggregation can ensure more uniform application of law. *See* William B. Rubenstein et al., Newberg on Class Actions § 1:10 (5th ed. 2015) ("Individual processing leaves open the possibility that one court . . . will

resolve a factual issue for the plaintiff while the next resolves a seemingly similar issue for the defendant.").

By adopting an aggregation procedure for this case, this Court would not be committing to aggregating future claims. It can allow claims to proceed as class actions when appropriate, in a way that promotes judicial efficiency while still benefitting all parties involved.

D. A Class Action Would Be Superior to a Precedential Decision for Resolving the Due Process Issues Caused by VA Delay.

This Court has asked how a class action would be "superior to a precedential decision from this Court in fairly and efficiently adjudicating the due process issue raised by petitioner." Order Inviting Amici ¶ 7 (Oct. 26, 2017). The cause of the procedural due process deprivation in this case is the VA's unreasonable delay in adjudicating benefits appeals. The problem is systemic. It affects veterans of many different wars, including Vietnam veterans who have been fighting for benefits for over forty years. It affects CVLC's clients in Connecticut, Swords' clients in California, VAP and NYLAG's clients in New York, and LAS's clients in Florida. If these systemic issues are not resolved, they will continue to affect veterans who have yet to file their appeals, just as they have affected the hundreds of thousands of veterans who are currently awaiting decisions. Due to the systemic nature of the problem, a class action or other aggregate resolution is the only way to resolve it.

Congress and the VA are attempting to solve the delay problem through new legislation and procedures such as the AMA and the Rapid Appeals Modernization

Program ("RAMP"). However, these approaches are untested and the GAO Comptroller General, Gene Dorado, recently testified before the House Committee on Veterans' Affairs that the VA is not currently prepared to move forward with implementation of these new procedures. House Committee on Veterans' Affairs Hearing, *Appeals Reform: Will VA's Implementation Effectively Serve Veterans?* (Jan. 30, 2018), available at https://veterans.house.gov/calendar/eventsingle.aspx?EventID=2029. Even once new procedures are implemented, there will certainly be many speed bumps in the way of the AMA and RAMP truly making a difference, as evidenced by the fact that less than 1% of veterans who received RAMP notice thus far have opted in. Ex. A ¶ 36. Because it is clear that veterans want to avoid delay, this lack of response may reflect how confusing and inaccessible the multi-track process is for most. This Court has the ability to act now to cut through much of the delay for veterans with pending appeals.

If this Court aggregates the claims of veterans currently experiencing delay, it would complement Congress and the VA's efforts in two ways. First, class resolution would help provide a constitutional benchmark for systemic participants, which is necessary for measuring the success of the AMA and RAMP. Second, class resolution would ensure that the due process rights of veterans with currently pending appeals are vindicated without any further delay.

By aggregating the claims of all veterans currently awaiting appeals, and ruling that the delays violate due process, this Court would be setting a constitutional benchmark necessary for measuring the success of the AMA and RAMP. Though these new efforts have set some timeliness goals—125 days for RO review and 365 days for

direct BVA review[7]—the VA has not set goals for the review of all types of pending and new appeals and does not have a standard for timeliness with which all appellate review must comply. A writ of mandamus ordering adjudication of all pending claims delayed over one year would establish a constitutional standard to guide the VA. This would aid rather than interfere with the VA's efforts, as evidenced by the success of aggregate procedures in administrating other large benefit programs. *See, e.g.*, *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) (using a national Autism Omnibus Proceeding to pool 5,000 individual claims raising the same scientific questions of whether a vaccine additive caused autism in children). Instead of facing repeat litigation over the same issues, aggregation would help establish clear standards for the VA all at once.

A simple precedential decision on this matter would not create a similar constitutional benchmark. Because of the contextual and flexible nature of a due process adjudication, *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972), there is no guarantee that a precedential decision on the delay in Mr. Monk or other co-plaintiffs' specific cases would have the same power as a decision proclaiming that current delays are "well past any reasonable time limit," *Kelly*, 625 F.2d at 490. A precedential decision on a specific case, rather than having the effect of allowing any veterans with similar delays to file a writ of mandamus and quickly receive the benefit of the precedent, would instead likely

[7] U.S. Dept. of Veterans Affairs, Comprehensive Plan for Processing Legacy Appeals and Implementing the Modernized Appeals System 7, available at https://www.benefits.va.gov/benefits/docs/90-Day-Plan-CMR-PL-115-55.pdf.

invite argument by the VA as to why the new petitioner's delays are more reasonable as compared to Mr. Monk's. This is especially likely to occur if this Court follows its "narrowest possible grounds" policy in issuing a precedential decision. *Best v. Principi*, 15 Vet. App. 18, 19-20 (2001); *Mahl v. Principi*, 15 Vet. App. 37, 38 (2001). A class determination, on the other hand, that the current delays are unacceptable, would provide future petitioners experiencing similar issues a chance for quick resolution.

Another side effect of a precedential decision in this case would be the likely shift of unreasonable delays from the BVA level to the CAVC. There are currently 470,000 pending appeals of denials of VA disability benefits claims. H.R. Rep. No. 115-135, at 5 (2017). A precedential decision that a delay of over a year is unreasonable, or even a delay of three years, could lead to a significant increase in veterans filing mandamus petitions before the CAVC. The CAVC already had the fifth highest number of merits decisions per active judge if compared to the thirteen Circuit Courts of Appeals in FY 2016. CAVC FY 2016, at 5. With only eight active judges, the CAVC's case load could become entirely unmanageable if even a fraction of the 470,000 veterans with pending appeals file mandamus petitions to follow a precedential decision. Of course, it is entirely possible that if the Court issues a precedential decision, a minimal number of veterans would actually take advantage of the procedures available to challenge their delay—which is another indication that aggregate resolution is necessary in this case, in order to simultaneously ensure justice to all veterans being unreasonably delayed, while still protecting the Court's docket and time.

Perhaps most importantly, class resolution of the due process issues would ensure that the rights of veterans with currently pending appeals are vindicated—something that neither new legislation nor a precedential decision are likely to accomplish. Under a precedential decision, each individual veteran experiencing similar delay would have to find the decision and file his own petition for extraordinary relief. Under a class action, all veterans with currently pending appeals could be notified and benefit from the decision immediately. This is especially important because veterans who filed appeals years ago without hearing anything are prone to have given up on their case, and are unlikely to make themselves aware of any single ruling unrelated to them. Furthermore, a class action would lead to immediate relief for the hundreds of thousands of veterans currently affected by delay. A precedential decision would still require a veteran to face further delays before this court.

The VA attempts to argue here that "due process and unreasonable delay analyses require individualized inquiries and determinations," Secretary's resp. 62, whereas in *Cushman*, they argued that "the question of what process is due does not turn upon the allegations of each individual claimant," Brief for Respondent-Appellee at 26, *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009) (No. 2008-7129), 2008 WL 5458597. The court in *Cushman* held that the VA's argument was not valid because the veteran in that case was not challenging "the adequacy of any procedures in place for filing a claim for veteran's benefits" or the constitutionality of the framework provided. *Cushman*, 576 F.3d at 1299. But here, where petitioners are directly challenging the adequacy and constitutionality of the VA's benefits appeal procedures, the VA's position in *Cushman* is

directly on point: the "process must be judged by the generality of cases to which it applies," Brief for Respondent-Appellee at 26, *Cushman*, 576 F.3d 1290 (No. 2008-7129). The delays in the generality of cases challenged by petitioners are wholly unacceptable.

Ultimately, the endemic delays in veterans' benefits appeals are caused by a systemic problem requiring a systemic solution with judicial accountability. This solution can only be achieved through aggregation.

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court certify a class based on the allegations in the Amended Petition, and hold that the VA's delays violate the Constitution.

Dated: February 8, 2018

Respectfully submitted,

By: /s/ Mario O. Gazzola

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EXHIBIT A

Declaration of Barbara Saavedra

1. I am the Interim Legal Director of Swords to Plowshares (Swords) in San Francisco, California. Founded in 1974, Swords is a community-based not-for-profit organization that provides needs assessment and case management, employment and training, housing, and legal assistance to veterans in the San Francisco Bay Area. We promote and protect the rights of veterans through advocacy, public education, and partnerships with local, state, and national entities.

2. The Legal Department at Swords serves homeless and other low-income veterans who seek assistance with disability benefits from the Department of Veterans Affairs (VA), Character of Discharge determinations (COD) for VA eligibility, and Discharge Upgrade applications before the Department of Defense military boards. In 2017, we provided free legal services to over 700 veterans in the initial and appellate stages of their claims.

3. In 2017, a small staff of attorneys at Swords provided ongoing representation to 284 veterans. Through our Pro Bono Program, a network of over 45 firms and in-house counsel provided pro bono representation to an additional 147 veterans. Even with significant staff caseloads and a robust Pro Bono Program, Swords staff and pro bono attorneys were only able to serve a small fraction of local veterans who were actively seeking legal assistance with their claims and appeals. While San Francisco is home to approximately 25,790 veterans, and the Bay Area home to approximately 219,000, Swords is one of only a small handful of local sources of free representation for VA matters. We are acutely aware of the tremendous unmet need local veterans have for legal assistance.

4. Currently, Swords staff attorneys represent 50 veterans in Decision Review Officer (DRO) appeals in a VA Regional Office (RO) or before the Board of Veterans Appeals (BVA), and recently completed representation in 11 additional cases. The majority of appeals in our caseload have been pending for a year or more; many for significantly more than a year. When I called the VA in January 2018 to inquire about

the status of pending requests for DRO review, the VA provided a standard estimate of 533 days before any DRO review will occur. In response to a similar recent inquiry, the BVA informed me that it is currently addressing cases on its docket from 2014.

5. This declaration provides a glimpse at how these delays harm veterans. It should come as no surprise that many veterans awaiting resolution of their claims experience significant hardship for the many months or years their appeals are pending. Many of our clients are unable to work because of their service-connected disabilities, and they often lack the basic necessities of life – adequate food, clothing, and shelter – while they wait for the benefits to which they are entitled. Delays in receiving their benefits also cause or exacerbate medical and mental health problems, with some veterans dying before their claims are resolved while others, who feel hopeless and overwhelmed by the process, attempt or think about suicide.

6. In our practice, we see that delays in VA appeals also cause evidence to become outdated, memories to fade, and any number of other relevant circumstances to change. Significantly, because many veterans awaiting benefits do not have stable housing and resources, they may move often, change phone numbers, and have a harder time maintaining contact with the VA and their representative, if they have one. Over time, the hurdles to successfully navigating the appeals process – responding to notices, attending hearings, appearing for VA examinations – grow.

7. Adding to these harms is the fact that veterans often must endure a broken and stalled appeals process because VA adjudicators have simply overlooked key evidence in the record and/or failed to correct blatantly inadequate VA examinations – errors occurring in a troubling and significant number of our cases. The number of successful outcomes we have in appeals generally, and on these common errors specifically, support the conclusion that the likelihood of error in VA claim denials is high. As can be seen in the veteran experiences discussed below, these common errors – as opposed to new evidence and additional claim development – are also routine causes of delay.

8. The case excerpts that follow are just a handful of examples that illustrate the issues we regularly see veterans experiencing when they have been disabled by their military service, are in need of VA benefits that exist to ensure their health and wellbeing, and yet must wait an extended period of time to resolve errors in their claims before accessing these benefits.

9. To fully appreciate the depth of injury that pervasive appellate delays cause veterans, it is important to recognize that before reaching this stage, many veterans have already endured significant delay. For example, the impact of a one-year wait after beginning the appeals process may occur after significant time has passed since the veteran first applied for critical life-stabilizing benefits.

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10. **<u>Example #1</u>: A.H. waited approximately two years from the time he appealed the denial of his claim to the time he received 100% disability compensation.**

A.H. is a Navy veteran who developed significant mental health problems after experiencing military sexual trauma (MST). In October 2012, he filed a claim for disability compensation for mental health conditions and back injuries related to his assault and other stressors during his service. As a homeless veteran, he was entitled to priority processing. A.H.'s claim was denied in September 2014, and he appealed in January 2015. As recognized by his ultimate benefit award in 2017, A.H. is not able to work because of his service-connected disability.

11. While waiting for the resolution of his appeal, A.H. did not have enough money to cover his basic needs and was homeless and estranged from his family. He feared for his personal safety as he tried to navigate temporary solutions to his homelessness and worried about his ability to feed and clothe himself. Treatment records in his claims file show that the VA's errors and appellate delay were additional sources of distress: while his claim was pending, A.H. perseverated on the claims process, and on thoughts that the government was intentionally trying to harm him, to such an extent that

he had difficulty engaging in day-to-day activities. In addition to exacerbating his mental health condition, A.H.'s financial and housing problems also made it difficult to care for and manage pain from his back injury, which caused him additional distress.

12. After finally winning his claim and receiving benefits, A.H. was able to focus on other life goals instead of on minimal economic survival, safety, and the stress of having his injuries and experiences denied. He followed through on VA-assisted housing opportunities, moved into an apartment, and reported briefly being able to spend time caring for his father, a Vietnam veteran, before his father passed away.

13. Grave errors during the VA examination to rate A.H.'s disability added to the delay and distress A.H. endured. At the time the BVA granted A.H. service connection, VA treatment records in his claims file documented years of his paranoid and delusional thinking, chronic suicidal thoughts and prior suicide attempts, and chronically low functioning. Inexplicably, without conducting an examination, and without considering or referencing this clinical history, the VA assigned A.H. a 0% disability rating in August 2016. The result was crushing for A.H., and unlawful.

14. Normally, another round of appeals would have ensued. However, because A.H. obtained Swords representation at this stage, his legal counsel requested reconsideration and detailed his treatment history, which led to an adequately informed in-person VA examination, and a corrected 100% disability rating in April 2017. Because of the VA errors, A.H. had to wait nearly nine months after winning his appeal at the BVA for the financial relief of compensation and the mental relief of vindication.

15. **Example #2: E.T. has been waiting 15 years for VA to resolve his appeal.**

E.T. is an Army veteran who filed an NOD in 2003 to appeal the denial and inaccurate rating of his claims for a lower back injury and related nerve damage and leg pain. During the decade and a half he has waited for resolution, E.T. has been unable to work because of his disabilities and has spent much of the time homeless. He has experienced

additional financial hardship paying out-of-pocket for additional physical therapy and equipment to manage his pain that his VA healthcare does not cover. E.T. also has had to endure all of this with the frustration of knowing that the VA has made and continues to make fundamental errors in evaluating his claim and of having to submit to repeated rounds of examinations because of those errors.

16. In multiple appeals and remands, the BVA has found that each of three different sets of VA examinations – in 2002, 2006, and 2015 – were inadequate to assess and rate E.T.'s conditions. The VA also acknowledged that one rating error that persisted for several years was due to a clerical error. Complicating the inadequate exams was the fact that the rating standards changed twice during the pendency of the claim.

17. E.T. finally received an adequate VA examination in 2016, and obtained a reasonably accurate disability rating and entitlement to Individual Unemployability. In the remand preceding the 2016 examination, the BVA instructed the VA to assess E.T.'s disability back to 2001, the original date of his claim; however, the exam only evaluated E.T.'s disability at the time of the exam. Because of this, the VA has stated that there is no evidence of E.T.'s level of disability or unemployment prior to his 2016 exam, although the voluminous record contains medical treatment records and other sources documenting the level of his disability level and unemployment for over a decade. His appeal continues in an effort to bring this evidence to the VA's attention and correct the effective date of his disability benefits.

18. There is no way to make E.T. whole for the 15 years he lived without disability compensation, was homeless and unable to work, and was subject to endless and incompetent VA proceedings. Moreover, a decision that ignores evidence of over a decade of uncompensated pain and unemployment, much of it generated by the VA itself, merely adds insult to the extraordinary injury of delays and error E.T. has endured.

19. **Example #3: J.P. waited two years for a DRO hearing, and is still waiting for a decision**.

J.P. enlisted in the Navy in 1989 to build a military career. However, upon being sexually assaulted by an officer, J.P.'s mental state drastically declined. He became depressed and turned to alcohol to numb his emotional pain. Knowing he needed help, he reported the assault to a medical professional. When his efforts to seek help were met with silence, J.P. attempted suicide by cutting his wrist. Misinterpreting J.P.'s drinking, suicidality, and the other manifestations of his PTSD as misconduct, the Navy discharged him with an other-than-honorable characterization. Locked out of VA healthcare and benefits because of his discharge status, J.P. deteriorated even further.

20. Upon learning he could apply for VA eligibility, J.P. submitted a detailed statement about his MST and its role in his discharge, asking for a COD determination finding his service honorable and for disability compensation for PTSD and several physical conditions. The VA denied the COD without referencing J.P.'s evidence of MST. J.P. filed a timely NOD. However, the VA took two years to schedule a DRO hearing, and only did so when J.P. obtained the assistance of a Swords attorney who pressed for the claim to move forward.

21. At the hearing, the DRO apologized for the VA's failure to acknowledge J.P.'s MST evidence in the first instance. But the VA cannot give J.P. back those two lost years of his life. J.P. has been homeless during his appeal, receives therapy at a Vet Center, and remains hopeful that soon he may be able to access the specialized substance use treatment only available through the VA. In a sad irony, J.P.'s military records are replete with Navy recommendations that he receive specialized VA substance abuse treatment. Yet J.P. is still waiting for this help, which he bravely first asked for decades ago while still in service.

22. **Example #4: C.G. waited two years for the BVA to grant his claim, even after advancing on the docket due to his financial hardship.**

During his service in the Marine Corps, C.G. was sexually assaulted and received treatment for alcohol dependence that arose from his trauma. He filed his first claim for

compensation for PTSD caused by MST in December 2003, which the VA denied, along with two subsequent claims. In April 2015, C.G. filed his fourth claim for PTSD, which the VA again denied. C.G. filed an NOD in January 2016, waived a hearing, and with the assistance of a Swords attorney, filed a motion to advance on the BVA's docket, which was granted.

23. While his 2016 appeal was pending, C.G. participated in vocational rehabilitation but his PTSD made it very difficult for him to work. In a letter to the VA, his vocational rehab counselor detailed his difficulties, significant distress, and noted that without assistance he would become homeless when his vocational rehab support ended. This is what happened in April 2017. C.G. could not find work or afford a safe and stable place to live and he became homeless. In addition to these problems, because he was not service-connected, C.G. owed significant payments on his prior inpatient treatment for PTSD. C.G. pushed himself to continue seeking work that he could manage in spite of his PTSD but was turned down repeatedly. By September 2017, C.G. had become suicidal and entered emergency inpatient care. He remained extremely vulnerable while he continued to await his disability rating and commencement of desperately-needed benefits. C.G. was still homeless in January 2018, when the BVA granted his appeal and C.G. finally received a 70% disability rating.

24. The root of error in C.G.'s case added to his distress because a blatantly inadequate C&P exam ignored and discounted his experience and treatment. Before filing his claim in 2015, C.G. had been in inpatient treatment for substance use and for MST for nearly a year. He supported his application for disability compensation for PTSD with his own statements, the statements of a friend and family member to whom he reported his MST, and the extended VA treatment record diagnosing his PTSD and confirming his MST. Without mentioning or addressing the lay and medical evidence supporting his claim, a C&P exam found no evidence of MST and no diagnosis of PTSD. Although the VA explicitly requested an addendum from the examiner to address overlooked evidence of MST and prior diagnoses and treatment for PTSD, the C&P

examiner did not do so, and did not justify his conclusions that ignored the array of evidence C.G. provided. The RO then simply affirmed the exam result, also without commenting on the contrary evidence and the examiner's failure to address prior VA questions.

25. **Example #5: S.M. has been waiting two years for the VA to address an improperly low rating.**

S.M. is an Army veteran who was service-connected for PTSD caused by MST in December 2015 and immediately filed an NOD to challenge a 50% disability rating as too low. Over two years later, she is still waiting for DRO review to address the VA's failure to acknowledge or discuss lay and medical evidence presented in 2015, which showed a more severe condition and substantial social and occupational impairment. In the meantime, S.M. has had to move in with relatives. Her difficulty with ongoing economic problems and stressful living circumstances only further exacerbate her condition. The two year delay also makes effective retrospective assessment of her 2015 disability level much more difficult than if it had been completed shortly after the initial rating. The VA could have, for example, requested an addendum from the examiner to address the overlooked evidence and dysfunction close in time to the initial examination – an option that is now well out of reach.

26. **Example #6: J.D. has been waiting almost 5 years for VA to correct a patently incorrect reading of its own rule.**

J.D. is an Army veteran who suffered an eye injury in service resulting in cataracts and loss of vision. In May 2013, he filed an NOD after the VA awarded a 30% rating for cataracts but did not include the required separate rating for special monthly compensation (SMC) due to loss of vision in the right eye. In August 2014, a DRO informed Swords that she agreed that the veteran was eligible for SMC, but the C&P exam had been incorrectly completed and she did not have the discretion to change the finding. In October 2017, the veteran had a hearing in which the BVA also acknowledged the simple cause of error. Yet J.D. has yet to receive a decision. He has

been homeless and for nearly five years he has been waiting for VA to correct what amounts to a clerical error.

27. **<u>Example #7</u>: A.G., a Purple Heart recipient, waited 8 months for a DRO hearing and got a denial that ignored critical medical evidence**.

A.G. enlisted in the Marines in the wake of the September 11th attacks, eager to do his part to prevent future losses of American lives. A.G. deployed to Iraq three times and experienced numerous combat traumas. During his first tour, he was hit in the leg by shrapnel and medevacked for life-saving treatment. At A.G.'s insistence, he returned to the frontline soon after, refusing to leave his fellow service-members behind. In recognition of his valor, A.G. received a Purple Heart. Over the course of A.G.'s service, IEDs hit his tank more than a dozen times. During his second tour, an IED attack killed four of A.G.'s Marine buddies. During A.G.'s third tour, an IED also killed his Commanding Officer. These tragic deaths and threats to A.G.'s life had a profound effect on him. As his service progressed and his traumas multiplied, A.G. turned to substance use to manage his increasingly severe symptoms of PTSD. Failing to recognize the medical basis of A.G.'s substance use, the Marines discharged him.

28. Because of A.G.'s discharge status, he has been unable to access the VA healthcare and benefits he so urgently needs: despite symptoms of TBI, he cannot get evaluated for TBI, let alone treatment; despite still carrying shrapnel in his leg, VA physical therapy is out of reach; and despite PTSD so severe that A.G. attempted suicide and is unable to maintain fulltime employment, he is barred from VA psychiatric care and disability compensation.

29. A.G. filed a request that the VA recognize his eligibility and his right to benefits in 2010 without the assistance of counsel, and received a denial years later. With the assistance of a Swords attorney, he filed a timely NOD in 2017. In spite of policies that require claims to be expedited when a veteran was seriously injured in service and is not yet receiving benefits, A.G. waited approximately eight months after filing his NOD

to receive a DRO hearing. A.G.'s Swords attorney has pressed every step of the way for speedier resolution of his claim; without such assistance, his wait for DRO review likely would have been longer. Nevertheless, the DRO ultimately denied A.G.'s request, ignoring evidence of his severe combat PTSD on display in his military records and the lengthy testimony and medical opinion of his treating psychologist. The Marine who refused to leave his fellow Marines behind must continue to fight for the VA to recognize him as a "veteran" and to receive VA compensation and care for the wounds of his service.

* * *

30. Swords devotes significant resources to advocacy during the initial stages of a claim to help veterans avoid the appeals backlog. However, these efforts – which can mean the difference between a six-month and a four-year wait time – are a level of advocacy that most veterans cannot access. Swords is unique in that it provides free legal representation to challenge common errors in the initial claims stage. The vast majority of veterans seeking to challenge routine and readily correctable errors must wait in line in the appeals backlog, and endure the economic, health, and other hardship this wait brings. The following case excerpts further depict the simple mistakes that underlie numerous cases that normally would wind up on appeal were it not for the initial stage advocacy Swords provides. These excerpts also exemplify the delay many veterans face before they even begin pursuing their appeals.

31. **Example #8: Y.N.'s C&P examiner found she did not have PTSD without addressing the contrary opinions of her VA clinicians.**

Y.N., who was raped while in the Air Force and had an abortion, received a grossly inadequate C&P to assess her resulting PTSD. Though the examiner recognized that the MST had occurred, she concluded that Y.N. does not have PTSD. In reaching this conclusion, the C&P exam did not address or even cite the opinions of two of Y.N.'s VA clinicians – a licensed psychologist and a psychiatrist who directs a VA behavioral health site – concluding that Y.N. suffers from severe PTSD due to her MST. During the

examination, the examiner lectured Y.N. on how the many ways in which her life had disintegrated since her in-service rape could be chalked up to her old age. Because of the persistence and advocacy of a Swords attorney, the VA recognized the significant flaws in the C&P exam and requested a corrective addendum.

32. However, to date, approximately four months have passed since the VA recognized the inadequacy of the exam and the addendum has yet to be issued. Y.N. submitted her MST claim through the Fully Developed Claim lane, and by the VA's own estimate, her claim in its entirety should have been resolved in the time that has already passed since her flawed C&P exam.

33. **Example #9: B.W. received a low disability rating because the C&P examiner did not consider his substantial inpatient treatment.**

In B.W.'s case, the C&P examiner supported her conclusions about the lower severity of B.W.'s PTSD by stating that there was no evidence of inpatient treatment. In fact, because of suicidal thoughts and substance use related to his PTSD, B.W. had been placed on an involuntary psychiatric hold or hospitalized after an emergency room visit on six separate occasions – all documented in his claims file – in the seven months preceding the C&P exam. The subsequent rating decision did not cite this evidence or address B.W.'s substance use at all, though he specifically claimed it as a disability secondary to his PTSD. Normally, this would be resolved through appeal but Swords has requested reconsideration in the hopes of avoiding that lengthy process.

34. **Example # 10: C.D.'s C&P examiner did not consider key VA health records documenting his condition.**

In the case of C.D., a Vietnam veteran, the C&P exam found no evidence of kidney disease that C.D. claimed as secondary to his Agent Orange-related diabetes. In fact, C.D.'s VA treatment records document his chronic kidney disease, specifically noting that it is secondary to his type II diabetes. After Swords raised the inadequacy of the C&P exam and pointed out the relevant treatment records, the VA has ordered a C&P

addendum to address this overlooked clinical evidence in the VA treatment record, but it has yet to be resolved.

35. **<u>Example # 11</u>: F.A. waited over a year for VA to recognize his VA eligibility and to grant him urgently needed benefits**.

F.A. is a Vietnam veteran who waited over a year for the VA to recognize his veteran status and eligibility for VA healthcare, and right to compensation for PTSD. This delay occurred even though F.A. was suffering severe financial hardship, which entitles him to expedited consideration. During the pendency of his COD application, F.A. suffered extreme ill health from congestive heart failure, COPD, and chronic PTSD. He barely had enough food to eat and was only able to keep a roof over his head by living with a friend. Elderly Vietnam era veterans such as F.A. do not have a lot of time left, and such VA delays rob them of the care to which they are entitled at the time in their life when they most need it.

* * *

36. The harms that flow from delays in VA appeals affect veterans most profoundly, but also sap critical resources from the limited number of representatives available to assist those veterans. In a recent meeting at our local RO, the appeals coordinator announced that the VA's pilot project to test revised review procedures for appeals, the Rapid Appeals Modernization Program (RAMP), has attracted less than 1% of the veterans invited to participate in it. Given how fiercely many veterans we see want their appeals expedited, the low success of RAMP suggests what is apparent at every stage of the disability benefits application process – that it presents a daunting and confusing collection of procedural options that veterans need assistance to tackle. Aggregate resolution of the pervasive delays would free veterans' representatives to focus their efforts on the substance of veterans' claims, and to expand their critical services to the many veterans who currently have to navigate the increasingly complex benefits process alone.

37. A precedential opinion, in contrast, would not change the unacceptable current state of affairs. As the experiences of our clients illustrate, many disabled veterans have pressing concerns about their health, livelihood, and other necessities that occupy them fully. If the Court were to issue a favorable precedential opinion, many veterans simply would not know of its existence. Even if they somehow were alerted to such an opinion, they would then face the challenge of finding an attorney they could afford, and who also had the expertise to enforce the precedential opinion on their behalf. Then, they would have to wait in line just as before, for the Court to adjudicate these petitions one by one.

38. Indeed, even veterans who have been represented by attorneys that specialize in veterans law before VA adjudicators will often not be positioned to benefit from a precedential opinion. VA accreditation and Court of Appeals of Veterans Claims admission are different for a reason: they involve distinct types of practices. In addition, many resource-strapped veterans legal service non-profits do not have the capacity to operate in both legal arenas. At Swords, for instance, were we to file a petition for a writ of mandamus to enforce an opinion addressing systemic delays for each of our 50-60 clients who would be eligible, we would have to abandon our core practice. This would mean closing our doors to the veterans who come to us in droves for help accessing the benefits upon which their wellbeing hinges.

39. In Swords' mission statement, we recognize that "War causes wounds and suffering that last beyond the battlefield." Over the decades, we have seen the healing powers of VA benefits to many of the thousands of veterans we have represented. But we also see an ever-increasing number of veterans trapped in VA delays that prolong and aggravate their suffering. The VA can and must do better. By allowing this class action to proceed, the Court can give veterans a chance to stop fighting alone, and to heal together.

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: February 7, 2018

/s/ Barbara Saavedra

Barbara Saavedra
Interim Legal Director/Senior Staff Attorney
Swords to Plowshares

EXHIBIT B

Declaration of Margaret Middleton

1. I am the Executive Director and Co-founder of Connecticut Veterans Legal Center (CVLC) in West Haven, Connecticut. Founded in 2009, CVLC is the first program in the United States to integrate legal services on-site at VA mental health facilities. We help veterans recovering from homelessness and mental illness overcome legal barriers to housing, healthcare and income.

2. In addition to other civil legal needs, CVLC attorneys and pro bono volunteer attorneys serve homeless and other low-income veterans with Department of Veterans Affairs (VA) disability benefits claims and Character of Discharge determinations (COD). To date, CVLC has assisted over 2,000 veterans with over 3,000 legal issues.

3. Through my affidavit, I aim to illustrate the gravity of harms VA delays inflict on our veteran clients. These examples are only a few of the hundreds of cases we see in which veterans in poverty or living at the margins of poverty are impacted by the VA's failure to timely adjudicate their claims.

The Harms of Common VA Delays and Errors

4. **Example #12: C. S. has waited over eight years for his decision.** C.S. is a Vietnam-era Army veteran who suffered severe and pervasive racial discrimination and racially motivated assaults during his time of service. As a result, while serving he began to suffer from symptoms which were later diagnosed as major depressive disorder (MDD) and post traumatic stress disorder (PTSD).

5. C.S. first filed for MDD and PTSD disability benefits pro se on June 26, 2009. The VA denied his claims in February 2010. In October of 2012, C.S. with CVLC's help filed a request to re-open based on new and material evidence. Since that time, he has received two denials, both confusing the MDD and PTSD standard. Finally, on April 24, 2017, he was granted a DRO hearing. He is still waiting for the decision on that hearing.

6. These delays have caused C.S. economic and psychological harm. Although he has diligently gone to therapy for his mental health, he was admitted to the VA psychiatric ward in 2015 and again in 2017, in large part due to these stresses. Further, C.S.'s home is now in foreclosure. CVLC helped him obtain pro bono counsel to assist with the foreclosure, and on June 12, 2017, that counsel wrote the VA pleading for expedited review due to his imminent homelessness. C.S. received no response to this request. He will likely lose his home.

7. **Example #13: D.V. struggled for three years due to a VA rating error.** D.V. was sexually assaulted while serving in the Navy. Post service, he struggled with PTSD and substance abuse related to his mental health disabilities. Despite struggling for decades with substance abuse incident to his PTSD, subsequent relationship problems and homelessness, the VA found him only 50% disabled after a flawed compensation and pension exam attributed much of his disability to a personality disorder. He struggled financially with no employment and a rating that did not match his level of disability. He and his disabled twin brother were evicted from multiple apartments for non-payment of rent during this period.

8. In 2015, D.V. came to CVLC seeking an increased rating to fully reflect the level of his service connected disability. He timely field a NOD. On February 22, 2017, almost three years after his original filing, the VA granted him 70% PTSD disability with 100% TDIU. Moreover, acknowledging its mistake, it backdated this rating to his original filing date in 2014, giving him a lump sum of $57,156.38.

9. **Example #14: T.J. waited three years for his appeal, and continues to face delays on remand.** T.J., an Army veteran, first applied for VA service connected disability for schizophrenia on March 10, 2011. His application was denied on May 7, 2012. And he timely appealed on April 24, 2013. On June 25, 2014, CVLC transferred the case to the BVA and requested a hearing via video conference. A hearing was scheduled for August 25, 2014 but due to conflicts of that date, a timely request to reschedule the hearing was sent. October 2015, a reminder was sent to the BVA to

reschedule the hearing. The hearing was eventually rescheduled for and held on March 25, 2016, 19 months later. At the hearing, CVLC provided expert medical testimony in the form of a comprehensive psychiatric evaluation by a forensic psychiatrist at Yale Medical School opining that T.J. experienced disabling symptoms of schizophrenia while on active duty and during the one year following discharge.

10. T.J.'s income is limited to $1,200.00 per month from Social Security Disability and is working with a VA homeless team to find stable housing. Acknowledging this, the BVA agreed to expedite his claim.

11. On review of the appeal and hearing evidence, the BVA remanded this case on July 12, 2017 to the RO, stating that the VA's duty to assist in the development of the claims had not been satisfied and that certain records must be obtained. Although this evidence suffices to establish T.J.'s claim, the BVA requested T.J. undergo yet another VA compensation and pension exam. T.J's claim is still pending but now at the RO level.

* * *

12. CVLC represents a small fraction of the veterans needing representation in Connecticut. Over one hundred thirty veterans requested help with their VA benefit claims in 2017. Due to the resource intensive and protracted timeframe of VA benefit appeals; CVLC can only take in twenty-five percent of cases that need representation – focusing on the highest need clients with the most complex claims.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Margaret M. Middleton

Connecticut Veterans Legal Center