23-1387

IN THE

United States Court of Appeals

FOR THE FEDERAL CIRCUIT

MARK FREUND, MARY S. MATHEWSON,

Claimants-Appellants,

—v.—

DENIS MCDONOUGH, Secretary of Veterans Affairs,

Respondent-Appellee.

On Appeal from the United States Court of Appeals for Veterans Claims, No. 21-4168, Judges Michael P. Allen, Amanda L. Meredith, and Scott J. Laurer

CORRECTED AMICUS BRIEF FOR THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND THE NATIONAL ORGANIZATION OF VETERANS' ADVOCATES IN SUPPORT OF CLAIMANTS-APPELLANTS AND REVERSAL

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CERTIFICATE OF INTEREST

Under Federal Circuit Rule 47.4, the undersigned counsel certifies as follows:

1. The full names of the entities represented by the undersigned counsel are The National Veterans Legal Services Program ("NVLSP") and The National Organization of Veterans' Advocates ("NOVA").

2. NVLSP and NOVA are the real parties in interest in this amicus brief.

3. NVLSP and NOVA do not have parent corporations and no publicly held corporation owns ten (10%) percent or more of either entity's stock.

4. All of the law firms, partners, and associates who are expected to appear for NVLSP and NOVA are identified on the cover page and signature page of this brief: Covington & Burling LLP, Alice Ahn, Megan L. Rodgers, Sara Sunderland, Alexander Setzepfandt, and Paul Enríquez.

5. I am not aware of any related or prior cases that meet the criteria set forth under Federal Circuit Rule 47.5.

6. No information is required to be disclosed under Federal Rule of Appellate Procedure 26.1(b) or (c) because this is neither a criminal nor a bankruptcy case.

Dated: April 20, 2023 /s/ Paul Enríquez

Counsel for Amici Curiae

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STATEMENT OF INTEREST

Amici curiae are two national veterans organizations.[1] The National Veterans Legal Services Program (NVLSP) is a nonprofit organization that has worked since 1981 to ensure that the government honors its commitment to deliver to our nation's veterans and active-duty service members the benefits to which they are entitled because of disabilities associated with their military service to our country.

NVLSP prepares, presents, and prosecutes veterans' benefits claims before the Department of Veterans Affairs (VA), pursues veterans' rights legislation, and advocates before this Court and others, seeking to provide assistance in cases that present issues of importance to veterans. NVLSP also recruits, trains, and assists thousands of volunteer lawyers and veterans' advocates, and publishes the 1,900-page Veterans Benefits Manual—the leading practice guide in the field—for advocates who assist veterans and their families in obtaining benefits from the VA. NVLSP has also filed class action lawsuits challenging the legality of various VA rules and policies.

The National Organization of Veterans' Advocates (NOVA) is a not-for-profit educational membership organization that was incorporated in 1993. Its members

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici curiae certify that no part of this brief was authored by counsel for any party to this case, and no party in this case, counsel for a party in this case, or person other than amici curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief. All parties to this case have consented to this filing.

are more than 800 individual attorneys and agents who represent our nation's military veterans, their families, and their survivors before the VA and federal courts. NOVA is committed to developing veterans' law and procedure through research, discussion, education, and participation as an amicus before this Court.

SUMMARY OF ARGUMENT

The purpose of the Veterans Court is to ensure that veterans are fairly treated and receive the benefits to which they are entitled. Sometimes, the only way to further these goals is with class action practice. That is true here.

The VA has admitted to improperly closing the appeals of over 3,500 veterans, preventing the Board of Veterans' Appeals (BVA) from hearing those cases. Rather than fixing this problem in a timely manner, the VA has admitted that it still does not have procedures in place for proactively identifying veterans whose appeals have been improperly closed. Many, possibly all, of these veterans have no idea that their appeals were improperly closed and therefore have no ability to bring individual claims to address the issue. Nor do many of these veterans have attorney representation that would allow them to effectively pursue such a claim (even if they knew about it). Class actions are designed to address exactly this type of problem. Class claims can be brought on behalf of individuals who do not know they have been injured, and class counsel can effectively represent them.

Class actions are well-suited to address another problem this case presents: any individual action will inevitably become moot. Once the VA becomes aware that an appeal was inappropriately closed, the VA will reactivate that appeal, mooting any individual action seeking that relief; indeed, that is what happened to the Petitioners here. Under these circumstances, a class action can stand under the "inherently transitory" exception to mootness, where—as here—(1) the class representative's claim became moot before the court had the reasonable ability to decide class certification and (2) at least some putative class members continue to have live claims. *Gerstein v. Pugh*, 420 U.S. 103, 111 n.11 (1975). Under Rule 23, petitioners can "adequately" represent the class even though their individual claims have become moot, so long as there is no reason to doubt their continued willingness to "vigorously advocate" for the class. Given that Petitioners suffered the same injury as the class and are aligned in trying to protect them from that injury, their adequacy as class representatives is not in question.

Finally, a class action is the only avenue through which systemic change can be achieved under these circumstances. Even if petitioners are successful in obtaining a judgment, past experience demonstrates that the VA sometimes does not follow binding precedent as to any other claimants, stymying the possibility of global relief. By contrast, a class action judgment is enforceable by every member of the class, providing much needed systemic change.

ARGUMENT

I. Class Action Relief Is Needed to Assist Veterans Whose Appeals Have Been Erroneously Closed Without Notice

The "purpose" of the Veterans Court is to "ensur[e] that veterans [are] treated fairly by the government and to see that all veterans entitled to benefits receive[] them." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). In light of that mission, the Veterans Court has broad authority to craft effective relief for veterans and to protect the court's jurisdiction, including allowing for class action relief. As discussed below, without class action relief, thousands of veterans will continue to have their appeals delayed due to admitted problems with the Veterans Appeals Control and Locator System (VACOLS), an electronic database that tracks veterans' legacy appeals and has mistakenly closed thousands of those appeals. Because those veterans are unaware of the problem and many are *pro se*, they have no ability to bring individual actions to challenge the improper closure of their appeals—or the VA policy at the root cause of that problem. Further, because any individual claim would inevitably become moot—after the VA realizes that a lawsuit has been filed and corrects the error in the VACOLS system—and because an individual action would not be enforceable by others even if it did survive a mootness challenge, only a class action can provide systemic relief.

A. Class Treatment Is Needed Because Veterans Who Are Unaware Their Appeals Were Improperly Closed Cannot Bring Individual Actions to Defend Themselves

In response to questioning by the Veterans Court, the VA admitted that it improperly closed 3,806 legacy appeals between May 15, 2017, and January 31, 2022—representing 69.8% of the appeals closed during that time period. *Freund v. McDonough*, 35 Vet. App. 466, 478 (2022). The VA further admitted that it "did not plan to notify claimants whose legacy appeals were improperly closed," but instead intended to "execute a plan to reactivate those closed appeals." *Id.* The VA's intentions aside, there is still no indication that the VA has fixed the problem. For that reason, thousands of veterans may still be waiting for the Board to hear their appeal, with no idea their cases were improperly closed. *See id.*

It is almost tautological that before an individual can bring a lawsuit on their own behalf, that individual must be aware they have some legal claim to bring. Because the thousands of veterans with appeals improperly closed in VACOLS may be unaware that occurred, they are in no position to bring an individual action challenging that improper closure.

Class actions are uniquely suited to solve problems like this. It is common for class claims to be brought on behalf of individuals who may not realize they were injured. *E.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985) (explaining that because putative class members may be "unfamiliar with the law," they may not

realize they have any legal claim). There are many different situations where this may occur, ranging from class members not realizing they overpaid for a product to not realizing that they are owed legal protections from creditors. *E.g.*, *Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 404 (6th Cir. 1980) ("Additionally, the class action provides an opportunity to educate a segment of the public, those included in the class, of the obligations which creditors owe to them as credit consumers."); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (holding that a class action is superior to individual actions because many plaintiffs may not "be aware of [their] rights"). Indeed, in some cases, the primary benefit provided by a class action is educating people with injuries about their rights. *Watkins*, 618 F.2d at 404 (noting that a "mass awakening of awareness could, indeed, be the greatest single benefit derived" from the class action). That is the case here, where one of the biggest impediments to veterans getting their cases reactivated by the VA is that they do not realize those cases were improperly closed in the first place.

Class treatment is not only needed, but also pressing. Many of these veterans have already been waiting years for their appeals to be heard and are at risk of giving up. The veterans affected by this problem all have their cases in the legacy appeals system that has been described as "broken." *See* H.R. Rep. No. 115-135, at 5 (2017) ("VA's current appeals process is broken."). Indeed, this Court found time and again that veterans in that system were "trapped for years [at the VA] in a bureaucratic

labyrinth, plagued by delays and inaction," *Martin v. O'Rourke*, 891 F.3d 1338, 1349 (Fed. Cir. 2018) (Moore, J., concurring), and faced "extraordinary delays" in obtaining the benefits to which they are entitled, *Ebanks v. Shulkin*, 877 F.3d 1037, 1040 (Fed. Cir. 2017). Delays of this kind have serious consequences. Veterans may move during this period and never receive important paperwork needed to prosecute their case. Others may die while waiting for the Board to act. *Martin*, 891 F.3d at 1349. Their spouses may also die, or their minor children may reach age 18 and become ineligible for a parent's benefits. *Id.* at 1349–50 (Moore, J., concurring). And even veterans who eventually succeed on appeal have still been denied "disability benefits for basic necessities, such as food, clothing, housing, and medical care" while waiting for a decision. *Id.* at 1347.

The VA's improper closing of thousands of appeals compounds those systemic issues with the legacy appeals system and makes it more likely that veterans who have already faced significant delays in that system will give up on their claims altogether. *See id.*; *see also* Adam S. Zimmerman, *Exhausting Government Class Actions*, U. CHI. L. REV. ONLINE (Oct. 20, 2022) ("Facing seven-year wait times to wade through the VA's complex benefit system, many unrepresented veterans gave up before ever seeing the Veterans Court.").

Class action treatment is needed to prevent these serious consequences.

B. Class Treatment Is Needed Because Many Individuals Lack Access to Attorney Representation

According to the most recent annual report issued by the Board of Veterans' Appeals, only 23% of veterans are represented by attorneys in appeals resulting in a Board decision.[2] Although metrics are not available on the rate of attorney representation before the disposition of Board appeals, it is likely that many veterans appeared *pro se* in earlier phases of the case as well.[3] That is true of the many veterans whose appeals have been improperly closed in the VACOLS system. Without an attorney, it will be difficult for them to determine whether their appeal has been improperly closed, much less challenge the improper closure.

Allowing for class treatment solves this problem. Class actions allow for the litigation of claims where individual representation would not be feasible. As courts have recognized, one "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Mace*, 109 F.3d at 344. At the extreme, class actions can allow for the litigation of claims where each class member has lost only a dollar, or even less. *E.g.*, *Van v. LLR, Inc.*, 2023 WL

[2] Board of Veterans' Appeals Annual Report, Fiscal Year 2021, at 39, *available at* https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2021AR.pdf.

[3] Indeed, paid legal representation is still quite limited prior to litigation before the Board. *See Mil.-Veterans Advoc. v. Sec'y of Veterans Affs.*, 7 F.4th 1110, 1135–37 (Fed. Cir. 2021).

2469909, at *4 (9th Cir. Mar. 13, 2023) (class members could bring claims for less than $0.01). In such cases, where individual representation is not feasible, "class action treatment is most needful"—both to redress current injuries and deter future conduct. *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013); ("A class action, like litigation in general, has a deterrent as well as a compensatory objective."); *see also Reyes v. Netdeposit, LLC*, 802 F.3d 469, 492 (3d Cir. 2015) (recognizing importance of class actions to "deter fraud in the marketplace").

Consistent with these goals, this Court has recognized the importance of class actions in the Veterans Court for "improving access to legal and expert assistance by parties with limited resources." *Monk v. Shulkin*, 855 F.3d 1312, 1320 (Fed. Cir. 2017). That is because class counsel can be appointed with the goal of ensuring a global resolution. *See id.* Courts have recognized that class treatment affords claimants "with limited resources" access "to legal and expert assistance" to help them determine if they are one of the veterans affected by the improper closures. *Id*. As Judge Reyna made clear in his separate opinion in *Monk v. Wilkie*, 978 F.3d 1273, 1278 (Fed. Cir. 2020), class action relief helps counter the sort of "unacceptable" delay that requires "the nation's veterans [to] carry the burden of compounding health and financial implications." Indeed, this Court has recognized that class treatment is uniquely situated to the cycle of veterans' claims languishing at the VA

and allows the Veterans Court to craft effective and timely relief. *Ebanks*, 877 F.3d at 1040. Such relief is needed here.

C. Class Treatment Is Needed Because Any Individual Action Would Become Moot

Even if a veteran manages to discover his or her appeal was improperly closed and brings an individual action, that action would not help the vast majority of other veterans. That is because the VA's reactivation of the appeal would inevitably render the individual action moot before any injunctive relief is granted. Only a class action can avoid this cycle.

1. Any Individual Action Would Become Moot

Any individual action seeking reform of the VACOLS system will inevitably become moot. By the nature of the claims here, any claimant who discovers that their appeal has been improperly closed and files an individual action to redress the issues with the VACOLS system will face the following: The VA will read the complaint, realize its error, and correct the problem as to that *claimant* by reactivating their appeal, mooting their claims for injunctive relief. Because their claims will be moot, the case likely will be dismissed, leaving the systemic issues with the VACOLS system unresolved. *E.g.*, *Monk*, 855 F.3d at 1316 ("A case is said to lack an actual or concrete dispute where the relief sought by a plaintiff is satisfied or otherwise rendered moot.").

That is precisely what happened in this case: the Petitioners' individual claims became moot when the VA reactivated their appeals. *Freund*, 35 Vet. App. 466 at 473, 481 (concluding that plaintiffs' "individual claims for relief" "are moot because the VA has reactivated their administrative appeals"). Indeed, it is the "VA's established policy to reactivate appeals [the] VA learns were wrongly closed." *Id.* (internal quotation marks omitted). For that reason, once the VA learns of a case alleging that the VACOLS system improperly closed that veteran's appeal, the VA is effectively required to moot the veteran's individual action by reactivating their appeal. *Id.*

The inevitability that any individual action would become moot is also demonstrated by VA's conduct in other actions. As this Court previously noted, the "case law is replete with such examples" of the VA mooting individual claims before a decision can be issued by the Veterans Court. *Monk*, 855 F.3d at 1321. In *Monk*, for example, after an individual plaintiff filed a mandamus action in the Veterans Court seeking an order requiring the Board to act on his delayed appeal, the VA responded by issuing a decision on the appeal before the Veterans Court could hear the issue. *Id.* As a result, "the petition [was] dismissed as moot because the relief sought ha[d] been obtained"—at least from the perspective of the individual. *Id.*

2. A Class Action Can Survive Individual Claims Becoming Moot

A class representative can continue to litigate a class action even if their individual claims have become moot. That is true both as to constitutional requirements under Article III and for the purposes of showing adequacy under Rule 23. For those reasons, a class action can proceed even if the claims of the class representatives have become moot.

Article III. Even where a class representative's individual claims have become moot, a live case and controversy can still exist under Article III as to class claims. That is true because, after a class is certified, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by" the named plaintiff. *Sosna v. Iowa*, 419 U.S. 393, 399 (1975). For that reason, the class claims remain live even if "the controversy is no longer alive as to" the class representative. *Id.* at 401. But even before class certification, the Supreme Court has recognized that an individual whose claims have become moot can still litigate on behalf of a class in certain circumstances under the "relation-back doctrine." *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75–76 (2013) (noting that under *Sosna*, class certification can relate back to the filing of the complaint in cases where a plaintiff's individual claim becomes moot before a ruling on the certification motion, and the issue would otherwise evade review). This

doctrine applies, for example, when an individual's claims are "inherently transitory." *Id.* at 76.[4]

The "inherently transitory" exception to mootness was "developed to address circumstances in which the challenged conduct was effectively unreviewable." *Genesis*, 569 U.S. at 76. One prime example is a challenge to the constitutionality of pretrial detention: because "pretrial custody likely would end prior to the resolution" of any class certification motion, "the transitory nature of the conduct giving rise to the suit would effectively insulate defendants' conduct from review." *Id.* In such situations, where (1) it is uncertain that any individual who could be named as a plaintiff would have a live claim throughout the litigation, but where (2)

[4] This brief focuses on the "inherently transitory" exception to mootness because the Veterans Court concluded that this particular exception "can apply in the context of a request for relief from the [c]ourt on a class action basis." *See Freund*, 35 Vet. App. at 481–82. But other relation-back doctrine exceptions may equally preclude mooting the Petitioners' class claims. For instance, the "picking-off" exception to mootness applies here because (1) the Petitioners expressed a "clear intent to represent" the class, and (2) their individual claims were "acutely susceptible to mootness"—as demonstrated by the VA's ability to easily moot those claims. *Duncan v. Governor of the Virgin Islands*, 48 F.4th 195, 206 (3d Cir. 2022); *see also Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 707–09 (11th Cir. 2014); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011); *Reed v. Heckler*, 756 F.2d 779, 787 (10th Cir. 1985); *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1049 (5th Cir. 1981); *White v. Mathews*, 559 F.2d 852, 857 (2d Cir. 1977).

Further, some courts have held that the relation-back doctrine applies whenever the plaintiff had a live claim when he filed for class certification. *LaSpina v. SEIU Pa. State Council*, 985 F.3d 278, 290 (3d Cir. 2021) ("[W]hen a plaintiff files a motion to certify a class when his individual claim still is live, the mooting of that claim while the motion is pending permits the court to decide the certification motion."). That is the case here, as Petitioners filed their request for class certification in June 2021, which was before the VA reactivated their appeals in July 2021. *See Freund*, 35 Vet. App. at 473.

"it is certain that other persons similarly situated" will have live claims throughout the case, an individual plaintiff with moot claims can continue to litigate on behalf of the class. *Gerstein*, 420 U.S. at 111 n.11; *see also J.D. v. Azar II*, 925 F.3d 1291, 1311 (D.C. Cir. 2019) ("The 'inherently transitory' exception to mootness requires [courts] to determine "(i) whether the individual claim might end before the district court has a reasonable amount of time to decide class certification, and (ii) whether some class members will retain a live claim at every stage of litigation.").

Relying on this exception, courts have held in circumstances like this one that individual representatives can continue to litigate on behalf of a putative class even if their individual claims have become moot. *E.g.*, *Monk*, 855 F.3d at 1318 (permitting plaintiffs to continue to bring claims on behalf of veterans whose appeals were improperly delayed, even after plaintiffs' appeals were decided); *Unan v. Lyon*, 853 F.3d 279, 287 (6th Cir. 2017) (permitting plaintiffs to continue to bring claims on behalf of individuals who lost Medicare coverage due to systemic computer error, even after named plaintiffs' issues were resolved); *Robidoux v. Celani*, 987 F.2d 931, 939 (2d Cir. 1993) (permitting plaintiffs to continue to bring claims on behalf of individuals whose welfare applications were unlawfully delayed, even after named plaintiffs' applications were successfully processed).[5] Further, this Court has

[5] *See also Jonathan R. by Dixon v. Justice*, 41 F.4th 316, 326 (4th Cir. 2022) (permitting plaintiffs to continue to bring claims on behalf of children in foster care

previously recognized that claims of unreasonable delay in the context of VA proceedings, in particular, are "best addressed in the class-action context." *Ebanks*, 877 F.3d at 1039-40 (ruling that individual claims concerning delay in the VA claims process are moot and suggesting that delays in the VA claims process would be "best addressed in the class-action context"); *see also Godsey v. Wilkie*, 31 Vet. App. 207, 214 (2019) (petitioners permitted to continue to bring claims on behalf of veterans whose appeals were not timely certified to the BVA, even though their individual claims were certified after filing the lawsuit).

The Sixth Circuit's decision in *Unan* is instructive. In that case, plaintiffs filed a putative class action alleging that due to "a systemic computer problem," the State of Michigan improperly denied them access to comprehensive Medicaid coverage. 853 F.3d at 283. But two days after filing the lawsuit, the relevant government agency determined that the plaintiffs were eligible for such coverage,

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in West Virginia, even after aging out of foster care themselves), *cert. denied sub nom. Justice v. Jonathan R.*, 143 S. Ct. 310 (2022); *Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020) (permitting plaintiffs to continue to bring claims on behalf of individuals subject to improper payroll deduction for union dues, even though plaintiff is no longer subject to those improper deductions); *J.D.*, 925 F.3d at 1313 (permitting plaintiffs to continue to bring claims on behalf of pregnant women in custody denied access to abortion, even after plaintiffs were released from custody and were no longer pregnant); *Salazar v. King*, 822 F.3d 61, 75 (2d Cir. 2016) (permitting plaintiffs to continue to bring claims on behalf of individuals whose student debt was not discharged, even though plaintiffs' debts were fully discharged); *Haro v. Sebelius*, 747 F.3d 1099, 1110 (9th Cir. 2014) (permitting plaintiffs to continue to bring claims alleging improper Medicare reimbursement determinations on behalf of others, even though her individual injury was cured).

mooting their individual claims. *Id.* at 284. Relying on the inherently transitory exception, the court held that the named plaintiff could still proceed on behalf of the class. *Id.* at 287. That was because without allowing the class action to proceed to completion, "a systemic problem" would continue, resulting in no redress for "other class members [who] are suffering the injury that [plaintiffs] experienced." *Id.* (internal quotation marks and citation omitted).[6]

Likewise here, without allowing class claims to proceed, there will continue to be a substantial group of veterans whose appeals have been improperly closed. Indeed, the Veterans Court noted that even after the VA took "proactive" steps to address the problems with the VACOLS system, thousands of legacy appeals were still improperly closed. *Freund*, 35 Vet. App. at 478 ("In other words, 69.8% of 5,456 closed legacy appeals with which a Substantive Appeal was filed were improperly closed."). The VA has also conceded that it does not have procedures for the sole purpose of identifying improperly closed claims. *Id.* at 476 ("Secretary's counsel responded that the VA does not have procedures 'for the sole purpose of identifying, if in a claims file, a missed VA Form 9 is present.'"). Put simply,

[6] In addition to relying on the inherently transitory exception to mootness, the *Unan* court separately relied on the "picking off" exception, reasoning that defendants sought to avoid litigation. *See* 853 F.3d at 287. As noted above, the Second, Third, Fifth, Ninth, Tenth, and Eleventh Circuits have applied the pick-off exception in the class-action context to preclude mooting claims where the plaintiff had already filed for class certification, without regard to a defendant's specific intent. *See supra* n.4 (collecting cases).

without some way to hold the VA accountable, the problem is unlikely to be fixed, continuing to delay the appeals of potentially thousands of veterans.

Indeed, one of the reasons the Veterans Court has jurisdiction to hear class actions is to address situations like this. As this Court has explained, the authority to hear class actions derives from the "the All Writs Act, other statutory authority, and the Veterans Court's inherent powers" to protect its own jurisdiction. *Monk*, 855 F.3d at 1318. In particular, class treatment is important for that purpose to "fill gaps" that "would thwart" a court's "jurisdiction." *Id.* at 1318–19. Absent class treatment, that is exactly what will happen here: any individual claim would become moot, thwarting the court's ability to review and correct VA policy.

Rule 23. A class representative with moot claims can also still act as an adequate class representative under Rule 23. As the Supreme Court recognized decades ago, whether a plaintiff's "claim on the merits has expired" is a separate inquiry from whether that plaintiff can "adequately represent the class." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980). Any class representative is required to engage in "vigorous advocacy" for the class, but a representative with moot claims can still do that, even if they no longer have a "personal stake in the outcome." *Id.* (citation omitted). Given the Court's jurisprudence on mootness discussed above, this rule should not be surprising. Indeed, the "very existence of the inherently-transitory exception disproves any suggestion that the mootness of a plaintiff's

claims necessarily demonstrates her inadequacy as a representative." *J.D.*, 925 F.3d at 1313.

J.D. is instructive. In that case, the named plaintiffs sought the ability to terminate their pregnancies while in immigration custody, and to represent a class of women who were similarly prevented from doing so. *Id.* After the named plaintiffs were released from custody, their individual claims became moot. *Id.* Nevertheless, the D.C. Circuit held that they could continue to bring claims on behalf of the class. *Id.* Relying on the inherently transitory exception, the court held that the fact of mootness alone could not undermine the district court's finding that the class representatives would "vigorously prosecute the interests of the class through qualified counsel." *Id.* at 1312 (citation omitted). That was so even though those representatives were no longer in custody and were no longer pregnant. *Id.* In other words, even though the named plaintiffs were no longer being injured by the government policy they sought to challenge, they could still act as adequate class representatives.

Like the plaintiffs in *J.D.*, although Petitioners are no longer being injured by the improper closure of their appeal, there is no reason to question that the Petitioners in this action would "vigorously prosecute the interests of the class" in challenging VA policy. *See id.* For that reason, the Veterans Court erred with its black and white holding that "because Petitioners are not members of the class they seek to represent,

they are not adequate representatives of the class." *Freund*, 35 Vet. App. at 486. Although it may be true as a general matter that class representatives should be "members of the class they seek to represent," that is *not* necessary for class representatives whose claims have become moot. Class representatives who are no longer being injured can still "adequately represent the class." *See Geraghty*, 445 U.S. at 404. For that reason, it was error here for the Veterans Court to find that the Petitioners were inadequate representatives merely because their claims had become moot. *See id.*

In holding to the contrary, the Veterans Court relied on two inapposite Supreme Court cases, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Neither of those cases involved mootness. In *Amchem*, the Court held that the named plaintiffs could not adequately represent a class with a multitude of divergent interests and injuries, including people who "were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time." 521 U.S. at 609. Likewise in *Ortiz*, the Court held that one class consisting of "holders of present and future claims" related to asbestos exposure, as well as class members who were exposed to asbestos at different periods of times for which different insurance settlement funds were available, could not all be fairly represented as part of one broad class. 527 U.S. at 856.

This is not similar to an asbestos case. The Petitioners here suffered the same type of injury as the class members: their appeals were erroneously closed in the VACOLS system without notice. Although Petitioners are now aware of what happened to them and have had their appeals reactivated, there is no suggestion that this difference has caused their interests to diverge from the interests of the class. Instead, the whole reason Petitioners are continuing to litigate this claim is to attempt to correct the problem with the VACOLS system that caused their injuries, so that other class members facing those same issues can have their appeals re-opened—and so that the VACOLS system does not continue to harm other veterans. Unlike in *Amchem* and *Ortiz*, the record here contains no reason for doubting the Petitioners' ability to adequately represent the class as a whole. The only evidence in the record to the contrary is that their claims are moot. But the "very existence of the inherently-transitory exception disproves any suggestion that the mootness of a plaintiff's claims necessarily demonstrates her inadequacy as a representative." *J.D.*, 925 F.3d at 1313. The Veterans Court erred by not recognizing that.

D. Even Putting Mootness Aside, Class Action Treatment Is More Likely to Result in Systemic Change

Even if an individual action could survive a mootness challenge, success in that individual case may not be as effective in changing VA policy. That is because to the extent the VA does not comply with that order, other individuals may not be able to enforce it. Indeed, because precedential decisions have been ignored by the

VA in the past, the Veterans Court has criticized their effectiveness in bringing about systematic changes. *See Wolfe v. Wilkie*, 32 Vet. App. 1, 33 (2019) ("Petitioner Wolfe's allegations uniquely highlight the inferiority of a precedential decision," given that the "VA could circumvent another decision—as it allegedly did [in] *Staab*—without concern about enforcement beyond another appellate proceeding."), *rev'd on other grounds sub nom. Wolfe v. McDonough*, 28 F.4th 1348 (Fed. Cir. 2022).[7]

By contrast, there is little dispute that a class action could effectively cure the issues here. If successful, a class action would result in each of the class members having a separate and binding claim against the VA. *See Wolfe*, 32 Vet. App. at 33 ("If we award the Wolfe Class's requested relief, any class member (particularly those who are absent) who suffers VA's noncompliance could enforce it."). The VA would then be legally obligated to fix the VACOLS system with respect to the entire class. *See id.* That resolution would provide systematic change. *See id.*; *see also Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 310–11 (3d Cir. 2011) (en banc) (recognizing a class action's ability to achieve "global peace" including "potential plaintiffs who had not yet filed cases").

[7] In fact, this Court has suggested in dicta that the VA cannot be bound by Veterans Court precedent. *See Wolfe*, 28 F.4th at 1358. If the VA agrees, it may decide to ignore precedential opinions with impunity.

Class action treatment is necessary to "compel correction of systemic error and to ensure that like veterans are treated alike." *Monk*, 855 F.3d at 1321. In providing that relief, the Veterans Court fulfills its mandate by ensuring "that all veterans entitled to benefits receive[] them." *Barrett*, 466 F.3d at 1044. For that reason, this Court has previously recognized the importance of "class action suits" in situations like this one—i.e., to "compel correction of systemic error and to ensure that like veterans are treated alike." *Monk*, 855 F.3d at 1321.

Without class treatment, the vast majority of veterans whose appeals have been improperly closed will not get the relief they need and deserve.

CONCLUSION

For the above reasons, NVLSP and NOVA support Petitioners' appeal seeking reversal of the Veterans Court's decision, and respectfully submit that the Veterans Court erred by denying Petitioners' request for class action treatment.

Dated: April 20, 2023

Respectfully submitted,

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Counsel for Amici Curiae

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Dated: April 20, 2023 */s/* Paul Enríquez

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that the foregoing was served on counsel of record in this action by being filed on the ECF system on April 20, 2023.

Dated: April 20, 2023 */s/* Paul Enríquez

Counsel for Amici Curiae