**Nos. 21-1757 and 21-1812**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

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VICTOR B. SKAAR
*Claimant-Cross-Appellant*,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs
*Respondent-Appellant*.

---

Appeal from the United States Court of Appeals for Veterans Claims in Case No. 17-2574

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# CORRECTED AMICUS BRIEF OF 15 ADMINISTRATIVE LAW, CIVIL PROCEDURE, AND FEDERAL COURTS PROFESSORS IN SUPPORT OF CLAIMANT-CROSS-APPELLANT AND AFFIRMANCE

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## CERTIFICATE OF INTEREST

Counsel for Amici, Jonathan D. Selbin, certifies the following:

1. The full name of every party represented by us is: Brooke D. Coleman, Maureen S. Carroll, Zachary Clopton, Robin Effron, Maria Glover, Andrew Hammond, Deborah R. Hensler, Helen Hershkoff, Alexandra D. Lahav, Elizabeth G. Porter, Alexander Reinert, Judith Resnik, Joan E. Steinman, Michael D. Sant'Ambrogio, and Adam S. Zimmerman.

2. The name of the real party in interest represented by us is: Not Applicable.

3. All parent corporations and any publicly held companies that own ten percent or more of the stock of the party represented by us are: Not Applicable

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are: Not Applicable

5. The following cases are those 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: Not Applicable

6. The following information is required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees): Not Applicable

Dated: November 10, 2021

*/s/ Jonathan D. Selbin*
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# TABLE OF CONTENTS

**Page**

INTEREST OF AMICI CURIAE....1

SUMMARY OF ARGUMENT....3

ARGUMENT....5

I. Class actions provide redress for wrongful government conduct affecting groups of individuals....5

A. The Advisory Committee that drafted Rule 23 intended that it apply expansively in government litigation....6

B. Consistent with Rule 23's design, courts have long relied on class actions to resolve systemic challenges to government conduct....9

C. Class actions promote judicial review, access to justice, efficiency, and uniform administration of law....13

II. Consistent with fundamental principles of representative litigation in federal court, a class may include individuals who have not yet received governmental determinations....18

III. Class actions are consistent with other administrative law doctrines that enable judicial review of government action that affects many people....22

A. Collateral Challenges....25

B. Futility and Competence....27

CONCLUSION....29

# TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*Almendares v. Palmer*,
222 F.R.D. 324 (N.D. Ohio 2004).....16

*Amchem Prods., Inc. v. Windsor*,
521 U.S. 591 (1997).....7

*Appleton Elec. Co. v. Advance-United Expressways*,
494 F.2d 126 (7th Cir. 1974).....19

*Avocados Plus Inc. v. Veneman*,
370 F. 3d 1243 (D.C. Cir. 2004).....23

*Baby Neal for and by Kanter v. Casey*,
43 F.3d 48 (3d Cir. 1994).....21

*Barfield v. Cook*,
No. 3:18-cv-1198, 2019 WL 3562021 (D. Conn. Aug. 6, 2019).....13

*Barrett v. Principi*,
363 F.3d 1316 (Fed. Cir. 2004).....22

*Brown v. Board of Education*,
347 U.S. 483 (1954).....7

*Carr v. Saul*,
141 S. Ct. 1352 (2021).....28

*Cohen v. United States*,
650 F.3d 717 (D.C. Cir. 2011) (en banc).....26

*D.L. v. District of Columbia* ("*D.L. II*"),
860 F.3d 713 (D.C. Cir. 2017).....10

*Dawson Farms, LLC v. Farm Serv. Agency*,
504 F.3d 592 (5th Cir. 2007).....24

*Devlin v. Scardelletti*,
536 U.S. 1 (2002)..... 18, 19, 20

*Doe v. Arizona Dep't of Educ.*,
111 F.3d 678 (9th Cir. 1997).....27

*Ebanks v. Shulkin*,
877 F.3d 1037 (Fed. Cir. 2017).....17

*Exxon Mobil Corp. v. Allapattah Servs., Inc.*,
545 U.S. 546 (2005).....19

## TABLE OF AUTHORITIES
## (continued)

**Page(s)**

*Garnett v. Zeilinger* ("*Garnett I*"),
301 F. Supp. 3d 199 (D.D.C. 2018) ..... 10, 11

*Gayle v. Warden Monmouth Cnty. Correctional Inst.*,
838 F.3d 297 (3rd Cir. 2016).....16

*Honig v. Doe*, 484 U.S. 305 (1988) .....27

*I.A.M. Nat'l Pension Fund Ben. Plan C. v. Stockton TRI Indus.*,
727 F.2d 1204 (D.C. Cir. 1984) .....23

*In re Steele*,
799 F.2d 461 (9th Cir. 1986).....24

*J.D. v. Azar*,
925 F.3d 1291 (D.C. Cir. 2019) ..... 12, 19

*Johnson v. Robison*,
415 U.S. 361 (1974), .....25

*Joyner v. McDowell Cnty. Bd. of Educ.*,
92 S.E.2d 795 (N.C. 1956).....7

*Kennedy v. Esper*,
No. 16-cv-2010, 2018 WL 6727353 (D. Conn. Dec. 21, 2018) .....12

*King v. Burwell*,
759 F.3d 358 (4th Cir. 2014), *aff'd*, 576 U.S. 473 (2015) .....26

*Ledford v. West*,
136 F. 3d 776 (Fed. Cir. 1998).....24

*Lippert v. Baldwin*,
No. 10 C 4603, 2017 WL 1545672 (N.D. Ill. Apr. 28, 2017 .....9

*Lyngaas v. Ag*,
992 F.3d 412 (6th Cir. 2021).....18

*Maggitt v. West*,
202 F.3d 1370 (Fed. Cir. 2000)..... 23, 28

*Manker v. Spencer*,
329 F.R.D. 110 (D. Conn. 2018).....12

*Mathews v. Eldridge,*
424 U.S. 319 (1976) .....28

*McCarthy v. Madigan*,
503 U.S. 140 (1992) ..... 23, 24, 28

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

*McKart v. United States*,
395 U.S. 185 (1969) ..... 23

*McNary v. Haitian Refugee Ctr., Inc.*,
498 U.S. 479 (1991) ..... 25

*Monk v. Shulkin*,
855 F.3d 1312 (Fed. Cir. 2017) ..... 15, 22

*N.S. v. Hughes*,
335 F.R.D. 337 (D.D.C. 2020) ..... 13

*Nehmer v. U.S. Veterans' Admin.*,
118 F.R.D. 113 (N.D. Cal. 1987) ..... 10

*New York Petroleum Corp. v. Ashland Oil, Inc.*,
757 F.2d 288 (Fed. Cir. 1985) ..... 27

*Parent/Prof'l Advocacy League v. City of Springfield, Massachusetts*,
934 F.3d 13 (1st Cir. 2019) ..... 27

*Parko v. Shell Oil Co.*,
739 F.3d 1083 (7th Cir. 2014) ..... 20

*Potts v. Flax*,
313 F.2d 284 (5th Cir. 1963) ..... 8, 9

*R.F.M. v. Nielsen*,
365 F. Supp. 3d 350 (S.D.N.Y. 2019) ..... 21

*Reno v. Catholic Social Servs., Inc.*,
509 U.S. 43 (1993) ..... 26

*Reynolds v. Giuliani*,
118 F. Supp. 2d 352 (S.D.N.Y. 2000) ..... 14

*Scholl v. Mnuchin*,
494 F. Supp. 3d 661 (N.D. Cal. 2020) ..... 10

*Scott v. Quay*,
338 F.R.D. 178 (E.D.N.Y. May 25, 2021) ..... 12, 22

*Sullivan v. Zebley*,
493 U.S. 521 (1990) ..... 10, 21

*Supreme Tribe of Ben-Hur v. Cauble*,
255 U.S. 356 (1921) ..... 18, 20

*Sweet v. DeVos*,
No. C 19-03674 WHA, 2019 WL 5595171 (N.D. Cal. Oct. 30, 2019) ..... 11

## TABLE OF AUTHORITIES
## (continued)

**Page(s)**

*Weinberger v. Salfi*,
422 U.S. 749 (1975) ..... 21, 28

*Zahn v. International Paper Co.*,
414 U.S. 291 (1973) ..... 19

**STATUTES**

8 U.S.C. § 1160(a) ..... 25
26 U.S.C. § 7422(a) ..... 26
Administrative Procedure Act ..... 24
Federal Power Act ..... 23
Federal Tort Claims Act ..... 13, 23
Prison Litigation Reform Act ..... 13
Social Security Act ..... 21, 23

**RULES**

Fed. R. Civ. P. 23(a)(1) ..... 15
Fed. R. Civ. P. 23(b) ..... 5, 9
Fed. R. Civ. P. 23(b)(1) ..... 5
Fed. R. Civ. P. 23(b)(2) ..... passim
Fed. R. Civ. P. 23(b)(3) ..... 5, 17
Fed. R. Civ. P. 26 ..... 26
U.S. Vet. App. R. 15(e) ..... 18
U.S. Vet. App. R. 22(f)(2) ..... 18
U.S. Vet. App. R. 23 ..... 18
U.S. Vet. App. R. 23(a)(1) ..... 15
U.S. Vet. App. R. 23(a)(5) ..... 3
U.S. Vet. App. R. 123(c)(2) ..... 18
U.S. Vet. App. R. 123(e)(5) ..... 18

## TABLE OF AUTHORITIES (continued)

**Page(s)**

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Adam S. Zimmerman, *The Class Appeal*, 89 U. Chi. L. (forthcoming 2022).....14

Charles A. Wright et al., Federal Practice and Procedure § 1775 (3d ed. 2008).....5

David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 Fla. L. Rev. 657, 678–91 (2011). .....7

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Letter from Charles A. Wright. Professor of Law, Univ. of Texas, to Benjamin Kaplan, Professor of Law, Harvard Law Sch. (Feb. 6, 1963).....8

Letter from Charles Alan Wright, Professor of Law, Univ. of Texas, to Benjamin Kaplan, Professor of Law, Harvard Law Sch. (Feb. 16, 1963).....8

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## TABLE OF AUTHORITIES
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**Page(s)**

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Newberg on Class Actions § 4:26 (5th ed. 2018) .....15

William B. Rubenstein,
Newberg on Class Actions § 4:35 (5th ed. 2018) .....15

William B. Rubenstein,
Newberg on Class Actions § 4:36 (5th ed. 2018) .....18

## INTEREST OF AMICI CURIAE

Amici teach and write in the fields of administrative law, civil procedure, and federal courts.[1] Amici support appellee's position that when the Court of Appeals for Veterans Claims hears a class action for injunctive relief against the same government policy, the Court may properly include veterans who have not yet presented their claims to the Board of Veterans' Appeals, but will in the future.

Amici file this in their individual capacity as scholars. They provide institutional affiliation solely for purposes of identification.

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## SUMMARY OF ARGUMENT

Amici submit this brief to explain how courts employ injunctive relief class actions to hear system-wide claims against governmental bodies. The Veterans Court certified a class of veterans whose disability benefits claims "have been" or "will be denied" under a policy that the Court found was not supported by sound science. The Government now argues that the class improperly includes veterans who "will be denied" benefits under the same invalidated policy simply because they have not yet filed their claims. This brief makes three points in support of the Claimant-Cross-Appellant's argument that courts can and should hear such class actions.

*First*, class actions against governmental agencies are well-established and common in such cases. The Veteran Court's rules for class actions were modeled after Rule 23(b)(2) of the Federal Rules of Civil Procedure, which permit class actions against government defendants when they have "acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2); U.S. Vet. App. R. 23(a)(5) (permitting class action when VA "has acted or failed to act on grounds that apply generally to the class"). That power allows courts to hear lawsuits that seek to enjoin or vacate government policies, even though those policies may ultimately affect individual plaintiffs in different ways. Courts also consistently rely

on Rule 23(b)(2) to hear class actions against federal and state agencies, even when not all class members have yet cleared every procedural or administrative hurdle.

*Second*, because class litigation is representative litigation, typically only *named class representatives* must establish subject matter jurisdiction in federal court. This distinction between named plaintiffs and absent class members allows courts to provide sensible, efficient, and uniform relief in a class action while respecting jurisdictional limits. A categorical approach that forced parties to serially exhaust administrative remedies to participate in a class action—especially one challenging the same governmental policy—would needlessly undermine the fundamental benefits of a class litigation.

*Third*, class actions challenging agency policies are consistent with basic administrative law principles that dictate how courts review government conduct. It is true that courts sometimes will require that individuals file claims with a government agency before they file claims in court. But courts rarely do so when the relief plaintiffs seek is collateral to the merits of agency adjudication or when the agency cannot competently provide it. In these cases, courts hear systemic challenges to government programs in class actions because the claims *will not turn on the merits or particularities of any individual claim* the agency will decide. Absent a clear statement from Congress that says otherwise, courts can hear these

cases as class actions to promote efficient access to justice, avoid piecemeal remedies, and "say what the law is."

## ARGUMENT

### I. Class actions provide redress for wrongful government conduct affecting groups of individuals.

Rule 23 of the Federal Rules of Civil Procedure allows three types of class actions, listed under subsections 23(b)(1), 23(b)(2), and 23(b)(3). The second type of class action—declaratory and injunctive relief class actions under Rule 23(b)(2)—has long been used to resolve aggregate challenges to unlawful government conduct, even when government policies may ultimately impact the class members in different ways. The Veterans Court modeled its own Rule 23 closely on Fed. R. Civ. P. 23(b)(2). *See* In re: Rules of Practice and Procedure, U.S. Vet. App. Misc. Order 12-20 (Nov. 10, 2020).

Under Rule 23(b)(2), "the party opposing the class" must "act[] or refuse[] to act" in a way that "apply generally to the class." Fed. R. Civ. P. 23(b)(2). In cases where plaintiffs seek injunctive or declaratory relief against the government, courts have long said that phrase encompasses situations in which the defendant established a "regulatory scheme common to all class members." 7AA Charles A. Wright et al., Federal Practice and Procedure § 1775 (3d ed. 2008) (collecting cases) ("Wright & Miller"). The Advisory Committee notes to Rule 23 make clear that courts should liberally certify classes under Rule 23(b) in such cases. *See* Fed. R. Civ. P. 23(b)(2)

Advisory Committee Notes to 1966 amendments (recommending courts certify classes for injunctive or declaratory relief even when the defendant's actions threaten only "one or a few members of the class, provided it [defendant's conduct] is based on grounds which have general application to the class.").

This construction is consistent with the history of the modern class action rule. The authors of Rule 23 designed it to address cases where a government defendant's policies or practices systematically frustrated plaintiffs' ability to vindicate their rights through individualized government procedures. For decades, the federal courts followed suit, certifying countless injunctive relief classes against government benefit programs. In the process, class actions promoted better interactions between the judicial and executive branch—avoiding piecemeal remedies that, when applied one at a time, frustrate judicial review, limit access to justice, and interfere with the uniform administration of law.

### A. The Advisory Committee that drafted Rule 23 intended that it apply expansively in government litigation.

The history of Rule 23 confirms that a class certification order that includes plaintiffs who completed different stages of an administrative process fits easily into class action jurisprudence stretching back to the modern class action's origins.

Class actions against governmental entities are "prime examples" of what Rule 23(b)(2) was designed to facilitate, and Rule 23 "builds on experience, mainly, but not exclusively, in the civil rights field." *Amchem Prods., Inc. v. Windsor*, 521

U.S. 591, 614 (1997) (internal quotation marks and citations omitted); *see also* David Marcus*, Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 Fla. L. Rev. 657, 678–91 (2011); Judith Resnik, *"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pool Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. Pa. L. Rev. 1765, 1791-96 (2017) (tracing the constitutional developments and historical records that gave rise to the modern class action rule). The effort to revise Rule 23 coincided with efforts after *Brown v. Board of Education*, 347 U.S. 483 (1954), to desegregate public schools. By the early 1960s, a number of southern states had jettisoned crude, explicit policies that simply required segregated schools. Instead, school boards gave children a default school assignment, but allowed them to petition to have that assignment changed. *Marcus*, *supra*, at 684-85. Whether a board would grant any particular child's petition ostensibly depended on a host of individual, facially nondiscriminatory factors specific to each one. *E.g., Joyner v. McDowell Cnty. Bd. of Educ.*, 92 S.E.2d 795, 798 (N.C. 1956).

As administered, however, these processes left segregated schools almost entirely intact. Boards made default assignments by race, then systematically deployed a set of pretextual practices to reject individual petitions. *Marcus*, *supra*, at 687-88. When challenged in class actions, governments invoked these individualized government processes to argue that no two children's claims to attend

desegregated schools depended on common questions of law or fact. Such arguments sometimes succeeded in derailing desegregation class actions, even as schools remained categorically segregated.

The Committee members most responsible for the revised Rule 23 were "keenly interested" in these efforts to use individual remedial processes to defeat desegregation class actions. Letter from Charles Alan Wright, Professor of Law, Univ. of Texas, to Benjamin Kaplan, Professor of Law, Harvard Law Sch. (Feb. 16, 1963), microformed on CIS-7004-34 (Jud. Conf. Records, Cong. Info. Serv.). "It is absolutely essential," Wright wrote the committee reporter Benjamin Kaplan, "that such suits be treated as class action[s] . . . ." Letter from Charles A. Wright. Professor of Law, Univ. of Texas, to Benjamin Kaplan, Professor of Law, Harvard Law Sch. (Feb. 6, 1963), microformed on CIS-6312-65 (Jud. Conf. Records, Cong. Info. Serv.).

Wright and other members of the Rules Committee relied extensively on *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963) to highlight the importance of using class actions to join together parties who, although ostensibly in different positions, challenged the same government policy. *See* Wright Letter (Feb. 16, 1963), *supra*. There, a school board attempted to defeat a class action on grounds that a student's petition to change her assignment to a school required an individualized process. The Fifth Circuit refused to allow this mirage of individualized treatment to thwart

the plaintiffs' challenge. "Properly construed," the Fifth Circuit reasoned, "the purpose of the suit was not to achieve specific assignment of specific children to any specific . . . school." Rather, the suit "was directed at the system-wide policy of racial segregation." *Potts*, 313 F.2d at 288. Based on *Potts*, Rule 23(b)(2) was rewritten to clarify that such classes should be "maintained" in such cases. *Potts* was included in the Advisory Committee's note on the revised rule as an exemplar of the Rule 23(b)(2) class action.

As examples of class actions described in Part B demonstrate, federal courts to this day have honored the Advisory Committee's intention that Rule 23 provide a powerful tool to promote legal access, judicial review, and uniform relief, even when individual plaintiffs in a class were impacted in different ways, at different stages of a governmental program. The Court of Appeals for Veterans Claims order in this case is just a recent example in this unbroken line of decisions.

### B. Consistent with Rule 23's design, courts have long relied on class actions to resolve systemic challenges to government conduct.

Consistent with the history of Rule 23(b), courts have long relied on class actions to resolve constitutional and statutory challenges to agency decisions—particularly when plaintiffs challenge a common procedure or pattern that systemically violates the law—regardless of whether all those who stand to benefit have exhausted a government administrative process. *See, e.g., Lippert v. Baldwin*, No. 10 C 4603, 2017 WL 1545672, at *4 (N.D. Ill. Apr. 28, 2017) (collecting cases);

Wright & Miller, *supra*, § 1775 (3d ed. 2008) (collecting cases where "Rule 23(b)(2) . . . has been used extensively to challenge" complex benefit schemes). In the process, class actions have offered courts critical tools to review agency policies, provide coherent relief where appropriate, and ensure the executive branch complies with their decisions.

Since the creation of the modern class action rule in 1966, courts have routinely certified class actions to review systematic and unlawful practices against a wide array of federal and state agencies. These cases include Social Security, IDEA claims, immigration, food stamps, prisoner rights, stimulus payments, and veteran benefits for system-wide problems that impact large groups of differently situated claimants. *See, e.g., Sullivan v. Zebley*, 493 U.S. 521 (1990) (social security); *D.L. v. District of Columbia* ("*D.L. II*"), 860 F.3d 713 (D.C. Cir. 2017) (IDEA); *Alli v. Decker*, 650 F.3d 1007 (3d. Cir. 2011) (immigration); *Garnett v. Zeilinger* ("*Garnett I*"), 301 F. Supp. 3d 199, 203–04 (D.D.C. 2018) (food stamps); *Scholl v. Mnuchin*, 494 F. Supp. 3d 661, 680-81 (N.D. Cal. 2020) (CARES act stimulus benefits); *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113 (N.D. Cal. 1987) (veterans benefits).

One recent study reviewed every reported government class action decision for injunctive relief since 2011. It found that courts certified approximately 75% of all such class actions. *See* David Marcus, *The Persistence & Uncertain Future of the*

*Public Interest Class Action*, 24 Lewis & Clark L. Rev. 395 (2020). Many of these actions challenged uniform policies that denied plaintiffs the "opportunity to seek a benefit or vindicate a right, without actually demanding that the court award each class member the benefit or vindicate each one's right." *Id.* at 412-14 (citing dozens of examples).

In such cases, courts comfortably certified class actions for injunctive relief, despite government arguments that not all the class members would be entitled to win their individual case at the end of a government adjudication process. For example, courts certified class actions against the Department of Education for categorically refusing to adjudicate requests to cancel student debt based on creditor schools' misconduct; the Department of Homeland Security for refusing to hold bond hearings for certain classes of detained immigrants; and the District of Columbia for ignoring statutory deadlines to process individualized student assessments and food stamp applications. *Sweet v. DeVos*, No. C 19-03674 WHA, 2019 WL 5595171, at *7 (N.D. Cal. Oct. 30, 2019); *Reid v. Donelan*, No. 13-30125-PBS, 2018 WL 5269992, at *5 (D. Mass. Oct. 23, 2018); *Garnett*, 301 F. Supp. 3d at 208. This is true even though individual litigants, in the end, might never receive an order cancelling their debts, releasing them on bond, approving their education plan, or awarding SNAP benefits. *See, e.g., Garnett*, 301 F. Supp. 3d at 208 ("[T]he key question for liability under the statute is *whether* the [government] is

systemically processing applications and sending recertification notices within the statutory deadlines, not *why* it has failed to do so in any particular case.")

Courts frequently certify classes comprised of members who can benefit from its judgment today and those who may do so in the future, including people who have not yet satisfied exhaustion or presentment requirements. For example, *Manker v. Spencer*, 329 F.R.D. 110 (D. Conn. 2018) and *Kennedy v. Esper*, No. 16-cv-2010, 2018 WL 6727353 (D. Conn. Dec. 21, 2018), involved class actions of Navy, Marine Corps, and Army veterans with post-traumatic stress disorder and related conditions challenging their less-than-Honorable discharges. The courts permitted those cases to proceed on a class-wide basis without limiting the class to those who already had petitioned the government for relief. *See Manker*, 329 F.R.D. at 123 (certifying class of Navy and Marine Corps veterans who "have not received upgrades of their discharge status to Honorable from the NDRB").

In many cases, courts craft class definitions that expressly include those who may later be (but are not yet) in a position to benefit from the result of the class adjudication. *See, e.g.*, *J.D. v. Azar*, 925 F.3d 1291, 1305 (D.C. Cir. 2019) (affirming certification of a class of pregnant children denied abortion access "who are or will be in the legal custody of the federal government"); *Scott v. Quay*, 338 F.R.D. 178, 192 (E.D.N.Y. May 25, 2021) (certifying class comprised of "all those people who were confined in the Metropolitan Detention Center's West Building from January

27, 2019 until February 3, 2019, and who have or will in the future have satisfied the exhaustion requirement imposed" by the Federal Torts Claims Act); *Barfield v. Cook*, No. 3:18-cv-1198, 2019 WL 3562021 (D. Conn. Aug. 6, 2019) (certifying class of individuals "who have been or will be diagnosed with Hepatitis C" and "who are or will be in the custody of the Connecticut Department of Corrections" and noting that Prison Litigation Reform Act exhaustion requirement satisfied vicariously for all class members by named plaintiff); *N.S. v. Hughes*, 335 F.R.D. 337, 355 (D.D.C. 2020) (certifying class of "all indigent criminal defendants . . . who were, are, or will be detained").

The absent class members in such cases may still need to present their claims to the agency if they want individual relief—at least when a statute clearly requires they do so. *See* Part III, *infra*. In other words, the certification of a class action does not alter the administrative exhaustion requirements or jurisdictional prerequisites that apply to individual eligibility determinations. But, as set forth below, class actions mean that when eligible recipients apply for relief, they will have meaningful access to the courts and lawyers who can assure the same, correct policy will be applied uniformly.

### C. Class actions promote judicial review, access to justice, efficiency, and uniform administration of law.

Class actions serve several important goals in the judicial review of government action. Class actions allow courts to meaningfully review systemic

problems in government programs. Class actions afford parties economies of scale to challenge government problems and promote accountability and efficiency. And class actions promote the consistent and orderly administration of law.

First, courts have found class actions essential to hear important questions that may otherwise evade judicial review, while helping to effectuate faithful compliance with court orders. *See, e.g., Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 391-92 (S.D.N.Y. 2000) (certifying a 23(b)(2) class challenge to food stamp administration due to the fluid nature of the class and the "defendants' ability to moot the claims of the named plaintiffs, 'thereby evading judicial review of their conduct'"). Some government policies or practices are inherently transitory or compromise a petitioner's ability to obtain judicial review at all. *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 404 (1980). These include systems that shackle parties before trial, impose excessive fees or bonds, deny lawyers timely access to records, or unreasonably delay the docketing of internal appeals inside an administrative agency. *See* Adam S. Zimmerman, *The Class Appeal*, 89 U. Chi. L. Rev. _ (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3901197 (describing examples). When those claims proceed individually, they may vanish before they ever reach a judicial forum.

Class actions enable courts to overcome these difficulties. In a class action, the class representative asserts claims on behalf of parties "where joinder of all

members is impracticable," *see* Fed. R. Civ. P. 23(a)(1); U.S. Vet. App. R. 23(a)(1), including deported children, veterans with PTSD, mentally disabled adults, or other vulnerable groups unable to assert rights on their own. Class actions continue, even after the lead plaintiff's individual claim becomes moot, so long as members of the class continue to have a live controversy. *See Geraghty,* 445 U.S. at 404. This is true regardless of the reason—such as if the plaintiff is released, retains counsel, or simply ages out of a government program. In this way, class actions help courts to efficiently serve as a "lawgiver and error corrector" in cases that repeatedly arise, but often evade review. *See Monk v. Shulkin,* 855 F.3d 1312, 1321 (Fed. Cir. 2017).

Second, class actions expand access to legal representation and promote accountability. William B. Rubenstein, Newberg on Class Actions § 4:26 (5th ed. 2018) (observing government class actions afford "economies of scale" to attorneys and clients with "limited resources"). This may be particularly important in large government benefit programs, where parties lack representation to interpret and apply precedential decisions—or when precedential decisions are a rarity. Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992, 2010-12 (2012); Jerry L. Mashaw, Richard A. Merrill, & Peter M. Shane, Administrative Law: The American Public Law System, 457 (6th ed. 2009) (discussing why precedent-based decisions are not realistic for ALJs in Social Security disability cases); 2 Newberg on Class Actions § 4:35 (collecting cases

certifying class certification when "the defendants have not formally committed to granting class-wide relief or taken any concrete steps to address the plaintiffs' concerns").

In this way, class actions provide an important, adversarial tool to ensure compliance *after judgment*. *See, e.g., Almendares v. Palmer*, 222 F.R.D. 324, 334 (N.D. Ohio 2004) (certifying a class challenge when it is "not clear that any injunctive relief awarded to an individual plaintiff will automatically inure to the benefit of the class as a whole"); Maureen Carroll, *Aggregation for Me, But Not for Thee: The Rise of Common Claims in Non-Class Actions*, 36 Cardozo L. Rev. 2017, 2063-64 (2015) (highlighting importance of class certification to post-judgment enforcement of injunctions). Without class actions, would-be class members subjected to the same unlawful government program, may confront enormous backlogs and have to "undertake the expense, burden, and risk of instituting their own litigation—barriers that in many cases will be prohibitive." *Gayle v. Warden Monmouth Cnty. Correctional Inst.*, 838 F.3d 297, 310-11 (3rd Cir. 2016).

Precedential decisions, when available, do little to improve access to representation. In fact, an adjudicatory system that relies on stare decisis in one sense creates *more work for lawyers*, requiring counsel to find relevant precedents, interpret their significance to the case at hand, and advocate how they should be applied. *See, e.g.*, 2 Charles H. Koch, Jr., Administrative Law and Practice § 5:67

(3d ed. 2010) (explaining how stare decisis disadvantages unsophisticated claimants who lack resources to be informed of individual decisions in mass justice adjudicatory system). Aggregate adjudication, by contrast, may simultaneously promote "efficiency, consistency, and fairness, and improv[e] access to legal and expert assistance by parties with limited resources." *Monk,* 855 F.3d at 1320.

Finally, aggregate procedures provide for uniform and efficient application of law when many different people challenge the same organizational misconduct. Newberg, § 1:10 (noting that aggregate procedures "reduce[] the risk of inconsistent adjudications"). As this Court recognized, individual petitions that challenge the same government policy or practice only risk "line-jumping" that would aggravate delays throughout the VA system. *Ebanks v. Shulkin*, 877 F.3d 1037, 1040 (Fed. Cir. 2017); *see also* Sant'Ambrogio & Zimmerman, *supra* at 2010-12 (without class actions, large public benefits programs waste resources in "duplicative litigation, requiring frequent remands to address common factual errors, and hampering the efficient development and enforcement of law"). Absent a class-wide order that ensures claims are resolved in a uniformly timely manner, piecemeal challenges may needlessly favor some individual petitioners over others.

Uniformity is a central goal of the Rule 23(b)(2) class. Unlike class actions certified under Rule 23(b)(3), which allows class members a chance to "opt out" of the litigation, class members in a (b)(2) class cannot exclude themselves. *See also*

U.S. Vet. App. R. 23 (no express right to opt out of actions for "injunctive relief"). This is because an individual's request for an injunction that, say, forces the Education Department to change how it provides student debt relief may affect others who depend upon that agency for relief. Class actions for injunctive relief recognize this fact by allowing different stakeholders to participate when a judicial decision "invariably affect the rights of others" and there is "no realistic sense of 'opting out' of such a class." *See* Newberg § 4:36; *see also* U.S. Vet. App. R. 15(e) (motion to intervene in class actions); 22(f)(2) & 23(c)(2) (notice); 23(e)(5) (objections).

## II. Consistent with fundamental principles of representative litigation in federal court, a class may include individuals who have not yet received governmental determinations.

Courts routinely certify class actions even when, in the end, not all their members may be eligible for relief. This is consistent with the representative nature of a class action. As the Supreme Court has recognized, "[n]onnamed class members ... may be parties for some purposes and not for others." *Devlin v. Scardelletti*, 536 U.S. 1 (2002). For most purposes, courts only look to the *named class representative* to determine whether subject matter jurisdiction exists in federal court. *Devlin*, 536 U.S. at 10 ("[N]onnamed class members cannot defeat complete diversity..."); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) (same); *Lyngaas v. Ag*, 992 F.3d 412, 437 (6th Cir. 2021) ("Regarding subject-matter jurisdictional

inquiries, the Supreme Court has held that absent class members are not considered parties at all.") (citing *Devlin*, 536 U.S. at 10); *J.D.*, 925 F.3d at 1323 (holding only one representative plaintiff is needed to satisfy Article III's case-or-controversy requirement in a "Rule 23(b)(2) class action advancing a uniform claim and seeking uniform injunctive and declaratory relief").

The same is true for federal statutes that govern venue in federal court. *See Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 140 (7th Cir. 1974) (holding that Rule 23 does not "require the establishment of venue for nonrepresentative-party class members"). The rule that nonnamed class members cannot defeat jurisdiction in such cases is "justified by the goals of class action litigation." *Devlin*, 536 U.S. at 10 ("Ease of administration of class actions would be compromised by having to consider the citizenship of all class members, many of whom may even be unknown, in determining jurisdiction.").[2]

[2] The Government relies on *Zahn v. International Paper Co.,* 414 U.S. 291 (1973) —a case that once held that damage class actions required each class member establish the "amount in controversy"—for the proposition that it represents a "well-established rule" for subject-matter jurisdiction in class actions. Gov. Br. at 23. Of course, Congress made *Zahn* a dead letter when it passed the supplemental jurisdiction statute. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 566-67 (2005). But, even before, most commentators considered *Zahn* an "outlier" in the world of class litigation, not a "well-established rule." Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 Emory L.J. 55, 61 (2004) ("Which case, then, is the outlier? *Zahn* ... *Zahn* is inconsistent with the litigation posture of class members. Class members are not full-fledged parties to the litigation. They are not subject automatically to party discovery, and are not expected (or entitled) to take an active

This distinction between named plaintiffs and absent class members has long allowed courts to provide sensible, efficient, and uniform relief in a class action while respecting procedural and jurisdictional limits. If each class member had to separately satisfy a threshold procedural requirement before class certification, courts and administrative agencies would have to engage in the very sort of individualized, resource-intensive processes that aggregate litigation is designed to avoid. *See Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084-85 (7th Cir. 2014) (Posner, J.) ("To require the district judge to determine whether each of the 150 members of the class sustained an injury . . . would make the class certification process unworkable.").[3]

As illustrated by the class actions discussed in Part I, the same is true for most prudential and legislative requirements that claimants "exhaust" administrative remedies before accessing a federal court. Those class actions strike the appropriate balance between the needs of representative litigation and the jurisdictional limits of

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role in the litigation; they are along for the ride. If, as *Ben-Hur* held, their citizenships should not be 'counted,' it is difficult to see why the amount of their claims should matter."). Moreover, *Zahn,* on its own terms, did not apply to classwide claims for injunctive relief, which, unlike "spurious claims" asserted in that case, invariably affect the rights of others. Since then, *Devlin* has made clear that absent class members are generally *not* parties for the purposes of subject matter jurisdiction.

[3] That burdensome process is also inconsistent with the scope of an injunctive remedy outside the class action context, where vacating a rule under the APA frequently benefits people who are not before the court. *See* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121 (2020).

our courts. Parties still participate in an administrative process that gives the government a chance to resolve an issue first. At the same time, courts can use class actions to apply the law without imposing an arbitrary limit on class membership (and relief) by excluding those with common claims who have not yet met certain procedural requirements at the earliest stages of litigation.

Courts have only rarely created exceptions for these background principles of representative litigation—and only when Congress expressly said so under a strict statutory scheme. For example, in 1973, the Supreme Court excluded absent class members who had not presented claims to the Secretary under the strict language of the Social Security Act. *Weinberger v. Salfi*, 422 U.S. 749 (1975). But under most statutory review schemes, the fact that the proposed "class includes members at various stages of administrative review does not defeat class certification." *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 369 (S.D.N.Y. 2019) (collecting cases). This is, in part, because in injunctive relief cases, the "named plaintiffs are simply not asserting any claims that are not also applicable to the absentees." *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 63 (3d Cir. 1994). Even in strict statutory schemes, like the Social Security and Federal Torts Claims Act, courts still allow class actions on behalf of members who "have or will" in the future satisfy exhaustion requirements. *See, e.g., Zebley*, 493 U.S. at 527 (affirming class of children "who are now, or who

in the future will be, entitled to an administrative determination" for children's disability payments.); *Quay*, 338 F.R.D. at 192.

A different result would impose an arbitrary division between those whose claims were perfected at the time of an injunction and those whose claims were not yet ready. A hypothetical claimant who perfected an exhaustion requirement the day before issuance of a class-wide injunction might benefit from the judgment, while another claimant who did so the following day would not. Such a scenario, and the risk of inconsistent adjudications under the same invalid policy, would needlessly frustrate the goals of class actions "to compel correction of systemic error and to ensure that like veterans are treated alike." *Monk v. Shulkin*, 855 F.3d 1312, 1321 (Fed. Cir. 2017). A parsimonious requirement here also would disturb a statutory scheme "designed to award entitlements to a special class of citizens, those who risked harm to serve and defend their county." *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004) (internal quotation marks omitted).

## III. Class actions are consistent with other administrative law doctrines that enable judicial review of government action that affects many people.

Certifying class actions in this manner is also consistent with basic principles of administrative law that dictate how courts review government action.

Courts sometimes require that parties "exhaust" remedies—that is, file their claims with a government agency—before filing their claims in court. The word "exhaustion" has come to mean one of two things. Often it refers to situations where

courts, for prudential reasons, require parties to exhaust their remedies at an agency before allowing them into federal court. *McKart v. United States*, 395 U.S. 185, 193–95 (1969). The main goal behind those prudential doctrines, which are applied flexibly, is to give government agencies a chance to correct mistakes in the programs they have primary responsibility to administer and to conserve judicial resources. *McCarthy v. Madigan*, 503 U.S. 140, 145-48 (1992) (abrogated by statute on other grounds). *See also Maggitt v. West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000) (finding the Veterans Court "uniquely positioned" to "decide the considerations regarding exhaustion in a particular case"). Such analysis requires a flexible, "case-by-case analysis of the competing individual and institutional interests." *Id*.

Second, in rarer circumstances, courts may read a statute to require that individuals petition a government agency before they file their claims in court when Congress uses "sweeping and direct language." *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1248 (D.C. Cir. 2004). Examples include the Social Security Act, the Federal Tort Claims Act, and the Federal Power Act, which have adjudication systems with statutory provisions that expressly bar review of actions, findings, or objections outside of the specific rules Congress created. *Id.; I.A.M. Nat'l Pension Fund Ben. Plan C. v. Stockton TRI Indus.*, 727 F.2d 1204, 1208 (D.C. Cir. 1984). In such cases, the principal question for a court is one of statutory interpretation: based on the text, purpose and history of the rule, does the statute allow the court to

consider the claims? In many administrative programs, courts will read the statute to still account for similar prudential concerns.[4]

Courts frequently recognize exceptions in both situations when (1) relief is "collateral" to the merits of agency adjudication or (2) individual adjudication is "futile" and the agency simply lacks the "competence" to resolve petitioners' claims. *McCarthy*, 503 U.S. at 146-50. These include cases when parties challenge the "adequacy of an agency procedure itself." *Id.* at 148. All these examples have a common thread that lend themselves to class actions. Courts hear class actions that pose systemic challenges to government programs or policies when they do not turn on the merits or particularities of an individual claim the agency eventually will decide under that uniform policy.

[4] For example, courts may codify a "judicially developed requirement, for which there are recognized exceptions and excuses." *Dawson Farms, LLC v. Farm Serv. Agency*, 504 F.3d 592, 594 (5th Cir. 2007) (collecting cases). In other cases, courts may describe the statute as "jurisdictional," but still allow parties to argue for exceptions based upon equitable policies behind exhaustion. *See, e.g., In re Steele*, 799 F.2d 461, 466 (9th Cir. 1986) (holding that FOIA's exhaustion requirement is jurisdictional, but adding an exception for "futility"). Decisions involving the Veterans Judicial Review Act appear to take a similar approach. In *Ledford v. West*, 136 F.3d 776, 779-80 (Fed. Cir. 1998), for example, the court found a claimant failed to satisfy the "jurisdiction" of the Veterans Court by not first presenting his Administrative Procedure Act claims for a "decision of the board." But the Court still went on to evaluate whether it would have been futile to do so under the "intensely practical" considerations of "administrative exhaustion." *Id.*

### A. Collateral Challenges

First, courts regularly permit class actions that pose system-wide challenges to generally applicable policies, both as a matter of statutory interpretation and under prudential considerations. An early case in this line is *Johnson v. Robison*, 415 U.S. 361 (1974), where the Supreme Court ruled that a law that barred judicial review of the Veteran's Administration did not prevent the Court from resolving a class action that challenged a government policy that denied educational benefits to conscientious objectors of the Vietnam War. The Court reasoned that the statutory bar applied only to "those decisions of law or fact that arise in the *administration* by the Veteran's Administration of a *statute* providing benefits for veterans." *Id.* at 367 (emphasis in original). The statute barred judicial review over administrative decisions involving "a particular provision of the statute to a particular set of facts." *Id.* But it did not bar constitutional and system-wide challenges to an entire administrative scheme, at least absent a clearer statement from Congress.

The Court drew a similar distinction in *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 487 (1991), which challenged a government process for immigrant farmworkers seeking to adjust their status. *See* 8 U.S.C. § 1160(a). Litigants commenced a class action alleging that the entire system illegally denied claimants the chance to submit evidence, present witnesses, and access competent interpreters. *Id.* at 487. But Congress had limited judicial review "respecting an application for

adjustment of status." *Id.* at 491. The Supreme Court nevertheless held that the law's "reference to 'a determination' describes a single act rather than a group of decisions *or a practice or procedure employed in making decisions*." *Id.* at 492 (emphasis added). Accordingly, the law did not prevent "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id.; see also Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43 (1993) (allowing a class challenge to generally applicable regulations interpreting the statute, rather than to the merits of any individual claim).

Similar principles apply to other administrative regimes, including those raising class-wide challenges to tax and IDEA claims. Even though people who want a tax refund from the United States must first submit an administrative claim before filing in court, *see* 26 U.S.C. § 7422(a), courts have repeatedly held that the statute does not bar judicial review of collateral challenges to generally applicable agency policies or practices. *See*, *e.g.*, *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014), *aff'd*, 576 U.S. 473 (2015) (permitting a "challenge [to] the legality of a final agency action," as "consistent with the APA's underlying purpose of remov[ing] obstacles to judicial review of agency action") (internal quotation marks omitted).[5] IDEA

[5] *See also Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc) (permitting challenge to generally applicable IRS procedures for requesting refunds related to wrongfully collected excise taxes); *Scholl*, 494 F. Supp. 3d at 680-81 (permitting challenge to IRS policy treating incarcerated people as categorically ineligible for pandemic-related stimulus relief).

claims raising "systemic" or "structural" allegations also may not need to be administratively exhausted.[6] In sum, courts frequently allow collateral challenges to general policies or procedures. They often do so as a matter of statutory interpretation, when reading jurisdictional or non-jurisdictional statutes, or by accounting for prudential concerns that underlie basic principles of administrative exhaustion.

### B. Futility and Competence

Second, courts excuse administrative exhaustion when it is futile. *See*, *e.g.*, *Honig v. Doe*, 484 U.S. 305, 327 (1988) (although Education of the Handicapped Act "normally" precludes judicial review "until all administrative proceedings are completed . . . parents may bypass the administrative process where exhaustion would be futile or inadequate"); *New York Petroleum Corp. v. Ashland Oil, Inc.*, 757 F.2d 288, 293 (Fed. Cir. 1985) (observing that exhaustion of administrative remedies is not required "when pursuit of administrative remedies to the point of exhaustion is demonstrably futile"). The cases include those in which parties challenge the

[6] *Doe v. Arizona Dep't of Educ.*, 111 F.3d 678, 681 (9th Cir. 1997) (collecting cases); *but see Parent/Prof'l Advocacy League v. City of Springfield, Mass.*, 934 F.3d 13, 27 (1st Cir. 2019) (noting that "[o]ther circuits have defined an exception to the IDEA's exhaustion rule for 'systemic' suits," but declining to decide whether to recognize such an exception).

"adequacy of the agency procedure itself" or when the agency "predetermine[s]" the outcome. *McCarthy*, 503 U.S. at 148.[7]

In much the same way, courts do not require parties to seek relief from agencies when the agency cannot competently provide it. Lower officers and adjudicators, for example, often may not have discretion to review lawfulness of generally-applicable policies and procedures. Nor can they review constitutional or statutory questions that fall outside the agency's expertise. *See*, *e.g.*, *Weinberger v. Salfi*, 422 U.S. 749, 767 (1975) (noting that an administrative hearing would be "futile and wasteful, once the [agency] has determined that the only issue to be resolved is a matter of constitutional law concededly beyond [its] competence to decide"); *Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021) (explaining "[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested"). This Court, for example, recognized that claimants in the VA system face obstacles when they mount broad "legal challenges" to the Secretary's position, "either in a regional office or before the Board." *Maggitt*, 202 F.3d at 1378. For that reason, it has avoided an "across-the-board" presumption "for or against invocation of the exhaustion doctrine." *Id.* Rather, it has said that the Veterans Court

[7] Such challenges are also justified when the delay required to administratively process individual claims creates "prejudice," including harm to the deteriorating health of plaintiffs. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319, 331 (1976).

is "uniquely positioned" to consider exhaustion on a case-by-case basis to develop a "body of law in its unique setting." *Id.*

All these doctrines highlight an important background principle in the judicial review of administrative action. Courts will not turn individual requirements designed to balance the roles of administrative expertise and judicial oversight into something they are not—obscure traps that frustrate well-established tools courts need to review systemic challenges to the same illegal government policy or practice. Absent a clear statement from Congress that says otherwise, courts routinely hear these cases to promote access to justice, avoid piecemeal remedies, and "say what the law is."

## CONCLUSION

The Court of Appeals for Veterans Claims certified a class action to decide a common legal question affecting a similarly situated group of veterans. That decision is consistent with an unbroken line of decisions where courts relied on class actions to effectively review government action, the fundamental principles of representative litigation in federal court, and foundational principles of administrative law.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and Federal Circuit Rule 32(b)(1). It contains 6,895 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). It was prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point type.

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## CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing on counsel of record on November 10, 2021 via CM/ECF, which will serve notice to all counsel of record.

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