No. 12-296

IN THE

Supreme Court of the United States

VETERANS FOR COMMON SENSE AND VETERANS UNITED FOR TRUTH, INC., ON BEHALF OF THEMSELVES AND THEIR MEMBERS,

Petitioners,

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE VETERANS LAW COMMITTEE OF THE DELAWARE STATE BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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244122

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Amicus Veterans Law Committee[1] is a committee of Delaware lawyers organized under the Delaware State Bar Association. The Veterans Law Committee agrees with Petitioners' arguments in their Petition for a Writ of *Certiorari* and offers the following additional reasons why it is important for the Court to hear this case.

INTERESTS OF *AMICUS CURIAE*

The Veterans Law Committee's mission is "to further the knowledge and understanding of legal issues relevant to members and Veterans of the armed services and their families, to foster delivery of *pro bono* legal services to disadvantaged veterans, and to encourage members of the private bar to consider obtaining specialized knowledge in legal issues relevant to members and Veterans of the armed services so that individuals who can afford legal representation will have a broad array of qualified counsel to assist them on a fee paying basis."[2]

The Veterans Law Committee and its members witness the delay in the Department of Veterans

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[1] The parties have been given more than 10 days' notice and both have consented. No counsel for a party authored this brief in any part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] Delaware State Bar Association, Veterans Law Committee, Mission Statement *available* from counsel of record. Any party that desires *amicus* to lodge the "Mission Statement" with the Court should notify counsel of record so he may comply with SUP. CT. R. 32.3.

Affairs (VA) claim benefit system and how those delays harm veterans in the mid-Atlantic region. The members of the Veterans Law Committee and their clients unfortunately have also experienced the inability of the VA to address the overwhelming backlog efficiently, and the ineffective remedies available to veterans through the non-Article III Board of Veterans Appeals (BVA) and Court of Appeals for Veterans Claims (Veterans Court). As of October 1, 2012, in the Wilmington, Delaware Regional Office there were 1,065 compensation claims pending, of which 538 (50.5%) had been pending for more than 125 days.[3] In nearby Philadelphia, as of the same day, there were 21,912 compensation claims pending, of which 13,248 (60.5%) had been pending for more than 125 days.[4]

The Veterans Law Committee membership represents veterans in both the Wilmington and Philadelphia Regional Offices and based on those representations, a sample of which is set forth below, submits this *amicus* brief in support of the Petitioners' Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision tells our nation's veterans, who defend the freedoms guaranteed by our Constitution, that the VA cannot be held accountable

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[3] *See* Veterans Benefits Administration, Monday Morning Workload Report, October 1, 2012, *available* at http://www.vba.va.gov/REPORTS/mmwr/index.asp.

[4] *Id.*

in a federal district court for past VA systemic Constitutional violations.

The Petitioners petitioned for a Writ of *Certiorari* to the Ninth Circuit Court of Appeals so this Court can remedy a grave social and Constitutional crisis facing the nation's veterans. This brief provides an analysis of the Court's historic decisions on statutes similar to the one at issue below, Section 511 of Title 38 of the United States Code, and details delays our veteran clients have experienced before the VA.

The historic analysis reveals the Court has reviewed veterans' Constitutional claims for over 80 years and consistently held that federal district courts have jurisdiction to do the same. This was true in 1924 in *Silberschein v. United States*, 266 U.S. 221 (1924) and in 1974 when the Court ruled in *Johnson v. Robison*, 415 U.S. 361 (1974) and *Hernandez v. Veterans' Admin.*, 415 U.S. 391 (1974).

The Ninth Circuit's opinion below conflicts with the Court's prior rulings. The lower Court's holding that when Congress enacted the Veterans Judicial Review Act of 1988 it intended to take away veterans' rights to bring systemic Constitutional challenges in federal district courts, because such review would be like a review of the Secretary's decision on an individual benefit claim, invokes JUSTICE THURGOOD MARSHALL's question in *Hernandez* about whether the impact of a "no-review" clause was to let the Secretary be "scot free" if he violates the Constitution. And, as the dissent in the opinion below noted, the limited remedy of mandamus referenced by the majority below to cure these systemic flaws, is inadequate because it is not binding in any case other than the one at issue

and "would have no affect on the procedures that apply to the millions of [other] potential claims . . .." (Pet. App. at 66a.)

Congress did not provide "clear and convincing" evidence that it intended to take away prior, existing recognized rights and create a political solution as the logical consequence to a total bar on judicial review for systemic Constitutional violations.

A political solution to Constitutional violations against veterans has many flaws. The Veterans Court, an Article I tribunal, lacks the power to invalidate systemic Constitutional violations. Indeed, the Veterans Court has already held that it cannot certify a class and that under the Veterans Judicial Review Act, Congress did not intend to alter the logic of *Johnson v. Robison*, which contradicts the opinion below. *Cf. Lefkowitz v. Derwinski*, 1 Vet. App. 439, 440 (1991); *See Dacoron v. Brown*, 4 Vet. App. 115, 118-19 (Vet. App. 1993). One reading of the decision below is that the Ninth Circuit acknowledges this very point -- but denied judicial review, leading to a confused Constitutional jurisprudence that this Court should grant *certiorari* to clarify. *See, e.g.,* Pet. App. at 67a ("The majority's holding thus reduces itself to a 'Catch 22': To challenge delays in the system, you must bring a systemic claim and not just an individual claim. But if you bring a systemic claim, it has to be treated as an individual claim and you must suffer the delays in the system. Get it?").

The issues in this case reflect a grave social crisis and resolution will affect thousands of veterans and their dependents. Relying on our representations of clients, we show delays are indeed systemic and

suggest that systemic litigation is Constitutionally viable and more efficient than individualized litigation of those systemic Constitutional violations in a restricted Article I venue.

ARGUMENT

I. THERE ARE COMPELLING REASONS WHY THE COURT SHOULD GRANT THE PETITION FOR WRIT OF *CERTIORARI*.

A. The Ninth Circuit Has Decided an Important Federal Question in a Way that Conflicts with Relevant Decisions of this Court.

On December 11, 1973, this Court heard oral argument in *Hernandez v. Veterans' Admin.*, 415 U.S. 391 (1974), regarding whether the VA Administrator's decisions were subject to judicial review under 38 U.S.C. § 211(a), the predecessor statute to Section 511. During the *Hernandez* Argument, JUSTICE THURGOOD MARSHALL asked the Solicitor General, "[I]f the [Secretary] just deliberately violates the Constitution of the United States, he is the only man in Government who goes scot free?" Transcript of Oral Argument at 29, *Hernandez v. Veterans' Admin.*, 415 U.S. 391(1974)(No. 72-700).[5] The Solicitor General argued there was no exception in Section 211. *Id.*

The Court rejected the argument and held that "§ 211(a) does not bar judicial consideration of constitutional challenges to veteran's benefits legislation." *Hernandez*, 415 at 393. And, in the more frequently cited companion case to *Hernandez*, *Johnson v. Robison*, the Court held that nothing in the legislative history suggested "any congressional intent to preclude judicial cognizance of constitutional

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[5] The copy of the transcript in the Supreme Court Library does not indicate questioner's identity and just reads, "Question." The audio of the oral argument at www.Oyez.org allows determination of each Justice's asked specific questions.

challenges to veterans' benefits legislation." 415 U.S. at 373.

The Ninth Circuit held Congress intended to and did take away veterans' rights recognized by this Court in *Johnson* and *Hernandez* to bring Constitutional claims in federal district courts when Congress enacted Section 511 not only with respect to past "decisions," but also with respect to past indecision. The Ninth Circuit, thus, has broadened Section 511 beyond its statutory language, congressional intent, and *Johnson* and *Hernandez*, specifically it stated that Section 511

> precludes jurisdiction over a claim if it requires the district court to review VA decisions that relate to benefits decisions . . . including any decision made by the Secretary in the course of making benefits determinations . . . This preclusion extends not only to cases where adjudicating veterans' claims requires the district court to determine whether the VA acted properly in handling a veteran's request for benefits, but also to those decisions that may affect such cases.

See Pet. App. at 27a.

While the district courts might lack jurisdiction to review Secretarial decisions on individual claims merely dressed as Constitutional claims, in the case below, there were no past individual benefit decisions made by the Secretary; rather, the allegations were of systemic constitutional violations. And by refusing to hear those claims, the Ninth Circuit's answer to JUSTICE MARSHALL'S 1973 question is that the Secretary is "scot free" to violate veterans' Constitutional rights on a system wide basis.

In its analysis, the Ninth Circuit reviewed the historical statutes and this Court's decisions interpreting them. A close examination suggests the Ninth Circuit did not consider all prior decisions of this Court and indeed ruled contrary to them.

1. The Ninth Circuit Only Examined Two Decisions and Not Others as Far Back as the 1920s, all of Which Have Held that Decisions of the VA are Subject to Judicial Review in Certain Circumstances.

In the underlying opinion, the Ninth Circuit stated that its discussion of the history of judicial review of VA decision-making was brief because the history is a "short one." (*See* Pet. App. at 13a.) The court then examined the Economy Act of 1933 and cited this Court's *Lynch* decision for the proposition that the Economy Act of 1933 removed "the possibility of judicial relief". (*Id*. at 14a.) The Ninth Circuit concluded that Congress consistently has precluded judicial review of veterans' benefits determinations thereafter with a few exceptions. *Id*. at 14a.

The Ninth Circuit's review of the statutes that preceded Section 511(a) falls short. Admittedly, Section 511(a) traces more directly to the Economy Act of 1933, but there are other relevant statutes that predate that Act.

The first law[6] on judicial review of the VA's decisions was an Act of August 21, 1921 to establish the United States Veterans' Bureau. *See* Act of August 21, 1921, ch. 57, 42 Stat. 147. In Section 2, Congress provided that the Director of the Veterans Bureau, subject to the general direction of the President, was to administer, execute, and enforce the Act. *Id*. at 148. Congress also gave the Director the authority to make rules and regulations and empowered the Director to "decide all questions arising under this Act except as otherwise provided herein." *Id*.

This Court interpreted this language in *Silberschein v. United States*, 266 U.S. 221 (1924), when the Court held that the Director's decisions are "final and conclusive and not subject to judicial review, at least unless the decision is wholly unsupported by the evidence, or is wholly dependent upon a question of law, or is seen to be clearly arbitrary or capricious." *Id*. at 225.

Congress consolidated, codified, revised, and re-enacted the laws establishing the United States

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[6] Congress passed the "Tucker Act" on May 3, 1887, ch. 359, 24 Stat. 505 (current version at 28 U.S.C. § 1491), in which the United States waived sovereign immunity for numerous claims. Congress excluded pension claims and claims arising out of the Civil War in this Act, which did not contain a provision similar to Section 511.

Veterans' Bureau in the World War Veterans' Act, 1924. *See* ch. 320, 43 Stat. 607. Congress again gave the Director authority to make "all decisions of questions of fact affecting any claimant" to certain benefits and those decisions were "conclusive" except as otherwise provided in the Act. *Id.* § 5.

When examining cases under the 1924 World War Veterans' Act and related legislation with similar language, the Court referred to the rule in *Silberschein* and consistently stated that the Director's decision regarding a veteran's benefits was "final, at least unless it be wholly without evidentiary support or wholly dependent upon a question of law or clearly arbitrary or capricious." *See, e.g., United States v. Williams*, 278 U.S. 255, 257-58 (1929); *Reynolds v. United States*, 292 U.S. 443, 446 (1934).

As stated, Section 511(a) traces more directly to the Economy Act of 1933, than to the Act of August 21, 1921, but the Court never directly interpreted the Economy Act language that is similar to Section 511(a). Moreover, in the underlying decision, the Ninth Circuit stated that *Lynch v. United States*, 292 U.S. 571, 587 (1934), construed the Economy Act of 1933 to "remove the possibility of judicial relief." (Pet. App. at 14a.) The statement of the Court in *Lynch*, however, was *dicta*. It was not a holding of the Court on the meaning of Section 5 of the Economy Act of 1933.

Congress enacted other veterans-related laws regarding judicial review,[7] which lead to the "no-

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[7] *See, e.g.,* Act of October 17, 1940, ch. 893, § 11, 54 Stat. 1193, 1197; Veterans Benefits Act of 1957, Pub. L. No. 85-56, § 211(a), 71 Stat. 83, 92 (codified at 38 U.S.C. §211(a)); Act of Sept.

review" statute the Court analyzed in *Johnson* and *Hernandez,* and later *Traynor v. Turnage*, 485 U.S. 535, 541-45 (1988). In these cases, this Court held, consistent with its earlier holdings, that federal district courts retain the right to examine Constitutional claims asserted by veterans. *See Johnson*, 415 U.S. at 368 ("No-review clauses similar to § 211(a) have been a part of veterans' benefits legislation since 1933"). As shown, these decisions are consistent with the Court's historic decisions on judicial review.

Congress's enactment of the Veterans Judicial Review Act did not evince clear intent to overrule this Court's longstanding exception to the "no-review" clauses of prior legislation. While the exception is narrow, it is important. This Court has maintained Constitutional protection for veterans from *Silberschein* in 1924 to *Johnson* in 1974. As the Petitioners request, this Court should grant *certiorari* to clarify whether veterans may challenge unconstitutional systemic acts of the Secretary and the VA in federal district courts.

2. Legislative History Does Not Demonstrate Clearly and Convincingly that the Secretary May Violate Veterans Constitutional Rights without Review by the Federal District Courts.

As noted above, this Court rejected the Government's position of no-judicial review and held that the federal courts do have jurisdiction over

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2, 1958, Pub. L. No. 85-857, 72 Stat. 1105; Act of August 12, 1970, Pub. L. No. 91-376, 84 Stat. 787, §8.

veterans' Constitutional claims in *Johnson* and *Hernandez.*

The Ninth Circuit decision turns Congress's 1988 enactment of Section 511, which is similar to Section 211, into an absolute preclusive statute that permits the VA's unconstitutional conduct in the form of systemic violations that result in *de facto* claim denial of veterans' benefits unless a political solution presents itself.[8] As Petitioners note, this is only possible under our system of laws if Congress expresses with "clear and convincing" evidence its intent for this result. (*See* Pet. Br. at 26-27.)[9]

Several points suggest Congress did not intend to eliminate federal court jurisdiction of systemic Constitutional claims brought by veterans or organizations acting on their behalf when it enacted the Veterans Judicial Review Act.

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[8] During the 1973 oral argument in *Hernandez*, CHIEF JUSTICE WARREN E. BURGER asked the Solicitor General if in an extreme case, the then-Administrator could just nullify a Congressional mandate by not paying benefits for whatever reason he decided and not be subject to mandamus. The Solicitor General stated that the Government believed "that 211 supersedes whatever jurisdiction is otherwise available under one of the general jurisdiction statues whether it be 1361, the mandamus statute, or 1331 of the general question Statute." CHIEF JUSTICE BURGER questioned whether under this line of argument, the only logical conclusion would be a political remedy to the Secretary's systemic violations of veterans' Constitutional rights. The Solicitor General agreed. *See generally* Transcript of Oral Argument at 39-40, *Hernandez*, 415 U.S. 391(No. 72-700).

[9] Additionally, as noted by Petitioners, this Court has said such a construction raises its own serious Constitutional concerns. (*See* Pet. Br. at 26)(citing *Johnson*, 415 U.S. at 366).

First, the Ninth Circuit determined that Congress gave the Veterans Court authority to decide "*all* questions involving benefits under laws administered by the VA," including "factual, legal and constitutional questions." (Pet. App at 17a-18a (emphasis in original).) Yet, the Veterans Judicial Review Act omits authority for veterans or veterans' organizations to file class actions in the Veterans Court or the Federal Circuit, leading the Veterans Court to rule elsewhere it lacks the authority to entertain class actions. *See American Legion v. Nicholson*, 21 Vet. App. 1 (Vet. App. 2007) ("Upon review of the plain text of the statute, along with the statutory scheme of title 38, and the legislative history of the VJRA, we conclude that Congress has expressly limited our jurisdiction to addressing only appeals and petitions brought by individual claimants."); *Lefkowitz*, 1 Vet.App. at 440. The Federal Circuit tends to respect this concept as well. *Cf. Liesegang* v. *Secretary of Veterans Affairs*, 312 F.3d 1368, 1378 (Fed. Cir. 2002). If the Ninth Circuit's preclusive interpretation of Section 511 stands, veterans and veterans' organizations would be unable to file class action cases challenging unconstitutional systemic violations in VA practices in federal court (as they could do before the Veterans Judicial Review Act). Thus, each veteran affected by an unconstitutional act would have to bring an individualized claim, which is not an adequate remedy for systemic Constitutional harms. *See, e.g.* Pet. App. 312a-18a (district court's discussion that there are no adequate remedies for systemic constitutional flaws in VA). Congressional silence in the legislative history of the Veterans Judicial Review Act on this important matter hardly meets the standard of "clear and convincing"

Congressional intent. *Compare Elgin v. Dept. of Treasury*, 567 U. S. 1 ___, 132 S. Ct. 2126 (2012).[10]

Second, in *Dacoron*, 4 Vet. App. at 119, the Veterans Court held Constitutional systemic challenges should and can be brought in federal district court. Thus, when a veteran brings a Constitutional challenge by a writ of mandamus in the Veterans Court, it will be denied because there is an alternate remedy of filing a federal suit in district court.[11]

Third, the Veterans Court, an Article I legislative tribunal, cannot invalidate statutes as unconstitutional. Thus, if the lower court's answer to systemic Constitutional flaws is that an Article I court should invalidate congressional acts, that logic may be flawed for separation of powers and related reasons. *See, e.g., Stern v. Marshall*, 564 U.S. ___, 131 S. Ct. 2594 (2011); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Because the Veterans Court lacks authority to invalidate an act

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[10] In the dissent, JUSTICE ALITO cited to *Johnson* for the proposition that unlike the statutory scheme discussed in the majority opinion, the VA review system did not prohibit district court review of claims "challenging the constitutionality of laws providing benefits," because those claims were not precluded by a statute creating exclusive administrative review over how those benefits were administered. . .." *Elgin*, 564 U.S. ___, 132 S.Ct. at 2144 (Alito, J., dissenting).

[11] If the decision below stands, then veterans in the Ninth Circuit facing claim delays might be entitled to mandamus relief, 28 U.S.C. § 1651, or extraordinary relief under Veterans Court Rule 21, but veterans in other circuits would not, because they would have to pursue their remedies for Constitutional violations in district courts. This could create an equal protection issue.

of Congress that creates systemic Constitutional violations, if the Ninth Circuit's opinion below stands, veterans will have no recourse for past systemic violations. (*See* Pet. App. at 66a ("The upshot of the majority's holding with respect to the claims of systemic delay is that veterans have no place to go to adjudicate such claims.")). This would raise serious Constitutional questions such as equal protection even if Congress intended to eliminate this right, which it did not. *See Johnson*, 415 U.S. at 366 ("We consider first appellants' contention that § 211(a) bars federal courts from deciding the constitutionality of veterans' benefits legislation. Such a construction would, of course, raise serious questions concerning the constitutionality of § 211(a).").

B. The Ninth Circuit Decided an Important Question of Federal Law That Will Impact the Lives of Thousands of Veterans Practically and That Should be Settled by this Court.

There is an acknowledged pervasive delay in adjudicating veterans' claims. This delay leads to uncompensated individual injuries because veterans face months, if not years, during which they lose the value of being able to use their benefits. Awarding recovery of arrearages (without interest) years after submission of a claim cannot adequately compensate veterans and their families for the period that they suffered without the value that comes from use of the benefits. If 38 U.S.C. § 511 is construed as it was by the Ninth Circuit, it would preclude veterans from any effective remedy for recovery of the use-value of claim benefits during the agonizingly slow adjudication process.

A common sentiment among veterans is that the VA's policy is "[d]elay, deny until we die."[12] By the VA's own admission, it has failed to address its massive claims back log, which the VA believes was caused by a combination of the ongoing war against terror, higher battlefield survival rates, and the concomitant increasingly complex battlefield injuries the VA must treat, including traumatic brain injury and post-traumatic stress disorder.[13] The Secretary recently put this in perspective: "Three and a half years ago, the total claims inventory was roughly 400,000. Today, it's approximately 880,000. The backlog -- the number of claims older than 125 days -- was about 135,000 in 2009 and is roughly 580,000 today." [14]

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[12] Randi Kaye and Scott Bronstein, *Hundreds of Thousands of War Vets Still Waiting for Health Benefits*, CNN, updated Oct. 4, 2012, *available at* http://www.cnn.com/2012/09/29/health/delayed-veterans-benefits/index.html.

[13] The number of veterans has declined since 1985, with approximately 22 million veterans in 2011. At the same time, the number of veterans with service-connected disabilities has increased by almost forty-six percent (46%) between 1990 and 2011, with approximately 3.4 million service-connected disabled veterans in 2011. *See* National Center for Veterans Analysis and Statistics, *Trends in Veterans with a Service-Connected Disability: 1985 to 2011*, May 2012, *available at* http://www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL.pdf.

[14] Secretary Eric K. Shinseki, Remarks by Secretary to the VFW Annual Convention, Reno, Nevada (July 24, 2012) (transcript *available at* http://www.va.gov/opa/speeches/2012/07_24_2012.asp).

Despite the VA's efforts to determine claims timely, it has not made headway. In 2009, the VA processed 900,000 claims -- but veterans filed one million new claims. In 2010, it completed, for the first time, one million claims decisions -- and received 1.2 million new claims. In 2011, the VA again produced a million claims decisions, but veterans filed 1.3 million new claims.[15] Secretary Shinseki said that although the backlog of claims has admittedly increased, "today's inventory and backlog are not the same claims that were there three years ago, two years ago -- not even a year ago. Now, there are sure to be a handful of exceptionally complex cases, but the process is dynamic."[16]

The VA processes, including the appeals process in an Article I court system, while dynamic by some metrics, are not effective. Instead of receiving prompt determinations with respect to their claims, those men and women (and their families) who have already made tremendous mental and physical sacrifices in service of their nation must again sacrifice from unacceptable delay. Whether this delay is due to chronic underfunding, bureaucratic incompetence and/or indifference, or perverse incentives for those VA workers (charged with ensuring that our service members receive the benefits to which they are entitled) to deny summarily claims for benefits (or to choose the easiest files to review rather than those thicker, and presumably more complex files) in order

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15 *See id.*

16 *See id.*

to meet their work quotas,[17] what is clear is (i) the delay is real, (ii) the delay causes irreparable damage to veterans, many of whom have been or soon will be forever precluded from benefits to which they are entitled, and (iii) those injured by delay have been and will be denied effective relief.

Notwithstanding the Secretary's assertions that the claims in the admitted backlog are new claims, less than one year old, in fact, according to a recent article in The New York Times, the VA is not only failing to keep pace with new filings, processing less than an estimated 80% of its inventory of cases, but is also taking an average of two months longer to process claims than it took in 2002.[18] Nationwide, it took the VA an average of more than eight months to process a claim in June 2012 (approximately 50% longer than one year earlier).[19] Sometimes the only means

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[17] The VA pays bonuses to workers in the VA system, which some suggest the VA awards for bureaucratic paper shuffling rather than quality in claims processing. *See, e.g., Examining the Backlog and the U.S. Department of Veterans Affairs' Claims Processing System: Hearing before the Subcomm. on Disability Assistance and Memorial Affairs of the House Comm. on Veterans' Affairs,* 110th Cong, 2d. Sess., 110-70 (2008) (statement of Ronald B. Abrams, Join Executive Director, National Veterans Legal Services Program); *see also generally* James Dao, *Veterans Wait for Benefits as Claims Pile Up*, THE N.Y. TIMES, Sept. 27, 2012, [hereinafter *NYT Veterans*] *available at* http://www.nytimes.com/2012/09/28/us/veterans-wait-for-us-aid-amid-growing-backlog-of-claims.html?pagewanted=all&_r=0.

[18] *See NYT Veterans*.

[19] Aaron Glantz, *For Disabled Vets Awaiting Benefits, Location Matters*, VETERANS TODAY, Aug. 30, 2012 [hereinafter *VET Today*], *available at*

veterans in the *Amicus'* region have to get results is for the press to challenge the VA directly, as the local Philadelphia Fox News Station has reported it has done on several occasions.[20]

The backlog is not likely to shrink because the number of new claims filed annually increased by 48% since 2010, while the number of claims representatives only increased by 5%.[21]

The administrative backlog does not end with the VA's initial determination. If a veteran disagrees with the VA's decision, the veteran may either re-submit the claim with additional information (thereby re-initiating the claim process and entering once again into the utterly overwhelmed administration of the VA) or appeal to the BVA. 38 U.S.C. §§ 501, 5103A(f), 5108 and 7104; 38 C.F.R. § 3.156 and § 19.1. An appeal of a BVA decision may then be appealed to the Veterans Court. 38 U.S.C. §§ 7252 and 7261.

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http://www.veteranstoday.com/2012/08/30/for-disabled-veterans-awaiting-benefits-decisions-location-matters/.

[20] *See FOX 29 Get's Results for World War II Vet*, Sept. 14, 2012, *available* at http://www.myfoxphilly.com/story/19370286/gox-29-gets-results-for-world-war-ii-vet (reporting that a World War II veteran who had waited for benefits for over a year suddenly got all his back benefits after the News network contacted the VA); *see also More Veterans Turning To FOX 29 For Results*, Sept. 14, 2012, *available* at http://www.myfoxphilly.com/story/19539798/more-veterans-turning-to-fox-29-for-results (same regarding Vietnam Veteran that had waited for benefits for three years who received a call and promise of benefits check two hours after the News network contacted the VA).

[21] *See VET Today*.

If the Veterans Court remands an appeal, it must be treated expeditiously.[22] Although meaningful statistics are difficult to obtain, the press has reported that the average time for determination of an appealed claim has been reported as three and one-half years.[23] Moreover, the delay that veterans experience at this initial appeal level is likely to be even greater in 2012 (once such figures are available) because the BVA anticipates that appeals will increase from 47,763 appeals in Fiscal Year 2011 to 66,600 appeals in Fiscal Year 2012, an increase of approximately 40%.[24]

Even those veterans and their spouses whose illnesses are presumptively service-related may face an inexplicably long delay before receiving their

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[22] 38 U.S.C. § 7112 ("The Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court of Appeals for Veterans Claims."). Similarly, when the BVA remands a decision to the Regional Office, it too must give "expeditious treatment." *Id*. § 5109B.

[23] *See VET Today*. The BVA claims it took an average of one hundred and nineteen (119) days in 2011 to issue a decision (measured from the date the appeal is received by the Board, until a decision is "dispatched." *See* BVA Report of the Chairman, Fiscal Year 2011, at 4, *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2011AR.pdf. This measuring stick does not take into account the time an appeal can remain at the Regional Office before it is "certified" and sent to the BVA.

[24] *See* BVA Report of the Chairman, Fiscal Year 2011, at 3, *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2011AR.pdf.

earned benefits.[25] Indeed, as a result of lost or misplaced documents, at least one veteran has had his request for full disability as a result of multiple sclerosis delayed by almost two years.[26] The same Regional Office that lost this veteran's paperwork, also delayed a straightforward review of retroactive pension of a World War II veteran's widow for almost two years, and then only approved payments after intervention of a member of Congress.[27]

Individual accounts of the pervasive delays plaguing the VA in processing claims unfortunately occur with more frequency than is acceptable. While the case below raised constitutional challenges to the VA's systemic failures and their future impact, numerous individual accounts of the pervasive delays plaguing the VA in processing claims demonstrate that for many veterans, the system is in a grave crisis and this Court's consideration of the case below could have significant and positive social consequences.

The following real life stories of veterans local to the geographic area served by the Veterans Law Committee provide examples of the systemic problems. In each case, the identity of the veteran has been protected by use of his or her initials.

C.S. served as an Army Signal Corps Specialist detached from his unit and assigned to a base in Vietnam manned by South Vietnamese, Thai, and

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[25] *NYT Veterans*.

[26] *Id.*

[27] *Id.*

Australian personnel during the Vietnam war. C.S. had a documented mental collapse while in Vietnam. Years ago, C.S. filed a claim for combat-related PTSD, hepatitis C, and chloracne stemming from Agent Orange exposure. His PTSD claim was denied in November 2004, and he appealed through the Veterans Court. The Veterans Court remanded the case to the BVA, which remanded it to the regional office. Despite (i) the VA's change in the PTSD regulation, which liberalized the evidentiary standard for establishing the occurrence of the required in-service stressor, (ii) the submission of an expert forensic psychiatric report diagnosing him with PTSD and linking it to his military service, and (iii) having been treated by VA doctors for years for PTSD, the VA still has not awarded him benefits. These benefits were initially denied because the VA would not take the word of C.S. that his camp was subjected to enemy fire in 1969. Not only would the VA not accept the veteran's account, it refused to accept an Australian Military Police report that independently confirmed the incident. In total, C.S.'s claim went to the BVA and was remanded three times. C.S. always said that the VA would delay deciding his claims until he died. He passed away on August 15, 2012, almost 8 years after filing his appeal. The VA was aware that C.S. was seriously ill, and was ordered by the BVA to process the claim in an expeditious manner. Nonetheless, C.S. died without receiving needed benefits.

B.T.B., a widow of a Vietnam Veteran who served four tours of duty, originally filed her dependent and indemnity claim on December 1, 2004, based on her husband's death from cancer. This claim was filed over 2,870 days ago (7 years, 9 months, and 4

days). The Regional Office originally denied B.T.B.'s claim because it believed that Agent Orange did not presumptively cause the cancer that killed her husband, even though the veteran's doctor had provided an unrebutted opinion that Agent Orange had caused the cancer. B.T.B. appealed to the BVA. When the BVA denied her claim, she appealed to the Veterans Court. On August 17, 2010 (785 days ago or 2 years, 1 month, and 23 days ago), in a joint motion for remand with the Secretary and B.T.B., the Veterans Court ordered the BVA to provide B.T.B.'s claim expeditious treatment.

On January 10, 2011, the BVA remanded the case to the Regional Office and ordered that the Regional Office provide expeditious treatment to B.T.B.'s claim. Over one year after the BVA remanded the case to the Regional Office, it issued a Supplement Statement of the Case denying B.T.B.'s claim. On March 15, 2012, B.T.B.'s attorney wrote the Regional Office disagreeing with the Supplemental Statement of the Case and providing additional material and argument in support of B.T.B.'s claim. The Regional Office has not provided B.T.B. with any response to the March 15, 2012 letter as of the date of filing of this brief. There is no end in sight and sadly it is foreseeable that B.T.B. may have to wait for more than a decade to obtain dependency and indemnity compensation.

G.P. is a Vietnam-era veteran who was rated at 60% disability in both knees. G.P. has not been able to work since 1982 because of pain associated with his disability. In 2009, G.P. submitted a VA Form 9 appealing an earlier denial of benefits. In 2010, G.P. submitted a claim for depression secondary to his

physical disabilities and total disability due to individual unemployability. In 2011, the claim was supplemented with an expert medical opinion confirming G.P.'s depression and linking it with his service-related disability. To date, the VA Regional Office has yet to decide his open claim, which has been pending two years, and the appeal remains pending three years later.

On April 22, 2010, W.H., a recipient of three purple hearts from the Korean Conflict, sent a Notice of Disagreement to a February 22, 2010 statement of the case issued by the Regional Office and filed a V.A. Form 9 Appeal with the BVA. The Regional Office signed the certified mail receipt for the VA Form 9 on April 27, 2010. As of October 10, 2012, W.H.'s case remained in the Regional Office, which had not yet even certified the appeal to the BVA. Thus, 897 days (2 years, 5 months, and 31 days) have passed without the Regional Office certifying the appeal to the BVA.

The average number of days for an Agency of Original Jurisdiction to certify a substantive appeal to the BVA is 585 days and the average length of time between filing the appeal and the BVA's disposition was 883 days. *See* BVA, Report of the Chairman, Fiscal Year 2011 at 18. W.H.'s appeal has been pending certification in the Regional Office for more than the average length of time for the BVA to decide an appeal, and the current statistical data suggests that after the Regional Office certifies that appeal, another year will pass before the BVA is able to decide it. W.H.'s health is deteriorating as he waits.

D.B., a 30-year old veteran, served in the Army for eight years. DB filed a claim for PTSD and

disability related to a hernia operation in 2007. D.B.'s claims were denied in 2008. He appealed the denial and the case was remanded to the VA Regional Office in December 2011. D.B. is married and has a young son to support. He is only able to find employment at a minimum wage (or near minimum wage) job and is struggling to support his family. D.B. is still waiting for a rating decision.

J.V., a 42-year old veteran, has a 30% rating for right knee disorder, a 20% rating for a right shoulder disorder, and a 70% rating for depression secondary to his service-connected disabilities. In 2009, J.V. appealed several of the ratings, and in 2010, J.V. filed a claim for total disability based on individual unemployability. Rather than certify the appeal to the Board of Veterans Appeals, the VA Regional Office re-reviewed J.V.'s claims and in September 2012, it again summarily denied both his initial claims and his total disability claim. Accordingly, it took the VA three years to provide J.V. with exactly the same decision it provided him in 2009, and two years to deny his claim based on ongoing unemployabilty. The BVA has yet to receive the appeal J.V. filed in 2009.

C.C. is a veteran who served in the military from 1966 – 1969. C.C. filed a claim for a failed laminectomy (spinal surgery) performed by a VA hospital. As a result of the failed surgery, C.C. was left with less mobility than prior to the surgery. The BVA remanded his case in December 2010 to the VA Regional Office. The Regional Office has yet to render a decision. C.C. is a veteran living in senior housing with limited income from social security, and he has been waiting almost two years after the remand for a final decision.

These are only a few real world examples of systemic delays our veterans and their families face in trying to obtain needed benefits from the VA. These pervasive delays lead to individual injuries that cannot be compensated through the recovery of arrearages years after a claim is submitted. Each of these veterans lose the use of benefits for years, which, as the examples provided demonstrate, means they have lost the ability to help support their families, provide better lives for their children, and live higher quality, independent lives. The time lost without benefits cannot be compensated fully with an award of arrearages alone. A veteran who files a new claim is already behind each of the 880,000 claims currently pending with the VA. Today, each veteran can expect to wait an average of more than eight months to have his or her initial claim decided. If an appeal is necessary, the veteran can expect to wait up to more than three and a half years for final resolution all while not receiving benefits. And, in extreme cases a decade can pass. This time frame is not acceptable, and veterans faced with these delays should have a remedy in an Article III court because they have an injury in fact as a decade's loss of entitlements cannot be remedied. Many veterans need the money to pay rent, pay for subscriptions, buy bus passes, and pay for food. Moreover, even if benefits are eventually awarded, and calculated as of the date the original claim was filed, this back pay is paid without paying interest on the money detained. Thus, thousands of veterans are deprived of the use of the their claim benefits for years while the VA slowly and tediously reviews their claims.

What was the Ninth Circuit Court of Appeals response to this grave social crisis and obvious

systemic Constitutional violation in the VA System? This Court should grant *certiorari* to address whether veterans are entitled to those constitutional protections.

C. The Ninth Circuit Decided an Important Matter in a Way that Conflicts with Other Appellate Court Decisions on the Same Important Matter.

Petitioners briefed the Court on the Circuit Court split on the interpretation of 38 U.S.C. § 511(a). *See* Pet. Br. at 19-24. Based on this briefing, the Court should grant the Petition. *See* SUP. CT. R. 10(a). Indeed, this Court has previously granted a petition for writ of *Certiorari* when the lower courts split on an important question of federal law affecting veterans. *See Traynor v. Turnage*, 485 U.S. 535, 541 (1988).

CONCLUSION

The Court should grant the Petition for Writ of *Certiorari* to the Ninth Circuit Court of Appeals.

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