Nos. 2021-1757 and 2021-1812

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

VICTOR B. SKAAR,

Claimant-Cross-Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Respondent-Appellant.

RESPONSE AND REPLY BRIEF FOR RESPONDENT-APPELLANT

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RESPONSE AND REPLY BRIEF FOR RESPONDENT-APPELLANT

INTRODUCTION

In the decision on appeal, the Veterans Court correctly recognized that class certification requires court "jurisdiction over each subgroup" of a class, and that jurisdiction can "never be waived." Appx17. Yet its ultimate holding directly contravened these principles by waiving the explicit jurisdictional requirement of 38 U.S.C. § 7252 and certifying a class including individuals over whom it lacks jurisdiction – "present-future" claimants, who have not received a Board of Veterans' Appeals (board) decision, and "future-future" claimants, who have not even filed a benefits claim with the Department of Veterans Affairs (VA). Appx22.

In response, Mr. Skaar endeavors to turn the Court's attention away from this violation of section 7252, instead arguing that: (1) United States district courts

can certify classes that include future claimants, and (2) the All Writs Act (AWA) is an allowable basis for certifying such classes. Response Brief (Resp.) 21-30, 34-40. But the Veterans Court is an entirely different creature from a district court, and section 7252 is not remotely similar to the statute governing the jurisdiction of district courts. Moreover, Mr. Skaar's appeal does not implicate the AWA, as Mr. Skaar never requested a writ of mandamus or alleged that the court's jurisdiction to review his appeal was being obstructed.

Mr. Skaar also attempts to downplay the Veterans Court's action at issue, insisting that the court only addressed a common legal question and exercised its inherent authority to manage its docket, and that the court did not exert jurisdiction over any claim other than his own. Resp. 14-20, 44-46. But the court's management of the cases on its docket is not analogous to its action importing into Mr. Skaar's appeal hundreds of individuals whose cases are not even eligible for that docket. Nor is the court's practice of issuing precedent that decides a legal question comparable to its directly binding hundreds of individuals (without their acquiescence) to the judgments in this litigation. Indeed, the Veterans Court was transparent that the purpose of this class certification was to place these individuals' pending or future claims under its direct supervision and authority. Appx34-35.

Finally, in his response, Mr. Skaar does not attempt to defend the linchpin of the Veterans Court's analysis – its reliance on *Bowen v. New York*, 476 U.S. 467 (1986) – to find waiver. Appx20-22. In our opening brief, we explained that *Bowen*'s holding permitting waiver of a *non-jurisdictional* requirement of 42 U.S.C. § 405(g), the Social Security statute, is inapplicable to whether the *jurisdictional* requirement of 38 U.S.C. § 7252(a) could be waived. Opening Brief (Op.) 31-35. In his response, Mr. Skaar agrees that *Bowen* is distinguishable, and concedes that it is "inappropriate[ ]" to rely on *Bowen* to uphold the Veterans Court's decision. Resp. 31. This concession alone should warrant vacatur.

With regard to Mr. Skaar's cross-appeal, the Veterans Court correctly and lawfully excluded past and expired claimants from the class; thus, the Court should affirm that aspect of the Veterans Court's decision. *See* Appx23-25. Mr. Skaar protests that the court imposed a "categorical rule" that equitable tolling is only available for challenges to secretive governmental policies, but in doing so he mischaracterizes the court's reasoning, as the court explicitly stated that an equitable tolling evaluation "requires a case-by-case analysis and not a categorical determination," and listed several different scenarios where equitable tolling might be warranted. Appx23. Moreover, Mr. Skaar's general arguments about the claimant-friendly VA administrative system do not demonstrate that the Veterans Court should have granted equitable tolling *for these particular claimants*, a

question that involves the application of law to fact. This Court should decline Mr. Skaar's attempt to create, through this cross-appeal, a new exception to the rule of finality via Veterans Court class action.

ARGUMENT

I. The Veterans Court Exceeded Its Jurisdiction By Certifying A Class Including Veterans Who Had Not Received Board Decisions Or Even Filed VA Benefits Claims

As explained in our opening brief, the Veterans Court committed clear legal error in holding that it could "waive" the requirements of its jurisdictional statute for individuals without board decisions simply because Mr. Skaar, an unrelated appellant, was properly before the court. Appx22. Nothing in Mr. Skaar's response persuades otherwise.

A. The Court Should Give Short Shrift To The Ancillary Issues Of Dubious Relevance Highlighted By Mr. Skaar

As an initial matter, Mr. Skaar colors his discussion of a relatively straightforward legal question with three particular misdirects: (1) VA's allegedly unlawful reliance on a flawed dose estimate methodology, (2) the aging state of Palomares veterans, and (3) the perceived policy benefits of class actions. Resp. 10, 12, 17. But these issues do not address the lawfulness of the Veterans Court's actions, and the Court should not heed Mr. Skaar's attempts to distract from the actual question at hand—whether the Veterans Court erred, and violated 38 U.S.C.

§ 7252, in including within the class veterans over whom it clearly lacks jurisdiction.

First, Mr. Skaar's personal beliefs about the merits of the dose estimate methodology do not affect this Court's decision on class certification. The Veterans Court *did not hold* that the methodology is flawed, or that VA's reliance on the methodology is unlawful. *Contra, e.g.*, Resp. 2, 10 (alleging that the court "reject[ed] the Secretary's reliance on an unsound methodology"). Rather, the court held that the board had not provided an adequate statement of reasons or bases for denying Mr. Skaar's claim, and remanded for board factfinding on the merits of the methodology. Appx76-79.[1] It did not render a determination on the merits of the methodology.

Second, while we acknowledge that Palomares veterans are aging, the specific situation of these veterans has no bearing on whether the Veterans Court's class certification decision constitutes legal error. Moreover, this Court's decision on appeal will not affect their rights to file a claim for benefits, appeal a claim denial, and secure Veterans Court review at any time.[2] Finally, and notably, it was

[1] Indeed, the court observed that VA counsel had provided a detailed defense of the methodology at oral argument, but held that it was ultimately the board's prerogative to provide such an explanation. *Id.*

[2] This is not a situation where Palomares veterans cannot "vindicate their rights through individualized government procedures," or where the board is "powerless to give" the requested relief. *Contra* Appx22; Amicus Brief, ECF No.

Mr. Skaar's choice – not the Government's – to pursue a novel class certification motion, which considerably delayed resolution of Mr. Skaar's appeal, instead of a precedential decision that could have definitively decided the merits question for Palomares veterans years ago. Appx89 (for "3 years . . . the parties and the en banc Court expended considerable time and resources debating the [class action issue], without bringing the appellant any closer to receiving a decision that adequately addresses the [dose estimate issue]"); Appx102-109.

Third, as stated in our opening brief, the perceived policy benefits of class actions are irrelevant to the extent that a court must exceed its jurisdiction to achieve them. Op. 40; *contra* Resp. 43 (alleging that the "aims" of the class mechanism "will not be achieved" if class actions are less frequent). Any purported policy goals supporting class actions cannot overcome the Veterans Court's disregard of a clear jurisdictional limitation.

To the extent the Court considers these purported policy benefits at all, Mr. Skaar still fails to demonstrate that class actions are more efficient[3] or fairer than

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29 (Am-29), 6. The board is undoubtedly capable of making determinations regarding the dose estimates and methodology, and the Veterans Court's remand was premised on that very point. Appx76-77 (remanding for the board, "as factfinder," to determine the credibility and weight of the dose estimate, which "is at base nothing more than a piece of evidence").

[3] As Judge Falvey noted in dissent, "the procedural history of Mr. Skaar's case demonstrates that aggregated appeals at our [c]ourt may not be as efficient as expected." Appx59.

precedential opinions in the chapter 72 appeal context.[4] And, interestingly, despite Mr. Skaar's proclamation that "the Veterans Court's ability to issue precedential decisions," which bind all of VA, regional offices, and the board alike, "is not a substitute for a class action," Resp. 18, many of his statements in favor of class actions would seem to apply equally to the court's unique power to issue precedential opinions. *See, e.g.,* Resp. 40 (class action ensures that "*all* afflicted Palomares servicemembers will receive the benefit of [Veterans Court] rulings"), 17 (class action "communicates to [veterans] that presenting their claim for benefits will not be futile"), 10 (class action "will ensure their claims are not denied for the same [ ] reason as Mr. Skaar's"); *see also* Appx58 (Judge Falvey noting that a nationwide precedent would fix any systemic dose estimate problem and would apply to all veterans' claims).

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[4] Although this Court in *Monk v. Shulkin* listed a variety of potential benefits to the class mechanism, the primary genesis of the movement for class actions at the Veterans Court was the particular conundrum of mooted unreasonable delay petitions. 855 F.3d 1312, 1320-21 (Fed. Cir. 2017). Specifically, when unreasonable delay was alleged, VA typically acted promptly to resolve the delay, which mooted the underlying allegation. *Id.* at 1321. This exact scenario occurred for Mr. Monk, and the putative class permitted his appeal to qualify for a mootness exception. *Id.* at 1317-18. The utility of class actions in the chapter 72 appeal context is much less clear. Appx57-59 (Judge Falvey noting that the Secretary cannot unilaterally moot an appeal like a petition, and fully discussing the utility issue).

As to fairness, we have already noted in our opening brief serious due process concerns with the Veterans Court's personally binding absent individuals (and their potential VA benefits) to a proceeding while giving them absolutely no say in the matter. Op. 30-31 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 364 (2011) (emphasizing the need for absent class members with "monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone," lest they "be *precluded* by litigation they had no power to hold themselves apart from")). The court recognized that its class certification "assume[d] the risk of prejudicing the rights of absent veterans," but provided no meaningful analysis on the issue, instead simply declaring that "class members may not opt out." Appx9; Appx32.

Mr. Skaar expresses similar unconcern, stating that potential prejudice to absent class members "is always the case with class actions." Resp. 20. He surmises that "well-developed standards" can "protect" absent class members, *id.,* but overlooks the fact that the Veterans Court had no such standards when certifying this class. *See* Appx26, Appx58.[5] Such a nonchalant approach to absent veterans' rights does not serve the fairness goal and disregards Supreme Court instruction. *See Taylor v. Sturgell*, 553 U.S. 880, 900-01 (2008) (cautioning that

[5] The court implemented formal rules for the class mechanism approximately one year after the class certification in this case. *See* U.S. Vet. App. Misc. No. 12-20 (Nov. 10, 2020).

class certification in the absence of specific rules for class proceedings lacks procedural safeguards grounded in due process); *Beaudette v. McDonough*, 34 Vet. App. 95, 110-11 (2021) (Falvey, J., dissenting) (expressing concern that the court's class jurisprudence is governed by the doctrine of "because I say so").

B. This Appeal Concerns Veterans Court Jurisdiction Pursuant To 38 U.S.C. § 7252, Not District Court Jurisdiction

As demonstrated in our opening brief, the Veterans Court must have jurisdiction over an individual in order to include that person in a class. Op. 22-31; *see Califano v. Yamasaki*, 442 U.S. 682, 701 (1979); *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975); *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973); *see also Zipes v. TWA*, 455 U.S. 385, 397 (1982) (if filing requirement had been jurisdictional, court "would have been without jurisdiction to adjudicate the claims of those [absent class members] who had not filed"); *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785, 796 (Fed. Cir. 2009) (holding that "a party's failure to exhaust mandatory administrative remedies bars the court from treating that party as a class member"); *Beamon v. Brown*, 125 F.3d 965, 969-70 (6th Cir. 1997) (class action procedural device does "not confer [ ] courts with jurisdiction over claims that they could not hear if brought individually"). "[I]t would make no sense" for a person whose individual appeal to the Veterans Court would be dismissed for lack of jurisdiction to become subject to the court's direct authority

and personally bound to a court proceeding, simply because an unrelated appellant was properly before the court. *Arctic Slope*, 583 F.3d at 796.

Rather than providing meaningful engagement with the points we raised,[6] Mr. Skaar focuses his attention on district court practice, contending that because district courts, when handling Administrative Procedure Act (APA) cases, may certify classes that include individuals who have not received a final agency action (what Mr. Skaar terms "future-oriented classes"), the Veterans Court should be allowed to as well. Resp. 26-30. As demonstrated below, this argument suffers from a number of major flaws.[7]

1. The Veterans Court Is Distinguishable From A District Court

Simply put, the Veterans Court is not a district court, having neither the same authorities nor jurisdiction as one. While district courts have jurisdiction over "all civil actions arising under [Federal law]," 28 U.S.C. § 1331, the Veterans Court's jurisdiction is much narrower: "to review decisions of the [b]oard," 38

[6] Mr. Skaar's only response to *Arctic Slope* is that "*Arctic Slope* . . . involved a statutory requirement . . . which the court held to be jurisdictional. . . . The VJRA contains no similar requirement." Resp. 33 n.7. However, section 7252's very title is "Jurisdiction. . . ."

[7] We are not arguing here that *Monk* was wrongly decided. Op. 41, 39 n.17. Rather, we argue the Veterans Court may not enlarge its jurisdiction and subject to its direct authority individuals without board decisions under the guise of the procedural class action device.

U.S.C. § 7252(a). District courts also possess supplemental jurisdiction over "all other claims related" to the litigation before it, pursuant to 28 U.S.C. § 1367, while the Veterans Court has no comparable jurisdictional grant. Finally, district courts review evidence and make factual findings, while the Veterans Court may only review the "record of proceedings before the Secretary and the [b]oard," 38 U.S.C. § 7252(b), and may not find facts in the first instance. 38 U.S.C. § 7261(c).[8]

These differences were deliberate and purposeful. Congress did not intend the Veterans Court to have district court jurisdiction or authorities. Op. 42-44. To the contrary, Congress only was able to enact judicial review legislation once it moved away from bills proposing review in a district court-like setting and embraced the concept of an *appellate* court with the limited function of reviewing individual board decisions. *See* 134 Cong. Rec. H10333 (Oct. 19, 1988) (Rep. Montgomery, the sponsor of H.R. 5288: "The sole function of this court is to decide on the record, whether the VA and the [board] decided a matter correctly . . . [The court] would not be burdened with matters which often require a

[8] In our opening brief, we noted a district court's fact-finding ability as a distinction between this case and *Nehmer v. U.S. Veterans Admin.*, 118 F.R.D. 113 (N.D. Cal. 1987). Op. 47. In addition, *Nehmer* found no "statute mandating" that the plaintiffs before it file a VA claim or receive a board decision, 118 F.R.D. at 121, while here section 7252 clearly mandates a board decision to invoke Veterans Court review. That pivotal difference helps demonstrate why Mr. Skaar's reliance on district court practice is unavailing.

district court to delay a decision in a case."); *see also* S. Rep. No. 100-418, at 70 (1988) (recognizing that predecessor bills had proposed judicial review in district courts, but explaining why judicial review in an appellate setting would be preferable).

NVLSP submits that, because the VJRA was generally intended to expand veterans' rights, the Veterans Court's authority in the class action realm "should be at least comparable" to pre-VJRA district court authority. ECF No. 32 (Am-32), 2. But this argument ignores the type of court that Congress actually intended and created with the VJRA: a limited review appellate court. Moreover, the Supreme Court has clearly stated that "the review opportunities available to veterans before the VJRA was enacted are of little help in interpreting" the VJRA. *Henderson ex rel. Henderson v. Shinseki,* 562 U.S. 428, 441 (2011).

NVLSP "is quite mistaken to assume" that "whatever might appear to further the statute's" overarching goal is the law. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (internal quotation marks omitted). "Legislation is, after all, the art of compromise [and] the limitation expressed in statutory terms [are] often the price of passage." *Id.* Nothing in Congress's stated intentions with regard to creating an appellate court with limited judicial review of individual board decisions indicates the will to treat the Veterans Court similarly to a district court, and allow it to become the "only appellate court in the Nation"

certifying classes "in the first instance[,]" particularly outside of its jurisdictional boundaries. Appx26.

2. The APA Is A Non-Jurisdictional Statute

Mr. Skaar erroneously assumes that the Veterans Court's jurisdiction should be treated identically to a district court's because the VJRA has similarities to the APA. Resp. 21-26. Certainly, portions of the VJRA's and APA's "scope of review" sections are similar. *See Henderson*, 562 U.S. at 432 n.2 (once "an appeal is taken," the Veterans Court's "scope of review" is similar to APA review).

But, critically, the VJRA and APA are actually *dissimilar* with regard to jurisdiction, and, thus, Mr. Skaar's analogy necessarily breaks down. While 38 U.S.C. § 7252 constitutes an independent grant of jurisdiction to the Veterans Court, the APA itself does *not* independently bestow jurisdiction. Rather, 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under [Federal law]") grants district courts the jurisdiction to review agency action. *See, e.g., Califano v. Sanders*, 430 U.S. 99, 105-06 (1977); *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991); *Suburban Mortg. Assocs. v. United States HUD*, 480 F.3d 1116, 1122 (Fed. Cir. 2007).

Assuming the Veterans Court has jurisdiction, its "scope of review" has similarities to the APA. But one can learn nothing about the Veterans Court's

jurisdiction itself from the APA, which does not contain a jurisdictional requirement or otherwise confer jurisdiction. *See Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 184 (D.C. Cir. 2006) ("[T]he requirement of final agency action [for APA review] is not jurisdictional."); *see also Emery Worldwide Airlines, Inc. v. United States,* 264 F.3d 1071, 1085 (Fed. Cir. 2001).

Accordingly, Mr. Skaar's citations to district court APA cases with "future-oriented classes" are inapposite. The principle that "each individual plaintiff in a class action need not exhaust his or her administrative remedies individually so long as at least one member of the class has" may apply to the APA, but does "not apply . . . to jurisdictional requirements" like 38 U.S.C. § 7252(a). *Blackmon-Malloy v. United States Capitol Police Bd.*, 575 F.3d 699, 704 (D.C. Cir. 2009); *see also Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519, 526 (D.C. Cir. 2010) ("Where exhaustion is a jurisdictional requirement [ ], every class member must exhaust its administrative remedies."); *Arctic Slope*, 583 F.3d at 796.

We recognize that the path to judicial review (and opportunity to be included in a class) is different for VA benefits claimants than other Federal benefits claimants, but this is consistent with the plain statutory language and Congress's intent when fashioning the Veterans Court. Congress had the opportunity to employ a district court-like review scheme, but instead chose to provide veterans a unique appellate path. H.R. Rep. No. 100-963, at 28 (1988) ("The committee

believes that it is strongly desirable to avoid the possib[ility of] . . . conflicting opinions on the same subject due to the availability of review in . . . the 94 Federal Districts."); *accord* Am-32 14 (veterans are "specifically excluded from the judicial review provisions of the APA").[9]

Mr. Skaar contends that "Congress was aware" of district court class actions involving veterans and "chose not to insert language into the VJRA" excluding such class actions at the Veterans Court. Resp. 26. To support his claim, Mr. Skaar cites certain various comments that mention the APA and access to the courts generally.[10] Resp. 22-24. But these comments were rendered before Congress struck a critical compromise that enabled passage of the VJRA – the agreement to create the Veterans Court as an appellate court with a "very limited jurisdiction." 134 Cong. Rec. S16632 (Sen. Mitchell); *see* 134 Cong. Rec. H9253 (Oct. 3, 1988) (Rep. Edwards) (supporting compromise that "includes scaling back substantially the [proposed Veterans C]ourt"). The House Committee report cited by Mr. Skaar, for example, envisioned something very different: the Veterans Court as a replacement for the board, and this Court applying APA review of

[9] Indeed, the only role for the APA in the realm of veterans' claims is that bestowed on this Court through 38 U.S.C. § 502, a grant of authority specifically withheld from the Veterans Court.

[10] These comments are not related to class actions. *See*, *e.g.*, S. Rep. 100-418, at 60 (discussing Veterans Court review of "a decision on an individual claim."

Veterans Court decisions. H.R. Rep. 100-963, at 29, 36. This proposed scheme cannot be considered evidence of intent for the starkly different Veterans Court that was ultimately created.

As discussed in our opening brief, legislative history reveals Congress's explicit criticism of veteran class actions that prioritize policy over plain statutory limitations. H.R. Rep. No. 100-963, at 21 (criticizing the *Wayne State* line of cases). Though NVLSP alleges that we selectively quoted this criticism, Am-32 11, the full context of the discussion clearly conveys Congress's desire that any created court respect statutory limitations and not become an intervening agency supervisor. *See* H.R. Rep. 100-963, at 22-25. Given Congress's stated view on the matter, there is no reasonable argument that Congress would have supported the evasion of 38 U.S.C. § 7252(a) in order to achieve the perceived policy benefits of a class action.

More fundamentally, the assumption underlying Mr. Skaar's argument that the VJRA tacitly approves of future-oriented class actions lies on shaky ground, as Congress *did* include language in the VJRA precluding the Veterans Court from exercising jurisdiction or direct authority (via class action or any other procedure) over individuals who have not received board decisions. Through the limitations of 38 U.S.C. §§ 7252(a), 7252(b) (Veterans Court may only review "the record of proceedings before . . . the board"), and 7266(a) (notice of appeals may only be

filed by "a person adversely affected by [a board] decision"), Congress effectuated its intent that the Veterans Court not be "burdened" with the jurisdiction of a district court, but instead have the "sole function" of reviewing board decisions. 134 Cong. Rec. H10333. "If Congress had intended the court's jurisdiction to be broader than that conferred by [section] 7252, Congress would have expressed that intention legislatively." *In re Wick*, 40 F.3d 367, 373 (Fed. Cir. 1994); *see Palmore v. United States*, 411 U.S. 389, 396 (1973).

C. The Veterans Court Exerted Jurisdiction Over Class Members

Rather than dispute our argument that the Veterans Court cannot enlarge its jurisdiction through a procedural device like the class mechanism, Mr. Skaar employs the interesting tactic of denying that the court was "exerting jurisdiction over [class member] claims" at all, and averring that it was only addressing a "common legal question." Resp. 15-16. While certainly a creative gambit to navigate around the court's violation of section 7252, this contention has numerous flaws, not the least of which is that it stands in contravention to the court's own rationale.

If the Veterans Court were simply addressing a common legal question, as Mr. Skaar alleges, the dissent would have been the majority and the court would have issued a precedential decision binding the board and VA, as Judge Falvey explained should have been done. But the court desired more: it sought to make

additional individuals a "party to [its] decision," so those individuals would not have to "fully exhaust[ ] agency review," could receive "prompt remedial enforcement" directly through court order, and could receive "judicial supervision" of their cases. Appx34-35; *see also Wolfe v. Wilkie*, 32 Vet. App. 1, 32-33 (2019) (similarly discussing the Veterans Court's conception of "the enforcement advantages that a class action offers"), *appeal pending*, No. 2020-1958 (Fed. Cir.).

In certifying the class, the court brought hundreds of individuals into this litigation, placing their (pending or future) claims under the court's direct supervision and authority, and personally binding them to a judgment that will affect their rights and obligations. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("[A] judgment in a properly entertained class action is binding on class members in any subsequent litigation."); *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 298 (D.C. Cir. 2020) ("[C]lass certification [ ] brings unnamed class members into the action."). Encapsulated in one word, the court was exercising *jurisdiction* over these individuals and their (pending or future) claims. *See Carlsbad Tech, Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (court "rul[ing] on the conduct of persons or the status of things" is an exercise of jurisdiction (quoting BLACK'S LAW DICTIONARY 870 (8th ed. 2004)); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (jurisdiction required to bind); *In re Sealed Case*, 141 F.3d 337, 341 (D.C. Cir. 1998) (jurisdiction required

to adjudicate rights); *Noble v. Tennessee Valley Authority*, 892 F.2d 1013, 1015 (Fed. Cir. 1989) (same); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 382 (1994); Black's Law Dictionary "Jurisdiction" (11th ed. 2019) (the "power to exercise authority over [ ] persons and things").

Given the court's explicit reasoning for the action it was taking, the different picture Mr. Skaar tries to paint is dubious at best. For instance, Mr. Skaar maintains that this litigation "will not actually affect future-oriented class members until they present benefits claims to the VA." Resp. 17. But the Veterans Court clearly viewed class certification in this appeal as a mechanism for directly intervening in class members' (pending or future) claims, before class members have "fully exhaust[ed] agency review," as a matter of "prompt remedial enforcement" and/or "judicial supervision." Appx34-35. Indeed, Mr. Skaar's own brief states the same, *see, e.g.*, Resp. 11, 18 (promoting the "prompt remedial enforcement" to which class members would be entitled), undermining his effort to mitigate the court's action here.

Mr. Skaar also claims that the court "did not decide the merits of individual cases not yet before it." Resp. 10. But this ignores that circumstances exist where the court declines to decide the merits of a case – *e.g.*, a remand for readjudication or further development – but the court has nonetheless exercised jurisdiction. Even when a court order does not definitively decide entitlement to the ultimate benefit,

its ruling on the "status of things" still represents an exercise of jurisdiction. *Carlsbad Tech.*, 556 U.S. at 639.

In sum, the fact that the Veterans Court otherwise lacked the jurisdiction or authority to bring these individuals into the litigation, place their (pending and future) claims under direct supervision, and personally bind them to its judgment, lays bare that the court used class certification to impermissibly enlarge its jurisdiction. *See, e.g., Mahaffey v. Sec'y of HHS*, 368 F.3d 1378, 1381 (Fed. Cir. 2004) ("[I]t is well settled that an authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge its jurisdiction." (internal quotation marks omitted)). This Court should not heed Mr. Skaar's attempts to detract from this legal error.

D. The Veterans Court Did Not, And Could Not, Rely On The AWA

While we acknowledge this Court's decision, as set forth by *Monk*, that the Veterans Court may certify a class of claimants within its prospective jurisdiction when mandamus under the AWA is invoked to remedy an obstruction to the court's actual jurisdiction, the AWA was not, and could not be, an appropriate basis for the court's exercise of jurisdiction here. Mr. Skaar, nevertheless, leans on the AWA as a basis for affirming the Veterans Court's class certification decision, asserting that the court "correctly invoked the AWA to certify the class in this appeal." Resp. 35.

As an initial matter, the Veterans Court did not rely on the AWA in certifying the class: while noting that Mr. Skaar's case stemmed from an appeal of a board decision, and stating that the AWA "arguably could be confined to the context of a petition," the court invoked only its "ability to craft rules of practice and procedure" and its "inherent powers" to certify the class. Appx14-15. And, indeed, the court never issued any writ of mandamus, or explained how the criteria for a writ were satisfied, necessary steps if the court were to premise its decision on the AWA. Appx37; *see Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004).

1. The Veterans Court Had All The Necessary Tools To Adjudicate Mr. Skaar's Appeal

Even accepting the premise that the Veterans Court had *sub silentio* relied on the AWA, such reliance should be considered impermissible. As Mr. Skaar confirms, the purpose of the AWA is to authorize a court to *protect* its jurisdiction when circumstances *thwart* the exercise of that jurisdiction. Resp. 35-36 (citing *Monk*, 855 F.3d at 1318). But no circumstances thwarted the court's jurisdiction with regard to Mr. Skaar's appeal, and Mr. Skaar did not file a petition for a writ of mandamus under 28 U.S.C. § 1651(a), but rather a notice of appeal, pursuant to 38 U.S.C. § 7266(a), to obtain review of an adverse board decision.

Though Mr. Skaar attempts to disconnect the AWA from situations involving obstructed jurisdiction, Resp. 39-40, he cannot escape the line of Supreme Court cases referencing that limitation. *See, e.g., Pa. Bureau of Corr. v.*

United States Marshals Serv., 474 U.S. 34, 41 (1985) (AWA scope "confined" to circumstances "threaten[ing] to thwart" court's jurisdiction); *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966). The AWA authorizes courts to resolve an obstruction, not preempt a statutory appeal process in the interest of maximizing judicial power or providing premature judicial supervision. *See Pa. Bureau of Corr.*, 474 U.S. at 43 (AWA not available just because "compliance with statutory procedures appears inconvenient or less appropriate"); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) ("[W]hile a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute.").

But even if the Court reads the AWA as broadly as Mr. Skaar suggests,[11] and construes it as more of a general "gap-filler" that can be invoked at any time to help courts "fully exercise their jurisdiction," Resp. 35, Mr. Skaar fails to identify the "gap" in the veterans benefits scheme preventing the Veterans Court from adjudicating Mr. Skaar's appeal, or the claim of any potential class member who follows the statutory appeal process. *See Wick*, 40 F.3d at 373 (denying writ because appellant "has not established that . . . the court will be prevented or frustrated from exercising its statutorily granted jurisdiction over a [b]oard

[11] While NVLSP argues that the "writ" is more flexible than history indicates, Am-32 25, its support for that proposition is a case addressing the writ of habeas corpus, which deals with illegal restraint, a very different situation.

decision"); *see also Cheney*, 542 U.S. at 380 (writ may not issue unless appellant has "no other adequate means to attain the relief he desires").

In short, Mr. Skaar invokes the AWA not to fill a "gap" in statutory authority, but to steamroll a statutory-prescribed jurisdictional limitation in order to achieve the perceived policy benefits of a class action. The AWA should not be employed as a tool for overriding statute or extending jurisdiction. *See Pa. Bureau of Corr.*, 474 U.S. at 43 ("Where a statute specifically addresses the particular issue at hand, it is that authority, and not the [AWA], that is controlling."); *Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999) (AWA "does not enlarge [a court's] jurisdiction").

2. Prospective Jurisdiction Is Not Relevant Here

In attempting to ground the Veterans Court's decision in the AWA, Mr. Skaar notes that the AWA can reach cases within a court's prospective jurisdiction, and that a class may "include[ ] veterans that ha[ve] not yet received a [b]oard decision." Resp. 35, 42 (citing *Monk*, 855 F.3d at 1318, 1320). But the fact that the Veterans Court can reach into its prospective jurisdiction (and certify a class) to issue a writ of mandamus to remedy circumstances like unreasonable delay that "thwart the otherwise proper exercise of [its actual] jurisdiction" has no bearing on Mr. Skaar's case, which involved neither a writ of mandamus nor any circumstance thwarting the court's actual jurisdiction. 855 F.3d at 1318.

The concept of prospective jurisdiction is simply not relevant here.[12] If the Veterans Court could reach claimants within its prospective jurisdiction without an obstruction to the court's jurisdiction, then the jurisdictional limitation of section 7252(a) would be rendered meaningless. This weaponized incarnation of a writ would read *Monk* so broadly as to transcend the jurisdiction conferred by Congress.

While Mr. Skaar might wish to divorce *Monk* from its context, "statements in an opinion [ ] must be read in light of the issue before the court, and broad language cannot be applied uncritically to wholly different factual situations." *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1494 (Fed. Cir. 1987). Mr. Skaar's suggestion to treat precedent recognizing a court's AWA powers as precedent defining the scope of a court's actual jurisdiction is irreconcilable with the bedrock principle that the AWA is an extraordinary remedy of last resort, and available only when stringent criteria are satisfied. *See, e.g., Cheney*, 542 U.S. at 380-81.

[12] Even if prospective jurisdiction were relevant here, future-future claimants still should not qualify for the class. *See Roche*, 319 U.S. at 25 (prospective jurisdiction extends to "cases which are within its appellate jurisdiction although no appeal has been perfected"). These "claimants" do not just lack a perfected appeal, but lack a VA benefits claim entirely, so have no "case."

E. Mr. Skaar Agrees That The Veterans Court's Reliance On *Bowen* Was Erroneous

Interestingly, while Mr. Skaar employs numerous tools of distraction, he seems to make no attempt to justify the cornerstone reasoning behind the Veterans Court's decision: its understanding of *Bowen*, a Supreme Court decision addressing 42 U.S.C. § 405(g), the Social Security Administration (SSA) judicial review statute. Appx20-22 (holding that *Bowen* "bears a striking similarity to the matter before us," and that, "[a]pplying [the *Bowen*] test here . . . , we waive the [38 U.S.C. § 7252(a)] requirement for the [p]resent-[f]uture and [f]uture-[f]uture claimants.")

While we specifically addressed the Veterans Court's misplaced reliance on *Bowen*, Op. 31, Mr. Skaar does not defend the court's reasoning, instead agreeing that *Bowen* is distinguishable "because of important differences between the [VJRA] and the SSA[,]" and conceding that it is "inappropriate[ ]" to rely on *Bowen* in his case. Resp. 31. This concession alone, given the Veterans Court's heavy reliance on *Bowen*, warrants vacatur of the court's decision.

However, Mr. Skaar, in attempting to distinguish *Bowen*, bizarrely asserts that the jurisdictional requirement contained in 38 U.S.C. § 7252(a) is actually *more* amenable to waiver than the *non-jurisdictional* requirement at issue in *Bowen*. Resp. 33. But the Supreme Court has been crystal clear that jurisdictional requirements cannot be waived. *See, e.g.*, *Gonzalez v. Thaler,* 565 U.S. 134, 141

(2012); *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009); *Bowles v. Russell,* 551 U.S. 205, 213 (2007);[13] *United States v. Cotton*, 535 U.S. 625, 630 (2002).[14] Since section 7252(a) is undoubtedly jurisdictional, it is not subject to waiver, regardless of the claimant-friendly nature of the VA administrative system that precedes Veterans Court review. *Contra* Resp. 34.

Mr. Skaar claims that section 7252(a) does not include the word "final," while 42 U.S.C. § 405(g) does, and therefore the jurisdictional requirement is more easily waived. Resp. 32. While this point – that the Veterans Court has jurisdiction over "decisions of the [b]oard," as opposed to *final* board decisions – might matter if the class members here had been subject to board decisions that were not final (*e.g.*, board remands), Mr. Skaar does not allege that any such class members are in that situation. And, unlike 42 U.S.C. § 405(g), section 7252(a) has

[13] Mr. Skaar attempts to distinguish *Bowles* on the basis that the time to file a notice of appeal with the Veterans Court prescribed by 38 U.S.C. § 7266 is "not [ ] jurisdictional." Resp. 33 n.7. But this misses the point, as we have cited *Bowles* for the proposition that a jurisdictional requirement cannot be waived, and section 7252 *is* jurisdictional.

[14] The law professors' amicus brief relies on an outdated Ninth Circuit decision, as well as a misunderstanding of *Ledford v. West*, 136 F.3d 776 (Fed. Cir. 1998), to argue that jurisdictional requirements may be subject to equitable exceptions. Am-29 24 n.4. While *Ledford* held that the failure to present *a specific argument* to the agency is not jurisdictional, it also held that the requirement for a board decision "concerning the matter being appealed" is jurisdictional. 136 F.3d at 779-80.

no need to specify the term "final," because the statutory framework already makes clear that the board's decision *is* the final agency decision. *Compare* 38 U.S.C. § 7104(a) *with* 476 U.S. at 470-72 (SSA regulations, not statute, define what constitutes a "final" agency decision).

In any event, unless this Court breaks precedent to hold that section 7252(a)'s requirement for a board decision is *not* jurisdictional, the absence of the word "final" in that section has no probative value. [15] *See* 38 U.S.C. § 7266(a) (notice of appeal required to obtain Veterans Court review of "a final decision of the [b]oard"); *Tyrues v. Shinseki*, 732 F.3d 1351, 1355 (Fed. Cir. 2013) (noting this Court's precedent that a board order denying benefit sought is a "decision of the [b]oard" for purposes of section 7252, and that a board order definitively denying benefits constitutes a "final" decision of the board for purposes of section 7266).

Mr. Skaar also notes other allegedly "important differences" between 38 U.S.C. § 7252 and 42 U.S.C. § 405(g). Resp. 31-32. However, these differences – that section 7252(a) authorizes the court to "affirm, modify, or reverse a decision of the [b]oard," and section 7252(b) limits court review to the "record of proceedings before the Secretary and the [b]oard," – do not support Mr. Skaar's

[15] Again, if this Court decides that the requirement for a board decision is not jurisdictional, it should at least hold that section 7252(a) contains a jurisdictional presentment requirement that must exclude future-future claimants. Op. 35 n.15.

claim, and only confirm how strictly the statute ties the Veterans Court's jurisdiction, review, and authority to the existence of a board decision.

Finally, although Mr. Skaar portrays our opening brief as "rel[ying] on SSA precedent," Resp. 31, we discussed such precedent primarily to show that: (1) the Veterans Court misinterpreted it, and (2) the Supreme Court has required a court to have jurisdiction over an individual before including that person in a class. Mr. Skaar does not contest our first point and cannot contest our second.

F. The Veterans Court's Jurisdiction And Authority Is Governed By Statute, Not Equity

Mr. Skaar's final salvo is that the Veterans Court has "inherent and equitable powers" to manage the cases on its docket, provide equitable relief, and certify classes that include individuals over whom the court lacks jurisdiction. Resp. at 44. But, as noted in our opening brief, the Veterans Court "can have no jurisdiction but such as the statute confers," and thus cannot extend its jurisdiction and authority by invoking unspecified equitable or inherent powers. Op. 40 (quoting *Christianson v. Indus. Operating Corp.*, 486 U.S. 800, 818 (1988)).

Mr. Skaar's argument fails to recognize the monumental difference between the court's management of cases on its docket and the exertion of jurisdiction and binding authority over individuals not otherwise eligible for its docket. We do not dispute that the Veterans Court can control its docket and institute procedures or relief "required to enable the court to carry out its statutory grant of jurisdiction."

Burris v. Wilkie, 888 F.3d 1352, 1361 (Fed. Cir. 2018). The court need not even rely on equity for that authority, as 38 U.S.C. § 7264(a) authorizes it to institute procedures "need[ed] to exercise its jurisdiction." *Monk,* 855 F.3d at 1319.

"But the Veterans Court cannot invoke equity to *expand* the scope of its statutory jurisdiction." *Burris,* 888 F.3d at 1361 (emphasis in original).[16] Here, the court was not managing its docket, or carrying out its duty to review Mr. Skaar's board decision, by importing hundreds of additional individuals without board decisions or VA claims into Mr. Skaar's appeal. Instead, the court, by certifying the class, expanded its jurisdictional reach to exert direct authority over individuals over whom the court would otherwise lack jurisdiction.

We recognize that this Court, in *Monk*, invoked the Veterans Court's "inherent powers" as one potential authority for class certification. 855 F.3d at 1318. But *Monk* must be, and can be, read consistently with *Burris*, as referring to the court's inherent ability to *carry out* its jurisdictional duty, not any power to *alter* the scope of its jurisdiction. *Accord* Op. 39-40. Indeed, *Burris* understood *Monk* in this vein. 888 F.3d at 1360-61. Nothing in *Monk* suggests that a court's

[16] Mr. Skaar stakes his argument not on actual precedent like *Burris*, but on Veterans Court concurring/dissenting opinions that opine broadly on equity. Resp. 44-45. But this expansive conception of equity is not the law. *See Burris*, 888 F.3d at 1361; *Manio v. Derwinski*, 1 Vet. App. 140, 143 (1991) ("equitable doctrines" may "not be used to extend the court's statutory grant of jurisdiction.").

inherent powers can expand its jurisdiction, and the Veterans Court erred to the extent it relied on *Monk* to expand its jurisdictional reach to cover present-future and future-future claimants.

II. The Veterans Court Committed No Legal Error In Excluding The Past And Expired Claimants From The Class

In his cross-appeal, Mr. Skaar contests the Veterans Court's exclusion of past and expired claimants from the certified class on two grounds. Resp. at 46-54; *see* Appx23-25.[17] First, he alleges that the Veterans Court imposed an erroneous "categorical rule" requiring a challenged governmental policy to be "secretive" in order to invoke equitable tolling. Resp. at 46-47. Second, he asserts that the Veterans Court should have granted equitable tolling or waived statutory requirements for the past and expired claimants because of Congressional intent. *Id.* at 51-54. Neither argument has merit.

A. The Veterans Court Did Not Impose A Categorical Rule

Mr. Skaar's first argument mischaracterizes the Veterans Court's decision. Rather than imposing a categorical rule, the Veterans Court explicitly stated that an equitable tolling evaluation "requires a case-by-case analysis and not a categorical determination." Appx23 (quoting *James v. Wilkie*, 917 F.3d 1368, 1373 (Fed. Cir. 2019)). The court assured that "there are no bright line rules in the equitable

[17] "Past" claimants did not timely appeal a VA regional office denial to the board; "expired" claimants did not timely appeal a board denial to the court. *Id.*

tolling context," and listed several scenarios – mental illness rendering one incapable of handling one's own affairs, extraordinary circumstances beyond one's control, reliance on government official's incorrect statements, timely and diligent misfilings, secretive governmental conduct preventing one's knowledge of a rights violation – where equitable tolling might be available. Appx23-24. It did *not* establish a categorical rule that equitable tolling is only available for challenges to secretive governmental policies. *Contra* Resp. at 46-47.

While the court did state in its decision that "Mr. Skaar essentially asks us to equate VA's [Palomares adjudications] with the secretive conduct" found to warrant equitable tolling in *Bowen*, Appx24, it then declined Mr. Skaar's request; this only conveys that the court did not agree with Mr. Skaar that the two circumstances were comparable.[18] It would belie reason to treat these statements

[18] In a footnote, Mr. Skaar contests the court's factual determination that the two circumstances are not comparable. Resp. at 50 n.9. Though this Court cannot weigh in on this factual debate, 38 U.S.C. § 7292(d)(2), Mr. Skaar's argument that past and expired claimants "could not know" the reason why their claims had been denied, Resp. at 50 n.9, is without merit, given that all VA decisions come with a statement of reasons for the decision, 38 U.S.C. §§ 5104(b), 7104(d)(1) (2017), and VA regulations clearly outline the adjudicative process for a radiogenic claim, including the process for obtaining a dose estimate, 38 C.F.R. § 3.311.

Moreover, Mr. Skaar's argument that it was "impossible" for veterans to know "the systematic failures of the methodology," Resp. at 50 n.9, assumes a systematic failure that no court has actually found. *See supra* at Argument I.A. The court never rendered any finding of agency failure or misconduct. Appx76-79.

as the Veterans Court *sub silentio* undermining its prior discussion of the several example scenarios where equitable tolling might be available and instituting a bright line rule limited to secretive governmental conduct. As such, though Mr. Skaar argues that "secretive conduct" should not be the sole circumstance warranting equitable tolling, neither we nor the Veterans Court disagree on that point. Accordingly, any argument regarding "secretive conduct" does not serve as an appropriate basis for reversal of the court's decision regarding past and expired claimants.

B. Mr. Skaar's Arguments Regarding Equitable Tolling And Waiver Are Unpersuasive And Offend The Notion Of Finality

Mr. Skaar also argues, more generally, that the Veterans Court should have granted equitable tolling, or waived 38 U.S.C. §§ 7105 and 7266(a) (requiring claimants to appeal decisions to obtain further review) to include the past and expired claimants within the class, because Congress had intended to create a claimant-friendly VA administrative system. Resp. at 51-54.

At the outset, we note, as the Veterans Court did, that Mr. Skaar's arguments constitute no more than "an attempt to skirt finality" and resurrect closed claims under the guise of a class action. Appx24. This, the Court should not allow. As the Court held in *Cook v. Principi*, Congress provided only two exceptions to finality in the veterans' benefits scheme (neither of which are met here), and "[i]f additional exceptions to the rule of finality . . . are to be created, it is for Congress,

not [a] court, to provide them." 318 F.3d 1334, 1339-41 (Fed. Cir. 2002) (*en banc*). The Veterans Court's authority to aggregate claims in a class action does not permit it to create a new exception to the rule of finality or otherwise reanimate closed claims. *Cf. Jordan v. Nicholson*, 401 F.3d 1296, 1299 (Fed. Cir. 2005) (even where a statute or regulation is ultimately invalidated, the "Supreme Court does not supply a retroactive remedy for final judgments"). Statute dictates that the proper course for past and expired claimants is to file a supplemental claim, pursuant to 38 U.S.C. § 5108, or challenge their previous decision as the product of clear and unmistakable error under 38 U.S.C. § 5109A, 7111, not obtain a resurrection of their claims directly at the court under the guise of a class action.

Mr. Skaar's argument regarding Congressional intent only induces puzzlement, as 38 U.S.C. §§ 7105 and 7266(a) are two provisions that Congress *itself* enacted. *See* VJRA, Pub. L. 100-687, § 301(a), 102 Stat. 4105, 4116 (1988); Pub. L. 87-666, § 1, 76 Stat. 553, 553-54 (1962). An abstract notion regarding Congressional intent does not constitute sufficient basis for disregarding Congress's own plain textual commands. *See INS v. Cardoza-Fonseca,* 480 U.S. 421, 432 n.12 (1987) ("Congress expresses its intent through the language it chooses."). As an "important procedural rule," *Henderson*, 562 U.S. at 441-42, section 7266(a)'s time limit to file an appeal with the Veterans Court may only be tolled in "extraordinary circumstances." *James*, 917 F.3d at 1373. And section

7105(d)'s time limit to perfect an appeal to the board may only be extended for good cause. 38 U.S.C. § 7105(a), (d)(3) (2017).[19] Finally, section 7105(b)'s requirement to initiate an appeal to the board with a notice of disagreement has long been considered jurisdictional. 38 U.S.C. § 7105(a)-(c) (2017); *see also Ledford*, 136 F.3d at 780; *Marsh v. Nicholson*, 19 Vet. App. 381, 384 (2005). Because Mr. Skaar can neither demonstrate that the past and expired claimants fulfill the criteria for the requisite exceptions, nor persuade that the criteria should be waived, the Court should reject his arguments to include the past and expired claimants in the class.

1. Mr. Skaar Fails To Demonstrate Veterans Court Error With Regard To Equitable Tolling

Mr. Skaar's general arguments about the claimant-friendly VA administrative system might support the *availability* of equitable tolling in that system. But, unless Mr. Skaar is attempting to argue that equitable tolling must be bestowed for all claimants in all circumstances, he does not, and cannot, establish that the Veterans Court erred as a matter of law in declining equitable tolling for these particular past and expired claimants.

[19] The year "2017" connotes the statutory scheme that applies to Mr. Skaar's case (the "legacy" scheme predating the "modernized" scheme that became effective in February 2019). *See* 38 C.F.R. § 3.2400, 19.2.

The Veterans Court cited the correct law on equitable tolling. *Compare* Appx23 (equitable tolling warranted "when circumstances preclude[ ] a timely filing despite the exercise of due diligence"), *with James*, 917 F.3d at 1373 (equitable tolling requires "(1) extraordinary circumstance; (2) due diligence; and (3) causation"). It then applied that law to the particular situation of the past and expired Palomares claimants. Appx24-25 (finding that past and expired claimants' circumstances were no different from any other claimants who were denied benefits, and that these claimants did not exercise diligence by failing to pursue appeals). Accordingly, the Court should not disturb this finding, as it lacks jurisdiction to consider the application of law to particular factual circumstances, and the Veterans Court applied the appropriate legal standard. 38 U.S.C. § 7292(d)(2).

But even if the Court could review this factual question, *see James*, 917 F.3d at 1372 (where material facts are not in dispute, this Court may review availability of equitable tolling), Mr. Skaar has made no proffer that past and expired claimants experienced extraordinary circumstances[20] or exercised due diligence. *See* Appx24-25. And he has not explained exactly what filing the court would be

[20] Mr. Skaar's personal view that the dose methodology is flawed, or his belief that it is difficult for lay veterans to prove the flaw, Resp. at 52, does not constitute an extraordinary circumstance. Thousands of veterans' claims every year involve complex scientific or medical issues.

equitably tolling, because the past and expired claimants did not file untimely appeals – they filed no appeals at all. *See McPhail v. Nicholson*, 19 Vet. App. 30, 34 (2005) (appellant has "no basis for seeking equitable tolling" when "he *never* submitted" a filing at all). Indeed, Mr. Skaar's brief is conspicuously silent regarding the actual factors of an equitable tolling analysis.

2. Mr. Skaar Fails To Demonstrate Veterans Court Error With Regard To Exhaustion

Rather than actually engaging with the prevailing equitable tolling standard, Mr. Skaar instead cites a concurring opinion from the Court of Appeals for the D.C. Circuit, *Rafeedie v. I.N.S.*, 880 F.2d 506 (D.C. Cir. 1989) (Ginsburg, J., concurring), then asserts that the four purposes of the exhaustion doctrine mentioned therein ((1) to allow an agency to function efficiently, (2) to give the agency an opportunity to correct its own errors, (3) to provide claimants and the court the benefit of its experience and expertise, and (4) to compile a record adequate for judicial review) do not apply to the past and expired claimants here. Resp. at 51-52.

As an initial matter, the application of the four apparent purposes of the exhaustion doctrine to the particular situations of the past and expired Palomares claimants lies beyond this Court's purview. 38 U.S.C. § 7292(d)(2); *Maggitt v. West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000) (finding Veterans Court "uniquely positioned" to "decide the considerations regarding exhaustion in a particular

case"). But, assuming for the sake of argument that this Court could consider them, and that these four purposes somehow override the binding precedent setting forth the criteria for equitable tolling, Mr. Skaar would still fail to prevail. Requiring past and expired claimants to comply with the statutory requirements and file supplemental claims in order to obtain further review, rather than having the court effectively reanimate closed claims via class action, would certainly allow VA to (1) identify and decide their claims efficiently, (2) "correct [any] errors" in past adjudications, (3) bring to bear its technical "experience and expertise" adjudicating radiogenic claims, and (4) "compile a record which is adequate for judicial review." *Rafeedie*, 880 F.2d at 527-28 (quoting *Bowen*, 476 U.S. at 484).

Specifically, with regard to the issue of efficiency, Mr. Skaar never explains how requiring VA to embark on an expedition to find the past and expired claimants would be more efficient than those claimants simply filing supplemental claims. As to the purpose of correcting errors, Mr. Skaar asserts that "VA has repeatedly declined to correct its own errors, even when confronted with the shortcomings in its methodology." Resp. at 52. But this generalized statement is inaccurate and belied by the record; after the Air Force discovered inconsistencies in its methodology in 2013, it actually provided VA with new dose estimates for

veterans like Mr. Skaar. Appx7. No court has found additional flaws in the methodology since then.

As to experience and expertise, it is VA, rather than the Veterans Court, that has the authority to seek appropriate evidence and weigh the credibility of that evidence in these radiogenic claims, and the experience and expertise to best do so. *See* Appx76-77. Finally, regarding the development of a record, given the Veterans Court's finding that even Mr. Skaar's case – which was supplemented with hundreds of additional pages of evidence in 2019, Appx52 – required further agency development, Appx77 (board "should seek appropriate evidence to make its decision"), it is highly doubtful that past and expired claimants would have records immediately ready for judicial review or supervision, Appx79.

Nevertheless, Mr. Skaar disagrees with the supplemental claim route, alleging a "limited likelihood" that the past and expired claimants can "successfully . . . reopen their claims on their own." Resp. at 54. But it is well-established that the standard for reopening a claim is a "low threshold." *Shade v. Shinseki*, 24 Vet. App. 110, 117 (2010). For decades, claimants have successfully secured reopening of their claims without being included in Veterans Court class actions. Mr. Skaar's suggestion that class inclusion is the only prospect for past and expired claimants to obtain readjudication or benefits holds no water.

CONCLUSION

For these reasons, we respectfully request that the Court vacate the portion of the Veterans Court's December 6, 2019 decision granting class certification over a class including present-future and future-future claimants, and order the Veterans Court to revise its December 2020 remand to the board in accord with that vacatur. We also respectfully request that the Court affirm the portion of the Veterans Court's December 6, 2019 decision excluding past and expired claimants from the class.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Federal Circuit Rule 32(b), the undersigned certifies that the word processing software used to prepare this brief indicates there are a total of 9,275 words, excluding the portions of the brief identified in the rules. The brief complies with the typeface requirements and type style requirements of Fed. R. App. P. 32(a)(5) and has been prepared using Times New Roman 14 point font, proportionally spaced typeface.

/s/ Sosun Bae
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