2023-1387

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MARK FREUND and MARY S. MATHEWSON,
Petitioners-Appellants,

v.

DENIS McDONOUGH,
Secretary of Veterans Affairs,
Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims
in case no. 21-4168, Judges Allen, Meredith, and Laurer

BRIEF FOR RESPONDENT-APPELLEE

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Dated: July 13, 2023

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STATEMENT OF COUNSEL

Pursuant to Rule 47.5 of this Court's Rules, counsel for respondent-appellee is unaware of any other appeal from this civil action that previously was before this Court or any other appellate court under the same or similar title. Counsel is also unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

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STATEMENT OF THE ISSUES

1. Whether the Court of Appeals for Veterans Claims (Veterans Court) correctly dismissed the petition as moot because the petitioners received full relief prior to any decision on their request to certify a class, and the inherently transitory exception to mootness does not apply.

2. Alternatively, whether this appeal should be dismissed as moot because the putative class members have received all feasible concrete relief requested in the petition.

STATEMENT OF THE CASE

I. Nature Of The Case

Petitioners-appellants (petitioners) Mark Freund and Mary S. Mathewson, respective substitutes for veterans J. Roni Freund and Marvin Mathewson,[1] appeal the decision of the Veterans Court in *Freund v. McDonough*, No. 21-4168 (Vet. App. Oct. 20, 2022), which denied the petitioners' request for class certification and dismissed their petition for extraordinary relief in the nature of a writ of mandamus. Appx1-24.[2]

II. Statement Of Facts And Course Of Proceedings Below

A. Legacy Appeals And Relevant Internal Procedures

The United States Department of Veterans Affairs (VA) is responsible for processing disability and pension benefits claims filed by veterans. Millions of claims requiring substantive evaluation by VA are active at any one time. *See generally* https://www.benefits.va.gov/reports/detailed_claims_data.asp. VA relies on computerized databases, including the Veterans Benefits Management System and the Veterans Appeals Control and Locator System (VACOLS), to help process these claims. The Veterans Benefits Management System is a paperless claims file

[1] This brief, like the petitioners', only distinguishes between the veterans and their substitutes when material.

[2] "Appx__" refers to pages of the joint appendix filed in this case.

that allows VA employees to access claim information and evidence, automate certain processes, and manage the claims process. Privacy Act of 1974; System of Records, 77 Fed. Reg. 42,594 (July 19, 2012). VACOLS is a computerized system through which VA and the Board of Veterans' Appeals (board) track and monitor legacy appeal[3] activity. Appx5; Appx1011; M21-5, 6.A.1.a.[4]

Under the legacy appeal process, a veteran who receives an adverse decision on a claim for benefits from a VA agency of original jurisdiction and wishes to appeal the decision must file a notice of disagreement to initiate appellate review. 38 U.S.C. § 7105(a)-(c) (2016); 38 C.F.R. § 19.52(a). VA then prepares a statement of the case in response, providing a summary of the evidence relevant to the issues with which the veteran has expressed disagreement, a summary of the applicable laws and regulations and how they affect the benefits determination, and the determination of the agency of original jurisdiction regarding each issue with

[3] This litigation involves the legacy VA appeals system, not the Veterans Appeals Improvement and Modernization Act (AMA) system. *See* 38 C.F.R. § 19.2; Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, § 2(x), 131 Stat. 1105, 1115; Appx1-2; Appellant's Brief (App. Br.) 7. This brief uses the signifier "(2016)" to refer to the statutory scheme for legacy appeals.

[4] The M21-5, *Appeals and Reviews*, an internal VA manual for processing legacy appeals and AMA higher-level reviews, is available at https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/topic/554400000018297/M21-5-Appeals-and-Reviews (last visited July 13, 2023).

which the veteran has expressed disagreement. 38 U.S.C. § 7105(d)(1) (2016); 38 C.F.R. § 19.29. If the veteran wishes to obtain board review of the VA's benefits decision as set forth in the statement of the case, the veteran must next file a substantive appeal with VA to perfect the appeal. 38 U.S.C. § 7105(a), (d)(3) (2016); 38 C.F.R. § 19.52(b), (c). Then, VA reviews the appeal to determine whether any additional case development is necessary, and VA will prepare a supplemental statement of the case or certify the appeal to the board, whichever is appropriate. *Id.* §§ 19.31 (noting when a supplemental statement of the case, rather than board certification, is appropriate), 19.35 (certification), 19.36 (docket notification). The appeal certification is for administrative purposes only and does not affect the board's jurisdiction over the appeal or the veteran's right to receive a decision by the board. *Id.* § 19.35.

VA has adopted internal procedures to manage the legacy appeal process. When VA receives a timely notice of disagreement, a VA employee is responsible for ensuring the document is appropriately labeled as a notice of disagreement in the Veterans Benefits Management System, establishing an "End Product" for that notice of disagreement in the Veterans Benefits Management System, and initiating an appeal file within VACOLS. M21-5, 6.B.1-2. An "End Product" is a label used within VA's computer systems to help track each stage of a claim, including an appeal. Appx5 n.36. VA first mandated this specific End Product

framework in May 2017 in response to VA Inspector General audit reviewing the timeliness of the appeal process. Appx8 (citing Appx954-Appx955); Appx474; Appx1008.

Similarly, when VA receives a timely substantive appeal in response to a statement of the case, a VA employee is responsible for ensuring the document is labeled as a substantive appeal in the Veterans Benefits Management System, establishing an "End Product" for that substantive appeal in the Veterans Benefits Management System, and noting the substantive appeal in VACOLS. M21-5, 6.B.4. Then, absent the need to review or obtain additional evidence, a VA employee certifies the appeal to the board, after which the board sends a docket notification letter to the claimant. M21-5, 7.F.1.b, 7.F.3.

If a substantive appeal is not noted in VACOLS by the first day of the month following the 65th day after the date of the statement of the case (or one year from the date of the initial VA decision), *see* 38 U.S.C. § 7105(d)(3) (2016), VACOLS automatically converts its appeal file for that case to a status of "HIS" (history). Appx423; Appx680; Appx1011. This conversion is consistent with 38 U.S.C. § 7105(d)(3) (2016) ("[VA] may close the case for failure to respond after receipt of the statement of the case.") and 38 C.F.R. § 19.32 ("[VA] may close the appeal without notice to the appellant . . . for failure to respond to a Statement of the Case within the period allowed."). This process is more efficient than having VA

employees manually update all VACOLS appeal files at the expiration of the time to file a substantive appeal. Appx1231 at ¶ III. For example, if approximately 26 percent of claimants that receive a statement of the case file a substantive appeal (the rate for fiscal year 2023 to date), then with VACOLS automation VA employees only have to manually update 26 percent of VACOLS appeals files and are free to focus on other services for veterans. *See id.*

To be clear, however, VACOLS's characterization of its own appeal file has no inherent legal significance; VACOLS cannot actually close, withdraw, or terminate an appeal. If a timely substantive appeal is identified after VACOLS has already converted the file to a status of "HIS," a VA employee is required to "reactivate" the VACOLS appeal file. M21-5, 6.B.4.b; Appx418-419; Appx680. In such cases, the date of the timely substantive appeal, not the date of reactivation, governs when the board will consider and decide the appeal. Appx678. *See* 38 U.S.C. § 7107(a)(1) (2016). Though this brief will use the term "closure" for consistency with the terminology used by the Veterans Court, Appx244, it is important to note that the VACOLS action is merely a re-labeling of its own appeal file. The "closure" has no effect on the open "End Product" established in Veterans Benefits Management System and has no independent legal significance.

B. Mr. Mathewson and Ms. Freund Appeal The Denials Of Their Benefits Claims

Mr. Mathewson served in the U.S. Army from 1953 to 1955. Appx191. In June 2016, VA denied his claim for special monthly compensation. Appx4. After he filed a timely notice of disagreement, VA issued an October 2017 statement of the case continuing the denial. *Id.* In December 2017, Mr. Mathewson submitted a timely substantive appeal. *Id.* However, no VA employee noted that substantive appeal in VACOLS. Appx4-5. Therefore, VACOLS automatically converted its appeal file to a status of "HIS." *Id*.

Ms. Freund served in the U.S. Army from 1969 to 1970. Appx570. In March and July 2017, VA denied her benefits for post-traumatic stress disorder (PTSD) and depression but granted her a total disability rating based on individual unemployability (TDIU). Appx4; Appx1142-1146. In February 2018, Ms. Freund filed timely notices of disagreement with VA's PTSD and depression denials. Appx1147-1150. In January 2020, VA issued statements of the case continuing the denials. Appx1151-1177; Appx554-580. In March 2020, Ms. Freund submitted a timely substantive appeal with regard to PTSD, but an AMA opt-in with regard to depression. Appx583; Appx1178-1180. *See* 38 C.F.R. § 19.2(d)(2). A VA employee acted on her AMA opt-in, ultimately resulting in VA granting Ms. Freund service connection for depression in July 2020, Appx1181-1183, but no VA employee noted the PTSD substantive appeal in VACOLS. Appx4.

Therefore, VACOLS automatically converted its appeal file to a status of "HIS." *Id*.

C. The Petitioners Request That The Veterans Court Order The Reactivation Of Their VACOLS Appeal Files

The petitioners state that they learned of their appeals' VACOLS status in late 2020. Appx20 & n.131. On June 21, 2021, the petitioners filed a joint petition for extraordinary relief in the nature of a writ of mandamus with the Veterans Court, requesting that the court order VA to reactivate their VACOLS appeal files. Appx36. The petition also requested that the court (1) declare that VA had "unlawfully withheld" action on their appeals and (2) declare that VA's failure to notify the petitioners of the VACOLS closure violated 38 C.F.R. § 19.32 and fair process. *Id.*

The petitioners additionally filed a request for class certification. Appx228. They essentially proposed a class of individuals (1) who had filed timely substantive appeals, (2) which were closed by VA and remained closed, and (3) which had not been the subject of a VA decision on timeliness. Appx243. They requested, on behalf of the putative class, that the court (1) declare that VA had "unlawfully withheld" action on class members' appeals and (2) declare that VA's failure to notify class members of the VACOLS closure violated 38 C.F.R. § 19.32 and fair process. Appx263. They further requested that the Veterans Court order VA to discuss with the petitioners how VA might attempt to identify affected

claimants and reactivate affected appeals. Appx263-264. Notably, the petitioners only requested that the court order the parties to negotiate in good faith and submit their respective positions to the court on these issues. *Id.* The petitioners did not ask the Veterans Court to order VA to identify and reopen all potentially affected appeals.

D. VA Reactivates The Petitioners' VACOLS Files And Commits To Searching Out And Rectifying VACOLS Discrepancies

On July 6, 2021, the Veterans Court requested that VA respond to the petition. Appx527. The next day, VA reviewed the case and reactivated Ms. Freund's VACOLS file. Appx585. Then on July 19, 2021, VA reactivated Mr. Mathewson's VACOLS file. Appx664.

After reactivating Ms. Freund's VACOLS file, VA ordered an additional medical examination to evaluate Ms. Freund's claim on July 9, 2021. *Id*. On October 8, 2021, Ms. Freund requested that her examination be rescheduled, Appx1184, but on February 9, 2022, Ms. Freund informed VA that she would not be able to attend the rescheduled examination. Appx1185. On September 22, 2022, VA granted Mr. Freund's request for substitution. Appx1186. VA certified the appeal to the board and notified Mr. Freund on March 15, 2023. Appx1202. On March 20, 2023, the board notified Mr. Freund that the appeal had been docketed. Appx1205-1206.

Mr. Mathewson's appeal was certified to the board on September 14, 2021; one day later, VA notified Mrs. Mathewson of that certification; and one day after that, the board notified Mrs. Mathewson that the appeal had been docketed. Appx665; Appx1207. On November 1, 2021, Mrs. Mathewson opted into the AMA via supplemental claim. Appx1213-1214. On October 24, 2022, following the initial denial of her supplemental claim, the board granted Mrs. Mathewson special monthly compensation with an effective date of February 29, 2016. Appx1223-1230.

In response to briefing orders before the Veterans Court regarding the petition, VA discussed the actions it had taken, and was taking, to reduce the risk of VACOLS discrepancies. First, in response to a VA Inspector General recommendation on the issue, VA had revised its processes to design specific labels and a mandatory End Product framework in Veterans Benefits Management System (as discussed above) that could be used in conjunction with VACOLS to track appeals. Appx474; Appx954. *See* M21-5, 6.B.1-4. The Inspector General had found VA's revision sufficient and therefore closed its recommendation on this issue. Appx475. Second, VA had codified in policy (as discussed above) a VA employee's obligation to reactivate a closed VACOLS file any time a timely substantive appeal is identified. Appx956. *See* M21-5, 6.B.4.b. Third, VA began

performing monthly quality control reviews on samples of claims to identify errors or issues for correction, including VACOLS discrepancies. Appx959.

Fourth, and most substantially, VA undertook a review of the 253,913 appeal files that had been closed in VACOLS for failure to timely file a substantive appeal between May 2017 and January 2022. Appx1069. Using data mining techniques, specifically pulling historic appeals tracking data from VACOLS and the Veterans Benefits Management System and performing a match function to a broader Veterans Benefits Management System document tracking source, VA initially identified 5,456 closed VACOLS files that potentially involved a timely substantive appeal. Appx1071. VA's Office of Administrative Review reviewed those 5,456 files and determined that 3,806 of them seemed to involve a timely substantive appeal. *Id.* In other words, approximately 1.5% (3,806 out of 253,913) of VACOLS closures potentially warranted reactivation. *Id.*; Appx1231 at ¶ IV.[5]

Before the Veterans Court, VA stated that it would reactivate these 3,806 VACOLS appeal files by the end of the fiscal year (September 30, 2022) and affirmed that each affected claimant would be notified upon board docketing.

[5] The Veterans Court stated that 69.8% of legacy appeals (3,806 out of 5,456) "were improperly closed." Appx11. *See also* App. Br. at 9, 16 (repeating this statistic). But there were *253,913* VACOLS files that were closed for failure to file a timely substantive appeal, *3,806* of which (1.5%) seemed to involve a timely substantive appeal. Appx1069-1071; *Accord* Appx1231 at ¶ IV. This Court should not rely on the Veterans Court's inaccurate recitation of the statistics.

Appx1070-1071. VA also pledged to conduct monthly special reviews of appeal files closed in VACOLS to ensure the prompt reactivation of any files with timely substantive appeals. Appx1072.

E. The Veterans Court Dismisses The Petition As Moot And Denies Class Certification

On October 20, 2022, a panel of the Veterans Court dismissed the petition as moot and denied class certification. Appx1-24. The court explained that the petitioners had received the primary relief they had requested in their petition, reactivation of their appeals. Appx15. The court noted that the petitioners had also requested two declarations (that VA had "unlawfully withheld" action on their appeals and that VA's failure to notify them violated 38 C.F.R. § 19.32 and fair process), but held that the petitioners lacked standing to seek such declarations because they premised their desire for such declarations on "prevent[ing potential] prejudice in the adjudication of their administrative appeals in the future," a speculative future harm rather than any current injury in fact. Appx16.

The court next examined potential exceptions to mootness and stated that the "inherently transitory" exception to mootness *might* apply if class certification were warranted. Appx17-18. On review, however, the court found that class certification was not warranted on two independent grounds. Appx19. First, the court held that the petitioners were not adequate class representatives because there was a critical difference between them and other class members: they knew (at the

time they filed their petition) that their VACOLS appeal files had been closed, and others did not. Appx19-21. Second, the court held that the class lacked commonality. Appx22.

Judgment entered on November 14, 2022, and this appeal followed. Appx25.

F. VA Reactivations And Special Monthly Reviews

As described above, VA told the Veterans Court that it would reactivate all VACOLS appeal files warranting such action and had affirmed that each affected claimant would be notified upon board docketing. Appx1070-1071. VA also pledged to conduct a special review of VACOLS every month to ensure the prompt reactivation of any files with timely substantive appeals. Appx1072.

Since making those statements, and at the time of this brief, VA has done the following in accordance with its commitment to the Veterans Court:

1. VA individually reviewed the 3,806 VACOLS appeal files at issue and determined that 2,893 of those files warranted reactivation. Of those 2,893 appeal files, all 2,893 were reactivated in VACOLS. The remaining 913 either had been appropriately processed, showed an active appeal, or involved an untimely substantive appeal. VA sent notification to those claimants who had submitted untimely substantive appeals. Appx1231-1232 at ¶ V.

2. The special monthly reviews for VACOLS closures since January 2022 have identified 61 appeal files warranting reactivation in VACOLS. All 61 have been reactivated. Appx1232-1233 at ¶ VI.

3. Of the 2,954 reactivated appeals (2,893 from the initial review and 61 from the special monthly reviews), 2,453 have been certified to the board; 490 were not certified to the board but were otherwise processed; and 11 are pending VA action. Appx1233 at ¶ VII.

4. As of April 30, 2023, there were 517 appeals left in the legacy system that were not yet at the substantive appeal stage of the legacy process. *See* Veterans Benefits Administration Reports, April 2023 Report, Part 2(A), column C, rows 7 and 9, *available at* https://www.benefits.va.gov/REPORTS/ama (last visited July 13, 2023). These are the only appeals that can be subject to VACOLS's conversion function in the future since, as of February 19, 2020, no new appeals can enter the legacy system. *See* 38 C.F.R. §§ 19.2(a)-(b), 19.52(a). VA will continue its special monthly reviews until that number reaches zero. Appx1233 at ¶ VIII.

SUMMARY OF THE ARGUMENT

The petition in this case was moot at the time of the Veterans Court's decision, and the Veterans Court's ultimate judgment dismissing the petition was correct. Even though the petitioners requested certification of a class, there is no

dispute that the named petitioners' claims became moot more than a year before the Veterans Court issued its decision on the request to certify a class. In this circumstance, dismissal of the petition for mootness was required.

None of the petitioners' arguments on appeal overcome this straightforward application of mootness. First, the petitioners' requests for declaratory relief were not sufficient to maintain an actual case or controversy after the petitioners received the concrete relief they requested, reactivation of their appeals. Second, the inherently transitory exception to mootness in the class action context does not apply here because the challenged conduct, which the petitioners define as the indefinite closure of the petitioners' VACOLS appeal files, is by its own definition not transitory. And third, none of the prudential considerations underlying the inherently transitory exception to mootness are present here because VA has taken substantial efforts to resolve all of the similarly impacted appeals that VA could reasonably identify.

Alternatively, if the Court determines that the petition was not moot when dismissed by the Veterans Court, the appeal is moot now. The named petitioners' VACOLS appeal files have been reactivated, which was the only concrete relief requested in the petition. As to the putative class, the petitioners requested only that the Veterans Court order VA to engage in a good faith attempt to develop a reasonable plan to identify other veterans who may have been impacted by the

same issue as the petitioners and to reactivate their appeals. That has been accomplished: VA undertook a review of the 253,913 appeal files that had been closed in VACOLS for failure to timely file a substantive appeal between May 2017 and January 2022, and has been consistently performing special monthly reviews for appeals filed thereafter. VA has developed and implemented the most expansive possible plan to identify and reactivate other affected appeal files. And no additional claimants will meet the class definition going forward due to (1) VA's ongoing special monthly reviews to identify and immediately resolve similar issues as they arise and (2) the impending end of legacy appeals.

At bottom, this case is not a dispute over law, the facts, or even policy. Everyone agrees that timely substantive appeals must be processed, and that discrepancies in one of VA's systems delayed that processing for some claimants. But VA has acted to rectify the issue to the greatest extent feasible and will continue to do so as long as necessary. Thus, it is unclear what a continuation of this moot litigation will accomplish. The class mechanism is not a tool for unspecified or continual auditing of an agency that has proven its willingness to take all reasonable steps to resolve an issue.

ARGUMENT

I. Jurisdiction And Standard Of Review

Pursuant to 38 U.S.C. § 7292(a), this Court has jurisdiction to review a Veterans Court decision with respect to the validity of a decision on a rule of law or the validity or interpretation of any statute or regulation relied on by that court in making that decision. This Court also has jurisdiction to "interpret constitutional and statutory provisions, to the extent presented and necessary to a decision," and "decide all relevant questions of law." 38 U.S.C. § 7292(c), (d)(1). This Court may not "review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case," except to the extent that the appeal presents a constitutional issue. 38 U.S.C. § 7292(d)(2). *See*, *e.g.*, *Conway v. Principi*, 353 F.3d 1369, 1372 (Fed. Cir. 2004) (Court reviews only questions of law and cannot review application of law to fact). This Court reviews legal determinations of the Veterans Court *de novo*. *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991).

The Court reviews the Veterans Court's dismissal of a petition for a writ of mandamus for abuse of discretion. *Lamb v. Principi*, 284 F.3d 1378, 1384 (Fed. Cir. 2002). *See also Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976) ("Issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.").

II. The Veterans Court Correctly Dismissed The Petition As Moot Because The Petitioners Received Full Relief Prior To Any Decision On Their Request To Certify A Class And The Inherently Transitory Exception To Mootness Does Not Apply

As a general rule, if all of the named plaintiffs' claims become moot before a court rules on a request to certify a class, the entire case must be dismissed as moot. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018) ("Normally a class action would be moot if no named class representative with an unexpired claim remained at the time of class certification."). A court cannot exercise jurisdiction based on other potential class members that might still have live claims because "the judicial power . . . extends only to 'cases and controversies' . . . . There must . . . be a named plaintiff who has such a case or controversy at the time the complaint is filed, *and at the time the class action is certified* . . . ." *Sosna v. Iowa*, 419 U.S. 393, 402 (1975) (emphasis added). *Accord Genesis Healthcare Corp v. Symczyk*, 569 U.S. 66, 76 (2013) (explaining that potential class members' live claims are relevant only if "the named plaintiff's claim remains live at the time the district court denies class certification"); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (explaining that, ordinarily, at least one named plaintiff must possess a live claim when the class was certified "to avoid mootness under *Sosna*"); *Monk v. Shulkin*, 855 F.3d 1312, 1317 (Fed. Cir. 2017) (acknowledging the general rule that dismissal is required if a "plaintiff's claim was mooted before any decision on class certification was rendered"); *Dolbin v. McDonough*, No. 21-2373, __ F.

App'x __, 2023 WL 2981495, at *3 (Fed. Cir. 2023) (nonprecedential) ("A class action is usually moot if the named plaintiff's claim becomes moot before the class certification."); 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 2:11 (6th ed.) ("Most courts . . . have adopted the general rule that mooting of the named plaintiff's claims before a ruling on class certification usually moots the class action . . . . The rule is so widely accepted that it is usually repeated without significant analysis.") (citing 19 decisions from 11 Federal Courts of Appeal).

Here, there is no question that the claims presented by the named petitioners, Mr. Mathewson and Ms. Freund, became moot before the Veterans Court made any decision on their request for class certification. The named petitioners requested one substantive form of relief: that the Secretary, "within thirty days, reactivate Petitioners' timely perfected legacy appeals."[6] Appx36. Their opening brief acknowledges that VA provided the requested relief, reactivating their appeals "shortly" after the petition was filed. App. Br. 12. Indeed, VA met the 30-day reactivation timeline requested in the June 21, 2021 petition. VA reactivated Ms. Freund's VACOLS file on July 7, 2021, Appx585, and Mr. Mathewson's on July 19, 2021. Appx664.

[6] As discussed below in section II.A., the petitioners' further request for declaratory relief does not alter the mootness analysis.

Under the precedents cited above, the Veterans Court correctly dismissed the petition because the named petitioners' claims became moot before any decision had been made regarding their request to certify a class. To the extent the petitioners suggest that their "prompt filing of a Request for Class Certification and Class Action at the outset, before the Secretary could moot their individual claims," preserved the viability of any live claims possessed by the class, App. Br. 40, the petitioners are incorrect. The question is whether the named petitioners' claims became moot before the Veterans Court *decided* the requested class certification. *Genesis*, 569 U.S. at 75; *Monk*, 855 F.3d at 1317. The court did not decide class certification until October 20, 2022, Appx24, more than a year after the petitioners' claims became moot. Thus, the Veterans Court could not have retained jurisdiction over the petition based on any potential class claims and correctly dismissed the petition as moot.

The petitioners make two arguments in attempting to evade this straightforward analysis. First, their brief could be read to suggest that their unsatisfied request for additional declaratory relief preserved the Veterans Court's jurisdiction over their petition as a whole. *See* App. Br. 34, 37, 39-40 (repeatedly framing the petitioners' requested relief as (1) a judicial determination that VA's actions were unlawful and (2) reinstatement of the erroneously closed appeals). Second, the petitioners contend that their petition should not have been denied as

moot because the alleged unlawful conduct is "inherently transitory," an exception to mootness specific to the class action context. *Sanchez-Gomez*, 138 S. Ct. at 1538. Neither argument provides an adequate basis to reverse the Veterans Court's decision to dismiss the petition as moot.[7]

A. The Petitioners' Requests For Judicial Declarations Are Not Sufficient To Present A Live Case Or Controversy

In addition to their request for reactivation of their appeals, the petitioners also requested that the Veterans Court (1) declare that VA had "unlawfully withheld" action on their (and class members') appeals and (2) declare that VA's failure to notify them (and class members) of the VACOLS closure violated 38 C.F.R. § 19.32 and fair process. Appx36. The petitioners face an immediate hurdle in their suggestion that these claims for declaratory relief are yet unsatisfied and thus their petition was not moot when dismissed—the Veterans Court is not authorized to issue declaratory judgments. *In re Wick*, 40 F.3d 367, 372 (Fed. Cir. 1994) ("[T]he [Veterans Court] is not a 'court of the United States' within the meaning of the Declaratory Judgment Act and cannot derive any powers therefrom."); *Nagler v. Derwinski*, 1 Vet. App. 297, 306-07 (1991) (citing 28

[7] The petitioners do not contend that any other mootness exception, such as "capable of repetition, yet evading review" or the "voluntary cessation of challenged conduct," apply in this case. Thus, they have waived these arguments by not raising them in their opening brief, and we do not address them here. *Advanced Magnetic Closures, Inc. v. Rome Fastener Corp.*, 607 F.3d 817, 833 (Fed. Cir. 2010).

U.S.C. § 2201(a)). Thus, even if the Declaratory Judgment Act provides certain courts added leeway within the confines of Article III, the Veterans Court is strictly prohibited from issuing declarations about the law when it cannot provide concrete relief. Here, the petitioners received the concrete relief they requested, reactivation of their appeals, and the Veterans Court lacked authority to issue further declaratory relief.

In any event, once the petitioners received the concrete relief of reactivation, their request for declaratory relief could not maintain the Veterans Court's jurisdiction over their petition. "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)). The petitioners must show that they have a "specific live grievance" that gives them a concrete stake in the requested relief. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 479 (1990) (quotation omitted).

Here, the petitioners' request for a judicial declaration that VA unlawfully withheld agency action regarding their appeals and violated 38 C.F.R. § 19.32 and fair process, Appx36, would make no difference to the petitioners' actual legal interests. Their appeals were reactivated and processed based on the date of

original submission, and the petitioners face no risk that the same issue will affect their appeals again.[8] In this context, declarations about VA's past conduct would be nothing more than an advisory opinion on an issue that is no longer affecting the petitioners. And although the petitioners had ambiguously suggested to the Veterans Court that their requested declaratory relief could have some concrete impact on them by triggering a heightened duty to assist in their underlying claims based on government loss of evidence, Appx885-886, they have now abandoned this argument by not arguing it in their opening brief.[9]

It "has long been settled that a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of California v. U.S.*, 506 U.S. 9, 12 (1992) (internal quotation marks omitted). This Court has applied this rule in recent nonprecedential decisions where the appellants contended that their claims were not moot for reasons like

[8] There can only be one substantive appeal per claim. If the board remands a claim and VA's readjudication remains a denial, "the case will be returned to the [b]oard" without any need for an additional filing from the claimant. 38 C.F.R. § 19.38.

[9] Even so, before the Veterans Court, the petitioners never explained what evidence may have been lost or how that could affect the merits of any particular claim for benefits. Appx13 ("[T]o the extent petitioners seek an order concerning the future consequences of any past inappropriate closure, . . . this claim is speculative . . . ."); Appx16.

those the petitioners have presented here. *E.g.*, *Veterans Contracting Group, Inc. v. United States*, 743 F. App'x 439, 440 (Fed. Cir. 2018) (nonprecedential) (holding that plaintiff's request for a declaration that the agency acted unlawfully did not present a live claim because "[a] request for declaratory relief, in and of itself, is not sufficient to confer jurisdiction . . . ."); *Safeguard Base Operations, LLC v. United States*, 792 F. App'x 945, 948 (Fed. Cir. 2019) (nonprecedential) (holding that mootness is not overcome by the fact that a declaration on the underlying issue may influence appellant's other litigation).

In sum, the petitioners' request for declaratory relief to the effect that VA acted unlawfully is insufficient to present a live case or controversy. When VA reactivated the petitioners' appeals, they received complete relief, and their petition became moot.

B. The Inherently Transitory Doctrine Does Not Apply Because The Challenged Conduct Is By Definition Indefinite, Not Transitory

The petitioners contend that, even if their petition became moot prior to the Veterans Court's decision on their request for class certification, the Veterans Court should have retained jurisdiction because the challenged conduct is "inherently transitory." App. Br. 35-41. Their argument fails for two reasons. First, the challenged conduct, which petitioners describe as VA's indefinite withholding of action on the class's appeals, is by its own definition not transitory.

Second, the prudential considerations underlying the inherently transitory exception are not present here because the challenged conduct is not ongoing.

The inherently transitory doctrine is a mootness exception specific to potential class actions. *Sanchez-Gomez*, 138 S. Ct. at 1538. "[W]hen the pace of litigation and the inherently transitory nature of the claims at issue conspire" to make it difficult for a court to rule on a request for class certification before the named plaintiffs' claims become moot, a court can certify a class and proceed with the litigation based on the class's continuing live claims. *Id.* at 1539. Under this exception, the court deems the class certification to "'relate back' to the filing of the complaint," when the named plaintiffs possessed a live claim, thus preserving the court's jurisdiction. *Genesis*, 569 U.S. at 76 (citing *Gerstein*, 420 U.S. at 110 n.11; *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991)).

The inherently transitory doctrine "focuse[s] on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy." *Genesis*, 569 U.S. at 76-77. The petitioners here fail to explain how the challenged conduct itself is inherently transitory, instead focusing exclusively on the procedural course of the underlying litigation. App. Br. 34-41. The petitioners thus ignore the Supreme Court's explanation that the inherently transitory exception arises from the *combination* of the pace of litigation and the inherently transitory nature of the claims. *Sanchez-Gomez*, 138 S. Ct. at 1539.

Indeed, the challenged conduct here cannot reasonably be construed as inherently transitory because the petitioners have challenged what they describe as VA's *indefinite* inaction regarding their appeals. Appx35 ("[VA] erroneously closed [petitioners' appeals] and, in turn, has *withheld all further action* . . . ." (emphasis added)); Appx237 ("[Petitioners], on behalf of themselves and all similarly situated claimants . . . seek relief from the Secretary's erroneous closure of timely perfected legacy appeals—and the subsequent, unlawful *withholding of all action* on the appeals." (emphasis added)). The petitioners' opening brief urges the Court to reverse the Veterans Court in part because, they contend, potential class members' appeals will remain inactive indefinitely without judicial intervention. App. Br. 1-2. Thus, the petitioners' own claims demonstrate that the challenged conduct is not inherently transitory, and the Veterans Court correctly dismissed the petition as moot.

Further, none of the prudential considerations typically cited to justify application of the inherently transitory doctrine are present here. The Supreme Court has explained that inherently transitory claims should be addressed on the merits in part because "other persons similarly situated will continue to be subject to the challenged conduct . . . ." *Genesis*, 569 U.S. at 76 (internal quotation omitted). *Accord Gerstein* 420 U.S. at 110, n.11 (justifying application of the inherently transitory doctrine in part because "in this case the constant existence of

a class of persons suffering the deprivation is certain"). The petitioners themselves endorse the view that the inherently transitory doctrine applies where "the claimant population is fluid"—that is, there are constantly members entering and exiting the potential class—"but the population as a whole retains a continuing live claim." App. Br. 36 (quoting William B. Rubenstein, NEWBERG ON CLASS ACTIONS §§ 2:11, 2:13 (5th ed. 2011)).

Here, there are no new claimants that will be subject to the challenged conduct because VA has established appropriate procedures to correct the erroneous VACOLS file closures challenged by the petitioners. As noted above, the putative class is comprised of claimants who filed a timely substantive appeal "that the Secretary has closed" in VACOLS and "remains closed." Appx243. But no new claimants will experience those circumstances in the future. All cases VA could feasibly identify involving a timely substantive appeal have been reactivated in VACOLS. Appx1231-1232 at ¶¶ IV-VI. And any claimants whose VACOLS files are closed in the future despite a timely substantive appeal (a maximum population of 517 as of April 30, 2023) will receive prompt reactivation of their VACOLS file via VA's special monthly reviews, such that their case will not "remain[ ] closed." *See* Appx1233 at ¶ VIII. No new claimants will be impacted by this issue moving forward.

The petitioners also suggest that the Court must prevent VA from "strategic[ally] mooting" the claims of any potential class member. App. Br. 55-57. As an initial matter, the Supreme Court has clearly instructed that the inherently transitory exception to mootness "focuse[s] on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy." *Genesis*, 569 U.S. at 76-77. The two cases cited in the petitioners' opening brief to support their "strategic mooting" argument provide them no support. In *Deposit Guarantee National Bank, Jackson, Mississippi v. Roper*, 445 U.S. 326 (1980), the Court did not address any exception to mootness but instead held that the named plaintiffs' claims were not moot. *Id.* at 332-33, 340; *id.* at 341 (Rehnquist, J., concurring). And in *Monk*, this Court held that the litigation was not moot because Mr. Monk *himself* would "likely be subject to the same" challenged conduct in his subsequent appeal. 855 F.3d at 1318. Accordingly, the Court applied the "capable of repetition yet evading review" exception to mootness, an exception not argued by the petitioners here because it does not apply here. *Id.* (capable of repetition exception available "where the claim may arise again *with respect to that [named] plaintiff*" (emphasis added)).

But to the extent the Court considers VA's litigation actions as relevant at all, we emphasize that VA did not reactivate the petitioners' appeals as a matter of litigation strategy; VA reactivated these appeals because its internal procedures

mandated that action once VA became aware of the issue. While VA acknowledges that it learned of the issues with the petitioners' specific appeals as a result of this litigation, VA still had an obligation independent of this litigation to promptly reactivate those appeals. *See* M21-5, 6.B.4.b; Appx418-419; Appx680; Appx468 (VA Inspector General noting that VA reactivated specific appeals identified as improperly closed during the Inspector General's audit process). The petitioners have never suggested that VA should have withheld this mandatory reactivation and continued to deny timely resolution of the named petitioners' appeals simply to preserve the justiciability of this litigation. Indeed, the petitioners specifically requested that their appeals be reactivated within 30 days of the filing of the petition, which VA achieved.

Nor does the record suggest that VA reactivated the petitioners' appeals to avoid having to review and reactivate other similarly situated claimants. *Cf. Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2011) (explaining that an agency's processing of plaintiffs' applications after suit was filed did not suggest that the agency had "devised a scurrilous pattern and practice of thwarting judicial review"). To the contrary, VA undertook substantial efforts (as documented to the Veterans Court) to ensure that it had identified claimants most likely to be similarly impacted, and then reactivated their appeals as well. Appx1231-1232 at ¶¶ IV-VI. Again, to the extent the Court considers VA's litigation behavior at all,

VA has acted in good faith to resolve all potential class claims to the greatest extent possible. This is simply not a case where repeated mooting of similar claims suggests a larger issue that requires a class action procedure to resolve. *See Monk*, 855 F.3d at 1321.

In sum, the inherently transitory doctrine does not apply in this case, and the Veterans Court correctly dismissed the petition as moot.

C. This Court Need Not Address Or Review The Veterans Court's Comments On Standing, Class Representative Adequacy, And Class Commonality

The petitioners spend most of their brief raising concerns with the Veterans Court's denial of their request for class certification, taking issue with the court's discussion of standing, class representative adequacy, and class commonality. App. Br. 24-34, 41-57.[10] But this Court "'review[s] judgments, not statements in opinions.'" *Est. of Hage v. United States*, 685 F. App'x 927, 930 (Fed. Cir. 2017) (nonprecedential) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)). Here, the Veterans Court's judgment that the petition should be dismissed as moot was correct. Appx15-16, Appx24.

[10] The petitioners use the Veterans Court's comments to try to paint their appeal as the last hope for class actions at the Veterans Court. App. Br. at 3-4. That is hyperbole. We do not dispute the Veterans Court's power to certify classes consistent with its statutory authorities, including the All Writs Act. But this case is about mootness and must be decided based on the well-established law governing mootness.

Thus, this Court need not address or review the Veterans Court's statements on standing, class representative adequacy, and class commonality; they were purely dicta. Accordingly, this Court should either disregard or vacate the Veterans Court's statements on these issues and otherwise affirm.

If the Court ultimately reaches the issue of the Veterans Court's class certification analysis and determines that the Veterans Court erred, we respectfully request that the Court remand the case to the Veterans Court for further consideration of the class certification issues in the first instance. As the petitioners acknowledged, the Veterans Court only discussed the adequacy and commonality requirements. App. Br. 57-58. If necessary, the Veterans Court should have the opportunity to address any other relevant class certification considerations that it did not previously address. In particular, we note that the petitioners did not discuss the traditional requirement that the proposed class be "definite" or "ascertainable." *See* 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 3:2 (6th ed.). The potential impossibility of identifying class members who perfected an appeal prior to May 2017 could bear on these requirements, and the Veterans Court should have an opportunity to address those issues in the first instance if this Court reaches the class certification issue and reverses.

III. Alternatively, The Court Should Dismiss This Appeal As Moot Because The Putative Class Members Have Received All Feasible Concrete Relief Requested In The Petition

As discussed above, the Veterans Court was correct to dismiss the petition as moot. But if this Court disagrees and holds that that the Veterans Court should not have dismissed the petition, either because the petitioners' individual claims were not moot or because the inherently transitory exception applied, then this Court should dismiss the appeal as moot because the putative class members have received all feasible concrete relief requested in the petition. The Court has an independent obligation to review whether the petition is moot now. *Nasatka v. Delta Scientific Corp.*, 58 F.3d 1578, 1581 (Fed. Cir. 1995). *See North Carolina v. Rice*, 404 U.S. 244 (1971) ("Mootness is a jurisdictional question because the Court is not empowered to decide moot questions or abstract propositions." (internal quotation marks omitted)). "That the dispute between the parties was very much alive when suit was filed, or at the time the [lower court] rendered its judgment," is inapposite; a court "may only adjudicate actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988).

An appeal becomes moot if it is no longer possible for the court to grant any effectual relief if the appellant prevails. *Mission Prod. Holdings, Inc. v. Tempnology*, 139 S. Ct. 1652, 1660 (2019); *Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C. v. United States*, 32 F.4th 1130, 1139 (Fed.

Cir. 2022). A court only retains jurisdiction on appeal if it "can fashion *some* form of meaningful relief . . . ." *Church of Scientology of California*, 506 U.S. at 12 (emphasis in original). And the petitioners cannot sustain their appeal by recasting their claims to seek relief that they did not originally request. *See*, *e.g.*, *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71 (1997) ("[New claims] asserted solely to avoid otherwise certain mootness, b[ear] close inspection."); *Seven Words LLC v. Network Sols.*, 260 F.3d 1089, 1097 (9th Cir. 2001) (citing cases and rejecting plaintiff's attempt to avoid mootness by asserting a belated claim for damages); *Harris v. City of Houston*, 151 F.3d 186, 191 (5th Cir. 1998) (explaining that the court could not "fashion relief not requested below in order to keep a suit viable" nor "'read into' [the] complaint additional requests for relief and then proceed to an adjudication on the merits").

Unlike the petitioners' request that VA reactivate their individual appeals, Appx36, the petitioners did not originally request such specific relief on behalf of the entire class. Appx263-264. Implicitly recognizing the substantial logistical difficulties in identifying every potentially impacted claimant, the petitioners requested only that the Court order VA to discuss with the petitioners how VA might attempt to identify the affected claimants and then restart the processing of their appeals. *Id*. Notably, the petitioners only requested that the Court order the parties to negotiate in good faith and submit their respective positions to the Court

on these issues. *Id.* Nowhere did the petitioners suggest that the Court should order VA to actually identify and reactivate every single potentially impacted appeal. Thus, the petitioners cannot now assert that their appeal is not moot because of VA's failure to prove that it has reactivated every potentially impacted appeal; the petitioners did not request that relief before the Veterans Court.

As to the relief that *was* requested, VA has provided it. VA developed the most comprehensive plan it could feasibly achieve to identify and reactivate the affected appeals. VA undertook a review of the 253,913 appeal files that had been closed in VACOLS for failure to timely submit a substantive appeal between May 2017 and January 2022. Appx1069. This set of appeal files was the set identified by the Veterans Court, Appx1050, and included all appeals that VA could feasibly identify that might have been subject to an erroneous VACOLS closure. VA is additionally performing special monthly reviews to ensure no similarly affected appeals going forward. These actions constitute good faith attempts to resolve this issue, which is precisely what the petitioners asked the Veterans Court to order. Appx263.

Even if the Court could construe the petitioners' original appeal as requesting that VA identify and reactivate all potentially impacted appeals, it is simply not possible for VA to comprehensively identify closed VACOLS files where a substantive appeal may have been timely submitted before May 2017

because. Prior to May 2017, VA did not consistently include End Product codes corresponding to the receipt of a substantive appeal, Appx474, Appx954, codes that allow for the data mining techniques that enable a comprehensive search. Thus, the only way to identify potential class members who filed an appeal prior to May 2017 would be to manually review every single VACOLS file closed for the lack of a substantive appeal since 2003, when VA first began using the VACOLS system. *See* Appx2 n.9. Millions of files would have to be manually reviewed. Extrapolating from the time it took VA to manually review the VACOLS files between May 2017 and January 2022, VA would have to commit at least hundreds of thousands of work-hours to manually review all of the potentially impacted files. *See* Appx1231 at ¶ IV. Simply put, VA does not have the resources needed to accomplish this task and, if it were nevertheless to attempt it, it would have a significant negative effect on VA's processing of currently pending and newly arriving claims and appeals. *See Ebanks v. Shulkin*, 877 F.3d 1037, 1040 (Fed. Cir. 2017) (judicial order requiring that agency resources be diverted to one class of claimants "simply moves all others back one space and produces no net gain" (quoting *In re Barr Labs, Inc.*, 930 F.2d 72 (D.C. Cir. 1991)).

Nor is such an effort likely to be a responsible use of resources in fulfilling VA's mandate to serve our nation's veterans. VA's review of appeals submitted between May 2017 and January 2022 showed that only 1.5% of VACOLS files

closed during that timeframe potentially warranted reactivation. Appx1071; Appx1231 at ¶ IV. The percentage of claims impacted by this issue before May 2017 is likely to be even lower, as affected claimants would have had to submit a substantive appeal before May 2017 and then remain passive for more than six years waiting for some further communication from VA. It is far more likely that, after such a long period of silence, the claimant would have reached out to VA or filed a new claim. And even if the claimant has not yet reached out to VA, he or she can still do so now and still receive benefits retroactive to the original claim filing (since, as discussed above, a VACOLS characterization has no legal significance). Overall, spending hundreds of thousands of hours to reconfirm that more than 99% of VACOLS closures were proper, rather than processing current and future claims, is not a reasonable allocation of VA's limited resources.

To reiterate, implicit in the petitioners' narrow request for class relief is their recognition that such an enormous exercise would not be reasonable or in the best interests of veterans as a whole. The petitioners requested that the Veterans Court order VA to work in good faith to find the best possible solution to remedy erroneous VACOLS closures. Appx263-264. VA did so, and thus the specific relief requested by the petitioners on behalf of the class has been granted and the appeal is now fully moot as to the putative class.

For these reasons, even if the Court concludes that the petition was not moot at the time of the Veterans Court's decision, the appeal is moot now. If the Court reaches this issue and determines that the petition was not moot when dismissed by the Veterans Court, but that it is now moot, we respectfully request that the Veterans Court's decision be vacated with directions to dismiss the action as moot pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950). *See Apple Inc. v. Voip-Pal.com, Inc.*, 976 F.3d 1316, 1321 (Fed. Cir. 2020).

CONCLUSION

For these reasons, we respectfully request that the Court affirm the Veterans Court's decision dismissing the petition for mootness. Alternatively, we respectfully request that the Court vacate the Veterans Court's decision and remand with an instruction to dismiss the petition for mootness.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this response: (1) complies with the type volume limitation of Federal Circuit Rule 32(b)(1); (2) contains 8,484 words, excluding the portions of this response exempted from the type volume limitation by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2); (3) complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5); (4) complies with the type style requirements of Federal Rules of Appellate 32(a)(6); and (5) has been prepared on a computer in a proportionally spaced typeface using Microsoft Word in Times New Roman type style and 14 point size. In preparing this certificate of compliance, I have relied upon the word count function of the word processing system that was used to prepare the response.

/s/Evan Wisser