UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 15-1280

CONLEY F. MONK, JR., JAMES BRIGGS, TOM COYNE, WILLIAM DOLPHIN, JIMMIE HUDSON, SAMUEL MERRICK, LYLE OBIE, STANLEY STOKES, AND WILLIAM JEROME WOOD II, on behalf of themselves and all others similarly situated,

Petitioners,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

BRIEF OF AMICI CURIAE JUSTICE IN AGING, IMPACT FUND, ALAMEDA COUNTY HOMELESS ACTION CENTER, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, HOMELESS ADVOCACY PROJECT, INNER CITY LAW CENTER, LEGAL AID AT WORK, PUBLIC INTEREST LAW PROJECT, PUBLIC LAW CENTER, AND URBAN JUSTICE CENTER IN RESPONSE TO THE COURT'S REQUEST FOR PARTICIPATION OF AMICI DATED OCTOBER 26, 2017

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INTEREST OF AMICI

This brief is submitted by Justice in Aging, the Impact Fund, and eight non-profit legal and advocacy organizations as Amici Curiae. Amici file this brief in response to the Court's request for participation of amici, dated October 26, 2017.

Justice in Aging (formerly the National Senior Citizens Law Center) is a nonprofit legal advocacy organization with a mission of protecting the rights of low income older people. Since its founding in 1972, Justice in Aging has used administrative and legislative advocacy and litigation as well as training and support for legal services advocates across the country to protect and advance economic security and access to health care for low-income older people. Class action litigation plays a critical role in this effort with successful class actions filed, not just in Social Security and Supplemental Security Income ("SSI") cases, but also in Medicare, Medicaid and long term care.

The **Impact Fund** is a non-profit legal foundation that provides strategic leadership and support for litigation to achieve economic and social justice. The Impact Fund provides funding for impact litigation, offers innovative training and support, and serves as counsel in impact litigation across the country. The Impact Fund has served as counsel in a number of major civil rights class actions, including cases challenging employment discrimination, wage-and-hour violations, lack of access for those with disabilities, and violations of fair housing laws. Through this work, the Impact Fund

seeks to preserve class actions as an effective mechanism to effect structural reform and institutional change.

Alameda County Homeless Action Center ("HAC") is a client-centered non-profit legal services organization that provides no-cost, barrier-free, culturally competent legal assistance with a range of public benefit programs, with a special focus on Social Security disability benefits. HAC provides legal services in a holistic model, working closely with other legal services and social service programs to assist clients in meeting their emergency and longer-term needs during the lengthy process of qualifying for Social Security Disability benefits. HAC is the only program in the San Francisco Bay Area that specializes in legal services for those who are chronically homeless. HAC provided two of the named plaintiffs in *Hart v. Colvin*, No. 15-cv-00623-JST (N.D. Cal.), a class action challenging the use of reports from a disqualified physician in making disability determinations. In 2016, HAC provided assistance to over 2300 individuals, many of whom were veterans and had concurrent claims for veterans benefits.

The **Disability Rights Education & Defense Fund ("DREDF")** is a national nonprofit disability civil rights law and policy organization dedicated to protecting and advancing the civil rights of people with disabilities. Based in Berkeley, California, DREDF has remained board- and staff-led by people with disabilities since its founding in 1979. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws. As part of its mission, DREDF works to ensure that people with disabilities have the legal protections, including effective legal remedies, necessary

to vindicate their right to be free from discrimination. DREDF served as plaintiff class counsel in *American Council of the Blind v. Astrue*, cited herein. This matter is of interest to DREDF because people with disabilities are disproportionately among those applying for veterans benefits, given the statistical correlations between disability and age, as well as between disability and service-related injury.

The **Homeless Advocacy Project ("HAP")** provides free legal services to homeless veterans in Philadelphia. It was one of the first legal aid organizations in the country dedicated to this cause. Over the last 20 years, HAP has helped countless veterans obtain the income necessary to procure and maintain stable housing. This has included representation on claims for benefits from the Veterans Benefits Administration and the Social Security Administration. The organization has also prevented evictions, brought veteran families back together, and obtained expungements for veterans. As a result of its work, HAP has been recognized as a model for legal services organizations across the country that are interested in serving veterans.

Inner City Law Center ("ICLC") is the only provider of legal services on Los Angeles's Skid Row. ICLC's Homeless Veterans Project represents homeless veterans with disabilities in applications for compensation and pension benefits through the Department of Veterans Affairs. For veterans experiencing homelessness, VA benefits can bring the stability and independent living they need to receive consistent medical treatment and become housed. ICLC supports class certification in this case in order to efficiently resolve common difficulties faced by veterans, particularly those struggling with homelessness and low incomes, in the VA benefits process.

Legal Aid at Work ("LAAW") (formerly the Legal Aid Society – Employment Law Center), founded in 1916, is a non-profit public interest law firm whose mission is to protect, preserve, and advance the employment and education rights of individuals from traditionally under-represented communities. Through its Veterans and Military Families Project, LAAW assists service members, veterans and military families with a range of issues relating to benefits, discharge status and employer matters. LAAW regularly brings class actions in state and federal court on behalf of low-wage workers and students. LAAW's interest in preserving and enhancing class action procedures is longstanding.

The **Public Interest Law Project ("PILP")** is a California non-profit corporation providing advocacy support, technical assistance and training to local legal services offices throughout California on issues related to housing, government benefits, civil rights and community redevelopment. PILP is frequently called on to assist in class litigation directed at obtaining significant changes in governmental policies, laws and actions. The procedural framework the Court uses to determine whether class action or other aggregate action is appropriate will substantially affect the ability of the Court to ensure broad and effective enforcement of the laws pertaining to veterans claims.

The **Public Law Center ("PLC")** provides free legal services to low-income residents of Orange County. Annually, over 8,000 of the most vulnerable residents of the county, including immigrants, minorities, veterans, seniors, and children, receive services from PLC. PLC's work includes counseling, individual representation, community education and strategic policy advocacy and impact litigation to challenge societal

injustices, in the areas of domestic violence, human trafficking, guardianship, housing, health, bankruptcy, asylum, family law, consumer fraud, immigration, and discrimination. PLC's Operation Veterans Reentry Unit's mission is to empower veterans to live with dignity and ensuring their access to justice. This unit works on a variety of issues, including discharge upgrades and veterans benefits along with holistic services from the other PLC units providing assistance on issues involving homelessness, debt collection defense, identity theft, bankruptcy, student loans, auto fraud, predatory lending, domestic relations and immigration. In performing its work, PLC partners include a network of over 1400 volunteer private attorneys, law students and others in providing the highest quality services to our clients seeking the greatest possible impact for the community at large and have pursued class action cases where we sought to address issues we have seen repeatedly. Having available the ability to address repeated issues in the Court of Appeals for Veterans Claims is an important mechanism in potentially protecting many veterans.

The **Urban Justice Center ("UJC")** is an advocacy organization that serves low-income and indigent New Yorkers through a combination of direct legal services, systemic advocacy, community education, and political organizing. Its clients include claimants for veterans benefits, Social Security disability, and other public benefits. For those clients, legal representation is provided at all levels of the administrative appeals process, including reconsideration at field offices, administrative law judge hearings, the Appeals Council, and federal court. Clients are also advised and counseled when their cases are not taken for representation. Since its inception, UJC has served as class

counsel in numerous class action lawsuits related to disability benefits, food stamps, criminal justice, mental health, housing, immigration, and civil rights.

Each organization supporting this amicus brief appreciates and wishes to convey the utility of class actions in efficiently resolving common issues presented by large numbers of claimants.

INTRODUCTION AND SUMMARY OF ARGUMENT

On October 26, 2017, the Court invited interested amici to submit memoranda of law addressing a variety of questions regarding appropriate procedure for class/aggregate actions before the United States Court of Appeals for Veterans Claims. Court Order dated October 26, 2017 (per curiam) ("October 26 Order"). In this brief, Amici address Questions 1, 2, 6, and 7:

1. What framework should the Court use to determine whether class/aggregate action is warranted (for example, Federal Rule of Civil Procedure 23; an omnibus rule (*see, e.g.*, Office of the Special Masters of the U.S. Court of Federal Claims); or another framework) to reflect the unique nature of this appellate court?
2. Are there likely difficulties in managing the putative class, and, if so, should such difficulties be a factor that the Court considers in certifying a class?
6. If the Court decides to certify a class, should the Court direct any notice to the class members? In answering this question, please also address whether class members should have the right to opt out of the class and, if so, what notice should

be provided on that matter. Also, should the Court adopt an opt-in approach instead? *See* Fed. R. Civ. P. 23(c)(2).

7. How would a class action be superior to a precedential decision from this Court in fairly and efficiently adjudicating the due process issue raised by the petitioner? Does the type of relief the petitioner seeks from the Court play a role in determining whether the Court should issue a precedential decision or certify a class?

October 26 Order, p. 2 (footnote omitted).

It is the opinion of Amici that class actions are a superior method for adjudicating common issues shared by large numbers of claimants, as in the present case. Class actions also permit claimants to obtain injunctive relief to address structural issues that are frequently beyond the scope of what is available in an individual matter. Finally, Federal Rule of Civil Procedure 23 provides a relevant and useful framework for the Court to determine when class/aggregate action is warranted and how it can be effectively accomplished.

Amici demonstrate below how class actions can benefit the Court and the veterans it serves by providing specific examples of successful Social Security class actions that presented issues very similar to those encountered in the veterans' benefits context. Two of these cases hinged on the interpretation of certain Social Security Act provisions that have identically worded counterparts in the veterans' benefits law. In a third case, the question of notice formats – important for all benefit recipients – was litigated. There, the Social Security Administration was required to offer appropriate alternative formats

for Social Security and SSI notices to a class of approximately 3 million people, most of them over the age of 80. *Am. Council of the Blind v. Astrue*, No. C 05-04696 WHA, (N.D. Cal. 2008). These cases illustrate, in a practical way, how class actions will benefit both this Court and the veterans.

ARGUMENT

I. Class Actions Are Superior to Precedential Decisions Particularly Where Injunctive Relief and Systemic Remedies Are Sought (Question #7)

Unlike precedential decisions, class actions would allow for the resolution of common issues in one proceeding and would ensure consistent treatment of veterans. More importantly, class actions will facilitate the implementation and monitoring of broad systemic remedies that are beyond the limited scope of a single individual's claim.

a. Class Actions Provide Equitable Access to Justice by Permitting Efficient and Consistent Resolution of Substantially Similar Claims.

Class actions developed as a way for Article III courts to improve access to justice. The Supreme Court has described class actions as "an evolutionary response to the existence of injuries unremedied by the regulatory action of government." *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980). They allow individuals to gather together to seek answers to common questions where the cost or effort of individual litigation may overwhelm the potential remedy.

The Supreme Court has long recognized the importance of concerted action in providing legal redress for inequities that may be too time or resource-intensive to challenge through isolated individual claims. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*,

521 U.S. 591, 617 (1997) ("[T]he Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.") (internal quotation omitted). Class actions do this by allowing multiple plaintiffs to share the burdens of litigation, which is often key to obtaining redress. *See, e.g.*, *Duke v. Univ. of Tex. at El Paso*, 729 F.2d 994, 997 (5th Cir. 1984) (reversing judgment against a discrimination plaintiff to permit broad discovery in support of a class certification motion).

Veterans who appear before this Court to appeal adverse benefit determinations, like plaintiffs in Article III courts with small-value claims, face a common problem: the cost of litigation is high and the complexity of the legal system can deter them from pursuing their legal rights. Class actions will allow groups of veterans to share the cost, burdens, and benefits of litigation where their claims overlap. The value of collective benefit is fundamental to class actions that are governed by Rule 23, a framework which "stems from equity practice*." Amchem Prods., Inc.*, 521 U.S. at 613. As the Court of Appeals for the Fourth Circuit wrote in *Brown v. Nucor*, "Rule 23 provides wide discretion to district courts, in part, to promote the systemic class action virtues of efficiency and flexibility" with a goal of "simple justice." *Brown v. Nucor,* 785 F.3d 895, 921-22 (4th Cir. 2015). The same can be true for this Court.

Gathering common legal and factual questions in one class action also preserves judicial resources and promotes efficient resolution. *See, e.g. Hoffman-La Roche v. Sperling*, 493 U.S. 165, 170 (1989) ("The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged . . .

activity."); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982) ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.") (second alteration in original) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)); 1 Newberg on Class Actions § 1:9 (5th ed. 2017) (noting the efficacy of class actions where "courts are flooded with repetitive claims involving common issues").

Class actions also further the goal of ensuring consistency. Fielding a barrage of individual cases that raise the same arguments and defenses runs the risk of disparate rulings that treat similar plaintiffs differently and leave the government vulnerable to incompatible rulings. Class actions avoid this scenario by consolidating claims and permitting a court to issue a single ruling that is binding on all members of the class. This consolidation guarantees a court's consistency and maintains its integrity. *See* 1 Newberg on Class Actions § 1:9 ("[B]y having common legal . . . issues among numerous parties resolved in a single proceeding, the class suit ensures that the claims will be resolved similarly"). At the same time that the court serves this "fundamental aspect of justice," consistent rulings in class actions can provide the government with a predictable framework in which to conduct its public business.

b. Class Actions Allow for Relief to Correct Systemic Issues.

In addition to increasing efficiency and consistency, class actions also permit individuals to obtain systemic injunctive relief that is ordinarily unavailable in individual cases. Absent class certification, courts often refrain from granting relief that extends to

general policies and practices, and beyond addressing the specific harm suffered by an individual plaintiff. Class actions provide a vehicle for generally applicable and efficient class-wide remedies, correcting an administrative failure or enjoining an unlawful practice.

The Supreme Court has held that "the scope of injunctive relief is dictated by the extent of the violation established." *Califano*, 442 U.S. at 702; *see also Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) ("While district courts are not categorically prohibited from granting injunctive relief benefitting an entire class in an individual suit, such broad relief is rarely justified."); *Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996) (injunction can apply only to the named plaintiff until class is certified); *Zepeda v. U.S. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983) ("Without a properly certified class, a court cannot grant relief on a class-wide basis."); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 733 (5th Cir. 1977) (in ADEA case for individual termination, "nationwide or companywide injunction is appropriate only when the facts indicate a company policy or practice in violation of the statute"). Class actions are thus a uniquely necessary mechanism for addressing systemic problems.

The Secretary suggests that class actions are unnecessary because systemic relief is available in non-class cases, citing to three U.S. Supreme Court decisions. Secretary's Response to October 26, 2017 Order of the Court ("Secretary's Response"), pp. 53-54. In those cases, the high court addressed questions of *constitutional* interpretation but, notably, did *not* order relief beyond the individual plaintiffs. *See e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) ("We express no opinion as to

the form of relief which should be granted, this being a matter for the lower courts to determine."). The Secretary's position that a broad injunction is appropriate and available in an individual non-class case is inconsistent with the position elsewhere in its Response that a class action would be unfair because its outcome would bind absent class members. *See* Secretary's Response at 5-6. Class actions, which build in a panoply of safeguards to protect the rights of absent class members, are far superior to adjudicating broad relief in an individual case.

Finally, class actions permit the Court to ensure its decisions are in fact fully implemented, which is not the case with precedential decisions.

> [W]hen a precedential decision is issued by the Court, VA provides little transparency regarding how it is effecting our decisions. The Court is often left to wonder whether its decisions are actually applied quickly, correctly, and uniformly, which is especially troubling for a system wrought with delay and bureaucracy.

Rosinski v. Shulkin, No. 17-1117 (Vet. App. Jan. 26, 2018) (J. Greenberg, dissenting) (citations omitted).

Because class actions provide benefits and protections well beyond those of individual precedential decisions, this Court should establish a class action vehicle to aggregate claims challenging unlawful policies and practices. It is particularly important to support veterans' access to class actions and resolve class cases that can protect the rights and preserve the benefits of thousands of similarly situated beneficiaries.

II. Rule 23 Provides a Fully-Developed Model for Aggregating Claims Supported by a Significant Body of Case Law (Question #1)

Rule 23 provides an effective procedural framework for class actions in this Court. Since its adoption 80 years ago, Rule 23 has been repeatedly interpreted and refined to facilitate class actions in a wide variety of cases and in conformance with Due Process. In light of this history, there is no need for this Court to reinvent the wheel.

a. History and Evolution of Rule 23

The original Federal Rules of Civil Procedure, established in 1938, authorized class proceedings. Fed. R. Civ. P. 23 Advisory Committee Notes on 1937 Adoption. By 1966, the Advisory Committee concluded that the descriptive – and arguably vague – terms in Rule 23 had "proved obscure and uncertain," and "[t]he courts had considerable difficulty with these terms." Rules Advisory Committee's Note to Amended Rule 23, 39 F.R.D. 69, 98 (1966).

Lesson learned, the rule was completely redrafted and the "modern" Rule 23 was born. *Id.* at 94-98. In support of the revised rule, the Advisory Committee wrote:

> *The amended rule* describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Id. at 99. Importantly, the amended Rule differentiated among three circumstances in which class actions might be appropriate, each specified in Rule 23(b). Critical for this Court's deliberations, the Rule distinguished between actions primarily for injunctive and equitable relief [Rule 23(b)(2)] and those primarily for monetary relief [Rule 23(b)(3)].[1]

[1] Rule 23(b)(1) is used in rare circumstances (e.g. a limited fund) not presented here. *Ortiz .v Fibreboard*, 527 U.S. 815, 849 (1999).

Because these two distinct types of cases present different concerns, the revised Rule tailored notice and other requirements to address the unique nature of each.

Since 1966, the rule has been continually interpreted, tested and honed by courts and the Judicial Conference's Committee on Rules of Practice and Procedure ("Standing Committee"). Over 30,000 federal court decisions reference Rule 23, including over 100 references in U.S. Supreme Court decisions. That case law has explored a myriad of class action procedural and practical problems in a range of cases, providing clarity for future cases.

In addition, the Standing Committee is required to "carry on a continuous study of the operation and effect" of the Federal Rules of Civil Procedure, including Rule 23. 28 U.S.C. § 331 (2008). The Standing Committee's ongoing evaluation of the rule and proposed amendments is rigorous and incorporates feedback from every part of the legal community.[2] Amendments to Rule 23 often begin with suggestions from the legal committee to the Advisory Committee on Civil Rules, one of five subcommittees of the Standing Committee. The Civil Rules Advisory Committee performs an initial evaluation of suggestions for amendments and determines whether to move forward with a proposal. If it decides to advance a proposal, it seeks comments from the bench, bar, and general public. If a proposal does advance, comments are incorporated before the proposal is conveyed to the Standing Committee.

[2] James C. Duff, *Overview for the Bench, Bar, and Public*, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited Feb. 7, 2018).

The Standing Committee independently reviews the findings of the Advisory Committee and, if it is in agreement, forwards the proposal to the full Judicial Conference, which in turn recommends changes to the Supreme Court. The Supreme Court evaluates all proposals before approving them, and the Rules Enabling Act also gives Congress the opportunity to enact legislation to reject, modify, or defer pending rules before they are promulgated. In other words, the process is – and is intended to be – deliberative and thorough.

Since its adoption in 1937, Rule 23 has been amended six times – 1966, 1987 1998, 2003, 2007, and 2009. *See* Fed. R. Civ. P. 23 Advisory Committee Notes. Each of these amendments has been thoroughly vetted with an eye toward the evolution of case law, as well as feedback from the legal community. Three sets of amendments were substantive and designed to capture the advancements of case law in the rule itself. As described above, the 1966 amendments were a significant restructuring of the original rule after 30 years of operation. In 1998, Rule 23(f) was added, permitting interlocutory appeals from orders granting or denying class certification at the discretion of the Courts of Appeals. In 2003, the rule's provisions regarding the timing of class certification and notice were revised (Rule 23(c)), as were its provisions regarding class settlements (Rule 23(e)). Rule 23(g) and (h) were newly added in 2003, providing specific guidelines for the selection of class counsel and the evaluation of fee awards. The 2018 amendments, if approved and implemented, will contain refinements to the notice and settlement approval processes.

By adopting Rule 23 procedures, this Court gets the benefit of an extraordinary body of case law and studied procedural evolution. Just as important, in the future, the Court will have the benefit of this carefully considered expert analysis of proposals for changes to the rule, based on developments in the law and the experience of federal courts nationwide. A single court is simply not going to have the resources to replicate this process of deliberative study and refinement.

b. The Rule 23 Procedures Are Used Across a Wide Spectrum of Substantive Claims

Importantly for this Court's consideration, the provisions of Rule 23 address the issues that arise in class actions, irrespective of the substantive area of the law in which the case arises. "Rule 23 provides a one-size-fits-all formula for deciding the class-action question." *Shady Grove Orthopedic Assocs.,P.A. v. Allstate Ins. Co.,* 559 U.S. 393, 399 (2010). In other words, Rule 23 has been successfully applied to federal class actions in widely diverse fields, including securities, employment and housing discrimination, consumer fraud, ERISA, prisoner's rights, and education to name just a few. The rule provides courts with sufficient flexibility to accommodate different kinds of cases while still ensuring appropriate protection of due process rights.

c. Rule 23 Expressly Answers Many of the Court's Questions

Rule 23 provides procedural instructions for the key stages of a class action: certification, notice, settlement, and attorneys' fees. These instructions have been further

amplified by interpretative case law. The Court can find helpful answers to some of its questions in the language of the rule.[3]

Critical to this inquiry, though, is that Petitioners have proposed the adoption of class actions for injunctive relief type cases. Petitioners' Response at 26. As noted above, the rule addresses such cases in Rule 23(b)(2), and distinguishes such cases from claims for money damages addressed in Rule 23(b)(3). Because the two types of cases present different due process concerns, the rule proscribes different procedures for Rule 23(b)(2) and Rule 23(b)(3) cases.

1. <u>Individual Notice and Opt-Out Are Not Required (Question #6)</u>

This Court asked whether notice and opt-out should be directed to class members in the event a class is certified. Both of these questions were examined and addressed in the Advisory Committee's 2003 amendments to Rule 23 concerning injunctive relief cases.

Rule 23(c)(2) permits, but does not require, notice where an injunctive relief class is certified pursuant to Rule 23(b)(2). Moreover, a right to exclusion (opt-out) is not required because the class members share an undivided interest in a potential systemic remedy, e.g. prompt resolution of appeals. In other words, a decision to award or not to

[3] For example, Rule 23(g), added to the rule in 2003, addresses the appointment of class counsel and specifies the factors to be considered. (Question #3) The Petitioners and the Secretary appear to agree that Rule 23(g) is the appropriate procedure. *See* Brief for Petitioners ("Petitioners' Response"), pp. 27-28; Secretary's Response at 35-36.

award a classwide remedy will affect each class member equally whether or not he or she chooses to participate.[4]

Even without affirmative notice and the opportunity to opt-out, the rights of the class members are nonetheless protected because the Court, through the Rule 23(a) certification requirements, will have determined that there is a common question that ensures the interests of the class are cohesive and that there is adequate representation by both the named plaintiffs and counsel. The Court, which supervises the litigation at every stage, will also be responsible for evaluating and approving any proposed settlement that would bind class members. *See* Rule 23(h).

While, as noted, notice is not required, a court may nonetheless determine that notice of certification is desirable in a Rule 23(b)(2) case. Under Rule 23(c), the court retains discretion and flexibility with regard to the form of notice, keeping in mind that the costs of notice are ordinarily borne by the plaintiff. In amending Rule 23(c)(2) in 2003, the Advisory Committee wrote:

> The authority to direct notice to class members in a [Rule 23. . . (b)(2)] class action should be exercised with care. . . . There is no right to request exclusion from a . . . (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. . . .
>
> When the court does direct certification notice in a . . .(b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. Notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the

[4] For the same reason, an opt-in system is unnecessary. If the Court determines, as the result of a class action, that an unlawful practice must be abated or a systemic remedy must be implemented, the order would not be limited to the class members who affirmatively asked to be accorded procedures in compliance with the law.

> interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice.

Fed. R. Civ. P. 23 Advisory Committee Notes on 2003 Amendment. Rule 23 thus provides critical direction and rationale for the provision of notice for this Court.

2. <u>Manageability Should be Addressed as Part of the Rule 23(a)(2) Commonality Inquiry (Question #2)</u>

The Court correctly focuses attention on the practical side of a class action – how will it be managed. Again, Amici highlight here the differences between an injunctive relief class, subject to Rule 23(b)(2), and a damages class governed by Rule 23(b)(3).

Manageability involves an inquiry into how a class action will actually be tried. What are the specific legal issues and what kind of proof will be presented? Does there exist "macro" proof (e.g. written policies, statistical evidence, admissions of decision-makers) that will allow the case to be proven without requiring individualized testimony for each class member?

Rule 23 addresses these questions differently in Rule 23(b)(2) and Rule 23(b)(3) cases. "Manageability" is an explicit inquiry for a money damages case, part of the predominance analysis of Rule 23(b)(3). The Court must determine that questions of law or fact common to the class predominate over questions relevant only to individual class members. One of four factors in the predominance inquiry is "the likely difficulties in managing a class action." Rule 23(b)(3)(D).

In contrast, a Rule 23(b)(2) case does not include a manageability criteria. Instead, questions concerning the availability of common proof necessary to establish the

existence of a common question of law or fact form the Rule 23(a)(2) commonality inquiry and address whether an injunctive relief case is suitable for class treatment. *See Wal-Mart Stores v. Dukes,* 564 U.S. at 338, 349 (2011) (to satisfy Rule 23(a)(2) commonality, plaintiff must identify a common contention "capable of classwide resolution").

III. Social Security Systemic Cases Illustrate How Class Actions Would Benefit this Court and Veterans

The Social Security Administration (SSA) is responsible for administering the Old Age, Survivors and Disability Insurance (OASDI) (commonly known as Social Security) and the Supplemental Security Income (SSI) programs. Together these two programs provide cash benefits to 67 million people pursuant to statutory standards for eligibility and amount of benefits. Some of the issues involved in administering the program are very similar to those faced by the Department of Veterans Affairs, such as the need to determine disability status or financial eligibility or employment history. In some cases, as described below, there are legal issues that are identical.

Class actions have been used successfully in Social Security Administration (SSA) cases presenting a variety of systemic issues. *See, e.g., Clark v. Astrue,* 602 F.3d 140 (2d Cir. 2010) (challenging SSA practice of suspending Old-Age, Survivor and Disability Insurance and SSI benefits based solely on outstanding warrants for probation or parole violations); *Am. Council of the Blind v. Astrue,* No. C 05-04696 WHA, 2008 WL 1858928 (N.D. Cal. Apr. 23, 2008) (challenging SSA's failure to provide information in

an accessible format to individuals with visual impairments). Some examples, litigated by Justice in Aging over the last decade, illustrate the point.

Martinez v. Astrue

In 1996, Congress passed legislation to deny or suspend SSI benefits to individuals who were "fleeing to avoid prosecution, or custody or confinement after conviction" of a felony. 42 U.S.C. § 1382(e)(4)(A)(i). In 1999, Congress included the same provision in the Special Veterans Benefits (SVB) program administered by SSA for certain World War II veterans residing outside the U.S. who served under U.S. command. 42 U.S.C. § 1004(a)(2). In 2004, Congress extended this provision to OASDI benefits. 42 U.S.C. § 402(x)(1)(A)(iv). In 1999, Congress enacted a parallel provision for a variety of programs administered by the Department of Veterans Affairs. 38 U.S.C. § 5313B(b)(1)(A).

To implement these provisions, SSA established a data matching program with the National Crime Information Center (NCIC) as well as various state databases and adopted a policy of suspending benefits on the mere existence of a felony arrest warrant. The SSA policy was so simple to implement that the Department of Veterans Affairs decided to adopt it for veterans' benefits. The only differences were that the statute applied to a much wider array of veterans' benefits, including health care and education loans as well as cash benefits, and the statute authorized suspension of benefits for the veteran's dependents as well as the veteran.

A number of challenges were brought to SSA's policy and in each case the policy was determined to be contrary to the plain language of the statute. *See Fowlkes v.*

Adamec, 432 F.3d 90, 96-97 (2nd Cir. 2005).[5] Nevertheless, SSA made no change to its policy anywhere outside the Second Circuit.

In October 2008, *Martinez v. Astrue*, No. C 08-4735 CW (N.D. Cal.), was filed on behalf of a proposed nationwide class of approximately 200,000 people whose SSI, SVB or OASDI benefits had been suspended or denied for allegedly fleeing to avoid prosecution for a felony or fleeing to avoid confinement after conviction of a felony.

The case settled less than a year later. The settlement provided for a change in policy going forward beginning April 1, 2009. Under the new policy, no SSI, OASDI or SVB benefits would be suspended or denied for fleeing on the basis of a felony arrest warrant with exceptions amounting to less than 1% of outstanding warrants. It also provided full retroactive relief for those whose benefits were suspended or denied on or after January 1, 2007 or who had an appeal pending on that date assuming they met other eligibility requirements for benefits. It also required SSA to send a notice to all other class members whose benefits were suspended or denied between January 1, 2000 and December 31, 2006 advising them of the change in policy and giving them the opportunity to file a new application with benefits back to April 1, 2009 provided they meet other eligibility requirements.

Clark v. Astrue

[5] *See also Garnes v. Barnhart*, 352 F. Supp. 2d 1059 (N.D. Cal. 2004); *Blakely v. Commissioner*, 330 F. Supp. 2d 910 (W.D. Mich. 2004); *Hull v. Barnhart*, 336 F. Supp. 2d 1113 (D. Or. 2004).

The statutes at issue in *Martinez* each contained a companion provision which made someone ineligible for benefits if the person is "violating a condition of probation or parole." 42 U.S.C. § 1382(e)(4)(A)(ii); 42 U.S.C. §1004(a)(3); 42 U.S.C. § 402(x)(1)(A)(v). Once again, SSA developed a policy of suspending or denying benefits whenever a data matching program determined a person had an outstanding arrest warrant, in this case for an alleged violation of probation or parole, even if no determination of a violation had been made. *Clark v. Astrue*, 602 F.3d 140 (2d Cir. 2010). Once again, the Department of Veterans Affairs adopted the SSA policy. 38 U.S.C. § 5313B(b)(1)(B).

In *Clark*, which was filed on behalf of a proposed class of people whose SSI or OASDI benefits had been suspended or denied on the basis of a warrant for an alleged probation or parole violation, the Court of Appeals reversed a district court award of summary judgment to the defendant, ruling that the SSA policy was "inconsistent with the plain meaning" of the statute and remanded to the district court for relief. 602 F.3d at 152. On remand, the district court certified a nationwide class under Rule 23(b)(2) of people who had SSI or OASDI benefits suspended or discontinued solely on the basis of a probation or parole warrant on or after October 24, 2006 or who had an appeal pending on that date. *Clark v. Astrue*, 274 F.R.D. 462, 466 (S.D.N.Y. 2011). The court issued a final order in 2012 enjoining the defendant from suspending or denying SSI or OASDI benefits in the future solely on the basis of a warrant for an alleged violation of probation or parole and providing retroactive benefits to all members of the plaintiff class.

How Do Results in *Martinez* & *Clark* Compare With Results for U.S Veterans?

With no class action mechanism available, *see Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1016 (9th Cir. 2012), U.S. veterans did not fare nearly as well in challenging the same policies. In 2012, a group of veterans' advocates from across the country launched an effort to seek a change in the policies of the Department of Veterans Affairs with respect to arrest warrants. In June 2014, more than five years after the Social Security Administration stopped the practice of suspending or denying benefits for "fleeing," solely on the basis of an arrest warrant, the Veterans Benefits Administration issued VBA Letter 20-14-09, which essentially adopted the *Martinez* standard prospectively. VBA Letter 20-14-09 (June 23, 2014) (Attachment A hereto). While that was a significant positive development, the VBA Letter did not provide any form of retroactive relief, nor did it provide for notice to affected veterans. Furthermore, there was no change in the VBA policy for probation and parole violation warrants even though the Second Circuit ruled unanimously, four years earlier, that an almost identical policy was unlawful. If Rule 23 or something similar could be applied in this Court, justice long denied could be expeditiously provided to U.S. military veterans on this issue with a minimal burden on the court's resources.

Some further examples:

Hart v. Colvin

Hart v. Colvin, No. 15-cv-00623-JST (N.D. Cal.), was a challenge to disability determinations for the Social Security Disability Insurance and SSI Disability programs

that continued to rely on consultative examination reports by a physician who had been disqualified from performing these exams because of serious uncorrected deficiencies in the quality of his exams. The relief sought was a readjudication of all adverse disability determinations in which a report by this doctor was in the record. Five months after the complaint was filed, the government's motion to dismiss was denied. *Hart v. Colvin*, No. 15–cv–00623–JST, 2015 WL 4396259, at *1 (July 17, 2015). The following month the case was referred to a magistrate judge for settlement discussions. In the meantime, in October 2015, a plaintiff class of over 7,000 was certified under Rule 23(b)(2) consisting of persons who were examined by this doctor over a seven-year period and had their disability benefits terminated or who were denied disability benefits for all or part of the period for which they had applied. *Hart v. Colvin*, 310 F.R.D. 427, 429 (N.D. Cal. 2015).

A settlement was reached and a motion for preliminary approval was filed in September 2016. Although no notice is required for a Rule 23(b)(2) class, the motion included a provision for notice by publication to be paid for by SSA and for a notice to be sent by Justice in Aging to legal services organizations in the affected area of California. The settlement was preliminarily approved by the district court in November 2016. *Hart v. Colvin*, No. 15-CV-00623-JST, 2016 WL 6611002, at *1 (N.D. Cal. Nov. 9, 2016). A final approval order was entered in April 2017, and implementation is currently underway.

The result for approximately half the class members with more recent claims is an opportunity for a readjudication of the disability determination without considering the report of the disqualified doctor and a potential for ongoing disability benefits if

determined to be disabled for the previous period. Those with older claims receive more limited relief and only if they file a new application for benefits and are determined to currently be disabled.

Burlingame v. Colvin

Burlingame v. Colvin, No. 3:14-cv-00473-HZ (D. Or.), is an excellent example of how a class action can expeditiously provide justice for a large number of people with minimal use of court resources. *Burlingame* was an action brought on behalf of approximately 1,000 people in the Portland, Oregon area who had been determined to be unable to manage their own funds and who received Social Security and/or SSI benefits through an organizational representative payee, which is akin to a VA fiduciary. Many of these people were homeless and a high percentage were receiving disability benefits on the basis of a mental illness diagnosis.

In February 2014, SSA appropriately decertified the organizational payee because of misuse of funds. In March, SSA sent notices to the individuals for whom they had contact information to tell them they would not receive benefits for April and that they needed to find another payee even though the statute and regulations require benefit continuation either by payment to an alternative payee or direct payment to the individual. When efforts to resolve the issue with SSA proved fruitless, a class action was filed on March 24, 2014. Two days later, the court held an emergency hearing and issued a temporary restraining order prohibiting the suspension of benefits pending a hearing on a preliminary injunction. That was the last contested issue the court was called upon to decide.

Upon issuance of the temporary restraining order, SSA convened a team of staff from SSA Headquarters and from the Seattle Regional Office and managed to transfer the majority of class members to a new payee in time for them to receive their April benefits through the new payee and arranged for payments to be available at local SSA offices for all other class members. In May, when all but 21 class members had been located and less than two months after the complaint was filed, plaintiffs filed an unopposed motion for voluntary dismissal.

While a plaintiff class was never certified in this case, it was the filing of a class action that brought the issue to the attention of top agency officials and enabled plaintiffs to obtain all the relief they sought. It is inconceivable that these results could have been obtained without the availability of a class action.[6]

CONCLUSION

Class actions under Rule 23 provide for equitable access to justice, efficient resolution, and appropriate relief. This time-tested framework is a thorough and reliable model and resource for this Court in the present case and in developing an overall mechanism for collective action.

Respectfully submitted,

/s/ Lindsay Nako
LINDSAY NAKO
IMPACT FUND

[6] *See also Scrivens v. Barnhart*, No. 2:01-CV-159 (D. Vt.), which was an action filed on behalf of a class of disabled adult children resulting in a change to SSA's prior policy of counting child support arrears payments to a parent as income to the adult child. The relief sought was obtained without the court having to decide a single contested motion.

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February 8, 2018

Attachment A

DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

June 23, 2014

VBA Letter 20-14-09

Director (00)

All VBA Regional Offices and Centers

SUBJ: New Fugitive Felon Policy and Procedures

Purpose

This letter establishes Veterans Benefits Administration (VBA) policy on fugitive felons and updates the procedures for identifying fugitive felons and adjusting their Department of Veterans Affairs (VA) benefits.

New Fugitive Felon Policy

Section 5313B of title 38, United States Code (38 U.S.C. 5313B), precludes VBA from providing compensation, pension, dependency and indemnity compensation (DIC), insurance, education, vocational rehabilitation, and home loan guaranty benefits to beneficiaries, their dependents, or survivors who are fugitive felons. Section 5313B defines a fugitive felon as a person who is:

- Fleeing to avoid prosecution, or custody or confinement after conviction, for an offense, or an attempt to commit an offense, which is a felony under the laws of the place from which the person flees; or

- Violating a condition of probation or parole imposed for commission of a felony under Federal or State law.

Previously, VBA presumed that a beneficiary was a fugitive felon if he or she was the subject of any felony arrest warrant. See M21-1Manual Rewrite (MR) Part X, Chapter 16, Topic 1, Block c.

Effective immediately, VBA no longer presumes that any valid outstanding felony arrest warrant establishes a beneficiary's fugitive felon status under 38 U.S.C. § 5313B. As outlined below, VA Office of Inspector General (OIG) will send the Form FFP-3 (VA Investigative Summary Form) to VA Central Office (VACO) for all business lines. As required by section 5313B, VBA

will request the information only for beneficiaries who have a felony arrest warrant with a National Crime Information Center (NCIC) offense code indicating flight or a probation or parole violation. These codes are:

4901 – Escape
4902 – Flight to avoid prosecution
4999 – Flight-escape
5011 – Parole violation
5012 – Probation violation
8101 – Juvenile offender abscond while on parole
8102 – Juvenile offender abscond while on probation

When OIG notifies VBA that a beneficiary has a felony warrant with an offense code indicating flight or a probation or parole violation, VBA will notify the beneficiary of the warrant and VBA's proposed termination of benefits. VBA will afford the beneficiary 60 days to respond with evidence indicating that the warrant was entered in error, pertains to a different person, or was vacated by the issuing court. VBA will determine whether the beneficiary is or was a fugitive felon based on all of the evidence and facts found. If VBA determines that the beneficiary is or was a fugitive felon, it will create an overpayment based upon facts found.

As discussed above, VBA will discontinue benefits based on fugitive felon status only if:

- A judge issued a felony arrest warrant with a NCIC offense code indicating flight or a probation or parole violation,

- VA provided the beneficiary notice regarding the reason for the warrant and an opportunity to present evidence, such as an acknowledgement of the validity of the warrant or failure to respond to the due process notification, or that he or she did not flee from justice or did not violate any condition of probation or parole, and

- VA determines, based upon the warrant and evidence submitted by the beneficiary (if any), that the beneficiary was fleeing from justice or violated a condition of probation or parole. Benefits will be terminated for Veterans while they are fugitive felons and dependents of Veterans while the Veteran is a fugitive felon.

Responsibilities

In order to comply with section 5313B, VBA, through its Compensation Service, will continue to work with OIG as described above and according to the following responsibilities.

OIG Responsibilities:

- Match lists of individuals who are the subject of felony warrants with NCIC offense codes 4901, 4902, 4999, 5011, 5012, 8101, and 8102,

- Investigate matched records to determine whether the individual who is the subject of the warrant is the same as the VA beneficiary,

- Send electronic records regarding confirmed matches for beneficiaries in the benefit programs administered by VBA on Form FFP-3 (VA Investigative Summary Form) to VBA (Compensation Service), and

- Provide VBA (Compensation Service) with the advice, assistance, and investigative resources necessary to determine the legal status of any alleged fugitive felon.

VBA Responsibilities:

- Provide due process regarding proposed benefit adjustments to beneficiaries who are the subject of an OIG referral (FFP-3),

- Make a determination regarding whether it is more likely than not that the beneficiary fled from justice or violated a condition of probation or parole based upon the warrant, evidence submitted by the beneficiary, and development of any other evidence,

- Send the beneficiary a post-determination notice clearly stating the decision, outlining the evidence received and reviewed, and providing all reasons and bases for the decision rendered,

- Terminate payment of benefits based on the facts found,

- Resume benefits based upon a VBA determination that the beneficiary is no longer a fugitive felon. Establish an effective date for restoring benefits retroactively and resuming benefits based upon facts found, and

- Draft a formal notice of the decision and forward it to the beneficiary.

Procedures

The procedures prescribed below for the compensation, pension, and DIC programs are generally applicable to all VBA benefit programs. To the extent that any business line requires separate procedures to properly implement VBA's fugitive felon policy, such as those applicable to controlling or processing fugitive felon matters in program-specific information technology systems, those procedures are prescribed below under separate headings.

Compensation, Pension, and DIC

Use the procedures outlined below to determine whether VA must discontinue payment to a beneficiary who is the subject of a felony warrant.

<table>
<tr><th>Step</th><th colspan="2">Action</th></tr>
<tr><td>1</td><td colspan="2">Compensation Service receives the fugitive felon match from OIG and distributes non-compensation matches to the Office of Economic Opportunity (20E) and the Office of Field Operations (20F) for further distribution to business lines and field stations.</td></tr>
<tr><td>2</td><td colspan="2">Upon receipt of the FFP-3 forms from VACO, the field station establishes an EP 290 to control the process with the flash labeled “Fugitive Felon” located in SHARE. The date of claim for EP 290 is the date of receipt of the FFP-3.</td></tr>
<tr><td rowspan="4">3</td><td colspan="2">Due Process: Upon receipt of the FFP-3, the field station validates the information received before sending a notice of proposed adverse action.</td></tr>
<tr><td>If…</td><td>Then…</td></tr>
<tr><td>• The information matches the beneficiary’s VA record (name, birth date, and Social Security number)</td><td>• No additional information is needed.
• Proceed to step 4,</td></tr>
<tr><td>• The information on the FFP-3 is inconsistent with the VA record</td><td>• Field station will email the pertinent information and details to VAVBAWAS/CO/212A mailbox (212A.VBACO@va.gov).

• Inquirers should receive a response from the mailbox within 5 business days. Do not take action until Compensation Service responds with instructions on the required action.</td></tr>
<tr><td>• A source other than OIG submits documents that purportedly establish that a fugitive felon warrant exists</td><td>• Forward the information to the RO/PMC fugitive felon coordinator and cc the VAVBAWAS/CO/212A mailbox (212A.VBACO@va.gov).</td></tr>
</table>

<table>
<tr><td></td><td></td><td>• Document the receipt of any information and/or referral received in person or by telephone on VA Form 27-0820, Report of General Information.

• Do not take action until Compensation Service responds with instructions on the required action.</td></tr>
<tr><td>4</td><td colspan="2">Due Process: If the evidence indicates that the beneficiary may be a fugitive felon, afford due process as required by 38 C.F.R. § 3.103:

• Send a pre-determination letter to the beneficiary notifying him/her of the warrant and the proposed adverse action (See Enclosure 1).
• PCLR the EP 290 when releasing the pre-determination letter. Establish an EP 600 to control the response period. The date of claim for EP 600 is the date of the notice.

Companion EP for potential overpayments

• EP 690 is used to help monitor timeliness in completing action on pending issues with potential overpayments. The date of claim (DOC) for EP 690 is the date of the source document that generates the proposed adverse action. EP 690 must remain pending with the controlling EP until all actions are completed.
• The EP 690 is cleared when the final action for the EP 600 has been taken.</td></tr>
<tr><td>5</td><td colspan="2">Final Determination: After receiving a response from the beneficiary, or waiting 60 days, whichever is earlier, determine whether the beneficiary is a fugitive felon by reviewing the evidence submitted in response to our notice.</td></tr>
<tr><td></td><td>If…</td><td>Then…</td></tr>
<tr><td></td><td>• The beneficiary or the court that issued the warrant submits documentation that is inconsistent or contradictory with the FFP-3</td><td>• Review all evidence available and determine whether or not the beneficiary should be designated as a fugitive felon.

• Follow the guidance in the below two blocks for further procedures depending on whether the beneficiary is found to be a</td></tr>
</table>

		fugitive felon.
	• The beneficiary acknowledges the validity of the warrant, **or** • Does not respond to the due process notice	• Conclude that the beneficiary has fled from justice or violated a condition of probation or parole and, thus, is a fugitive felon. • Terminate the beneficiary's award based on the facts found under the EP 600. • Follow the procedures in M21-1MR, X, 16.2.i to discontinue payments. Send a notice of adverse action (Enclosure 2) to the beneficiary.
	The beneficiary submits one of the following: • A copy of a court order that clears or vacates the warrant within 30 days of issuance; • Evidence that a court specifically determined the warrant void from its inception because of mistaken identity or a defect in the warrant; • A certified copy of a court order that finds the recall is effective from a specific date that is on or before the date of the warrant; • A certified copy of a court order that states or uses the terminology "nunc pro tunc," which means that the court order applies retroactively to correct an earlier court order; **or** • a police report, statement from the Social Security Administration, other government agencies, a bank, or other reporting agency that supports a claim of identity theft	• Conclude that the beneficiary is not a fugitive felon. • Clear the EP 600. • Annotate the original documentation. • Send the beneficiary a letter confirming and continuing payments (Enclosure 3).
6	Follow the guidelines in M21-1MR, Part X, 16.2.e, f, and g if a beneficiary later claims to not be a fugitive felon.	

Please note:

1) VBA will update all applicable manual provisions to reflect this updated guidance.

For Enclosures 1, 2, and 3, until these documents are available in VBMS, field stations will use legacy systems (e.g., MAP-D) to develop these documents.

VBA will also update Modern Awards Processing-Development (MAP-D), Personal Computer Generated Letter (PCGL), and the Veterans Benefits Management System (VBMS) with the enclosed letters. For Enclosures 1, 2 and 3, claims processors should insert the text of the enclosed letter templates in MAP-D or PCGL as appropriate. Once these letters are completed, the enclosures will be uploaded into VBMS.

2) If the fugitive felon referral form included an FFP-4, VA Feedback Form, complete the FFP-4 and send it to the VAVBAWAS/CO/212A mailbox (212A.VBACO@va.gov). The FFP-3 form should remain in the claims file.

Insurance

When Insurance Service receives the fugitive felon matches as defined earlier in this document, Insurance Service will notify the insured of the warrant and Insurance Service's proposed termination of benefits. Insurance Service will afford insureds 60 days to respond with evidence indicating that the warrant was entered in error.

Following an insured's response, or expiration of the 60-day period for response, Insurance Service's Program Administration and Oversight Staff will determine whether the insured is or was a fugitive felon based on all the evidence and facts found.

If Insurance Service determines that the insured is a fugitive felon, Insurance Service will terminate all current and future insurance actions and send a final notification letter of fact. The Insurance Information Technology systems will be updated to limit access to insured's records. Access to these records is limited to select employees of Insurance Service's Program Administration and Oversight Staff and Business System Support Staff.

If Insurance Service determines that the insured is not a fugitive felon, Insurance will retroactively adjust any payments due as of the specified period and notify the insured when the warrant is cleared based upon facts found.

Education

Regional Processing Offices (RPOs) should continue to follow current policies and procedures as outlined in Circular 22-03-01 *"Fugitive Felon" Provisions of PL 107-103,* August 27, 2003, and all subsequent advisories except to the extent that previous guidance conflicts with VBA's new

policy, which no longer presumes that any valid outstanding felony arrest warrant establishes a Veteran's or beneficiary's fugitive felon status under 38 U.S.C. § 5313B. As such, the RPOs must provide the Veteran or beneficiary an opportunity to present evidence that he or she did not flee from justice, and the RPO must determine -- based upon the warrant, evidence submitted by the Veteran or beneficiary, or any other evidence gathered through development -- that it is more likely than not that the Veteran or beneficiary was fleeing from justice or violated a condition of probation or parole.

If there are additional questions, please contact the Policy and Regulations Development Team at VAVBAWAS/CO/225C.

Vocational Rehabilitation and Employment

When Vocational Rehabilitation and Employment (VR&E) Service receives notification from 20E that a Veteran has a felony warrant with an offense code indicating flight or a probation or parole violation, VR&E Service notifies the VR&E Officer (VR&EO) that the Veteran may be an assigned case on his or her workload. The VR&EO must review the Veteran's record to determine if he/she received benefits during the time period in question, determine whether the Veteran is a fugitive felon, and adjust benefits accordingly. A Veteran who is eligible for VR&E benefits may not receive benefits for any period during which he/she is a fugitive felon. A Veteran's benefits must be adjusted if he or she was receiving payments as authorized under a plan of services during the time in which he or she was a fugitive felon. Beneficiaries (e.g., children, spouses) of Veterans who are fugitive felons may not receive any benefits while the Veteran is in a fugitive felon status.

Due process must be provided for 60 days prior to taking action in accordance with this letter and Public Law (PL) 107-103, Veterans Education and Benefits Expansion Act of 2001, if benefits are adjusted resulting in the termination or suspension of payments. Subsequent to the 60-day due process period, the Vocational Rehabilitation Counselor (VRC) must adjust the Veteran's award if he/she received chapter 31 subsistence allowance during the period that the Veteran was a fugitive felon. However, a Veteran's request for a hearing causes the VRC to defer adjustment action. The VRC must terminate a Veteran's subsistence allowance while the Veteran is in fugitive felon status, and send him/her a letter notifying the Veteran that benefits have been terminated, if the Veteran has not requested a hearing. December 27, 2001, the effective date of PL 107-103, is the earliest date that subsistence allowance can be terminated.

Once the VRC confirms the Veteran is no longer considered a fugitive felon, the VRC will restore VR&E benefits and/or adjust retroactively any payments due as of the specified period and notify the VR&E participant when the warrant is cleared based upon facts found. Refer to VR&E Procedures Manual, M28R.V.D.3, *Incarcerated and Fugitive Felon Veterans*, for additional information.

Claims for Restoration of Benefits

Prior to release of this VBA letter, VBA presumed that a beneficiary was a fugitive felon if he or she was the subject of any felony arrest warrant. In any claim for restoration of benefits discontinued under the presumption, any new and material evidence of non-flight, including lay testimony, provided by a beneficiary whose award was terminated under previous procedures, will be accepted as sufficient to support reopening a claim for restoration of benefits. In such reopened claims, do not apply the presumption of flight, but maintain payments in discontinued status only if evidence establishes that the beneficiary is fleeing to avoid prosecution, custody, or confinement or is violating a condition of parole for a felony. Otherwise, payments may be resumed based on the policy set forth in this letter.

Effective Date for Restoration Claims

The effective date of restoration of benefits under this policy shall be set in accordance with 38 CFR § 3.400(q), *New and material evidence (§3.156) other than service department records*.

Restoration based on new and material evidence received within the appeal period or prior to appellate decision affirming previous termination of benefits (if appealed): as though the former decision had not been rendered. This typically means the benefits are restored effective the date they were previously terminated.

Restoration based on new and material evidence received after final termination: date of receipt of new claim or date entitlement arose, whichever is later.

QUESTIONS

General questions concerning this policy should be directed to VAVBAWAS/CO/212A. Questions regarding Service-specific procedures should be addressed directly to the affected Service.

/s/

Allison A. Hickey
Under Secretary for Benefits

Enclosures

Enclosure 1 – Pre-determination Letter
Enclosure 2 – Post-determination Letter – Notice of Adverse Action
Enclosure 3 – Post-Determination Letter: Confirming and Continuing Payments

PROOF OF SERVICE

I hereby certify that on this 8th day of February, 2018, I filed the foregoing:

Brief of Amici Curiae Justice in Aging, Impact Fund, Alameda County Homeless Action Center, Disability Rights Education & Defense Fund, Homeless Advocacy Project, Inner City Law Center, Legal Aid At Work, Public Interest Law Project, Public Law Center, and Urban Justice Center in Response to the Court's Request for Participation of Amici Dated October 26, 2017

with the Clerk of the United States Court of Appeals for the Veterans Claims via the CM/ECF system, which will generate a Notice of Docket Activity that constitutes notice and service to all registered CM/ECF users.

/s/ Lindsay Nako
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February 8, 2018