NO. 19-2367

In the United States Court of Appeals for the Federal Circuit

EUGENIA MOTE

Claimant-Appellant,

v.

ROBERT WILKIE, Secretary of Veterans Affairs

Respondent-Appellee.

On Appeal from the United States Court of Appeals for Veterans Claims (No. 16-2506)
(Hon. Schoelen, Greenberg, and Meredith, JJ.)

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March 19, 2020

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, undersigned counsel for appellant certifies the following:

1. The full name of the party represented by me is Eugenia Mote.

2. The name of the real party in interest represented: N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the party or amicus curiae represented: N/A

4. The name of all law firms and the partners or associates that appeared for the party now represented by me before the United States Court of Appeals for Veterans Claims (and who have not or will not enter an appearance in this case) is:

   Of Williams & Connolly LLP: Thomas G. Hentoff, Melinda K. Johnson.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal: None

March 19, 2020

/s/ Charles L. McCloud
Charles L. McCloud

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INTRODUCTION

Mrs. Mote is a veteran's widow who has suffered through years of delay in the processing and adjudication of her late husband's disability benefit appeal. She endures delays that are pervasive, harmful, and real. The Secretary concedes the failings within the system he oversees, describing it as "overburdened, complex, and non-linear." Br. 42. All quite accurate. But the rest of the Secretary's contentions are not.

The Secretary has attempted to avoid judicial scrutiny throughout the history of Mrs. Mote's case and those of her related petitioners. The tactic involves taking *some* action and declaring the case moot. It may be tempting to chalk up the BVA's sudden activity toward Mrs. Mote and others to luck or happenstance. But the more plausible explanation is that the Secretary rushed through a remand decision in Mrs. Mote's case to avoid a long-overdue reckoning.

As legendary basketball coach John Wooden keenly observed, "Never mistake activity for achievement." Those words best capture why Mrs. Mote's case is *not* moot: The BVA's order remanding Mrs. Mote's claim for further factual development is not the "reasoned decision" called for in her petition. And in any event, this Court already has

recognized that the Secretary's tactic of attempting to moot challenges to VA delays brings cases like Mrs. Mote's within the exception to the regular mootness rules for cases capable of repetition but evading review. If not through Mrs. Mote, when will this Court have the chance to exercise Congress's statutory mandate to remedy "unreasonable delay" in an individual case? There may be class actions percolating below, but they will not help Mrs. Mote, an elderly widow of a Vietnam Veteran, who deserves an answer to her plea *now*.

Regarding Mrs. Mote's mandamus claim, the Secretary concedes that the CAVC did not analyze this Court's *Martin* factors, but asserts it was sufficient to simply "acknowledge" them. This turns *Martin* on its head by denying this Court the reasoning necessary to evaluate whether the CAVC followed this Court's edict that the CAVC must apply *Martin* faithfully and carefully.

According to the Secretary, Mrs. Mote's mere *request* for a hearing justified denying her Petition. Stating that position reveals its perversity: Mrs. Mote surrendered her right to a timely adjudication when she had the temerity to exercise her due process rights. The Secretary's argument also ignores the realities of the current delays in

the system. Veterans regularly wait years before receiving a decision back from the Board, even after the Board grants a hearing.

The Secretary's evidence-free assertions notwithstanding, Congress has not fixed this problem through "expedited" processing of remand claims or a "streamlined" appeal process. The failure of the former and the inapplicability of the latter to Mrs. Mote's current claim (assuming it is even working) only underscores the need for granting Mrs. Mote relief beyond obtaining a Board hearing, including the CAVC's continued oversight through progress reports every 30 days until Mrs. Mote actually receives a final decision.

Mrs. Mote's request for mandamus is not about relying solely on "average statistics," as the Secretary contends. Nor is Mrs. Mote asking the Court to rewrite the law or the VA's procedures and policies (however much in need of rewriting they are). She simply asks for release from the delays she has experienced and is still experiencing. That relief falls squarely and uniquely within the province of a court, and there is no obstacle to granting it.

On Mrs. Mote's constitutional challenge, the Secretary has almost nothing to say. The Secretary admits the strength of Mrs. Mote's interest

on one side of the scale and the government's lack of interest in preserving the status quo on the other. And the Secretary's own statistics reveal what Mrs. Mote faces: The risk of erroneous deprivation is high, as it is more likely than not that the CAVC will overturn a benefits denial.

Mr. Mote answered the call to serve his country. He made no excuses. He blamed no one. And he survived that mission. Yet he died under the weight of an appeals system that took away his statutory and constitutional rights. His elderly widow may face the same fate unless this Court intervenes. Mrs. Mote deserves more than excuses and blame. She respectfully submits that enough is enough. The Court should reverse the CAVC's order and hold that the delays suffered by Mrs. Mote violate her rights.

ARGUMENT

I. This Appeal Is Not Moot

The mootness doctrine exists to ensure that courts properly exercise jurisdiction by resolving only active cases or controversies. The Board's remand of Mrs. Mote's appeal to a VA regional office for further factual development did not moot her case. To the contrary, the remand order

exacerbates Mrs. Mote's plight instead of solving it. Mrs. Mote still has not received the relief she requested in her mandamus petition: a reasoned decision on her benefits appeal. Mrs. Mote thus remains in need of this Court's intervention notwithstanding her seven years of fighting for a true resolution of her late husband's disability benefits appeal. And even if this Court finds that the remand order constitutes a reasoned decision, it can still resolve this mandamus appeal because Mrs. Mote's claim is capable of repetition yet evading review—an established exception to the mootness doctrine. Either way, the Secretary certainly has not carried his "heavy" burden to show it is "absolutely clear" the delays Mrs. Mote has experienced will not recur. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 66–67 (1987) (quoting *United States v. Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)).

A. Mrs. Mote Has Not Received Her Requested Relief

The Board's order remanding Mrs. Mote's appeal for further factual development did not give her the relief she seeks. In her amended mandamus petition below, Mrs. Mote requested more than simply *any* decision by the Board. She asked for a *reasoned* decision. Appx0068 ("Petitioner prays that the Court . . . . order the Secretary to issue a

reasoned decision on Petitioner's claim within 45 days of the Court's order."). And she requested that the Secretary provide the CAVC a progress report every 30 days to permit the CAVC to ensure the decision was, in fact, reasoned. *Id.* None of that happened.

Nevertheless, the Secretary makes a technical argument that, because the Board gave Mrs. Mote *a* decision—months after the CAVC issued its decision and left her without relief—her case is moot. Br. 12. Not so. Mrs. Mote's request for a "reasoned" decision did not seek a mere formality; it called for the substance necessary to resolve her disability benefits appeal. A Board remand is not even of sufficient moment to qualify as a "decision" for review by the CAVC—something the Secretary acknowledges but attempts to explain away in a footnote. Br. 15, n.5 (conceding that "[f]or purposes of Veterans Court review, a board remand does not qualify as a 'decision'"); *Kirkpatrick v. Nicholson*, 417 F.3d 1361, 1364 (Fed. Cir. 2005) ("Our case law and section 7104(d)(2) define a Board decision as including an order granting appropriate relief or denying relief. The Board's remand in this case contains no order granting or denying relief."); *cf. Former Empls of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1366 (Fed. Cir. 2003) ("We do not hold that every

remand constitutes a grant of relief on the merits."). This remand—containing no ruling on the merits of Mrs. Mote's claim and no deadline for final resolution of that claim—certainly does not qualify as a "*reasoned* decision" that would moot this appeal.

Furthermore, the remand did nothing that affected the additional relief Mrs. Mote requested in her petition. The Secretary denigrates that relief as "ancillary" or "abstracted from any concrete issue." Br. 13 (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)). The opposite is true: The additional measures were critical to compelling the Secretary to issue the reasoned decision Mrs. Mote needs. The course of this case proves the point: Freed by the CAVC's cursory decision in April 2019, the Board brushed aside Mrs. Mote's case in August 2019, leaving her to continue her quest for a true reasoned decision after years of trying to resolve this claim.

The Secretary sunnily promises, however, that Mrs. Mote has "expeditious" treatment coming to her on remand. But notably absent from these promises is any supporting evidence. That's because the promises have no substance. At present, Mrs. Mote (a senior citizen whose husband *died* waiting for a decision) must continue to wait and see

(1) whether additional records are actually available to substantiate her claims further; (2) whether any such evidence will persuade the VA Regional Office; and (3) whether the Board, the CAVC, or this Court agrees with the Regional Office. The Secretary's own statistics indicate that even "expedited" remands still add 467 days, on average, to the appeals process. Appx0183. And that figure does not include the additional time it may take the Board to issue a second decision. *See* Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 Neb. L. Rev. 388, 419 & n.234 (2011) (reporting that "when the Board remands a claim, it adds an average of 688 days—nearly two years—to the delay a veteran faces in obtaining a determination on her benefits appeal"). This is hardly the "expedited" treatment the Secretary claims Mrs. Mote has coming to her under section 5109B.[1]

What is more, the Secretary fails to acknowledge the reality that the Board's current remand order is unlikely to be its last. "The

[1] The absence of a reasoned decision and Mrs. Mote's request for additional relief distinguishes her case from that of the petitioner in *Ebanks v. Shulkin*, 877 F.3d 1037 (Fed. Cir. 2017). There, the petitioner received the only relief he had asked for—a videoconference hearing before the Board pursuant to 38 U.S.C. § 7107. *Id.* at 1038.

procedure for claiming and appealing benefits has been likened to a hamster wheel because veterans' claims are developed, denied, appealed, and remanded *ad infinitum*." Hugh McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. Rev. 277, 283 (2019). Thus, even if—contrary to the evidence—the Regional Office expedites remand proceedings in Mrs. Mote's case, there is no guarantee they will be the last proceedings.

It has long been recognized that "the 'flexible character of the Art. III mootness doctrine' encompasses consideration of the public interest in safeguarding fundamental constitutional rights." *Foster v. Carson*, 347 F.3d 742, 747 (9th Cir. 2003) (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980)); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (the "public interest in having the legality of the practice settled [] militates against a mootness conclusion"). The Board's and the CAVC's decisions combine to mean that Mrs. Mote's waiting game will continue unless this Court intervenes. Without such an intervention, the Secretary may outlast yet another veteran or their family member. This may sound harsh. But it describes the reality

thousands of veterans and their family members face—Mrs. Mote included. And that reality is harsher than any words used to describe it. In light of all that is at stake—for Mrs. Mote, for countless others—the Court should avoid rewarding the Secretary's gamesmanship by addressing this case on the merits.[2]

B. Mrs. Mote's Claim is Capable of Repetition Yet Evading Review

Even if the Board's remand decision were the full relief Mrs. Mote sought in her petition, her appeal qualifies as capable of repetition yet evading review. That exception to mootness applies when "(1) the

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[2] The Secretary argues that Mrs. Mote's former co-petitioner, Sarah Aktepy's petition was "virtually identical" to Mrs. Mote's when this Court dismissed her mandamus petition as moot in *Martin v. O'Rourke*, 891 F.3d 1338 (2018). Br. at 13. But Ms. Aktepy received both a decision on the merits of one of her claims *and* a decision remanding another claim. Mrs. Mote, on the other hand, received only a remand. Appx0240-0244. The Secretary also attempts to analogize Mrs. Mote's petition to Ms. Scyphers's. Br. 16. But, as the Secretary acknowledges, Ms. Scyphers was already *granted* disability benefits and was disputing the effective date.

Counsel for Appellant has voluntarily dismissed the petitions of other *Martin v. O'Rourke* petitioners after they received grants or denials of their benefits appeals. *See, e.g.*, *Punt v. Wilkie* (16-2510), *Martin v. Wilkie* (16-2502), *Meissgeier v. Wilkie* (16-2504), *Rhodes v. Wilkie* (16-2511). Mrs. Mote is situated differently because the Secretary continues to violate her right to receive a decision on her appeal in a timely manner.

challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). This case satisfies both criteria.

1. To start, a "short" duration for the challenged action does not, as the Secretary oversimplifies, mean the timeframe must be "short" in some absolute sense. Br. 17. The question, rather, is whether the litigation is "almost certain to run its course before either [the appellate court] or the Supreme Court can give the case full consideration." *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010) (controversy satisfied "evading review" requirement where litigation had been pending for six-and-a-half years); *see also Pub. Utils Comm'n of the State of Cal. v. F.E.R.C.*, 236 F.3d 708, 714 (D.C. Cir. 2001) (two years).

In applying that standard, the Supreme Court has found it significant that when cases involve governmental action, the government controls the schedule of proceedings, leaving litigants "adversely affected by government without a chance of redress." *Super Tire Eng'g Co. v.*

McCorkle, 416 U.S. 115, 122 (1974). That is the situation here, and this Court has already recognized as much in *Monk*. There, the Court rejected a similar mootness argument from the Secretary, finding that "the VA's delay in adjudicating appeals evades review because the VA usually acts promptly to resolve mandamus petitions." *Monk v. Shulkin*, 855 F.3d 1312, 1320–21 (Fed. Cir. 2017); *see also id.* (observing "that when the Veterans Court orders the VA to respond to a petition" alleging delay, "the 'great majority of the time' the VA 'responds by correcting the problem within the short time allotted for a response, and the petition is dismissed as moot because the relief sought has been obtained'" (quoting *Young v. Shinseki*, 25 Vet. App. 201, 215 (2012) (en banc) (Lance & Hagel, J.J., dissenting))).

Notably, this is not the first time the Secretary has claimed that Mrs. Mote's case is moot. For example, on March 8, 2019, the Secretary submitted a court-ordered response to the CAVC updating the court on the status of Mrs. Mote's claim. In the response, the Secretary argued that Mrs. Mote's claim was moot because "Petitioner was sent notice of the scheduled hearing date on March 8, 2019." *See* No. 16-2506, March 8, 2019 Response by Respondent to Court's January 11, 2019 Court

Order.[3] In other words, the Secretary told the CAVC that the mere act of scheduling Mrs. Mote's hearing mooted her mandamus petition *on the same day* the Board notified Mrs. Mote of the hearing. This curiously convenient timing, and the Secretary's moving mootness target, aptly demonstrates the reality this Court explained in *Monk*.

The consequence of the Secretary's aggressive mootness strategy are impossible to ignore. If the small sampling of veterans who bring mandamus petitions rapidly receive decisions on their underlying benefits appeals (including unreasoned remand decisions), then no party will ever be able to litigate the legal issues raised in their petitions. *Martin*'s promise of crucial precedential decisions that could help change the system and the lives of individuals like Mrs. Mote for the better will not be realized. *See Martin v. O'Rourke*, 891 F.3d 1338, 1351–52 (Fed. Cir. 2018) (Moore, J., concurring). The "capable of repetition but evading review" exception exists precisely to avoid such outcomes. *See, e.g.*, *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (applying the "evading review" exception because "a claim transitory by its very nature

[3] The Board actually dated the notice to Mrs. Mote *March 11*, three days later. *See* Appx0072-0074.

and one transitory by virtue of the defendant's litigation strategy share the reality that both claims would evade review").

2. As for the second criterion of the exception: When faced with a similar mootness argument in *Monk*, this Court relied on undisputed average delay statistics to conclude that a veteran who had prevailed on his disability claim would likely be subject to the same average delays if he filed an NOD challenging an effective-date decision. 855 F.3d at 1318. Those statistics apply with equal force to Mrs. Mote, compelling the conclusion that there is at the very least a reasonable expectation she will suffer delay again as her appeal progresses. And a reasonable expectation is all Mrs. Mote need establish. *See Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988) (noting that the Court had "found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable").

The Appeals Modernization Act, Pub. L. No. 115-55, 131 Stat. 1105 (2017), does not change the analysis. As the Secretary tacitly concedes, the Modernization Act has an effective date of February 2019; it does not automatically apply to individuals with pending appeals, like Mrs. Mote. And even if Mrs. Mote were able to opt into the new system—giving up

what progress she has been able to make in the legacy system—the Secretary provides no evidence that doing so will address the delays in which Mrs. Mote finds herself trapped. Indeed, the Government Accountability Office recently concluded that the Secretary's failure to "specifically articulate how VA will manage the [legacy and modernized] processes in parallel exposes the agency to risk that veterans with appeals in the legacy process may experience significant delays or otherwise poor results relative to those in the new appeals process or vice versa." Government Accountability Office, *VA Disability Benefits: Improved Planning Practices Would Better Ensure Successful Appeals Reform* 15 (March 2018).[4] The Secretary's breezy assurances of quicker results in this unproven new system thus do not eliminate Mrs. Mote's reasonable expectation of delay, especially given the long history of "inexplicable" VA delays that motivated the passage of the Modernization Act in the first place. *Martin*, 891 F.3d at 1346 n.9; *see also* Stacy-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 Kan. L. Rev. 513, 560–61 (2019) (noting that "much of the success of the

[4] *See* < https://www.gao.gov/products/GAO-18-352>.

Appeals Modernization Act depends upon the VA's own proposed implementation schedule" and that "[a]s demonstrated with the prior backlog . . . VA often struggles to meet its own internal goals to the detriment of veterans").[5]

II. The CAVC Abused Its Discretion by Denying Appellant's Petition for a Writ of Mandamus

The CAVC committed reversible error in failing to grant Mrs. Mote's mandamus petition. None of the Secretary's arguments demonstrates the contrary.

1. The CAVC held that the mere act of scheduling a Travel Board hearing for Mrs. Mote was enough to deny her any relief for the delays she has faced. Appx0006. The Secretary leverages this holding to repeatedly fault Mrs. Mote and ask this Court to validate a Hobson's Choice: seek a hearing and continue to face illegal delays, or forfeit the fundamental due process opportunity to be heard in the hope (but not guarantee) of getting quicker relief. *See, e.g.*, Br. 21.

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[5] Incredibly, the Secretary also refers to the VA's Rapid Appeals Modernization Program ("RAMP"), in which the VA intended to offer a faster track for certain legacy appeals, in discussing why Mrs. Mote should not fear further delay. But—setting aside the question of how successful that program was—the Secretary discontinued RAMP as of February 15, 2019. *See* <https://tinyurl.com/RAMPdiscontinued>.

As with his other assertions, however, the Secretary does not cite a single piece of evidence explaining why it was reasonable that fulfilling Mrs. Mote's request for a hearing should take a full three years—let alone why her request should excuse the Secretary's additional *six years* of delay on top of that. Moreover, the Secretary neglects to mention that it was the VA that held up Mrs. Mote's case before abruptly scheduling her Travel Board hearing on the same day the Secretary responded to a CAVC order requiring information about the status of Mrs. Mote's case.

For example, the Secretary took *1,195 days* (over three years, three months) to issue a Statement of the Case after Mr. Mote submitted a Notice of Disagreement in 2013, which is more than double the average delay. In other words, the Secretary took over three years to complete a step that, on average, took him less than half that time, unreasonably delaying Mrs. Mote's claim from the start. Whether this Court focuses on the length of delay from Mr. Mote's initial claim to today (9.5 years), his NOD until today (7 years), or on the delay from NOD to the Secretary issuing a SOC to allow the appeal to proceed (3+ years), the delay suffered by Mrs. Mote and her late husband violates of any rule of "reason."

More fundamentally, the opportunity to be heard is an essential pillar of our legal system. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard"). It would be unjust to conclude that veterans unable to come to Washington, D.C., where hearings are more readily available, effectively waive violations of their statutory and constitutional rights when they request the alternative the Secretary himself created, a Travel Board hearing. Such a request does not evaporate the Secretary's constitutional obligation to adjudicate veterans' claims promptly, and it does nothing to affect the CAVC's obligation to remedy actions that have been "unreasonably delayed."

It is true, as the Secretary contends, that there must be a balance between speed and accuracy. *See* Br. 32. But the Secretary again provides no evidence that the delays experienced by Mrs. Mote were necessary to ensure accuracy. Stretching this process so long that Mrs. Mote might not live to see the resolution of her case, or receive a single benefits' check, is unsupportable. It cuts strongly against the Secretary's supposed justifications.

Moreover, as discussed above, *see supra* Section I.A., a Travel Board Hearing or decision (reasoned or otherwise) is only part of what Mrs. Mote requested. The Secretary cites no evidence for his position that imposing scheduling and reporting requirements on the Secretary in advance of the hearing would have been inappropriate or premature. The Secretary either neglects to mention this additional relief or derogates it as "ancillary." Granting the requested monitoring relief may spare Mrs. Mote from waiting to experience greater (and totally unknowable) delay before she has a chance for relief.

2. Perhaps the most *un*reasoned aspect of the CAVC's decision is its failure to confront the *TRAC* factors in the first place, as required by this Court's recent *Martin v. O'Rourke* decision. The Secretary concedes that "the decision on appeal did not proceed step-by-step through an analysis of each *TRAC* factor." Br. 24. He contends repeatedly, however, that it is enough that the CAVC merely "recognized" the decision by listing the *Martin* factors. *Id.* A passing acknowledgment cannot be all this Court intended when it "adopt[ed] the *TRAC* standard as the appropriate standard for the Veterans Court to use in evaluating mandamus petitions based on alleged unreasonable delay." *Martin*, 891

F.3d at 1348. The Secretary similarly belittles *Martin* as simply a "starting point" in the analysis, in order to justify the CAVC's failure to address the decision. Br. 24. But when this Court called the *TRAC* factors "a useful starting point for the Veterans Court to analyze mandamus petitions based on unreasonable delay," *id.* at 1345, it plainly did not prospectively excuse the CAVC from performing the required analysis.

The CAVC's citation to *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367 (2004), as the standard for granting mandamus relief does not solve the problem. *Cheney*'s general standard is just that—it does not provide guidance on how to analyze a mandamus petition in the specific context of delayed veterans' disability benefits. *Martin* does. And this Court considered *Cheney* when issuing its *Martin* decision. *See* 891 F.3d 1338, 1343 n.5 (Fed. Cir. 2018) ("[W]e remand for the Veterans Court to consider the traditional [*Cheney*] mandamus requirements *as informed by the TRAC analysis*.") (emphasis added). As it stands from the CAVC's decision, however, this Court has no way to know whether the CAVC "look[ed] to the *TRAC* factors as guidance," *id.* at 1349, because there's

nothing in the record to indicate it truly looked to those factors to begin with.

The Secretary nevertheless asks the Court to take the extraordinary step of agreeing that *Martin* is effectively irrelevant. According to the Secretary, Mrs. Mote would not deserve relief "*even if a TRAC analysis had demonstrated unreasonable delay*." Br. at 27 (emphasis added). If that does not resurrect the *Costanza* "arbitrary refusal to act" standard, nothing does. The Secretary wants this Court to re-adopt *Costanza* under a different name and return to the 19-year period after *Costanza* when the Secretary consistently dodged orders of mandamus by taking some inconsequential action on a veteran's appeal to exonerate his inaction.

The Secretary is correct that *Godsey v. Wilkie*, 31 Vet. App. 207, 226–30 (2019), shows that *Martin* "has already proven to be a useful tool for claimants experiencing unreasonable delay." Br. 27. But that is only because *Godsey* did what the CAVC failed to do here: It gave *Martin* the life it deserves by analyzing each factor under this Court's framework. *Godsey* further reinforces how critical it is that this Court enforce *Martin*'s intent: that the CAVC faithfully apply the *TRAC* factors.

There is also no distinction to be gained from *Godsey* being a class action, whereas Mrs. Mote advances her individual claims. Nowhere has this Court somehow limited *Martin* to class actions or held that individual claims are less deserving of relief than class claims. The delays in Mrs. Mote's case are just as unreasonable, and just as worthy of relief, as the delays in *Godsey*. If not more so.

3. The Secretary also invokes the same tired "line jumping" argument he has used often before in Mrs. Mote's case and those of her related petitioners. Once again, however, the Secretary provides no supporting *evidence* for his argument that moving Mrs. Mote's appeal forward will somehow cause other veterans to fall farther behind.

In any event, the Secretary cannot violate Mrs. Mote's legal and constitutional rights just because he is delaying other veterans' appeals, too. If the Secretary is concerned about those other veterans' rights, the Secretary should create a process that alleviates those other veterans' delays. But those other veterans' claims are not before this Court. Mrs. Mote's are. She should not be forced to give up *her* statutory and constitutional rights because the Secretary's unreasonable and

unconstitutional behavior is so far-reaching that it is hurting other veterans, too.

The Secretary's "jumping the line" objection amounts to arguing that the veteran who currently suffers from the longest delay is the only veteran entitled to mandamus; otherwise, every person behind that veteran would "line jump" if given relief. This is not how Congress established the CAVC's review function. Whatever their reasons may be, certain veterans, like Mrs. Mote, seek mandamus relief and others do not. Those who do, like Mrs. Mote, deserve the relief Congress provided to them, without regard to whether other similarly situated veterans have declined to seek that same relief. To hold otherwise would turn the law and the Constitution on their heads.

4. The Secretary concludes his brief by arguing that Mrs. Mote may not have mandamus relief because her claim seeks "programmatic" change to the VA benefits process. Br. 46. The Secretary criticizes Mrs. Mote for citing the delays experienced by other veterans caught up in the same delay-ridden system. The Secretary's criticisms are misplaced.

Mrs. Mote does not contend that average delays alone establish a violation of her rights. Nor is that the only evidence she is relying on. To

the contrary, Mrs. Mote has provided the CAVC and this Court with detailed, specific information about the delays she and her husband have already suffered. *See* Opening Br. 4–5. Mrs. Mote cites average delays only as evidence of the *future* delay still to be suffered—exactly the use approved by this Court in *Monk*. *See* 855 F.3d at 1317–18 (relying on average-delay statistics to conclude that "Mr. Monk . . . will likely be subject to the same average delay").[6] Lacking a crystal ball, this is all Mrs. Mote can do, and there is nothing inappropriate about it.

Thus, while Mrs. Mote's petition recites average delay statistics, her fundamental request to the CAVC—and now to this Court—is for a remedy that addresses the wrongs *she* has suffered. That relief is not

[6] In addition to ignoring this aspect of *Monk*, the Secretary also overreads the discussion of average delay statistics in *Vietnam Veterans of Am. & Veterans of Modern Warfare v. Shinseki*, 599 F.3d 654 (D.C. Cir. 2010). *See* Br. 17. That case was brought by two veterans associations that attempted to use associational standing to remedy delay. 599 F.3d at 661–62. The associations argued that the average delays were illegal, not that a particular delay suffered by any specific member of their association was illegal, and the associations "went out of their way to forswear any individual relief" for their members who provided affidavits about their pending cases. *Id.* As an associational standing case, *Vietnam Veterans* has no bearing here, where Mrs. Mote is seeking individual relief for particular delays already suffered and relies on average-delay statistics, as this Court did in *Monk*, merely to project the future delays she likely will suffer.

"programmatic"; it is personal. And it is appropriate and necessary for this Court to grant. That doing so may have laudatory effects on all veterans would be a benefit of such a decision. It is not a barrier to one.

III. The CAVC Erred in Denying Appellant's Due Process Claims

The CAVC compounded its error by failing to assess Mrs. Mote's separate claim for violation of her constitutional right to due process under *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Secretary is wrong to claim this error was harmless and wrong to claim that the Secretary is not violating Mrs. Mote's due process rights at all.

1. The Secretary first errs in arguing it was unnecessary for the CAVC to analyze Mrs. Mote's due process claim given the court's conclusion that mandamus was not warranted. The Secretary relies on *Martin*'s statement that "[i]f the Veterans Court, employing the *TRAC* analysis, finds a delay unreasonable (or not unreasonable), it need not separately analyze the due process claim based on that same delay." 891 F.3d at 1348–49. The Secretary, however, ignores the key part of this statement—"*employing the TRAC analysis*." As explained above, *supra* Section II.2., the CAVC *did not* employ *Martin*/*TRAC* in Mrs. Mote's case. The CAVC's cursory "acknowledgment" of *Martin* made it *more*

important that the court carefully consider Mrs. Mote's constitutional claim, not less.

2. On the merits, the Secretary's brief confirms that the three *Mathews* factors weigh strongly for Mrs. Mote and against the Secretary.

a. The Secretary concedes that the first factor—"veterans' interest in obtaining timely adjudication of their claims for benefits"—is "not in dispute." Br. 38. Nor does the Secretary dispute that access to veterans' benefits is an interest of the highest order.

Instead, the Secretary once more blames Mrs. Mote for requesting a Travel Board hearing, arguing that "[i]t would be quite perverse to declare that honoring her request was unconstitutional." Again, that argument explains—at most—three of the ten years of delay Mrs. Mote has endured. The Secretary's blinkered view also ignores the range of remedial options available to the CAVC and this Court. For example, the Secretary never explains why it would not be possible to both hold the hearing before the Travel Board as scheduled *and* require the VA to issue a reasoned decision in Mrs. Mote's case within a certain time. The CAVC could alternatively have granted Mrs. Mote's request for court oversight, such as regular updates on the status of her case. This is not an

exhaustive list of possibilities. But the CAVC never considered any of them because it never considered Mrs. Mote's due process interest. That was error.

b. As to the third *Mathews* factor—the government's interest in maintaining the status quo—the Secretary admits that the VA "has no interest in keeping claimants in a legacy appeal system that is overburdened, complex, and non-linear." Br. 42. This is precisely the system in which Mrs. Mote is caught. So the Secretary deflects again, suggesting that the Court should give the VA credit for working with veterans' groups and Congress to change the system and enact the Modernization Act. As discussed above, that Act—though perhaps beneficial to some veterans going forward—is no guarantee of quick relief for those veterans, like Mrs. Mote, who have already filed an appeal.

c. That leaves just the second *Mathews* factor, the risk of erroneous deprivation. In her Opening Brief, Mrs. Mote pointed to evidence demonstrating that for appealed denials (that is, the claims it takes the VA years to process and adjudicate) the VA got more than half (56.7%) of its decisions either wrong or at least not correct. Opening Br. at 38. The Secretary argues these statistics overstate the error rate,

because "the majority" of remands are caused by the open record system in VA claims. Br. 39. Put more plainly, those remands are caused in many cases by the VA violating its statutory duty to assist veterans. As to those remands, the Secretary does not contest that the years-long delays themselves likely necessitate the submission of new evidence as a claimant's disability develops and changes. And, according to one study, 75% of claims that reach the BVA for a second time are remanded yet again. *See* Opening Br. at 38 (citing Serota & Singer, 90 Neb. L. Rev. at 416). This is the "hamster wheel" many veterans have come to know all too well.

Regardless, even using the Secretary's metrics shows the VA gets it wrong in nearly half of all cases that come before the BVA. The precise number of remands due to open records violations is about 60% according to government statistics. *See* Government Accountability Office, *VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions* 13 (March 2017).[7] Conversely, "41 percent of the reasons for the remands in fiscal year 2015

[7] *See* <https://www.gao.gov/assets/690/683637.pdf>.

were due to [Veterans Benefits Administration] error." *Id.* at 14. Combining the errors that cause remands with the errors that cause outright reversals brings the VA error rate to 44.3%.[8] By any measure, these numbers demonstrate a high risk of error, especially where the very livelihood of veterans and their families are at stake.

The Secretary next faults Mrs. Mote for failing to "identify any procedure in the legacy appeals system that should be added, substituted, or replaced for faster processing." Br. 41. But as explained in Mrs. Mote's opening brief (at 32), it is not her burden to identify the cause of those delays. *See, e.g.*, *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 491 (3d Cir. 1980) ("*Whatever its internal problems*, the Board has the power to implement regulations that would accelerate the agency review process. Four years is totally out of phase with the requirements of fairness." (emphasis added)).

The Secretary's complaint is unfounded anyway. Mrs. Mote has *repeatedly* identified the actions the VA can—and must—accomplish

[8] This number is derived as follows: (1) a 35.8% reversal rate, plus (2) a 8.5% remand-due-to-error rate (which consists of (a) the total remand rate (20.9%) multiplied by (b) the percentage of remands due to error (41%)).

without unreasonable delay: issue an SOC, certify the appeal to the BVA, deliver the appeal to the BVA for docketing, hold a hearing at the BVA, and decide the case with a reasoned decision. In fact, the Secretary complains in several other places in his brief that Mrs. Mote is being *too specific* in the relief she is requesting. Mrs. Mote, the Secretary says (incorrectly), is impermissibly asking this Court to "step into the role of legislator or policymaker," Br. 46, and micromanage the inner workings of the VA's practices and policies. The Secretary thus asks this Court to deny relief to Mrs. Mote because she is not being specific enough about what the VA needs to do, while also seeking to deny relief because she is being too specific about what the VA needs to do. The Secretary cannot have it both ways.

CONCLUSION

The VA's interminable delays have violated Mrs. Mote's rights, and the delays she faces going forward will only exacerbate those violations. Mrs. Mote is not asking for the Court to fix the entire broken system for veterans' appeals. But it is expressly within the CAVC's and this Court's jurisdictions to see that justice is done at last in her case.

Congress gave Mrs. Mote the right to be free from "unreasonable delay" and *Martin* clarified that the courts should be an effective instrument in carrying out Congress's mandate. Yet the CAVC refused to grant Mrs. Mote relief. The CAVC paid only lip service to *Martin*. It never even reached the due process issue. This Court should enter an order finding that the VA has violated Mrs. Mote's rights. In the alternative, the Court should direct the CAVC to actually apply the *Martin* factors to evaluate Mrs. Mote's mandamus petition.

Respectfully submitted,

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March 19, 2020

CERTIFICATE OF COMPLIANCE

I certify that this paper complies with the type-volume limitation of Fed. Cir. R. 8(b)(1) because it contains 6,341 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This paper complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point, proportionally spaced typeface using Microsoft Word.

March 19, 2020

/s/ *Charles L. McCloud*
Charles L. McCloud

CERTIFICATE OF SERVICE

I certify that on March 19, 2020, I caused the forgoing to be filed with the Court electronically using the CM/ECF system, which will send a notification to all counsel of record.

March 19, 2020

/s/ *Charles L. McCloud*
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