Vet. App. No. 17-1117

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DOUGLAS J. ROSINSKI,

Petitioner,

v.

DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,

Respondent.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

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Amici teach and write in the fields of administrative law, civil procedure, and federal courts.[1] Amici are listed in the Appendix and take no position as to whether aggregation in this particular case is warranted.

INTRODUCTION

Amici submit this brief to explain the ways that non-Article III courts use aggregate procedures and to offer principles that this Court may consider for developing similar techniques. In so doing, we make three points.

First, this Court may benefit by aggregating claims on a case-by-case basis before it adopts a formal rule. Many different courts have gained invaluable experience, and swiftly resolved large numbers of pending cases, by incrementally aggregating cases.

Second, non-Article III courts can tailor their aggregate procedures to handle the specific claims that come before them to promote access to fair representation and efficient outcomes. They need not adopt Rule 23 of the Federal Rules of Civil Procedure wholesale.

Third, "appellate level" tribunals have many ways to develop the evidentiary record needed to aggregate cases. In addition to presiding over the process themselves, appellate bodies may rely on other judicial officers, including special masters, magistrate judges, and other designated judges to find facts.

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[1] No counsel for a party authored this brief in whole or in part. No person other than amicus curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT

I. Many Courts Aggregate Case-By-Case Before Adopting a Formal Rule.

A case-by-case approach to aggregation may provide particularly valuable insights for courts, and their advisory bodies, as they work toward the promulgation of a formal rule. In the process, courts can expeditiously resolve long-pending cases, improve consistency, and promote access to important legal and other expert assistance.

A. Congress Generally Grants Non-Article III Courts Broad Power to Adopt Their Own Rules of Procedure

When Congress creates non-Article III courts,[2] Congress grants them broad powers to craft procedures to carry out their statutory missions. The Supreme Court has explained that non-Article III tribunals "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940). For that reason, non-Article III courts may consolidate cases and decide "subordinate questions of procedure," such as "the scope of the inquiry, whether [cases] should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions." *Id.* at 138.

Accordingly, such courts also may adopt rules to hear class actions. Just as class actions fall "within the Supreme Court's mandate to adopt rules of 'practice and

[2] By "non-Article III courts," we refer to courts that Congress may create with judges who do not receive the salary and tenure protections required by Article III of the Constitution—including bankruptcy and magistrate judges, who work inside the Article III judiciary, as well as "legislative courts" and administrative agencies. *See, e.g.*, 26 U.S.C. § 7441 (2012) (establishing the United States Tax Court as a stand-alone court).

procedure' for the district courts, . . . [t]here is no reason why [non-Article III courts] cannot use the same device" in appropriate cases." *Quinault Allottee Ass'n & Individual Allottees v. United States*, 453 F.2d 1272, 1274 (Ct. Cl. 1972) (holding that the Court of Claims may certify class actions in appropriate cases). "A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 408 (2010).

Indeed, over 70 non-Article III tribunals have adopted procedures to aggregate claims. *See* Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action,* 126 Yale L.J. 1634 (2017). Nine have adopted class action rules of some kind. *Id.* at 1659. Some rules loosely track Rule 23 of the Federal Rules of Civil Procedure, while others are tailored to the specific types of cases and claims that the court or agency hears. As the Federal Circuit recognized, the Court of Appeals for Veterans Claims (CAVC) also enjoys power to formally adopt rules for "class actions or other methods of aggregation" under its broadly worded statutory authority. *Monk v. Shulkin*, 855 F.3d 1312, 1320 (Fed. Cir. 2017).

B. Non-Article III Courts Also May Aggregate Informally

Non-Article III courts may rely on their equitable powers to consolidate cases and claims. *In re S & G Fin. Servs. of S. Florida, Inc.*, 451 B.R. 573, 582 (Bankr. S.D. Fla. 2011). Administrative tribunals may tailor ad hoc rules to specific cases as needed. *FCC v. Schreiber*, 381 U.S. 279, 289 (1965). And, as the Federal Circuit recently explained, courts have long used the All Writs Act to aggregate cases in the absence of a formal rule.

Monk v. Shulkin, 855 F.3d at 1319 ("We see no principled reason why the Veterans Court cannot rely on the All Writs Act to aggregate claims in aid of that jurisdiction."); *see also United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125–26 (2d Cir. 1974) (The All Writs Act allows courts to aggregate cases through "appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.").

Proceeding on a case-by-case basis may be particularly important to quickly resolve pending claims, while offering the court insights that will aid in developing more formal rules in the future. For example, the U.S. Court of Federal Claims experimented with class actions for years before promulgating its own formal rule. The Court reasoned that "the better road to follow" was to hear class actions on a "case-by-case basis, gaining and evaluating experience as we study and decide the class-suit issues presented by individual, concrete cases coming up for resolution." *Quinault Allottee Ass'n*, 453 F.2d at 1276. The Court followed this approach until it was "clearer as to the shape of the class-suit needs in this court and the functioning of various class-suit devices." *Id.*[3]

Another Article I court that has benefited from informal aggregation is the Vaccine Court, which relies on its general authority to "determine the format for taking evidence[,] … hearing argument[,]" and to "apply [its] expertise" from one case to

[3] Ten years after *Quinault,* in 1982, the Court adopted Rule 23 of the U.S. Claims Court, a rule "substantially similar in pertinent respects to Fed. R. Civ. P. 23," except for the opt-in requirement. *Kominers v. United States*, 3 Cl. Ct. 684, 685–86 (1983). In 2002, the Court revised its class action rule. Despite revisions over the years, the Court consistently returned to the *Quinault* criteria in certifying classes. *See, e.g., Moore v. United States*, 41 Fed. Cl. 394, 400 (1998) (certifying class of landowners whose property was burdened by recreational trail); *Taylor v. United States*, 41 Fed. Cl. 440, 448 (1998) (certifying class of employees who did not receive pay as mandated under Separation Pay Act).

another. *Snyder ex rel. Snyder v. Sec'y of Dep't of Health & Human Servs.*, No. 01-162V, 2009 WL 332044, at *2 (Fed. Cl. Feb. 12, 2009). Thus, when faced with large numbers of claims for compensation, the Vaccine Court developed "omnibus proceedings" to efficiently process claims involving the same alleged injury. *Cedillo v. Sec'y of Health & Human Servs.*, No. 98-916V, 2009 WL 331968 at *11 (Fed. Cl. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010). In an "omnibus proceeding," a single special master hears evidence and makes a decision on a theory of general causation. *Id.* at *12. The "general causation" evidence is then available for application in individual cases. *Id.* Such "omnibus proceedings," which work much like issue class actions in federal court, also have provided useful lessons for future rulemaking. Sant'Ambrogio & Zimmerman, *Inside the Agency Class Action*, *supra* at 1672–73.

Another example comes from the Office of Medicare Hearings and Appeals (OMHA). OMHA has long aggregated similar appeals brought by health care providers against the federal government. *See In re Apogee Health Serv., Inc.*, No. 769 (Medicare Appeals Council Mar. 15, 1999); *Chaves County Home Health Servs. v. Sullivan*, 931 F.2d 914, 919–22 (D.C. Cir. 1991). Its judges identify, process, consolidate and sometimes sample large numbers of similar cases. OMHA continues to experiment with aggregation techniques, piloting group mediation and statistical trial programs, to resolve large backlogs of claims, while improving case-management. Sant'Ambrogio & Zimmerman, *Inside the Agency Class Action*, *supra* at 1676–81.

Informal aggregation thus permits courts to develop general guidelines for aggregation, and over time, use rulemaking to tailor those rules to their experience. For

these reasons, advisory bodies to both federal and administrative courts recognize the value of incrementally adopting aggregate procedures. *See* Advisory Committee on Civil Rules, 95-96 (2016) (upon completion of five-year study of class actions in federal courts, recommendations rely on best practices developed by federal judges on a case-by-case basis), http://www.uscourts.gov/sites/default/files/2016-04-civil-agenda_book_0.pdf; Aggregation of Similar Claims in Agency Adjudication, 81 Fed. Reg. 40,260 (June 21, 2016) (Administrative Conference of the United States (ACUS) recommends principles for agency aggregation of claims, including in Recommendation No. 3(c) that agencies "pilot[] programs to test the reliability of an approach to aggregation before implementing the program broadly"); Senate Report on Multidistrict Litigation, S. Rep. No. 90-454, at 3–4 (1967) (finding that informal coordination and aggregation that led to the federal multidistrict litigation statute worked "exceptionally well"). Accordingly, the CAVC need not wait to aggregate cases as it considers whether to adopt a formal aggregation rule. As other courts have found, aggregation in an appropriate case can help resolve pending claims and complement future rulemaking.

II. Non-Article III Courts May Tailor Aggregate Procedures to Their Needs, While Promoting Due Process and Adequate Representation.

Rule 23 of the Federal Rules of Civil Procedure offers a framework from which this Court can develop a class action rule and procedures. Years of practice under Rule 23 provide a large body of precedent, experience, and standards that can be applied to guide class actions before the CAVC. For that reason, ACUS recommends that agencies developing aggregation rules consider "the principles and procedures in Rule 23 of the

Federal Rules of Civil Procedure" and "ensure that the parties' and other stakeholders' interests are adequately protected" consistent with Due Process. Aggregation of Similar Claims in Agency Adjudication, 81 Fed. Reg. 40,260-61 (June 21, 2016) (Recommendation Nos. 5 and 6). Such rules may involve, among other factors, whether: (1) the number of cases or claims are "sufficiently numerous and similar" to justify aggregation, (2) aggregate litigation will "materially advance" the resolution of the cases, (3) "adequate counsel" represents the parties, and (4) "separate interests are adequately represented in order to avoid conflicts of interest." *Id.*[4]

However, not every part of Rule 23 is relevant to the types of cases or claims heard by the CAVC. Other non-Article III courts often customize aggregate procedures for the types of claims they hear. Among other things, non-Article III courts have adopted rules principally for injunctive or declaratory relief that do not require parties to show that common issues "predominate" over individual issues under Rule 23(b)(3). They also permit courts to group together common scientific, technical, or legal questions, even where many individual questions remain.

A. Claims for Injunctive or Declaratory Relief Often Follow Different Rules

Injunctive and declaratory relief class actions, like cases before the CAVC, need not adhere to the same procedural formalities as traditional damages class actions. The

[4] *See also* ALI Principles of the Law of Aggregate Litigation § 2.02 (2010) (recommending class adjudication of common issues that "materially advance resolution," "ensure adequate representation," and that do "not compromise the fairness of procedures for resolving any remaining issues").

Federal Rules of Civil Procedure do not require parties in declaratory or injunctive relief class actions to (1) offer people a chance to opt out of the action, (2) show that common issues will "predominate" over individual questions or (3) establish that a class action is superior to other forms of adjudication. *Compare* Fed. R. Civ. P. 23(b)(1) & (2) *with* 23 (b)(3). This is because an injunction against a generally applicable policy or practice will impact all class members in the same way. *See* ALI Principles of the Law of Aggregate Litigation § 2.04 cmt. a (distinguishing classes pursuing "prohibitory injunctive or declaratory relief against a generally applicable policy or practice" from class actions that seek money damages). As the Supreme Court has observed: "The key to the [injunctive or declaratory relief] class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) (internal citation omitted).

Other non-Article III courts have likewise tailored their own class rules for injunctive relief. The EEOC, which has been hearing class actions for decades, does not permit opt outs or require that common questions "predominate" before certifying a class. *Compare* Fed. R. Civ. P 23 *with* 29 C.F.R. § 1614.204 (2012).[5] The EEOC designed its class action this way to ensure that parties can pursue declaratory and injunctive relief to resolve claims of discrimination. *See* 29 C.F.R. § 1614.204 (2012); 64 Fed. Reg. 37,644,

[5] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, MGMT. DIRECTIVE 110, ch. 8, § V.C (Aug. 5, 2015) ("The class members may not 'opt out' of the defined class"), http://www.eeoc.gov/federal/directives/md110.cfm.

37,651 (July 12, 1999) (observing that "class actions … are an essential mechanism for attacking broad patterns of workplace discrimination and providing relief to victims of discriminatory policies or systemic practices").

The Secretary is incorrect when he states that "prevailing case law" under Rule 23 "generally shows" that courts will decline to certify a class when an individual injunction will have the same effect as a class injunction. Sec'y Br. at 24. First, individual injunctions often will not have the same effect as class injunctions, particularly if one takes into account who has the right to enforce them. Second, rejecting class actions on such grounds is, in fact, a "controversial" idea that can subvert the very purpose of injunctive relief class actions against government entities, "a result hardly intended by the Rules Advisory Committee." William B. Rubenstein, Newberg on Class Actions § 4:35 (5th ed. 2014) ("for every class denial on the basis of lack of need, one is able to find a decision, or several decisions, often in the same circuit, where other courts have certified Rule 23(b)(2) classes under virtually the same circumstances") (collecting cases).[6] Courts, indeed, have found class actions particularly necessary when they (1) facilitate enforcement of judgments requiring complex affirmative relief; (2) avoid mooting of claims; (3) spur "institutional change"; or (4) are such that defendants cannot guarantee uniform application of a judgment. Newberg on Class Actions § 4:35 (collecting cases); *Nehmer v. U.S. Dep't of Veterans Affairs*, 118 F.R.D. 113, 119–20 (N.D. Cal. 1987)

[6] *See also* Gayle v. Warden Monmouth Cty. Corr. Inst., 838 F.3d 297, 310 (3d Cir. 2016) ("circumstances in which classwide relief offers no further benefit, however, will be rare, and courts should exercise great caution before denying class certification on that basis").

(rejecting necessity requirement and finding class action an effective tool to bring about change in VA regulations). Neither injunctive relief, nor stare decisis guarantees the uniform outcomes, binding impact, and legal access that aggregate adjudication provides. Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992, 2024–25 (2012) (describing advantages of binding aggregate judgment over precedent in mass adjudication systems).[7]

B. Courts May Resolve Common Questions While Leaving Some Individual Questions for Another Day

Courts also may aggregate common questions that materially advance the litigation, while leaving for another day application of a common rule to individual cases. One method courts have used is "bifurcation"— resolving issues that are common to each class member separately from issues that are unique to each individual class member. Bifurcation of common issues from individual issues "insulates a party from the possible prejudice of jointly trying certain issues." Newberg on Class Actions § 11:4. Bifurcating and then resolving common questions in the aggregate is used by Article III courts in many contexts.[8]

Article I courts have successfully used similar techniques. The Vaccine Court's use of "omnibus proceedings" helped to expeditiously resolve hundreds of cases raising

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[7] *See also* Newberg on Class Actions § 4:35 ("Class certification serves one central function even if an individual action [against the government] would itself achieve the classes ends"—that "the class is adequately represented...").

[8] *See* Elizabeth C. Burch, *Constructing Issue Class Actions*, 101 Va. L. Rev. 1855, 1894 (2015) ("[C]ourts have properly separated … plaintiffs' specific and proximate causation, reliance, and damages to facilitate issue classes in employment-discrimination, environmental contamination, and consumer-fraud litigation.") (collecting cases).

the same questions of general causation, substantially narrowing the range of issues that parties had to resolve individually. *Ahern*, *supra* at *3. Similarly, after the EEOC certifies a class and renders a class-wide decision, employees retain an individual right to challenge damages in mini-trials. 29 C.F.R. § 1614.204(l) (providing for individualized relief after a general "finding of discrimination against a class has been made").

Aggregating common issues in this way allows parties to pool information about recurring problems and eliminates the duplicative use of resources entailed in traditional one-on-one adjudication. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 672 F.3d 482, 491 (7th Cir. 2012) ("[It makes good sense … to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.") (citations omitted). It also may "improv[e] access to legal and expert assistance by parties with limited resources." *Monk*, 855 F.3d at 1320. The efficiencies afforded by aggregation can be especially helpful in cases arising from large benefit programs, where many claimants file cases involving similar legal and factual issues. *See* Sant'Ambrogio & Zimmerman, *The Agency Class Action*, *supra* at 2010–12.

Many aggregate claims before the CAVC are likely to have two aspects—one challenging a rule or practice of the VA, and the other applying a new rule to the individual facts of veterans before the court. In these situations, the CAVC could resolve common issues involving VA practices, before remanding individual veterans' cases for application of a new standard before the BVA. Such an approach would enhance representation of veterans before the CAVC while also conserving judicial resources.

III. "Appellate" Level Courts Can Use a Variety of Tools to Resolve Evidentiary Issues in Class Actions.

The CAVC may draw on the experience of other three-judge and appellate bodies in developing procedures to manage class actions.

A. Non-Article III Courts Aggregate at the "Appellate" Level

Appellate level tribunals have similarly broad discretion to aggregate cases.[9] Many appellate bodies in administrative agencies consolidate cases that raise "common questions of law or fact," including the Provider Reimbursement Review Board, the Environmental Appeals Board, and OMHA.[10] The Court of International Trade, an Article III court, hears administrative appeals and has allowed class actions since the early 1990s. *See Nat'l Bonded Warehouse Assoc. v. United States*, 14 C.I.T. 856 (1990).

Moreover, federal district courts may aggregate cases even when functioning in an "appellate" capacity, reviewing an agency's findings of fact and conclusions of law. Federal courts have certified class actions to review systematic practices in a variety of programs, including—before 1988—veteran benefits cases. *See, e.g.*, *Bowen v. City of New York*, 476 U.S. 467 (1985) (social security); *Nehmer, supra* at 113 (certifying nationwide plaintiff class of Vietnam veterans eligible for Agent Orange benefits); 7AA

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[9] In fact, Article III courts conduct full-blown trials in three-judge panels in some cases. *See, e.g.*, 18 U.S.C. § 3626 (2012) (requiring three-judge district court for certain prison conditions cases); 28 U.S.C. § 2284 (same, as to congressional reapportionment cases).
[10] *See* 42 C.F.R. § 405.1837 (2016) (granting right to Board hearing, as part of a "group appeal" with other providers, with respect to certain determinations); 40 C.F.R. § 22.12 (authorizing the "Environmental Appeals Board to consolidate proceedings for civil penalties or revocation of permits where there are common issues of law or fact"); 42 C.F.R. § 405.1044 (consolidation in OMHA for purposes of "administrative efficiency").

Charles A. Wright et al., Federal Practice and Procedure § 1775 (3d ed. 2008) (collecting cases where "Rule 23(b)(2)...has been used extensively to challenge" complex benefit schemes.) In such cases, federal courts need not wait for all class members to exhaust their administrative remedies in the agency below when the class claims are "collateral to [a] substantive claim of entitlement" and class members "would be irreparably injured were [] exhaustion … enforced against them." *Bowen*, 476 U.S. at 483 (1986). Notably, the CAVC's "scope of review" of BVA decisions, as set forth in 38 U.S.C. § 7261(a)(2), "is similar to that of an Article III court reviewing agency action under the Administrative Procedure Act." *Henderson v. Shinseki*, 562 U.S. 428, 432 n.2 (2011).

B. Appellate Courts May Rely on Other Judicial Officers to Develop Facts

Adjudicating class actions requires procedures to manage fact-finding, motion practice, and settlement conferences. This Court may need to develop evidence of the propriety of class treatment, including via pre-certification discovery.

Appellate courts, like the CAVC, possess broad and flexible powers under the All Writs Act (AWA), their inherent judicial powers, and their organic statutes to adopt rules to address these matters. *See Monk*, 855 F.3d at 1318 (noting all three sources); *Gulf Power Company v. United States*, 187 F.3d 1324, 1334–35 (11th Cir. 1999) (noting five different techniques that appellate courts might use to resolve factual disputes). This Court might consider several different procedures, including: (1) transferring evidentiary matters to a single judge of this court; (2) appointing a special master or magistrate, or (3) tailoring appropriate rules under its AWA authority in specific cases.

First, the Court could fashion a procedure to transfer aggregate actions to a single judge. This would mirror the Hobbs Act, which governs agency appeals to the U.S. Courts of Appeals and authorizes transfer to a district court for the purpose of fact-finding in some situations. 28 U.S.C. § 2347(b)(3) (2012); *see, e.g.*, *Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123, 1129–30 (9th Cir. 2001) (transferring immigration petition for review to district court "for further development of the record"). Although the Hobbs Act does not apply directly to this Court's review of agency action, a similar rule could be fashioned pursuant to the CAVC's AWA authority that allows transfer to a single judge or a recalled retired judge. *See, e.g.,* 38 U.S.C. § 7254(b) (2012) (single judges); 38 U.S.C. § 7257 (2012) (retired judges). The Court already disposes of most cases through single-judge decisions. James Ridgway, Bart Stichman, & Rory Riley, *'Not Reasonably Debatable': The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 Stan. L. & Pol'y Rev. 1 (2016) (surveying over 4,000 single judge decisions in two years). A single judge could address fact-finding about the putative group, resolve evidentiary disputes, and ensure a complete record for review by the three-judge panel.

Second, appellate courts may rely on special masters. *See, e.g., New Jersey v. New York*, 523 U.S. 767, 771 (1998) (noting trial held by special master appointed in matter of original jurisdiction before U.S. Supreme Court); Fed. R. App. P. 48 (courts of appeals may "appoint a special master to hold hearings"). Article III appellate courts use special masters to resolve factual disputes when issues arise for the first time at the appellate level. *See* Fed. R. App. P. 48 advisory committee's note to 1994 amendment. Special masters regulate "all aspects of a hearing" and can administer oaths, examine witnesses,

and require "the production of evidence on all matters embraced in the reference." Fed. R. App. P. 48(a)(1)–(4).[11] Even trial courts use special masters in complex litigation to improve fact-finding and facilitate settlement talks. *See* Manual for Complex Litigation, Fourth § 22.91 (2004) (describing use of special masters).

Finally, under the AWA, appellate courts may permit case-by-case fact-finding and the production of records. In *Harris v. Nelson*, for example, the Supreme Court allowed a district court to compel interrogatories in a habeas case, even where no express rule for interrogatories was available. 394 U.S. 286, 300 (1969) ("it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry" into the petitioner's claim). This Court too may rely on its AWA authority to authorize necessary proceedings "in order that a fair and meaningful evidentiary hearing may be held." *Id.*

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* This amicus brief does not purport to state the views of Yale Law School, Michigan State University College of Law, or Loyola Law School, if any.

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