No. 23-1387

In the United States Court of Appeals for the Federal Circuit

MARK FREUND AND MARY S. MATHEWSON,
Claimants-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

CORRECTED AMICUS BRIEF OF 16 CIVIL PROCEDURE PROFESSORS AS AMICI CURIAE IN SUPPORT OF CLAIMANTS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number	23-1387
Short Case Caption	Freund v. McDonough
Filing Party/Entity	16 Civil Procedure Professors as Amici Curiae

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
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Date: 04/20/2023

Signature: /s/ Meghan E. Brooks

Name: Meghan E. Brooks

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☒ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☒ None/Not Applicable
Christine Bartholomew		
Sergio Campos		
Maureen S. Carroll		
Brooke D. Coleman		
Robin Effron		
David Freeman Engstrom		
Myriam Gilles		
Maria Glover		
Andrew Hammond		
Deborah R. Hensler		
Helen Hershkoff		

☒ Additional pages attached

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Alexandra Lahav		
David Marcus		
Michael Sant'Ambrogio		
Adam Steinman		
Adam Zimmerman		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below) ☐ No ☒ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable ☐ Additional pages attached

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

INTEREST OF AMICI CURIAE[1]

Amici curiae specialize in administrative law, federal courts, and civil procedure. Amici's interests are in the orderly development of the class action doctrine and administrative law. Amici believe this case raises important questions regarding the standing and adequacy of class action representatives to pursue aggregate relief in representative litigation against the government, and they offer this perspective from their study of the availability of the class action device, injunctive relief, justiciability doctrine, and the administrative state.

Amici file this brief in their individual capacities and provide their institutional affiliation solely for the purposes of identification.

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Professor of Law, University of Buffalo School of Law

Sergio Campos
Professor of Law, University of Miami School of Law

[1] The parties were notified of the intention to file this brief per Fed. R. App. P. 29(a)(2) and consented to its filing. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

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SUMMARY OF ARGUMENT

Amici curiae submit this brief to explain how established principles of representative litigation support injunctive class actions against the government. Injunctive class actions are appropriate when defendants have "acted or refused to act on grounds that apply generally to the class." *See* Fed. R. Civ. P. 23(b)(2). The authors of the modern class action rule specifically chose this language to make clear that courts enjoy authority to resolve challenges to systemwide government policies through representative litigation. To that end, courts have routinely certified injunctive class actions against government benefit programs that commit widespread and systematic error. A common and unremarkable feature of the injunctive relief obtained in such cases is that the absent class members receive notice that their rights have been violated. This notice protects their ability to seek any court-ordered relief that results from the class proceeding.

Here, the Court of Appeals for Veterans Claims refused to certify a class action that would notify veterans about a systemwide computer

issue that automatically closed thousands of their claims at the Board of Veterans' Appeals. The Court identified a seeming catch-22 in the otherwise routine kinds of relief afforded to class members in such cases. The Court accepted that the government's program, left uncorrected, led to "troubling" and "inappropriate" closures of timely filed substantive appeals. Op. at 3, 17. But the Court felt it had no choice but to reject the class, reasoning that the class representatives had *already learned* that their appeal was erroneously terminated, and thus lacked standing to obtain relief that included notice to those who had not. *Id.* at 20. It then went further to say that *any veteran* whose appeal was wrongfully dropped could not become a class representative; once they too had learned they were wronged, they would lack standing and could not adequately represent a class of veterans who remained in the dark. *Id.* Taken to its logical conclusion, the Court's Kafkaesque reasoning undermines a fundamental tenet of representative litigation. No lead plaintiff would ever be able to challenge deficient notice in a government program because, to become a representative, they would have to know too much.

The procedural law and equitable principles that govern class actions do not support this result for two reasons.

First, class representatives have standing to seek injunctive relief that includes notice to absent class members—even when they are aware of how the government wronged them. When a lead representative litigates on behalf of herself and others in a class action, she can attack the full range of the defendant's misconduct to benefit the class, so long as she targets the same root conduct that injures her and otherwise satisfies the requirements of Rule 23. Ensuring meaningful notice to class members of the government's misconduct in such cases is a natural extension of the relief typically needed to accomplish the goals of representative litigation. Such notice also flows from courts' equitable authority—and responsibility—to fashion appropriate remedies that effectuate the "injunctive relief . . . the class as a whole" is entitled to receive. Fed. R. Civ. P. 23(b)(2).

Second, class representatives here raise "common" questions and may serve as "adequate" representatives consistent with modern class

action law. Procedural challenges to government institutions frequently raise common questions when they focus on generic questions about how systemwide hearing procedures impact the same group of people who depend on them for relief. Named plaintiffs can "fairly and adequately protect the interests of the class" absent structural conflicts among class members. Fed. R. Civ. P. 23(a)(4). Different information or knowledge regarding the scope of injunctive relief or the nature of the injury done to them does not create a structural conflict, so long as class members' interests are aligned. *See Hansberry v. Lee*, 311 U.S. 32, 42 (1940). To hold otherwise risks excluding sophisticated parties from representing a class in a challenge to government policies, even where all class members are seeking systemic relief such as notice that their appeals were summarily dismissed due to a computer issue. The conflicts that sometimes arise in large damages class actions—where the monetary relief pursued could benefit some class members at the expense of others—do not apply to classwide injunctive relief aimed at fixing a uniform problem in a government program.

ARGUMENT

I. The Modern Class Action Rule Was Designed to Facilitate Group Challenges to Unlawful Government Practices.

A. Doctrines of Standing, Mootness, and Remedies in Representative Litigation Flexibly Permit Classwide Relief.

The authors of the modern class action rule designed injunctive relief class action procedures to address cases where government defendants systematically interfere with a large number of private plaintiffs' rights. For that reason, Rule 23(b)(2) of the Federal Rule of Civil Procedure—on which class actions under the All Writs Act, 28 U.S.C. § 1651, such as this one, are often based—applies when the defendant "has acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2); *U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974) (approving All Writs Act representative action modeled after Rule 23). As the drafters of Rule 23 made clear, this language allows courts to liberally certify injunctive classes even when the defendant's actions threaten only "one or a few members of the class, provided it is based on grounds which have general application to the class." Fed. R. Civ. P.

23(b)(2) Advisory Committee Notes to 1966 amendments ("1966 Adv. Comm. Notes"). In cases where plaintiffs seek injunctive relief against the government, courts have long construed that language to mean the defendant must (1) act in a "consistent manner toward members of the class" such that its "actions may be viewed as part of a pattern of activity," or (2) establish a "regulatory scheme common to all class members." 7AA Charles A. Wright et al., *Federal Practice and Procedure* § 1775 (3d ed. 2008, last updated Apr. 2023) (collecting cases).

This interpretation is consistent with the history of the modern class action, which emerged against the backdrop of groupwide challenges to government agencies that erected complicated processes to slow-walk school integration. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) ("[Rule 23] subdivision (b)(2) 'build[s] on experience, mainly, but not exclusively, in the civil rights field.'" (citations omitted)); *see also* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 678-91 (2011). Drafters of the modern class action made clear that, in

representative litigation, lead plaintiffs could pursue claims on behalf of large groups, even if the representatives themselves were at different stages of an administrative process than the other members of the class. *See* Fed. R. Civ. P. 23(b)(2); 1966 Adv. Comm. Notes (citing *Potts v. Flax*, 313 F.2d 284, 290 (5th Cir. 1963), in discussion of amendment to subdivision (b)(2)).[1]

For decades, the federal courts have interpreted doctrines of standing, mootness, and remedies for injunctive relief consistently with these representative features of class action litigation. Courts need not, and do not, artificially carve up relief that a class representative may need at a given moment from that required to correct the common classwide problem that caused her injury. Rather, consistent with the equitable doctrines that gave rise to the modern class action, all three of these doctrines are applied in class actions to ensure that class members can

[1] In *Potts*, the Fifth Circuit held that "[e]xhaustion of internal school system administrative remedies [for a class action] is not required so long as racial segregation is the authoritative accepted policy." 313 F.2d at 290.

obtain the benefits of court-ordered relief for systemic government error, like those alleged in this case.

1. Standing Doctrine in Representative Litigation Permits Flexible Class Relief.

Although individual plaintiffs must experience an "injury in fact" for Article III standing, when a lead plaintiff litigates on behalf of herself and others in a class action, she can attack the full range of the defendant's misconduct so long as she targets the same root conduct that injures her. For example, a class representative denied university admission may seek injunctive relief on behalf of different groups of students because the "same set of concerns is implicated by the University's use of race in evaluating all undergraduate admissions applications under the guidelines." *Gratz v. Bollinger*, 539 U.S. 244, 267 (2003); *see also Ang v. Bimbo Bakeries USA, Inc.*, No. 13-1196, 2014 WL 1024182, at *4 (N.D. Cal. Mar. 13, 2014) (discussing *Gratz*'s flexible approach to standing for class representatives). In such cases, when the class representative as an individual has standing to sue for her injury and the class can be certified

under Rule 23, the court may proceed on a classwide basis. *See Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015) ("[O]nce the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met."); *Kirola v. City & Cnty. of San Francisco*, 860 F.3d 1164, 1176 (9th Cir. 2017) (citing *Melendres* in finding standing for named plaintiff and certified class); *K.W. ex rel. D.W. v. Armstrong*, 298 F.R.D. 479, 486 (D. Idaho 2014) ("[W]hether analyzed as a standing issue or a commonality issue, the courts have rejected the argument" that "not all members of the proposed class have been injured by the alleged due process violations" because "denial of due process is an injury in its own right."). This is because the requirements of Rule 23(a)—particularly, that the class has common claims and that the class representative is typical of the class—assure the court that the absent class members have a similarly genuine controversy to that of the named plaintiff. *See* 1 William B. Rubenstein,

Newberg on Class Actions § 2:3 (6th ed. 2022) (noting this approach to class standing has been adopted "in nearly every circuit").

Accordingly, if a large number of benefit claims were closed due to a systemwide issue—and the government did not reopen those claims on its own—a plaintiff would have standing to seek an injunction to reopen his claim and represent a class whose claims were closed because of the same root problem. Op. at 6; Opening Brief of Claimants-Appellants at 11. To effectuate relief for the class, a court could also order notice and other relief as necessary. That a plaintiff learned his appeal had been erroneously closed through his attorney's due diligence would have no bearing on his standing to pursue the overall relief needed to correct the systemic harm to the class.[2]

[2] If a government entity reactivated a plaintiff's claim *after* she filed a lawsuit, that would raise classic questions of mootness, which do not apply to lead plaintiffs in class actions. *See infra* Section I.A.2. But standing would not be implicated.

2. Mootness Doctrine in Representative Litigation Permits Flexible Class Relief.

Although plaintiffs in individual litigation must show that their claims have not been mooted after they file claims, class actions can continue even after the class representative's individual claim becomes moot, so long as members of the class continue to have a live controversy. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980). The Supreme Court has reasoned that the representative nature of class litigation means that "vigorous advocacy can be assured through means other than . . . a 'personal stake in the outcome'" because the class representative "continues vigorously to advocate his right to have a class certified." *Id.* at 404. This is true regardless of the reason—whether the plaintiff is released, retains counsel, or simply ages out of a government program. *See, e.g.*, *Clay v. Pelle*, No. 10-CV-01840, 2011 WL 843920, at *7 (D. Colo. Mar. 8, 2011) ("Because the practice alleged to be occurring . . . continues to affect members of the putative class who have a live stake in the controversy, if a class is certified, the claims are not mooted should the

named Plaintiffs be transferred or released from the jail."); *Mental Disability L. Clinic v. Hogan*, No. CV-06-6320, 2008 WL 4104460, at *11 (E.D.N.Y. Aug. 29, 2008).

This feature of class representation also protects the court's own jurisdiction in class actions under the All Writs Act, when many claims would be "so inherently transitory" that a court might not reach a class certification motion "before the proposed representative's . . . interest expires." *Geraghty*, 445 U.S. at 399 (approving exception in All Writs Act class action); *Monk v. Shulkin*, 855 F.3d 1312, 1319, 1321 (Fed. Cir. 2017) (observing that a "claim aggregation procedure" under the All Writs Act avoids mootness and thus "may help the [Court of Appeals for Veterans Claims ('CAVC')] achieve the goal of reviewing the [Department of Veterans Affairs ('VA')] delay in adjudicating appeals"). These jurisdictional concerns apply with equal force to judicial review schemes, like this one, that give courts and adjudicative bodies the power to authoritatively and coherently interpret law "for the government bodies that operate in the broad geographic regions they oversee." Adam S. Zimmerman, *The Class*

Appeal, 89 U. CHI. L. REV. 1419, 1448 (2022) (explaining how class actions operate within appellate channeling schemes); *cf. Henderson v. Shinseki*, 562 U.S. 428, 432 n.2 (2011) (observing CAVC's "scope of review [under the Veterans Judicial Review Act, 38 U.S.C.] § 7261, is similar to that of an Article III court reviewing an agency action under the [Administrative Procedure Act]"). Class actions further the goal of enforcing the law by enabling courts to maintain jurisdiction over large numbers of small, transient, or intangible claims that would otherwise evade judicial review. *See* Christine P. Bartholomew, *Redefining Prey & Predator in Class Actions*, 80 BROOK. L. REV. 743, 763 (2015).

Accordingly, courts have consistently interpreted justiciability doctrines to preserve the viability of injunctive class actions that challenge unlawful government procedures. For example, in *Unan v. Lyon*, 853 F.3d 279 (6th Cir. 2017), a systemic computer issue erroneously assigned non-citizen Medicaid applicants "Emergency Services Only" coverage, rather than comprehensive coverage. The Sixth Circuit held that, since "a named plaintiff in this case does not know whether her case will remain

alive sufficiently long enough to enable a district court to certify a class," her "injury [was] 'so transitory that it would likely evade review'" if the class action did not proceed. *Id.* at 287. *See also, e.g.*, *Doe v. Wolf*, 424 F. Supp. 3d 1028, 1039-40 (S.D. Cal. 2020) (holding that, in putative class action challenging federal agency's prohibition of retaining counsel for certain interviews, "Petitioners' claim is inherently transitory" because "the Court would not have had 'enough time to rule on a motion for class certification before [Petitioners'] individual interest[s] expire[d]'") (alterations in original).

3. Remedies Doctrine in Representative Litigation Permits Flexible Class Relief.

Although an individual plaintiff's application for injunctive relief must typically specify the prospective relief needed to address her own injury, in a class action, courts retain discretion to fashion relief consistent with the needs of the whole class after a decision on the merits. *See Yates v. Collier*, 868 F.3d 354, 368 (5th Cir. 2017); *Parsons v. Ryan*, 754 F.3d 657, 689 (9th Cir. 2014). This is why Rule 23(b)(2) states that

class certification requires the defendant to have acted on grounds that "apply *generally* to the class" (emphasis added). The Rule directs courts to issue injunctions that will apply to the class as a whole, on the predicate that the government's conduct (as here) impacts all or most class members in the same way. The difference between certification standards for injunctive classes and money damages classes clarifies the point—for an injunctive class like this one, the court is not asked to compare common and individual issues and decide which "predominates." Fed. R. Civ. P. 23(b)(3). Rather, the court's charge is to determine whether there is a policy or practice that applies to the class as defined and which can be cured by injunctive or declaratory relief.

Class actions provide an important tool to ensure compliance even after the court issues a decision (and even after class representatives have received the relief they require). *See Almendares v. Palmer*, 222 F.R.D. 324, 334 (N.D. Ohio 2004) (certifying class of plaintiffs seeking bilingual services in food-stamp program in part because it is "not clear that any injunctive relief awarded to an individual plaintiff will

automatically inure to the benefit of the class as a whole"); *see also Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113, 119-20 (N.D. Cal. 1987). This is particularly true for far-flung, unrepresented plaintiffs challenging opaque practices in a government bureaucracy. Without a class—and class counsel—to interpret and enforce a new judicial decision before the agency, the court's mandate may be misinterpreted or ignored.

This is why the class representative(s) need not themselves obtain all the relief the court affords the class, so long as their claims are "sufficiently similar" at the class certification stage to be addressed in a class-wide injunction. *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010) ("Rule 23(b)(2) demands class members' injuries alleged by Named Plaintiffs at the certification stage appear 'sufficiently similar that they can be addressed in a single injunction that need not differentiate between class members.'" (quoting *Shook v. Bd. of Cnty. Comm'rs of Cnty. of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008))).

* * *

Taken together, the doctrines of standing, mootness, and remedies in class actions embrace central goals of representative litigation that permit class representatives to pursue broader injunctive relief for the class than they themselves might require, so long as they are injured by the same government misconduct and can separately satisfy Rule 23's requirements. Standing doctrine in class actions ensures that class representatives can broadly attack core features of a government program that applies generally to the class. Mootness doctrine permits named plaintiffs to continue as class representatives vigorously pursuing class members' claims, even after their own have been resolved. And the rules governing injunctive relief permit class representatives to pursue flexible remedies so that class members may obtain the benefits of a court order tailored to the class's needs.

B. Features of Representative Litigation Allow Class Representatives to Redress Systemic Procedural Problems in Government Agencies.

Class actions have long played a critical role in permitting courts to address systemic flaws in government hearing procedures. Due process

and other procedural challenges to government hearing programs lend themselves to class certification because they often raise generic questions about how systemwide rules for adjudication impact a group of people who depend on them for relief. *See Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."). Due process challenges thus permit courts to answer many claimants' claims "in one stroke"—even when they are at different stages of an administrative process—precisely because they often raise the same policy questions about fair notice to claimants, systemic error rates, and government cost. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Many landmark due process challenges to Social Security, immigration and other state benefit proceedings in the Supreme Court proceeded as class actions—ensuring the Court could develop a complete record to address the full scope of the legal issues alleged, provide notice to absent parties, and effect systemwide relief. *See, e.g.*, *Califano v.*

Yamasaki, 442 U.S. 682, 701 (1979) ("[T]he class-action device save[d] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23."); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991) (providing federal jurisdiction to hear class action challenging procedures in amnesty program that failed to afford notice, an opportunity to challenge adverse witnesses, or access to translators). Even *Goldberg v. Kelly*, 397 U.S. 254 (1970), which emphasized that the "opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard," was brought as a consolidated action and uniformly affirmed plaintiffs' right to notice and a fair hearing. *Id.* at 268-69.

Injunctions correcting systemic problems in government programs, such as due process violations based on lack of notice, have been a standard and unremarkable feature of countless procedural government class actions. Absent class members often need notice that class representatives do not, so that they too may obtain court-ordered relief through the

representative proceeding. For example, in *Califano*, litigants brought a class action under the All Writs Act in federal district courts after their benefits were clawed back by the Social Security Administration without notice or an opportunity for a hearing to request a waiver. 442 U.S. at 687-90 (summarizing proceedings below). The class representatives learned about the unlawful program, as well as their rights to receive that waiver, in the litigation. But the lower court had no problem ordering relief in the form of notice to *all* class members of their right to receive a hearing, as well as a hearing for those who requested it under the All Writs Act. *Elliott v. Weinberger*, 564 F.2d 1219, 1235-36 (9th Cir. 1977). The class representatives' standing to represent a class seeking notice—despite their own knowledge of the government's failure to comply with the law—went unchallenged. *Califano*, 442 U.S. at 704 n.16.

Courts today routinely allow class representatives to pursue notice on behalf of a class when they are already aware of systemic harm that impacts all class members. *See, e.g.*, *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (rejecting the government's argument against class

certification based on previous notice to some class members as "a twisted result"); *Guadagna v. Zucker*, 332 F.R.D. 86, 96 (E.D.N.Y. 2019) (finding no "identifiable actual or potential conflicts" between plaintiff who eventually received notice and class members who had all "suffered reduction of Medicaid services without receiving adequate notice"); *Vietnam Veterans of Am. v. CIA*, 288 F.R.D. 192, 206 (N.D. Cal. 2012) (finding that proposed class representatives' receipt of notice through the suit was insufficient to foreclose standing).

There are several reasons why notice may be appropriate for absent class members, even when the class representative has received it independently. First, formal notice is important to the class representatives, who frequently enjoy a legal right to learn not just whether, but *why* the government has denied them relief. *See, e.g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (holding that notice must be "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," be of "such nature as reasonably to convey the required information," and

"afford a reasonable time for those interested to make their appearance"); *Goldberg*, 397 U.S. at 268 (observing the importance of notice in government benefit cases for "terminations [that] rest[] on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases"); Helen Hershkoff & Stephen Loffredo, *Standing for Democracy: Is Democracy a Procedural Right in* Vacuo*? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing*, 70 BUFF. L. REV. 523, 550 (2022) (arguing procedural rights confer value "separate from any immediate or anticipated payoff" because they also "accord . . . respect and dignity").

Second, notice is a natural extension of the representative litigation process, which anticipates that class representatives obtain counsel, vigorously represent absent class members, and notify class members of relief obtained on their behalf. *See* Fed. R. Civ. P. 23(c)(2) (affording courts discretion to notify class members of injunctive relief obtained in class action); *cf.* Christine P. Bartholomew, *E-Notice*, 68 DUKE L.J. 217, 220 (2018) (explaining that the purpose of classwide notice is to "maximize

delivery of relief to class members") (citing Advisory Committee Notes, 39 F.R.D. 98, 105, 107 (1966)).

Finally, such notice flows from courts' equitable authority, and responsibility, to fashion appropriate injunctive remedies to effectuate injunctive relief the class is entitled to receive through the litigation. Class actions attempting to secure notice, counsel, or other procedural rights against the government simply could not proceed if class representatives were always caught in a catch-22 wherein their wherewithal to sue was used against the absent class members they seek to help.

II. Parties Seeking Structural Relief from the Same Government Policy Share Interests with and Are Adequate Representatives of the Class.

Class representatives also raise "common" questions and may serve as "adequate" representatives in injunctive relief cases against the government when they target a common policy capable of classwide resolution and their interests are structurally aligned.

A. Challenges to Systemwide Government Policies Raise Common Questions That Are Easily Capable of Classwide Resolution.

Rule 23(a)(2)'s commonality requirement is "less demanding" in injunctive class actions than the predominance standard in proposed classes seeking money damages. *Stockwell v. City & Cnty. of San Francisco*, 749 F.3d 1107, 1113 (9th Cir. 2014). Plaintiffs must demonstrate "*questions* of law or fact common to the class[,]" Fed. R. Civ. P. 23(a)(2) (emphasis added), not that the court will ultimately accept on the merits the plaintiffs' preferred *answers* to these common questions. The Supreme Court confirmed this emphasis in *Wal-Mart*: plaintiffs' claims must "depend upon a common *contention* . . . of such a nature that it is *capable* of classwide resolution." 564 U.S. at 350 (emphasis added). It is the "'*capacity* of a class-wide proceeding to generate common [answers],'" not the answers themselves, on which commonality turns. *Id.* (emphasis added) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

Common contentions exist when plaintiffs challenge a common procedure or allege a consistent pattern of delay from which a trier of fact might infer a systemic unconstitutional practice. *See Lippert v. Baldwin*, No. 10 C 4603, 2017 WL 1545672, at *4 (N.D. Ill. Apr. 28, 2017) (collecting cases); Wright et al., *supra*, at § 1775 (collecting cases where "Rule 23(b)(2) . . . has been used extensively to challenge" complex benefit schemes). Courts routinely find that challenges to a systemwide government policy satisfy Rule 23(a)(2) commonality precisely because the relief sought—invalidation of the policy—will apply to all parties in the same way.

For example, federal courts have repeatedly certified injunctive classes in due process challenges to government institutions and hearing programs. As noted above, procedural due process challenges lend themselves to class certification because they often raise generic questions about how the same systemwide procedures impact classes of people who depend on them for relief. *See, e.g.*, *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) (affirming class

certification in part because "[c]ases alleging a single course of wrongful conduct are particularly well-suited to class certification"); *A.T. by and through Tillman v. Harder*, 298 F. Supp. 3d 391, 408-09 (N.D.N.Y. 2018) (certifying similar class in part because "plaintiffs allege defendants have engaged in a common course of unlawful conduct," and holding that termination of class representative's claims did not moot claims of unnamed class members); *Vietnam Veterans of Am.*, 288 F.R.D. at 213 (certifying injunctive class of veterans because whether VA regulations created notice duties "toward any of the class members is a common question, which . . . can be accomplished on a class-wide basis").

The same is also true for those seeking relief under the Administrative Procedure Act, 5 U.S.C. §§ 551-59 ("APA"), where class claims turn on the existence of a single procedure or process, including absence of a required procedure. *See, e.g.*, *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 368 (S.D.N.Y. 2019) (certifying APA class of immigrants challenging statewide practice of preventing family courts from serving as juvenile courts because "resolution on a class-wide basis will allow for an

important issue in the individual cases to be decided in 'one stroke'" (quoting *Wal-Mart*, 564 U.S. at 350)); *Alexander v. Azar*, 370 F. Supp. 3d 302, 329 (D. Conn. 2019) (denying motion for decertification of injunctive APA class because "*all* hospitals participating in Medicare are compelled to apply the standards for inpatient admission decisions that CMS dictates, and . . . the agency has no formal procedure through which any class members can challenge those decisions") (emphasis in original); *Ramirez v. U.S. Immigr. & Customs Enf't*, 338 F. Supp. 3d 1, 46 (D.D.C. 2018) (certifying APA class because "[p]laintiffs in this case have identified a single alleged practice—the refusal to comply with [statutory provision mandating consideration of less restrictive placements]—that provides the basis for every class member's injury"); *Al Otro Lado, Inc. v. Wolf*, 336 F.R.D. 494, 503 (S.D. Cal. 2020) (finding "refusal to inspect or process asylum-seekers by referring them for credible fear interviews" to be "sufficient for commonality" for APA class); *id.* at 505 (finding typicality satisfied despite "the chronology of [named] Plaintiffs' claims"). The Veterans Judicial Review Act, 38 U.S.C. §§ 7252, 7292, is the APA's

analogue in the VA claim context. *See* S. Rep. No. 100–418, at 60 (1988) ("[T]he [CAVC] shall have the same authority as it would in cases arising under the APA . . . ."); *Martin v. O'Rourke*, 891 F.3d 1338, 1343 (Fed. Cir. 2018) (explaining that 38 U.S.C. § 7261 "derived from the similar scope of review statute in the Administrative Procedure Act"); *Henderson*, 562 U.S. at 432 n.2.

For the same reasons, challenges to algorithmic or automated processes are well-suited for class certification. They necessarily impact every affected party in the same way—furnishing a straightforward basis for common question(s) of law or fact (and for typicality). For example, in *K.W.*, a class of developmentally disabled adults brought a class action challenging an Idaho agency's use of "budget tool software" that "automatically calculates what Medicaid would pay toward" home and community-based services. 298 F.R.D. at 483-84. In certifying the class, the court found that plaintiffs' challenge to this "generic method for making budget decisions" is the exact type of "system-wide challenge[]" which "avoid[s] the type of individualized inquiries that destroy commonality."

Id. at 486. *See also Hawkins v. Cohen*, 327 F.R.D. 64, 70 (E.D.N.C. 2018) (certifying class of Medicare beneficiaries after their claims were terminated without notice under automated system); *J.M. by and through Lewis v. Crittenden*, 337 F.R.D. 434, 439 (N.D. Ga. 2019) (certifying class of Medicaid beneficiaries deprived of outside review and notice by automated system).

Courts have been particularly comfortable certifying classes where the claims are collateral to the merits of each class member's individual case. *See* Wright et al., *supra*, at § 1776.1 (collecting cases). Here, for example, the class action petition asked for an order, after the VA's automated system erroneously closed their appeals, that would: (1) declare VA's withholding of action regarding claimants' timely filed legacy appeals as agency action "unlawfully withheld" within the meaning of 38 U.S.C. § 7261(a)(2); (2) declare that VA's closures of claimants' appeals without notice violate 38 C.F.R. § 19.32 and fair process; (3) order the Secretary to reactivate claimants' appeals within 30 days; (4) retain jurisdiction over this case until the Secretary complies with the Court's

order; and (5) order any such other relief as appropriate. Opening Brief of Claimants-Appellants at 11, Appx6-7. These questions were manifestly "capable of classwide resolution," even if the final answer to any one plaintiff would benefit them in different ways.

Rule 23(a)(2)'s emphasis on the *capacity* to provide common answers, not the specific answers themselves, is sometimes a source of confusion. For example, the lower court here appeared to suggest that the possibility that some individual veterans might identify a timely appeal on their own without notice meant that the court was unable to provide a common answer that would benefit all putative class members. Op. at 23. But a court need not offer an answer that automatically inures to the benefit of all class members; systemwide problems must simply be *capable* of a common answer—which, after a hearing on the merits, could be ordering the Secretary to update its system to notify and automatically enroll the vast majority of veterans who have not yet discovered they have been dropped from the VA system.

This flexibility in government class actions follows from the pivotal language and holding in *Wal-Mart*—the requirement that the plaintiffs' contentions be capable of resolution "in one stroke"—a reference to the well-known work of Professor Richard Nagareda. 564 U.S. at 350 (citing Nagareda, *supra*, at 132). Nagareda doubted that there was a common remedy for the millions of allegedly aggrieved women in *Wal-Mart*, a point upon which the Court decisively relied. *Id.* Yet in the same passage cited by the Court, Nagareda refers to a portion of the American Law Institute's *Principles* that affirmed why injunctive relief against the government often *does* apply to all:

> [I]n litigation against governmental entities . . . the generally applicable nature of the policy or practice typically means that the defendant government will be in a position, as a practical matter, either to maintain or discontinue the disputed policy or practice as a whole, not to afford relief therefrom only to the named plaintiff.

Principles of the Law of Aggregate Litigation § 2.04 cmt. a. (Am. Law Inst. 2010) (cited in Nagareda, *supra*, at 132 n.123).

It is therefore unsurprising that courts continue to find "common questions" in structural suits against government policies and practices.

See David Marcus, *The Persistence and Uncertain Future of the Public Interest Class Action*, 24 LEWIS & CLARK L. REV. 395, 412 (2020) (observing that, in cases against government defendants for equitable relief across roughly 250 published district court opinions after *Wal-Mart*, more than 75% favored plaintiffs). In such cases, class treatment may be the only viable way for people to learn about, and challenge, unlawful government action.

B. Parties Adequately Represent the Class When They Seek the Same Structural Relief from the Same Government Policy.

Named plaintiffs can fairly represent the interests of the class absent fundamental "structural" conflicts among class members. *Amchem*, 521 U.S. at 627. To maintain a class action, plaintiffs must demonstrate that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *Hansberry*, 311 U.S. at 42-43 (holding that absent parties "may be bound by the judgment where they are in fact adequately represented by parties who are present"); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 961 (9th Cir. 2009). The Supreme

Court has set guideposts for analyzing whether named representatives will adequately represent an absent class. The most significant guidepost, rooted in *Hansberry*, is the requirement that the interests of named class representatives be structurally aligned with the interests of other class members.

Notably, however, "[n]ot all allegations of conflict will make a proposed representative inadequate." Joseph M. McLaughlin, *McLaughlin on Class Actions: Law & Practice* § 4:30 (19th ed. 2022). "[T]he conflict inquiry asks what divisions should render the class representation so defective in structure as to rise to the level of a constitutional dereliction." Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1678 (2008); Wright et al., *supra*, at § 1768 ("[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status."). Federal appellate courts uniformly agree that only a fundamental conflict—a fissure, not a crack—defeats certification. *See, e.g.*, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (finding that incentive payments

to named representatives did not defeat adequacy where they were not promised *ex ante* and "there were no structural differences in the claims of the class representatives and the other class members"); *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 184 (3d Cir. 2012) ("Obviously, not all intra-class conflicts will defeat the adequacy requirement."); *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011) (explaining that disqualifying conflicts between representatives and class members must be "fundamental").

Structural conflicts, while rare, typically arise outside the context of injunctive class actions against the government. Rather, they arise in the context of Rule 23(b)(3) class certifications and settlements where plaintiffs seek money damages. *See, e.g.*, McLaughlin, *supra*, at § 4:45; *In re Deepwater Horizon*, 739 F.3d 790, 813 n.99 (5th Cir. 2014) (collecting cases). In these instances, potential conflicts exist where the court finds an obvious risk that the class representatives' recovery might trade off against the recovery of other class members.

For example, in *Amchem*, the Court rejected a proposed global settlement of most of the country's asbestos litigation. 521 U.S. at 625-29. The Court found irreconcilable conflicts between present claimants—those with current asbestos-related injuries—and exposure-only class members who had not yet manifested an injury. *Id.* at 625-26 (holding that a "class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members"). As its fatal flaw, the proposed class settlement contained "no *structural* assurance of fair and adequate representation" for the exposure-only, future claimants. *Id.* at 627 (emphasis added); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855-59 (1999) (finding inadequate representation where, *inter alia*, some claimants would have access to insurance funds while others would not); Principles of the Law of Aggregate Litigation, *supra*, at § 2.07(a)(1) (providing structural definition of adequacy of representation).

Injunctive class actions, by contrast, typically will not suffer from the same structural conflict between the relief sought by the class

representatives and other members of the putative class when they attack the same government misconduct. *See, e.g.*, *Walters*, 145 F.3d at 1047; *Vietnam Veterans*, 288 F.R.D. at 192; *K.W.*, 298 F.R.D. at 486 (observing that "courts have rejected the argument" that all class members "be aggrieved by or desire to challenge the defendant's conduct in order for some of them to seek relief under Rule 23(b)(2)"). That is particularly true for class actions like this one, that raise systemwide questions about claimants subject to the same faulty procedure. *See, e.g.*, *Powers*, 501 F.3d at 619 (affirming class certification of plaintiffs' due process claim). In such cases, classwide findings often help courts assess the full impact of government procedures on an entire population, a determination that the Due Process Clause often requires. *Parham v. J.R.*, 442 U.S. 584, 615 (1979) (noting "it bears repeating" that "procedural due process rules are shaped by the risk of error . . . as applied to the generality of cases").

Claimants-Appellants here, for example, allege their benefits were withheld because of the same programmatic error. They ultimately seek injunctive relief that benefits the class in the same way to ensure the

class's appeals are also not unlawfully closed by the same automated program. That the class representatives possess more information about the nature of the government's violation, and may not themselves need the same relief as do the absent class members, does not raise a structural conflict. Quite the opposite: such knowledge effectuates adequate representation. Any contrary conclusion would deny benefits claimants, who often lack access to information and counsel, the ability to challenge and obtain consistent relief from the same government policy.

CONCLUSION

Certification of injunctive class actions challenging government policies, like this one, is consistent with the procedural law and equitable principles that govern representative litigation in class actions. Such cases permit courts to answer many claimants' claims "in one stroke," just as *Wal-Mart* requires, precisely because they often raise systemwide policy concerns for claimants, while ensuring meaningful notice to class members of the government's misconduct in such cases.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Federal Circuit Rule 29(b). It contains 6,991 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing on counsel of record on April 25, 2023 via CM/ECF, which will serve notice to all counsel of record.

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