IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

AMANDA J. WOLFE, **Petitioner**, and DOUGLAS REDWOOD, TERRANCE FOWLER, JAMES LEPANT, JOHN JELEN, KENNETH SCHMIDT, and STEVEN BUTLER, individually and on behalf of others similarly situated, **Movants,** v. DENIS MCDONOUGH, in his capacity as Secretary of Veterans Affairs, **Respondent.**	)	Vet. App. No. 18-6091

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Pursuant to U.S. Vet. App. E-Rule 7, the following is the pagination of this PDF file:

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MOTION FOR LEAVE TO FILE A SECOND AMENDED PETITION
FOR CLASS RELIEF IN THE NATURE OF A MANDAMUS

Pursuant to U.S. Vet. App. Rule 27(a), Douglas Redwood, Terrance Fowler, James LePant, John Jelen, Kenneth Schmidt, Steven Butler, individually and on behalf of others similarly situated, ("Movants"), respectfully move for leave to file a second amended petition for class relief in the nature of a writ of mandamus.

Petitioners have contacted counsel for Respondent Secretary of Veterans Affairs McDonough ("the Secretary") regarding this motion, who has stated that VA opposes the motion.

The Original Petition, filed pursuant to Rule 21 for class relief in the nature of a writ of mandamus, sought declaratory and injunctive relief invalidating part of the 2018 Department of Veterans Affairs ("VA") rules adopted after this Court's decision in *Staab v. McDonald*, 28 Vet. App. 50 (2016)—i.e., 38 C.F.R. § 17.1005(a)(5)—and enjoining the Secretary from denying members of the class reimbursement for coinsurance and deductible payments incurred during emergency medical visits to non-VA facilities.[1]

Factual developments since September 2019—when the Court certified a class of nearly 75,000 veterans and ordered VA to readjudicate their pending reimbursement claims—have necessitated the filing of a Second Amended Petition ("2d Am. Pet."). These developments have left the overwhelming majority of the 75,000 veterans without the reimbursement relief to which this Court and the Federal Circuit have held in this case they have a "clear and indisputable" right.

[1] After the Original Petition was filed, numerous veterans contacted and provided counsel for Petitioner Wolfe with written communications that revealed that VA informed veterans who requested reimbursement that they cannot qualify for reimbursement unless "the veteran has no coverage under a health plan contract." This was and is an inaccurate statement of law. On February 1, 2019, the Court granted leave to Petitioner Wolfe to file the First Amended Petition to add an additional petitioner—Peter Boerschinger—who sought to represent himself and similarly situated veterans who had or would receive VA's inaccurate boilerplate statements about the reimbursement entitlement criteria. On September 9, 2019, the Court dismissed Petitioner Boerschinger's claim as moot.

After the denial of VA's motion for a stay of the 2019 readjudication order, VA wrote all class members stating that it would issue a new reimbursement decision on their claims and indicating they *did not* need to submit an administrative appeal of the prior denial of their pending reimbursement claim. *See* 2d Am. Pet. at 6-7. Then, during the 30 months between the readjudication order and the Federal Circuit's decision in *Wolfe v. McDonough*, 28 F.4th 1348 (Fed. Cir. 2022) ("*Wolfe II*"), VA readjudicated all the reimbursement claims of just 7,010 *Wolfe* class members—less than 10 percent of the class. This left approximately 67,000 class members without a new decision on all their pending reimbursement claims. *Id.* at 7.

On March 17, 2022, the Federal Circuit issued *Wolfe II.* That Court concluded that coinsurance is "the very type of partial coverage that Congress did not wish to exclude from reimbursement." 28 F.4th at 1356. In other words, the Federal Circuit agreed with the part of this Court's *Wolfe I* decision that "[u]nder the correct construction of the statute, there is a 'clear and indisputable' right to relief with respect to coinsurance . . . " *Id.* at 1357.

The Federal Circuit nonetheless reversed this Court's decision, holding that mandamus was inappropriate because "other adequate remedies were available with respect to coinsurance." *Id.* at 1351. For one, "Ms. Wolfe could have petitioned this court (and still can) for review of the . . . regulation pursuant to 38 U.S.C. § 502." *Wolfe II*, 28 F.4th at 1358.

Shortly after *Wolfe II*, Ms. Wolfe and another veteran, Mr. Kimmel, did just that, petitioning for review of VA's reimbursement regulation pursuant to 38 U.S.C. § 502. On summary disposition, the Federal Circuit held that "[f]or the reasons explained in *Wolfe*," the exclusion of coinsurance reimbursement in the VA regulation challenged in the Original Petition is invalid. *Kimmel v. Sec'y of Veterans Affairs*, 2022 U.S. App. LEXIS 29615, 2022 WL 14319044 (Fed. Cir. Oct. 25, 2022). The Federal Circuit directed VA to "revise the regulation consistent with *Wolfe,"* and directed that during this rulemaking proceeding, VA must "process claims for reimbursement consistent with [the reimbursement statute], including for eligible coinsurance claims." 2022 U.S. App. LEXIS 29615, at *4, 2022 WL 14319044, at *2.

However, once the Federal Circuit issued its March 2022 decision in *Wolfe II*, VA stopped processing the pending reimbursement claims that it had notified veterans it would re-decide. *See* 2d Am. Pet. at 9-11. Thus, for the last 14 months, VA has not performed any action at all on the pending reimbursement claims of the approximately 67,000 veterans who were *Wolfe* class members and whose claims VA had not redecided prior to March 17, 2022. On the other hand, since June 2022, VA has issued decisions and paid reimbursement for coinsurance to thousands of other veterans who filed more recent reimbursement claims. *Id.* at 11-12.

The last factual development necessitating the filing of a Second Amended Petition is that on May 8, 2023, Petitioner Wolfe informed class counsel that she no longer wished to serve as the named petitioner in this case. However, tens of thousands of *Wolfe* class

members continue to suffer from VA's undue delay in readjudicating, and if appropriate, making coinsurance reimbursements on their pending claims.

This motion to amend is filed along with a motion to substitute six veterans as named petitioners in lieu of Ms. Wolfe. The six movants are members of the previously certified *Wolfe* class, and by allowing this substitution and amendment, members of the *Wolfe* class who have not yet received decisions on their pending reimbursement claims could be granted relief.

Because of factual developments and VA's continued delay in processing the majority of the pending claims, the six movants, named as petitioners in the Second Amended Petition, seek to represent the following two proposed classes: (1) former *Wolfe* class members for whom VA has all necessary documentation needed to issue a decision on their pending reimbursement claims, but for whom it has not done so (i.e. the "Delayed Decision Class"); and (2) former *Wolfe* class members whose pending claims are not yet ready for decision because the Secretary has delayed complying with his statutory duty to assist the claimants in substantiating their claims (i.e. the "Delayed Assistance Class"). Ms. Wolfe, whose was reimbursed by VA on or about August 28, 2022 for the coinsurance she had paid in 2016, no longer qualifies as a member of either proposed class, because VA has already issued a decision on and paid her claim.

Ample grounds exist for this Court to grant movants leave to file a second amended petition. First, the proposed Second Amended Petition will promote efficiency and judicial economy by simplifying the class parameters, reducing the scope of briefing, and sparing

the Court and the parties considerable time and expense. Second, the Second Amended Petition clarifies the relief sought and accounts for significant factual developments, including a substitution of the named petitioner and the outstanding delay in VA's readjudication of pending reimbursement requests.

For the reasons set forth herein, Petitioners request that the Court grant this Motion and permit them to file the Second Amended Petition, annexed hereto as Exhibit 1.

ARGUMENT

I. PETITIONERS SATISFY THE STANDARDS FOR LEAVE TO AMEND.

On March 17, 2022, the Federal Circuit in *Wolfe II* reversed this Court's grant of a writ of mandamus, and the mandate from that Court issued on May 9, 2022. This Court, however, has not issued any subsequent order or mandate in these proceedings.

This Court has authority to grant leave to amend the First Amended Petition. Pursuant to the All Writs Act, 28 U.S.C. § 1651, this Court may fashion procedural rules "designed to achieve 'the rational ends of law.'" *Monk v. Shulkin*, 855 F.3d 1312, 1318 (Fed. Cir. 2017) (quoting *U.S. v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977)). The Court has also generally recognized a petitioner's right to seek to amend a pleading. *See, e.g., Frequently Asked Questions: What can an attorney do to improve pleadings?*, www.uscourts.cavc.gov/faqs.php ("[I]nclude a motion for leave if you are amending or supplementing a previously filed pleading."); *see also, e.g., Teixeira v. Nicholson*, 21 Vet. App. 77 (2006) (granting leave to amend).

This Court has historically found the Federal Rules of Civil Procedure ("FRCP") persuasive, if not binding, and it has particularly applied them in the context of motions to amend. *See, e.g., Molden v. Peake*, 22 Vet. App. 177, 180 (2008) (granting leave to amend Equal Access to Justice Act application); *Scarborough v. Principi*, 541 U.S. 401, 418–19 (2004) (same). The Supreme Court likewise recognizes the value of reliance on the FRCP even when not required. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 116 (2002) (noting that the FRCP constitute "a good rule for courts of law [and] it would be passing strange to call it bad for an administrative agency").

FRCP 15 and 20 are persuasive authority and should be applied by the Court to grant the relief sought herein. Under FRCP 15(a)(2), a court "should freely give leave when justice so requires." A motion for leave to amend may be denied if there is or would be "undue delay, bad faith . . . , repeated failure to cure deficiencies by amendments previously allowed, [or] undue prejudice to the opposing party," or if the amendment is futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see Intrepid v. Pollock*, 907 F.2d 1125, 1128–29 (Fed. Cir. 1990) (adopting *Foman* standard). In the absence of these factors, "the leave sought should, as the rules require, be freely given." *Id.*

The non-movant generally bears the burden of persuading the court that one of the *Foman* exceptions is present. *Nwachukwu v. Karl*, 222 F.R.D. 208, 211 (D.D.C. 2004). Absent such a showing, courts grant leave to amend on a broad variety of bases, including a desire to change legal strategies or join additional parties. *See, e.g., Duling v. Gristede's Operating Corp.*, 265 F.R.D. 91, 98 (S.D.N.Y. 2010) (finding a change in strategy to be a

legitimate reason to amend a pleading); *Daniel v. Fulwood*, 310 F.R.D. 5, 6–7 (D.D.C. 2015) (granting leave to join additional parties when new plaintiffs' claims presented a live controversy and the original plaintiffs' claims were mooted).

Here, movants seek to file a Second Amended Petition, in good faith, on account of significant factual developments and a requested substitution. Amending the existing matter is appropriate because the Second Amended Petition arises out of the operative facts and legal issues of the original action. When an amended complaint or petition seeks relief against the same defendant and encompasses facts and circumstances in the original complaint, those amendments are properly part of the same action, not a new action. *Cf. Vallejo Sanitation & Flood Control Dist. v. Fuld (In re Lehman Bros. Sec. & ERISA Litig.)*, 903 F. Supp. 2d 152, 182 (S.D.N.Y. 2012) (supplemental allegations based on new facts but derived from substantially similar fundamental issues do not constitute a new action for the purposes of statute of repose); *Boxdorfer v. DaimlerChrysler Corp.*, 396 F. Supp. 2d 946, 951 (C.D. Ill. 2005) (amending complaint to change named plaintiffs in class action does not constitute a new action for purposes of statutory deadline for removal to federal court). In addition, granting leave to amend the petition will save the parties' and the Court's resources in presenting the long and complex history of VA's adjudications of emergency medical care reimbursement claims.

A. The Amended Petition Will Facilitate This Court's Adjudication of Class Certification.

The Original Petition sought to certify a class of all VA claimants who, on or after January 8, 2018, have been denied reimbursement for coinsurance or deductible payments

incurred for emergency treatment at a non-VA hospital. The Second Amended Petition seeks to address VA's continued delay in readjudicating still pending claims. Since the Court's September 2019 readjudication order, less than one-tenth of the 74,432 *Wolfe* class members have received decisions on their pending reimbursement claims, either because VA has failed to issue one or has delayed complying with its statutory duty to assist veterans in substantiating their claims by not obtaining relevant Explanations of Benefits directly from the veteran's private insurance carrier. Considering VA's delays over the last three and a half years, it appears that VA has no intention of deciding these long pending claims. *See, e.g.*, *EEOC v. Grane Healthcare Co.*, Civ. No. 3:10-250, 2013 WL 1102880, at *3 (W.D. Pa. Mar. 15, 2013) (holding that newly discovered facts can provide sufficient justification to allow a party to amend its pleading). These facts will help inform the Court's decision regarding the necessity of Petitioner's requested relief.

B. Respondent Will Not Be Prejudiced in Any Way.

Respondent will not be prejudiced by the filing of a Second Amended Petition. The members of the proposed classes were originally certified as part of the *Wolfe* class and by granting this motion, the Secretary will not be required to expend "significant additional resources to conduct discovery" or "significantly delay the resolution of the dispute." *See Long v. Wilson*, 393 F.3d 390, 400 (3d Cir. 2004); s*ee also Hanover Ins. Co. v. United States*, 134 Fed. Cl. 51, 63 (2017) (permitting an amended pleading where "the additional discovery required is neither substantial nor burdensome").

Further, Petitioners sought leave to amend promptly, without undue delay once facts came to light. *See e.g., Pinnacle Pigging Sys., Inc. v. Eliminator Pigging Sys. USA, Inc.*, 55 Fed. App'x 943, 946 (Fed. Cir. 2003) (finding a three-month delay to not warrant denial of leave to amend); *Margel v. E.G.L. Gem Lab Ltd.*, No. 04-civ-1514(PAC)(HBP), 2010 WL 445192, at *10 (S.D.N.Y. Feb. 8, 2010) (finding a six-month delay in filing a motion for leave to amend to be not untimely). Nor can the Second Amended Petition be described as futile because the claims therein can survive dismissal. *See Shane v. Bunzl Distrb. USA, Inc.*, 200 Fed. App'x 397, 406 (6th Cir. 2006) ("A proposed amendment is futile only if it could not withstand a Rule 12(b)(6) motion to dismiss."). In short, Respondent cannot point to any factors weighing against the filing of a Second Amended Petition.

The factual developments invoke common questions of law, including whether VA's practices violate the Due Process Clause of the U.S. Constitution or otherwise constitute unreasonable delay. Moreover, the prospective Petitioners' claims are part of the same series of transactions or occurrences because they arise from the same flaws in VA's reimbursement process that underlay Petitioner Wolfe's original claim for relief. VA's outstanding delays in processing pending reimbursement claims have deprived tens of thousands of veterans of the rights and benefits that they are due.

CONCLUSION

Petitioners respectfully request that this Court grant this motion and allow leave to amend the First Amended Petition for class relief in the nature of a writ of mandamus in light of the newly discovered facts and request for substitution.

Respectfully submitted,

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EXHIBIT 1

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

DOUGLAS REDWOOD, TERRANCE FOWLER, JAMES LEPANT, JOHN JELEN, KENNETH SCHMIDT, and STEVEN BUTLER, individually and on behalf of others similarly situated, **Petitioners,**	)	
v.	)	Vet. App. No. 18-6091
DENIS MCDONOUGH, in his capacity as Secretary of Veterans Affairs **Respondent.**	)	

SECOND AMENDED PETITION FOR INDIVIDUAL AND CLASS RELIEF IN THE NATURE OF A WRIT OF MANDAMUS

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INTRODUCTION

Pursuant to Court Rule 21, this petition seeks relief in the nature of mandamus on behalf of two classes of veterans. Both classes involve veterans who were identified by the U.S. Department of Veterans Affairs (VA) as members of the class certified in *Wolfe v. Wilkie*, 32 Vet. App. 1 (2019) ("*Wolfe*"), *reversed in part by Wolfe v. McDonough*, 28 F.4th 1348 (Fed. Cir. 2022) ("*Wolfe II*"). During the pendency of the *Wolfe* litigation, at the direction of this Court, the VA began readjudicating class members' claims for reimbursement of emergency medical expenses that VA had previously denied.

At the time this Court ordered readjudication, the prior VA decisions denying reimbursement to *Wolfe* class members were non-final. When the Federal Circuit issued its final decision in March 2022, VA had not completed the vast majority of *Wolfe* readjudications, meaning that most class members' claims were still open.

Although the Federal Circuit ultimately reversed this Court's order granting mandamus relief to the class, it held that eligible veterans have "a 'clear and indisputable' right to relief with respect to coinsurance but not deductibles." *Wolfe II*, 28 F.4th at 1357. The circuit court's decision did not, and could not, change the fact that most class members' claims remained open. Nor could it unwind the fact that VA had already notified every class member that (a) their claims would be readjudicated, and (b) they did not need to take any action. Indeed, VA specifically told *Wolfe* class members in a letter sent in or after April 2020: "VA will re-decide you claim(s) and will issue a new decision. There is no need for you to take any action at this point." **Exhibit A** ("Template 2" letter).

Now, over three and a half years after the Court's readjudication order, the overwhelming majority of the 74,432 *Wolfe* class members are still waiting for a final decision on their reimbursement claims. Yet it appears the VA has no intention of deciding these long pending claims, or even of notifying veterans that it has unilaterally closed their claims without a decision.[1] This petition seeks relief from VA's unreasonable delay stemming from its refusal to act on the pending readjudications.

VA's unreasonable delay takes two forms, reflected in the two classes defined here (collectively, "Class Members"). First, certain claims are ready for a decision, but VA has simply failed to issue one. Petitioners Terrance Fowler, Douglas Redwood, and James LePant, on behalf of themselves and those similarly situated (collectively, "Delayed Decision Class" or "Delayed Decision Class Members"), seek a writ of mandamus compelling Respondent Secretary Denis McDonough ("the Secretary") to adjudicate Delayed Decision Class Members' claims for reimbursement of emergency medical expenses. Specifically, Petitioners Fowler, Redwood, and LePant seek a writ of mandamus compelling the Secretary to issue, by a date certain, a merits decision to them and those similarly situated on each of their pending reimbursement claims that are ready for a

[1] Instead, VA has stated in the Federal Register that it will only decide whether a *Wolfe* class member is entitled to the reimbursement they sought on claims filed prior to September 2019 if the veteran takes affirmative action and files an identical second reimbursement claim during the one-year period ending February 23, 2024. Reimbursement for Emergency Treatment, 88 Fed. Reg. 10835, 10841-42 (Feb. 22, 2023) (to be codified at 38 C.F.R. 17.10004(f)). It is unclear how these veterans, who VA individually notified in 2020 that VA would automatically send them a new decision and there was no need to take any action, will learn that VA now says they must submit second reimbursement claims that reiterate their first reimbursement claims.

decision by either (i) granting the claim and paying reimbursement for coinsurance or (ii) denying the claim.

Second, other claims are not yet ready for decision because the Secretary has delayed complying with his statutory duty to assist veterans in substantiating their claims. Petitioners James LePant, John Jelen, Kenneth Schmidt, and Steven Butler, on behalf of themselves and those similarly situated (collectively, "Delayed Assistance Class" or "Delayed Assistance Class Members"), seek a writ of mandamus compelling the Secretary to fulfill his duty to assist and process these Delayed Assistance Class members' claims, including seeking an Explanation of Benefits (EOB) from the veteran's private health insurer. The EOB facilitates VA's determination as to what part of the veteran's liability for emergency medical costs is reimbursable coinsurance. Specifically, Petitioners LePant, Jelen, Schmidt, and Butler contend that the Secretary has unreasonably delayed for years in taking the ministerial action that is necessary to comply with VA's duty to assist, namely, attempting to obtain relevant EOBs directly from the veteran's private insurance carrier. Petitioners LePant, Jelen, Schmidt, and Butler seek a writ of mandamus compelling the Secretary to attempt, by a date certain, to obtain the relevant, missing EOBs from the private health insurance carriers of the Delayed Assistance Class Members, followed by a timely merits decision on each reimbursement claim after VA fulfills its duty to assist obligations.

JURISDICTION

This Court has the power to issue a writ of mandamus pursuant to 28 U.S.C. § 1651(a) in aid of its prospective jurisdiction pursuant to 38 U.S.C. § 7252. *See Cox v.*

West, 149 F.3d 1360, 1363-64 (Fed. Cir. 1998); *Kelley v. Shinseki*, 26 Vet. App. 183, 185 (2013). This Court has supervisory jurisdiction over the Secretary pursuant to 38 U.S.C. § 7261(a) to "interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary"; and to "compel action of the Secretary unlawfully withheld or unreasonably delayed." *See also Sellers v. Shinseki*, 25 Vet. App. 265, 279–83 (2012) (recognizing duty to protect veterans' due process rights); *Erspamer v. Derwinski*, 1 Vet. App. 3, 7 (1990) ("[T]his court has jurisdiction to issue extraordinary writs to officials of the [Department of Veterans Affairs]."). Such jurisdiction "is particularly applicable where, as here, an alleged refusal to act would forever frustrate the ability of a court to exercise its appellate jurisdiction." *Erspamer*, 1 Vet. App. at 8. The Court also has authority to certify and adjudicate this case as a class action. *See Monk v. Shulkin*, 855 F.3d 1312, 1321–22 (Fed. Cir. 2017); *Godsey v. Wilkie*, 31 Vet. App. 207 (2019).

STATEMENT OF FACTS

I. THE *WOLFE* LITIGATION

A. VA Begins to Readjudicate Class Members' Reimbursement Claims

In *Wolfe I*, this Court certified a class of veterans who had filed claims under 38 U.S.C. § 1725 for VA reimbursement of emergency medical expenses they incurred at non-VA facilities. For a veteran to be a member of the class, one or more of the veteran's reimbursement claims must have been denied by VA "in whole or in part, on the ground that the expenses are part of the deductible or coinsurance payments for which the veteran was responsible" under the veteran's private health care insurance. 32 Vet. App. at 34.

These reimbursement claims were filed or pending before VA during the period between April 8, 2016 and September 9, 2019, and VA's denials were issued between January 9, 2018 and September 9, 2019.[2] The VA identified 74,432 veterans as members of the certified class. *See* Declaration of Alessandra Venuti ("Venuti Decl.") at ¶ 2 (attached hereto as **Exhibit B**).

On September 9, 2019, the Court invalidated the regulation prohibiting VA from reimbursing coinsurance and/or deductibles. It also ordered VA to re-adjudicate all *Wolfe* class member claims that had resulted in a VA denial of reimbursement for coinsurance and/or deductibles and to reimburse otherwise eligible class members for coinsurance and/or deductibles pursuant to the readjudication decision. *See* 32 Vet. App. at 41.

The Secretary appealed the decision to the Federal Circuit. *See* Notice of Appeal to the U.S. Court of Appeals for the Federal Circuit, *Wolfe v. Wilkie*, Ct. Vet. Cl. No. 18-6091 (June 11, 2020). The VA also sought a stay of the Order of September 9, 2019, pending the results of its appeal to the Federal Circuit. The Court, however, denied the motion. Order of January 20, 2020, *Wolfe v. Wilkie*, Ct. Vet. Cl. No. 18-6091. The VA did not seek a stay of the September 9, 2019 Order from the Federal Circuit.

[2] After the Court invalidated VA's reimbursement regulation in its April 8, 2016 decision in *Staab v. McDonald*, 28 Vet. App. 50 (2016), VA placed a moratorium on deciding all reimbursement claims pending on or filed after that date that would continue until VA was able to promulgate a replacement regulation. *See Wolfe I*, 32 Vet. App. at 16. VA promulgated a replacement regulation 21 months later, on January 9, 2018. That regulation forbade VA from reimbursing veterans with private health insurance for coinsurance and deductibles. On the effective date of the regulation – January 9, 2018 – VA began adjudicating the reimbursement claims that were pending on or filed after that date, *i.e.*, all reimbursement claims that were pending on or filed after VA's moratorium began on April 8, 2016.

VA, therefore, was required to comply with this Court's order while the case was pending at the Federal Circuit. As part of that compliance, VA began readjudicating the *Wolfe* class members' pending reimbursement claims that had been previously denied.

B. VA Notifies All *Wolfe* Class Members That They Will Receive a New Decision on Their Reimbursement Claims

On January 24, 2020, the Court ordered the Parties to submit a joint statement containing a notice plan to correct inaccurate information previously provided by VA to veterans about their right to reimbursement of costs for non-VA emergency care. The notice plan submitted by the parties required VA to send one of four different template letters to a total of more than 1.2 million reimbursement claimants. *See* Joint Response to Court's Order of January 24, 2020 ("Joint Response") (filed March 9, 2020) at 2-3. As a result, beginning in April 2020, VA mailed to all 74,432 *Wolfe* class members a letter which the parties denominated as the "Template 2" letter. *See* Venuti Decl. ¶¶ 4, 7. The first two paragraphs of the Template 2 letter notified recipients that, although VA had previously denied their reimbursement claims for costs associated with episodes of non-VA emergency care on the basis that the amounts claimed were non-reimbursable coinsurance and deductibles owed under the veteran's private health insurance plan, this Court had recently ruled in *Wolfe* that the VA could not deny reimbursement for such expenses. *Id.* ¶ 5. The third paragraph stated, in its entirety, that "As a result, VA will re-decide your claim(s) and will issue a new decision. There is no need for you to take any action at this point." *Id.* ¶ 6; **Exhibit A**.

A veteran would reasonably understand VA's language "There is no need for you to take any action at this point" to mean that he or she *did not* need to submit an administrative appeal of the pre-September 9, 2019 denial, at least until VA acted to inform the veteran otherwise at some point in the future. VA's affirmative statement that *Wolfe* class members did not need to take any action was not required or ordered by this Court.

C. VA Readjudicates A Small Percentage of Claims While Its Appeal to the Federal Circuit is Pending

While the Secretary's appeal to the Federal Circuit was pending, VA began re-adjudicating claims, and was required to submit periodic status reports to class counsel about the agency's progress. Venuti Decl. ¶ 9. Prior to the Federal Circuit's decision in March 2022, VA readjudicated all the claims of just 7,010 *Wolfe* class members—less than 10 percent of the class. *See* Petitioners' Opposed Renewed Motion for Specific Enforcement of the Court's Order of September 9, 2019, at 5-6, *Wolfe v. Wilkie*, Ct. Vet. Cl. No. 18-6091 (Mar. 16, 2022). This means that, during the 30-month period from this Court's September 2019 order to the Federal Circuit's March 2022 decision, the VA made merit decisions at a rate of only about 234 decisions per month. At that rate, it would take the VA *over 26 years* to issue reimbursement decisions to all 74,432 class members.

As it began readjudicating claims, the VA discovered that for some of the reimbursement claims, it needed to take action prior to making a merits decision because VA either never had or no longer possessed the EOBs that facilitated the determination of the amount, if any, of the veteran's liability for deductibles or coinsurance. Before the readjudications began, VA recognized that to comply with its duty to assist, it had to seek

missing EOBs from sources likely to possess the EOBs other than the veteran/claimant.[3] Nonetheless, from April 2020 on, the VA only requested EOBs from the veterans themselves. *See* Order of July 19, 2021 at 2. Finally, the Court ordered the Secretary "to begin requesting EOBs directly from third-party payers"—that is, the veteran's private health insurance carrier that generated the EOBs in the first place—"in accordance with VA's statutory duty under 38 U.S.C. § 5103A(a)(1) 'to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for benefit[s].'" *Id.*

However, on information and belief, VA did not request EOBs directly from third party payers for many class members, including petitioners LePant, Jelen, Schmidt, Butler, and thousands of other Delayed Assistance Class members. *See* Venuti Decl. ¶ 16.

D. Post-*Wolfe II* Inaction

On March 17, 2022, the Federal Circuit issued its decision in *Wolfe II.* That decision provided two key holdings. First, the Court "conclude[d] that the correct reading of the statute is one in which a deductible is a 'similar payment' to a copayment, but coinsurance is not. Rather, coinsurance is the very type of partial coverage that Congress did not wish

[3] *See* Template Letter 1, Exhibit 1 to the Joint Response to the Court's January 24, 2020 Order (filed March 9, 2020), in which VA agreed to the following language in the Template 1 letter it agreed to send to 50,298 veterans denied reimbursement:

> VA later sent you a letter informing you that it had processed your claim incorrectly and should have requested additional information needed to decide the claim, specifically an Explanation of Benefits (EOB) or other remittance document to show what your other insurance paid, instead of denying your claim. *To correct this, VA requested the needed information from your provider(s)*. [Emphasis added].

to exclude from reimbursement." 28 F.4th at 1356. In other words, "[u]nder the correct construction of the statute, there is a 'clear and indisputable' right to relief with respect to coinsurance but not deductibles." *Id.* at 1357.

Second, the Federal Circuit nonetheless reversed this Court's decision, holding that mandamus was inappropriate because "other adequate remedies were available with respect to coinsurance." *Id.* at 1351. For one, "Ms. Wolfe could have petitioned this court (and still can) for review of the similar payments regulation pursuant to 38 U.S.C. § 502." *Id.* at 1358. The Court reversed the grant of mandamus and stated that "we need not and do not reach the issue of class certification." *Id.* at 1360.[4]

On information and belief, after the Federal Circuit issued its March 17, 2022 decision, VA stopped issuing new decisions on the remaining claims that it had notified veterans it would re-decide and stopped complying with its duty to assist claimants by attempting to obtain missing EOBs from the veteran's private insurance carriers on claims in which no such attempt had previously been made. Venuti Decl. ¶¶ 15-17. Thus, for over one year, VA has not performed any action at all on the reimbursement claims of the approximately 67,000 veterans who were *Wolfe* class members and whose claims VA had not redecided prior to March 17, 2022. This despite (a) the fact that years earlier, VA had

[4] Because the Federal Circuit's judgment reversed and remanded the case, it was unclear if the Secretary would immediately comply with the Court's conclusion that coinsurance must be reimbursed. As a result, Joshua Kimmel and the named petitioner in *Wolfe*, Amanda Wolfe, filed a petition in the Federal Circuit pursuant to 38 U.S.C. § 502, seeking to invalidate the part of 38 C.F.R. § 17.1005(a)(5) that conflicted with the Court's decision in *Wolfe II*. The Federal Circuit granted the petition and vacated the part of the regulation prohibiting reimbursement for coinsurance as unlawful. *Kimmel v. Sec'y of Veterans Affairs*, 2022 U.S. App. LEXIS 29615, 2022 WL 14319044 (Fed. Cir. Oct. 25, 2022).

informed these 67,000 veterans that it would redecide their reimbursement claims and these veterans did not need to take any further action at that time on their pending claims; and (b) the Federal Circuit's ruling in both *Wolfe II* and *Kimmel* that reimbursement claimants have a clear and indisputable right to relief with respect to coinsurance.

Although VA possesses exclusive knowledge and control of all the evidence documenting its activities during the period following the Federal Circuit's decision in *Wolfe II*, the following substantial evidence exists that VA has taken no action after March 17, 2022 on any of the claims of these 67,000 veterans:

- As of March 17, 2022, VA completely stopped providing to class counsel (a) status reports every 45 days, as required by the September 9, 2019 Order, and (b) PDF copies of the VA decisions rendered on reimbursement claims of class members since the last VA status report, as required by the September 1, 2021 Order. VA sent its last report on February 4, 2022. Venuti Decl. ¶¶ 10-12.

- Over the course of the *Wolfe* litigation, class counsel was in communication with numerous *Wolfe* class members among the 67,000 veterans with pending claims (i.e., who were not listed as having all their claims adjudicated on VA's last status report in February 2022). From August through December 2022 – many months after the decision in *Wolfe II* -- counsel asked many of them whether they had received a VA decision on a reimbursement claim or a VA request for an EOB. None of these class members reported receiving a reimbursement decision or an EOB request or indeed any VA communication relating to reimbursement on or after March 17, 2022. *See* Venuti Decl. ¶¶ 15-16. That such a veteran did not receive an EOB request from VA provides evidence that VA did not simultaneously send an EOB request to the veteran's private health insurance carrier because counsel for the Secretary informed class counsel that VA's policy was to send the veteran an EOB request whenever it sent an EOB request to the veteran's private health insurance carrier. *Id.* ¶ 17.

- On April 27, 2023, class counsel sent electronic letters to three attorneys serving as counsel for the Secretary in *Wolfe* asking them to confirm by May 4, 2023 whether or not VA stopped after March 17, 2022 (a) issuing decisions on

> reimbursement claims covered by the September 9, 2019 Order; and (b) sending requests to private health insurance carriers for EOBs on claims covered by the September 9, 2019 Order. As of the date of Petitioners' motion for leave to file this Second Amended Class Action Petition, class counsel has not received a response to this letter.

Although VA continues today to withhold action on the reimbursement claims of these 67,000 veterans, it has issued merits decisions and paid reimbursement for coinsurance on thousands of more recently filed reimbursement claims. The VA informed the Federal Circuit on August 19, 2022, that after a short moratorium, it was now adjudicating reimbursement claims and reimbursing for coinsurance where appropriate. ECF No. 36, Gov't Reply in Support of Motion to Dismiss, *Kimmel v. Sec'y of Veterans Affairs*, Fed. Cir. No. 22-1754, at 7-8 (Aug. 19, 2022). VA further reported that it had adjudicated approximately 6,648 claims during the 46-day period from June 30 to August 15, 2022, granting 2,648 and denying approximately 4,000. *Id* at Appx005 (Decl. of Benjamin I. Altose).

II. THE NAMED PETITIONERS

A. Douglas Redwood

Mr. Redwood is a veteran of the U.S. Army. VA identified him as a member of the class certified in *Wolfe*. *See* Venuti Decl. ¶ 3. Mr. Redwood received emergency care at a non-VA facility at least once, on February 15-16, 2018. Mr. Redwood has private health insurance that did not cover all of the expenses incurred for this episode of emergency care, and to date, he has paid out of pocket at least $4,357.78 to these health care providers. Mr. Redwood and/or his health care provider(s) timely filed a VA claim for reimbursement of

medical expenses incurred for the aforementioned episode of emergency care. According to the VA, VA denied his reimbursement claims due to coinsurance and/or deductibles between February 8, 2019 and September 9, 2019.

In 2020, the VA sent Mr. Redwood a "template 2 letter" stating that VA "will re-decide your claim(s) and will issue a new decision. There is no need for you to take any action at this point."

On April 5, 2021, Mr. Redwood received a letter from the VA requesting that he mail his EOB for the emergency care he received on February 15-16, 2018 to OCC POM Office/136F, 700 19th Street South, Birmingham, AL 35233. On or about May 12, 2021, class counsel mailed Mr. Redwood's EOBs to the Birmingham address on his behalf, along with the EOB request he had received from the VA and a copy of the medical bills from his emergency care episodes. A tracking receipt confirms that the May 12, 2021 letter was received by the Birmingham regional office on May 18, 2021.

Not having heard from VA for nearly two years, on February 21, 2023, counsel for Mr. Redwood, Barton F. Stichman, mailed a letter enclosing another copy of the same EOBs that class counsel previously sent to the Birmingham address listed in the April 2021 EOB request. On March 14, 2023, class counsel received a signed tracking receipt from VA, indicating the documents had been received.

Thus, VA has received the relevant EOBs necessary to adjudicate Mr. Redwood's claim multiple times. However, since his receipt of the template 2 letter, Mr. Redwood has not received from VA any payment or decision on his reimbursement claims.

B. Terrance Fowler

Mr. Fowler is a veteran of the U.S. Marine Corps. VA identified him as a member of the class certified in *Wolfe*. *See* Venuti Decl. ¶ 3. Mr. Fowler received emergency care at non-VA facilities on September 23, 2018 and November 2-3, 2018. Mr. Fowler has private health insurance with Medicare, which did not cover all of the expenses incurred during these two episodes of emergency care, and to date, he has paid out of pocket at least $1,861.95 to these health care providers. He and/or his health care provider(s) timely filed VA claims for reimbursement of medical expenses incurred at non-VA facilities for the two aforementioned episodes of emergency care.

In 2020, Mr. Fowler received a "template 2 letter" from VA stating that VA "will re-decide your claim(s) and will issue a new decision. There is no need for you to take any action at this point." Thereafter, Mr. Fowler received a letter from VA dated November 24, 2020, requesting that he send his EOBs to the "above address" so that his reimbursement claims could be re-decided. The letter, however, neither (a) identified the episode of emergency care dates for which VA needs EOBs nor (b) included an address in any part of the letter to which the requested EOBs should be sent, no less an "address above," and failed even to include the address of the sender.

On or about December 15, 2020, Mr. Fowler mailed a copy of his EOBs (entitled "Medicare Summary Notices") for the two aforementioned episodes of emergency care to PO Box 1004, Fort Harrison, MT 59636, where Mr. Fowler believed medical claims from

his region were generally processed. Based on advice from counsel for the Secretary,[5] in March 2021, class counsel sent a letter on behalf of Mr. Fowler to the designated *Wolfe* Tampa PO Box address enclosing the same EOBs (Medicare Summary Notices) that Mr. Fowler had sent in December 2020 to VA's Office of Community Care in Fort Harrison, MT. In January 2023, Mr. Fowler's VA accredited counsel, Barton F. Stichman, sent the same EOBs (Medicare Summary Notices) to the Tampa PO Box address that Mr. Fowler had sent in December 2020 to VA's Office of Community Care in Fort Harrison, MT, and that class counsel had sent to the Tampa PO Box address in March 2021.

Thus, VA has received the relevant EOBs necessary to adjudicate Mr. Fowler's claims multiple times. However, Mr. Fowler has not received any VA decision or payments on his reimbursement claims nor any other VA correspondence or communications.

[5] On Dec. 22, 2020, class counsel sent an electronic letter to counsel for the Secretary notifying VA that letters were being set to class members that failed to provide any address to which claimants should send requested EOBs. Class counsel requested disclosure of the addresses to which these class members should send their EOBs. After several additional communications, the Secretary's counsel responded that the VA would send updated EOB request letters to class members with the address of the specific Office of Community Care that is readjudicating the individual's claim, and that alternatively, the class member may submit EOBs to a PO Box in Tampa, Florida, that was dedicated for *Wolfe*-related purposes.

Mr. Fowler never received from VA an updated EOB request identifying the address to which his EOBs should be sent.

C. James LePant

Mr. LePant is a veteran of the U.S. Army. VA identified him as a member of the *Wolfe* class. *See* Venuti Decl. ¶ 3. Mr. LePant received emergency medical care at non-VA facilities on January 16-18, 2016 and December 4-8, 2018. Mr. LePant has private health insurance that did not cover all of the expenses incurred for these two episodes of emergency care, and to date, he has paid out of pocket at least $2,500 to these health care providers. Mr. LePant and/or his health care provider(s) timely filed VA claims for reimbursement of medical expenses incurred at non-VA facilities for the two aforementioned episodes of emergency care. According to the VA, VA denied his reimbursement claims due to coinsurance and/or deductibles at some point between February 8, 2019 and September 9, 2019.

In 2020, VA sent Mr. LePant a "template 2 letter" stating that VA "will re-decide your claim(s) and will issue a new decision. There is no need for you to take any action at this point." Mr. LePant also received a letter dated May 13, 2021 that listed 18 separate emergency care charges for the two aforementioned episodes of emergency care. For the listed charges, the VA letter requested an Explanation of Benefits (EOB) from Mr. LePant so that it could determine which portion of these emergency charges were eligible for reimbursement.

The May 13, 2021 letter also stated that VA had all the documentation it needed to process three other reimbursement claims associated with the two aforementioned episodes for emergency care and that these three "claims will be processed with the documentation provided."

Mr. LePant did not possess the requested EOBs in May 2021 and does not currently possess any of these EOBs.

To date, Mr. LePant has not received a decision or payment on any of three reimbursement claims that VA notified Mr. LePant that it would re-decide based on the fact that it possesses the relevant EOBs necessary to adjudicate these three reimbursement claims.

For the remaining 18 of Mr. LePant's reimbursement claims, on information and belief, VA has never sent a letter to Mr. LePant's private health care insurer requesting the EOBs that VA stated it needed two years ago to re-decide these 18 reimbursement claims. As a result of VA's delay in processing Mr. LePant's 21 reimbursement claims, nearly three years have elapsed since VA informed Mr. LePant that these claims would be re-decided without any resolution or reimbursement payment.

D. John Jelen

Mr. Jelen is a veteran of the U.S. Coast Guard. VA identified him as a member of the class certified in *Wolfe*. *See* Venuti Decl. ¶ 3. Mr. Jelen received emergency care at non-VA facilities on various dates from January to August 2019. Mr. Jelen has private health insurance that did not cover all of the expenses incurred for these episodes of emergency care, and to date, he has paid out of pocket approximately $4,270 to these health care providers. Mr. Jelen and/or his health care provider(s) timely filed VA claims for reimbursement of medical expenses incurred at non-VA facilities for the aforementioned episodes of emergency care. According to the VA, it denied these claims due to coinsurance and/or deductibles between February 8, 2019 and September 9, 2019.

In 2020, Mr. Jelen received a "template 2 letter" from VA stating that VA "will re-decide your [reimbursement] claim(s) and will issue a new decision. There is no need for you to take any action at this point." On information and belief, the VA does not currently possess EOBs for at least some of Mr. Jelen's reimbursement claims, and VA has failed to request the missing EOBs from his private health insurance carrier.

In the nearly three years that have elapsed between VA's last communication and the present, Mr. Jelen has received no correspondence or payments from VA regarding his reimbursement claims, including no status updates, decisions, or requests for any documents like EOBs.

E. Kenneth Schmidt

Mr. Schmidt is a veteran of the U.S. Army. VA identified him as a member of the class certified in *Wolfe*. *See* Venuti Decl. ¶ 3. Mr. Schmidt received emergency care at non-VA facilities from March 11-14, 2018. Mr. Schmidt has private health insurance with Medicare, but Medicare did not cover all of the expenses incurred for this episode of emergency care, and to date, Mr. Schmidt has paid out of pocket approximately $3,946 to these health care providers. Mr. Schmidt and/or his health care provider(s) timely filed VA claims for reimbursement of medical expenses incurred at non-VA facilities for the aforementioned episode of emergency care. According to the VA, it denied these reimbursement claims due to coinsurance and/or deductibles between February 8, 2019 and September 9, 2019.

In 2020, Mr. Schmidt received a "template 2 letter" from VA stating that VA "will re-decide your [reimbursement] claim(s) and will issue a new decision. There is no need

for you to take any action at this point." On information and belief, the VA does not currently possess EOBs for at least some of his reimbursement claims, and VA has not requested the missing EOBs from his private health insurance carrier.

In the nearly three years that have elapsed between VA's last communication with Mr. Schmidt and the present, Mr. Schmidt has not received any correspondence or payments from the VA regarding his reimbursement claims, including status updates, EOB requests, or decisions.

F. Steven Butler

Mr. Butler is a veteran of the U.S. Army. VA identified him as a member of the class certified in *Wolfe*. *See* Venuti Decl. ¶ 3. Mr. Butler received emergency medical treatment at a non-VA facility from October 6-8, 2016. Mr. Butler has private health insurance that did not cover all of the expenses incurred for this episode of emergency care. As a result of the aforementioned emergency medical treatment, Mr. Butler was billed for and paid out of pocket approximately $1,776.51 to his emergency service providers. These out-of-pocket payments were not covered under his private health insurance plan. Mr. Butler or his health care providers timely filed claims for reimbursement for the emergency medical expenses he incurred during this episode of emergency care. According to the VA, it denied these claims prior to September 9, 2019 due to coinsurance and/or deductibles.

In 2020, VA sent Mr. Butler a "template 2 letter" stating that VA "will re-decide your [reimbursement] claim(s) and will issue a new decision. There is no need for you to take any action at this point." On information and belief, the VA does not currently possess

EOBs for at least some of his reimbursement claims and has not requested the missing EOBs from his private health insurance carrier.

In the nearly three years that have elapsed between VA's last communication with Mr. Butler and the present, Mr. Butler has not received any correspondence or payments from the VA regarding his reimbursement claims, including status updates, EOB requests, or decisions.

ARGUMENT

The Court may grant a writ of mandamus compelling VA officials to act when the petitioner: (1) has a clear and indisputable right to the writ and (2) lacks adequate alternative means to obtain the sought relief. *See Vargas-Gonzalez v. Principi*, 15 Vet. App. 222, 225 (2003). Petitioner and Class Members' rights to a writ are clear and indisputable, and they lack adequate alternative means to compel the VA to process their reimbursement claims.

I. THE PROPOSED CLASSES

Petitioners Redwood, Fowler, and LePant seek relief on behalf of a class defined as:

> *Wolfe* class members with one or more reimbursement claims covered by the Court's September 9, 2019 Order in *Wolfe* as to which VA has not yet issued a post-September 9, 2019 reimbursement decision, and for which VA either (a) has all of the EOBs necessary for basing a new decision on the merits or (b) does not have all the necessary EOBs, but believes it has satisfied its duty to assist by adequately requesting the EOBs directly from the class member's third party insurance carrier.

This is the "Delayed Decision" Class.

Petitioners LePant,[6] Jelen, Schmidt, and Butler seek relief on behalf of a second class, defined as:

> *Wolfe* class members who have one or more reimbursement claims covered by the Court's September 9, 2019 Order in *Wolfe* as to which VA has not yet issued a post-September 9, 2019 reimbursement decision and for which VA (a) does not have all of the EOBs necessary for basing a decision on the merits of the claim(s) and (b) has not yet satisfied its duty to assist to obtain the evidence necessary to substantiate the claim(s) by adequately requesting the EOBs directly from the class member's third party insurance carrier.

This is the "Delayed Assistance" Class.

II. THE RIGHT TO A WRIT OF MANDAMUS IS CLEAR AND INDISPUTABLE

This Court has the power to "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. § 7261(a)(2); *Martin v. O'Rourke*, 891 F.3d 1338 (Fed. Cir. 2018). In *Martin*, the Federal Circuit "adopt[ed] the *TRAC* standard as the appropriate standard for the Veterans Court to use in evaluating mandamus petitions based on alleged unreasonable delay." *Martin*, 891 F.3d at 1348. That standard balances the following six factors to determine whether a delay is unreasonable:

> (1) the time agencies take to make decisions must be governed by a "rule of reason";
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;

[6] Petitioner LePant is a member of both classes, as VA has the EOBs for some of his claims, but for other claims, VA does not possess the EOBs and has not requested the EOBs from Mr. LePant's third party insurance carrier. Petitioners do not know how many *Wolfe* class members are members of both classes in this Petition.

> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is "unreasonably delayed."

Telecomms. Research & Action Center v. FCC ("*TRAC*"), 750 F.2d 70, 80 (D.C. Cir. 1984) (internal quotation marks and citations omitted). The balance of these factors militates in favor of a finding that VA's delay in processing Petitioners' and Class Members' claims is unreasonable.

A. The Secretary's Delay Is Unreasonable Under A Rule Of Reason

The first *TRAC* factor weighs heavily in favor of Petitioners and Class Members in both classes. This first *TRAC* factor—whether the time the agency took to make a decision or comply with the duty to assist adhered to a "rule of reason"—is the most important one. *See Martin*, 891 F.3d at 1345 (citing *In re Cmty. Voice*, 878 F.3d 779, 786 (9th Cir. 2017)). In addition, when the agency's delay is due to complete inaction, the delay is unreasonable. *Id.* at 1346; *Godsey*, 31 Vet. App. at 226-27; *Monk v. Shulkin*, 32 Vet. App. 87, 103 (2019). The delay for Petitioners and both Delayed Decision and Delayed Assistance Class members is a result of unreasonably delayed VA action and failure to adhere to a rule of reason.

1. Delay Experienced by the Delayed Decision Class

Since this Court's September 2019 order requiring VA to readjudicate the reimbursement claims of the 74,432 class members, VA has readjudicated all reimbursement claims for only about 7,010 *Wolfe* class members. Venuti Decl. ¶ 14. This

means that, during the 30-month period from this Court's September 2019 order to the Federal Circuit's March 17, 2022 decision (at which point VA stopped readjudicating these claims entirely), VA issued decisions on reimbursement claims at a rate of only about 234 decisions per month. At this rate, it would take VA *26 years* to fully comply with the Court's directive to readjudicate the claims of the 74,432 class members.

Twenty-six years is unreasonable on its face, but there is more evidence supporting that VA's readjudications under the Court's order was unreasonably slow. Both before and after this 30-month period, VA proceeded much more quickly on reimbursement claims for emergency medical care. From January 9, 2018 to September 9, 2019, VA denied on the merits the reimbursement claims of the 74,432 veterans who would become *Wolfe* class members—a rate of 3,722 decisions per month. Then, after *Wolfe II*, VA issued approximately 6,648 reimbursement decisions on the merits during the 46-day period from June 30, 2022 to August 15, 2022—a rate of approximately 4,336 decisions per month, plus an unknown number of additional decisions made for lack of sufficient evidence. ECF No. 36, Gov't Reply in Support of Motion to Dismiss, *Kimmel v. Sec'y of Veterans Affairs*, Fed. Cir. No. 22-1754, at 7-8 (Aug. 19, 2022); *Id.* at Appx005 (Decl. of Benjamin I. Altose). In other words, VA has shown that it can issue decisions about *15 to 20 times* faster than it did for *Wolfe* class members during the 30 months it was ostensibly processing claims under this Court's orders.

Then, after March 17, 2022, VA exacerbated its unreasonable delay. The VA completely ceased taking any action on the reimbursement claims of both the Delayed Decision and Delayed Assistance Class members. These reimbursement claims are still

open, and the VA has not issued decisions granting or denying the claims, or sending letters requesting EOBs to the private health insurers. *See* Venuti Decl. ¶¶ 15-17.

The most important aspect of the "rule of reason" is that, when the agency's delay is due to complete inaction, the delay is unreasonable. *Martin*, 891 F.3d at 1346; *Godsey*, 31 Vet. App. at 226-27; *Monk*, 32 Vet. App. at 103. That principle applies here.

The Federal Circuit's *Wolfe II* decision did not and does not provide a valid reason for VA's complete inaction. *Wolfe II* made clear that "[u]nder the correct construction of the statute, there is a 'clear and indisputable' right to relief with respect to coinsurance but not deductibles." *Wolfe II*, 28 F.4th at 1357; *Kimmel*, 2022 U.S. App. LEXIS 29615, 2022 WL 14319044 (same). VA thus should have promptly issued decisions granting reimbursement for coinsurance and denying reimbursement for deductibles and copayments for the Delayed Decision Class. Instead, VA has done nothing.

Another factor weighing heavily in favor of a finding of unreasonable delay on Delayed Decision Class claims is the relative simplicity of the act that has been delayed. A court is much less likely to find a delay adheres to a rule of reason if the delay involves a relatively simple claim or ministerial action, as opposed to a complex, substantive agency action. *Martin*, 891 F.3d at 1345-46; *Monk*, 32 Vet. App. at 103. For the reimbursement claims of Petitioners Fowler, Redwood, LePant, and Delayed Decision Class Members, the VA, by definition, either (a) has the necessary EOBs, or (b) has been unable to obtain the EOBs despite making all attempts that VA believes is necessary to comply with the duty to assist by, among other things, requesting the EOBs directly from the veteran's private

insurance carrier. All that remains is for VA to evaluate the existing record and prepare a decision.

These claims do not require VA to obtain a medical examination of the veteran, evaluate complex issues, or review a lengthy record. In other words, these claims are not the types of complex agency actions that would entitle VA to more time before it issued a decision. Given the relatively simple tasks involved and the discrepancy in decision-making rates discussed above, the delay here easily fails the rule of reason, and the first *TRAC* factor weighs in favor of the Delayed Decision Members. Because most cases hinge primarily on this first factor, this tilts the entire *TRAC* analysis heavily in favor of Petitioners Fowler, Redwood, LePant, and Delayed Decision Class Members.

2. Delay Experienced by the Delayed Assistance Class

The delay experienced by Petitioners LePant, Jelen, Schmidt, Butler and Delayed Assistance Class members is similar, except that the VA's delayed action is not issuing a decision, it is complying with its duty to assist. As this Court has held, to comply with this duty, VA must attempt to obtain these EOBs from the veteran's private health insurers. *See* Order of July 19, 2021 at 2. Specifically, from September 9, 2019 to March 17, 2022, VA failed to complete the required assistance, which includes sending a letter or letters to the private health insurers of these veterans requesting the missing EOBs that these companies had prepared. Then, as with the Delayed Decision Class, after March 17, 2022, VA completely stopped taking actions to comply with the duty to assist. *See* Venuti Decl. ¶¶ 15-17.

Preparing and sending a letter of this type is purely a ministerial task. Again, these required actions are not the types of complex agency actions that would entitle VA to more time to prepare and send a letter. Given the relatively simple tasks involved, the delay in sending these letters easily fails the rule of reason, and the first *TRAC* factor also weighs heavily in favor of Petitioners LePant, Jelen, Schmidt, Butler, and Delayed Assistance Class Members.

There is simply no valid reason for VA to continue to both take no actions and withhold notice of whatever actions VA believes these veterans need to take to get VA to continue to process their pending claims.

B. Whether VA's Delay Conflicts with VA's Statutory Requirements

The second *TRAC* factor is not applicable because no statutory period nor timetable has been provided by Congress.

C. VA's Delay Harms the Health and Welfare of Petitioners and Class Members

The third *TRAC* factor also weighs in favor of the Class Members. This factor considers whether a delay involves a claim in which human health and welfare are at stake; if they are, the factor weighs in favor of the veteran. Courts have found that "[v]eterans' disability claims always involve human health and welfare." *Martin*, 891 F.3d at 1346; *see also Monk*, 32 Vet. App. at 105-06. The third and fifth factors both focus on the veteran's interest and often overlap. *Martin*, 891 F.3d at 1346.

There are currently no cases which analyze a claim of unreasonable delay under *TRAC* in the context of a reimbursement claim for emergency care expenses. But veterans'

health and welfare are certainly at stake here, for similar reasons that they are at stake in disability claims. Given that many veterans in the Delayed Decision and Delayed Assistance Classes seek reimbursements of thousands of dollars in coinsurance for their emergency medical expenses, human welfare is certainly at stake due to the financial burdens created by this delay, which are similar to those created by delays in VA decisions on disability claims, in which thousands of dollars are also frequently at stake. For instance, one Class Member filed an affidavit in *Wolfe* in which he stated that he has been forced to "alter and reduce the amount of groceries" he purchases due to a payment plan he entered to pay back the emergency medical bills neither VA nor his private health insurance would cover, and to fall behind on his utility bills. Affidavit of David Wasler ¶ 11. Another Class Member had the medical bills neither VA nor his private health insurance would cover referred by the service provider to collections, causing a financial burden that forced him to move into his daughter's home. Affidavit of Earl Paulson, ¶¶ 10, 11, 13. Another reimbursement claimant was unable to refinance his house because his unreimbursed emergency medical debt hurt his credit score, and he was forced to take money out of his retirement plan in order to pay back this debt. Affidavit of Joshua Kimmel, ¶¶ 11-13.

Human health is also at stake here, as the outcome of these reimbursement claims determines who will pay for the veteran's health care: the veteran or the VA. If the veteran is required to pay, it can radically alter the veteran's financial circumstances. Many Class Members have struggled to afford their health care expenses because the VA has not

reimbursed them in a timely manner, as explained above. The third *TRAC* factor therefore weighs in favor of the Class Members.

D. The Fourth TRAC Factor Weighs In Favor of Petitioners and Class Members

The fourth *TRAC* factor also weighs in favor of the Class Members. This factor asks the court to consider the effect of expediting delayed action on agency activities of a higher or competing priority. "Considerations relevant to the fourth factor—the effect of expediting delayed action on agency activities of a higher or competing priority—include VA's limited resources, the fact that the agency is in a better position than the courts to evaluate how to use those resources, and the effect of expediting action on other claimants, including any undesirable line-jumping." *Godsey*, 31 Vet. App. at 227. Some courts have expressed a preference for class actions to resolve systemic delays precisely because of the line-jumping concerns inherent in individual unreasonable delay cases, and have weighed this factor in favor of the veteran class as a result. *Godsey*, 31 Vet. App. at 228-29; *Ebanks v. Shulkin*, 877 F.3d 1037, 1039-40 (Fed. Cir. 2017).

Here, the class action petition does not raise any concerns about line-jumping that might be present in other individual unreasonable delay cases. If anything, veterans who are part of either class are merely asking to take their rightful place in line. VA's inaction has resulted in veterans not involved with *Wolfe* who have filed more recent reimbursement claims to jump ahead of Delayed Decision and Delayed Assistance Class Members in the reimbursement claims adjudication process, rather than the other way around. After the Federal Court determined last year in *Wolfe II* that VA must reimburse insured veterans for

their coinsurance liability, VA decided over 6,000 later-filed reimbursement claims on the merits in a 46-day period, rather than act to complete the work that remained to be done on the pending claims submitted years ago by *Wolfe* class members, without explanation as to why these later-filed claims received priority. *Kimmel*, 2022 WL 14319044 at *1. Given courts' preference for class actions when it comes to this *TRAC* factor, and the fact that there is no risk of line-jumping in this case, this factor weighs in favor of the Class Members.

E. The Fifth TRAC Factor Weighs In Favor of Petitioners and Class Members

The fifth *TRAC* factor weighs in favor of the Class Members as well. The fifth factor "'incorporates an analysis of the effect of a delay on a particular veteran'—including the extent to which the veteran is dependent on the requested benefits." *Mote v. Wilkie*, 976 F.3d 1337, 1345 (Fed. Cir. 2020) (quoting *Martin*, 891 F.3d at 1347). Although *Martin* asks courts to examine the effect of a delay on a *particular* veteran, courts have recognized in class action cases that "the interests prejudiced by a *systemic* delay may 'transcend' those of a single petitioner because 'excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans.'" *Godsey*, 31 Vet. App. at 229 (quoting *Erspamer v. Derwinski*, 1 Vet. App. 3, 10 (1990)).

As with the third *TRAC* factor, the fifth *TRAC* factor almost always weighs in favor of the veteran. Although there are no unreasonable delay court cases involving reimbursement for emergency medical expenses, this factor also weighs in favor of the

veterans here. Similar to *Godsey*, another class action case, the delays at issue here create uncertainty for the Class Members here, who for years now have remained in the dark as to whether or not their medical expenses will be covered by VA. For many Class Members, thousands of dollars are at stake, and for veterans with low incomes, these amounts can be critical. Because of courts' tendency to weigh this factor in favor of the veteran, along with the fact that this delay is systemic and creates uncertainty for many veterans who likely depend on such benefits, this factor weighs in favor of the Class Members.

F. A Lack of Bad Faith Provides, At Most, *De Minimus* Support For VA

The sixth *TRAC* factor makes clear that the Court may find a delay to be unreasonable even in the absence of bad faith on the part of the VA. *Monk*, 32 Vet. App. at 107; *Martin*, 891 F.3d at 1348. Courts in the past have held that a lack of bad faith on the part of the Secretary may provide "at most, de minimis support for his position." *Godsey*, 31 Vet. App. at 229. Thus, even if the VA has acted in good faith in refusing to process Class Members' reimbursement claims in a timely manner and processing their claims extremely slowly compared to others' claims, this factor has little if any effect on the overall *TRAC* analysis.

Under the *TRAC* factors, therefore, the VA delay experienced here by Petitioners and Delayed Decision and Delayed Assistance Class members is unreasonable.

III. THE RIGHT TO A WRIT OF MANDAMUS IS CLEAR AND INDISPUTABLE BECAUSE VA'S DELAY VIOLATES 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 quotations omitted). The Federal Circuit has held that unreasonable VA delay on benefit clams can violate the Constitution. *See Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (VA disability-compensation claimants possess a Fifth Amendment property interest in their claims); *see also Fusari v. Steinberg*, 419 U.S. 379, 389 (1975) ("Prompt and adequate administrative review … is a significant factor in assessing the [Due Process] sufficiency of the entire process."). By unreasonably delaying in making a final decision or complying with the duty to assist on the Class Members' claims, the Secretary has deprived Petitioners and the proposed Delayed Decision and Delayed Assistance Class Members of this fundamental requirement.

In evaluating petitions for mandamus, courts weigh: (1) the nature and weight of a petitioner's private interest; (2) the risk of erroneous deprivation of that interest in light of the procedures currently in place and the probable value of additional procedural safeguards; and (3) the government's interest in avoiding additional procedural safeguards. *See Mathews*, 424 U.S. at 335. Each factor weighs in favor of granting this petition.

First, Petitioners' interests (and that of the Classes) relate to health and welfare, thus the weight of this interest is high. The Federal Circuit has recognized that a veteran's entitlement to "nondiscretionary, statutorily mandated benefits" is "a property interest protected by the Due Process Clause of the Fifth Amendment." *Cushman*, 576 F.3d at 1298. Here, Petitioners seek statutorily-required reimbursement of medical expenses paid out of pocket for emergency care they received. Despite diligence in pursuing their claims, and despite VA's Template 2 letter informing these veterans that no further action would

be needed on their part, Petitioners and similarly situated respective Class Members have been waiting years to receive the compensation to which they are entitled. The delay in complying with the duty to assist and issuing decisions on the Class Members' claims has impacted the welfare of the class members by, *e.g.*, forcing them to reduce the amount spent on groceries (Affidavit of David Wasler ¶ 11) and preventing them from refinancing their homes due to the impact of medical debt on their credit scores (Affidavit of Joshua Kimmel, ¶¶ 11-13). The VA has recognized that such delays in the claims process "take[] a toll on Veterans' lives." *See* VA Center for Innovation, Veteran Appeals Experience: Listening to the Voices of Veterans and Their Journey in the Appeals System, at 11 (Jan. 2016).

Second, the risk of erroneous deprivation of Petitioners' interest is high. VA has acknowledged that its previous denials of the *Wolfe* class members' claims were erroneous and has amended its regulations to allow reimbursement for coinsurance expenses incurred by veterans at non-VA hospital facilities. *See* Reimbursement for Emergency Treatment, 88 Fed. Reg. 10,835 (Feb. 22, 2023). Yet VA has made no progress in issuing decisions on the Petitioners' and Class Members' claims. The longer the delay lasts, the higher the risk that Petitioners' and Class Members' claims fall through the cracks and that they ultimately do not receive the compensation they are due.

Third, the Secretary has no cognizable interest in avoiding this Court's intervention. There is no plausible reason why it should take more than three years to issue decisions on the Petitioners' claims. Indeed, VA's rates of decision-making before September 2019 and

after June 30, 2022 prove that it is capable of processing these claims in a more timely fashion.

Because all three *Mathews* factors weigh in favor of Petitioners and the proposed Classes, the Court should find that the Secretary has violated their due process rights and should grant the requested mandamus relief. *See, e.g., Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 490 (3d Cir. 1980) (finding due process violation when agency delayed in resolving disability application because "three years, nine months, is well past any reasonable time limit, when no valid reason for the delay is given").

IV. PETITIONERS LACK ADEQUATE ALTERNATIVE MEANS TO OBTAIN THE RELIEF SOUGHT

The VA has no established procedures through which Petitioners and Class Members can force the VA to either (i) issue decisions on their pending reimbursement claims or (ii) comply with its duty to assist by attempting to obtain missing and relevant EOBs directly from the veterans' third-party health insurance carrier. Petitioners have exhausted all available means to cause the Secretary to perform the non-discretionary duty of issuing decisions on their pending reimbursement claims or complying with the duty to assist by requesting missing EOBs from the veteran's private insurance carrier. Petitioners have been waiting years to the VA to take these actions to no avail. They have no other adequate alternative to this mandamus petition.

RELIEF SOUGHT

Petitioners respectfully request the following relief from the Secretary's unjustified delay in processing Petitioners' reimbursement claims:

First, that the Court grant Petitioners' request to represent two classes of similarly situated veterans, as supported by Petitioner's forthcoming Request for Certification of the Delayed Decision and Delayed Assistance Classes.

Second, that the Court order the Secretary to issue, within 60 days of the Court's Order, decisions on all the reimbursement claims of Petitioners Fowler and Redwood, and on three of Petitioner LePant's reimbursement claims that were supported by Petitioner's submission of relevant EOBs.

Third, that the Court order the Secretary to, within 120 days of the Court's Order, review the documents related to each relevant reimbursement claim of the Delayed Decision Class Members and send to the veteran and Class Counsel a merits decision on the reimbursement claim with notice of appellate rights,

Fourth, that the Court order the Secretary to (1) attempt, within 30 days of the Court's Order, to obtain the relevant EOBs for the reimbursement claims of Petitioners LePant, Jelen, Schmidt, and Butler, directly from their private health insurance carriers, and (2) prepare and send a decision on their reimbursement claims with a notice of appellate rights, within 60 days of the earliest of the following two events: (i) VA's receipt of the relevant EOBs or (ii) VA's determination that it has complied with its duty to assist Petitioners in obtaining their relevant EOBs, even though these attempts did not result in disclosure of the EOBs.

Fifth, that the Court order the Secretary to (1) attempt, within 120 days of the Court's Order, to obtain the relevant EOBs for the reimbursement claims of the Delayed Assistance Class members directly from their private health insurance carriers, and (2) prepare and send to each Delayed Assistance Class member and Class Counsel decisions on their reimbursement claims with a notice of appellate rights within 120 days of the earliest of the following two events: (i) VA's receipt of the missing EOBs or (ii) VA's determination that it has complied with its duty to assist the Delayed Assistance Class member in obtaining their relevant EOBs, even though these attempts did not result in obtaining the EOBs; and

Sixth, such other relief as may be appropriate in the interest of justice and in aid of the Court's jurisdiction.

CONCLUSION

Petitioners Redwood, Fowler, LePant and the other Delayed Decision Class Members have a constitutional and statutory right to have VA issue decisions on their reimbursement claims for emergency medical expenses now that VA has all the information it needs to make such a decision. Petitioners LePant, Jelen, Schmidt, and Butler and the other Delayed Assistance Members have a constitutional and statutory right to have VA comply with its duty to assist and thereafter issue decisions on their reimbursement claims for emergency medical expenses. The Secretary has unreasonably delayed in carrying out these nondiscretionary functions. This Court should grant this Petition and award aggregate relief to remedy this inexcusable delay.

Respectfully submitted,

Dated: May 16, 2023

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EXHIBIT A

Denial for Personal Responsibility (Template 2)

This letter is being sent to you by the Department of Veterans Affairs (VA) as a result of an Order of the U.S. Court of Appeals for Veterans Claims ("the Court") in the class action known as *Wolfe v. Wilkie,* 32 Vet. App. 1 (2019) ("the *Wolfe* case"). You are a member of the class in the *Wolfe* case.

VA denied your claim or claims for reimbursement of costs associated with the episode(s) of care referenced in this notice because the amounts claimed were coinsurance or deductibles you owed under your health insurance plan. On September 9, 2019, the Court ruled in the *Wolfe* case that VA's interpretation of the applicable statute was wrong and that VA cannot deny reimbursement of coinsurance and deductible amounts owed by a Veteran under a health insurance plan.

As a result, VA will re-decide your claim(s) and will issue a new decision. There is no need for you to take any action at this point.

If you have questions, you may contact the lawyers who represent you and the other members of the class in the *Wolfe* case at [contact information to be supplied by class counsel after the Court decides disputed issues].

{Signature}

{Contact Information}

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DOUGLAS REDWOOD, TERRANCE FOWLER, JAMES LEPANT, JOHN JELEN, KENNETH SCHMIDT, and STEVEN BUTLER, individually and on behalf of others similarly situated, **Petitioners,** v. DENIS MCDONOUGH, in his capacity as Secretary of Veterans Affairs, **Respondent.**	)	Vet. App. No. 18-6091

DECLARATION OF ALESSANDRA M. VENUTI

I, Alessandra M. Venuti, declare the following:

1. I am a senior staff attorney at the National Veterans Legal Services Program ("NVLSP"), a nonprofit veterans service organization, and I have worked at NVLSP as an attorney since 2016. A major part of my work for NVLSP since April 2020 has been assisting Barton F. Stichman in his work as class counsel in *Wolfe v. Wilkie*, 32 Vet. App. 1 (2019), including assisting him with monitoring compliance by the U.S. Department of Veterans Affairs ("VA") with the Court's Orders in that matter.

2. On March 9, 2020, the Parties to the *Wolfe* class action submitted a Joint Response to the Court's January 24, 2020 Order ("Joint Response") and agreed to a Notice Plan pursuant to which the VA would correct inaccurate information that had been previously provided by the Secretary to veterans who submitted claims for reimbursement of emergency medical expenses incurred at non-VA facilities. The Parties agreed to place these veterans (all of whom had received inaccurate information from the Secretary) into five categories (Categories A, B, C, D, and E). Members of the *Wolfe* class were placed into Categories B and D. VA represented that there were 61,533 Category B veterans and 12,899 Category D veterans, for a total of 74,432 class members who were entitled to corrective notice.

3. Pursuant to the Court's Order of March 12, 2020, VA provided Class Counsel with a list of the names and last known addresses of the 74,432 class members certified by the Court. On that list, VA identified petitioners Douglas Redwood, Terrance Fowler, James LePant, John Jelen, Kenneth Schmidt, and Steven Butler as members of the *Wolfe* class and therefore entitled to such corrective notice.

4. Attached to the Joint Response as an exhibit was a draft corrective letter entitled "Template 2," which the Parties agreed that VA should send to all 74,432 *Wolfe* class members ("the Template 2 Letter").

5. The Template 2 Letter notifies recipients that, although VA had previously denied their reimbursement claims for costs associated with episodes of non-VA emergency care on the basis that the amounts claimed were coinsurance or deductibles the veteran owed under his or her health insurance plan, the Court of Appeals for

Veterans Claims ruled in *Wolfe* that in fact VA could not deny reimbursement for such expenses.

6. The Template 2 Letter also notified recipients that, "[a]s a result [of the Court's decision in *Wolfe*], VA will re-decide your claim(s) and will issue a new decision. There is no need for you to take any action at this point."

7. On April 6, 2020, the Court ordered, among other things, that (1) within seven days (or by April 13, 2020), the Secretary must begin sending the corrective notice letters (including the Template 2 Letter) as set forth in the Joint Response; (2) within 45 days of the date in which the Secretary informs the Court that he has begun sending the notice letters, the Secretary must begin readjudicating the reimbursement claims of the 74,432 *Wolfe* class members; and (3) every 45 days thereafter, the Secretary must provide a status report to class counsel with an update on the readjudications of the *Wolfe* class members' claims.

8. Thereafter, NVLSP engaged a team of two advocates and me to help class counsel monitor VA's compliance with the Court's Orders and respond to inquiries from class members regarding the *Wolfe* case.

9. VA provided class counsel in *Wolfe* with the 45-day status reports required by the Court's April 2020 order in *Wolfe* from July 2020 to February 2022.

10. After the February 4, 2022 status report, the Secretary was obligated to provide class counsel with the next 45-day status report on March 25, 2022. The Federal Circuit issued its decision in *Wolfe v. McDonough*, 28 F.4th 1348 (Fed. Cir. 2022) (*"Wolfe II*") on March 17, 2022. The Secretary did not provide to class counsel the VA

status report due on March 25, 2022 and on all dates thereafter. As a result, the February 4, 2022 status report is the last status report provided by the Secretary to class counsel.

11. I describe below what NVLSP has learned through the Secretary's status reports, particularly the most recent report of February 2022.

12. The most recent editions of these 45-day reports, including VA's last report on February 4, 2022, listed the names of many, but not all of the 74,432 *Wolfe* class members under two categories: (1) "All Claims Adjudicated" and (2) "Claims in Process."

13. According to an email sent by VA counsel Drew Cornacchio to class counsel in *Wolfe* on February 4, 2022, the "All Claims Adjudicated" category consists of "all Veterans whose previously denied claims have all been processed by VA," and the "Claims in Process" category consists of all Veterans for whom "processing of the previously denied claim(s) has started." VA counsel informed class counsel that these reports were cumulative—that is, the class members listed under the "All Claims Adjudicated" category in the February 2022 report would include those class members listed under the "All Claims Adjudicated" category in previous VA status reports.

14. VA's February 2022 report listed a total of 7,010 *Wolfe* class members under the "All Claims Adjudicated" category and 54,439 veterans under the "Claims in Process" category, leaving 12,983 class members unlisted under either category.

15. From August through December 2022, I and several other advocates employed by NVLSP contacted numerous *Wolfe* class members, including petitioners, to ask, among other things, whether they had received a VA decision on their

reimbursement claim, a VA request for an EOB, or any correspondence related to reimbursement from VA since the Federal Circuit's March 17, 2022 decision.

16. None of the class members that NVLSP contacted reported having received a reimbursement decision, a reimbursement payment, an EOB request, or any other VA communication relating to reimbursement, on or after March 17, 2022. Petitioners Redwood, Fowler, LePant, Jelen, Schmidt, and Butler likewise informed NVLSP that they did not receive a reimbursement decision, a reimbursement payment, an EOB request, or any other VA communication relating to reimbursement, on or after March 17, 2022. Thus, the fact that none of the class members contacted and questioned by NVLSP reported to NVLSP that they have received a reimbursement decision or reimbursement payment from VA on or after March 17, 2022 indicates that, after the Federal Circuit's decision in *Wolfe II*, VA did not issue any reimbursement decisions to *Wolfe* class members.

17. After the Court ordered the Secretary to obtain missing EOBs from the veteran's health care insurers (*see* Order of July 19, 2021), VA counsel informed class counsel that VA began to send requests for EOBs to private insurance carriers in August 2021 and its policy is to send an EOB request to the veteran whenever it sends an EOB request to the veteran's private health insurance carrier. Thus, the fact that none of the class members contacted and questioned by NVLSP reported to NVLSP that they had received such an EOB request from VA on or after March 17, 2022, indicates that, after the Federal Circuit's decision in *Wolfe II*, VA did not send EOB requests to those veterans' private health insurance carriers.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 16, 2023 in Washington, DC.

/s/ Alessandra M. Venuti

Alessandra M. Venuti