No. 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

REPLY BRIEF OF CLAIMANTS-APPELLANTS MARK FREUND AND MARY S. MATHEWSON

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INTRODUCTION

The government has chosen not to defend the Veterans Court's rulings on standing and class certification, even as it refuses to acknowledge that the Veterans Court's ruling effectively eliminates class actions for mandamus petitions, the last remaining avenue for the class-action device in the veterans context. Instead, the government abandons those grounds and asserts only that those portions of the decision "were purely dicta." AB31. And it relies on mootness, both to defend the judgment and to seek dismissal of the appeal.

This appeal is not moot. The Secretary has effectively conceded that legacy appeals remain erroneously closed. While the agency has undertaken a review of some appeals closed after May 2017, the Secretary has now made clear the agency's refusal to undertake any review of other putative class members' appeals, including those closed prior to May 2017, leaving potentially thousands of legacy appeals wrongly closed. The Secretary has conceded all this while simultaneously asserting that all relief that could ever be granted has been given. The Secretary's position is without merit. This Court should reject VA's assertion of mootness on appeal.

The Secretary is also wrong to say that the Petition is moot. The Secretary fails to meaningfully respond to the caselaw noting the proper application of the inherently transitory exception to mootness in cases like this one. Indeed, as the Supreme Court has repeatedly recognized, some claims are so inherently transitory that the expiration of a named plaintiff's claim—even prior to a ruling on class certification—is not grounds to evade judicial review.

As the opening brief showed, the Veterans Court's decision denying class certification and dismissing the Petition as moot is erroneous. Because the Secretary declines to defend the core reasoning of the Veterans Court's class certification ruling, this Court should reverse the denial of class certification and remand for an adjudication of the Petition on the merits.

ARGUMENT

I. This Appeal Is Not Moot.

VA asks at the conclusion of its brief, in the alternative, for this Court to vacate the Veterans Court's decision and dismiss this appeal as moot. AB32-37 (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950)). Because this argument implicates this Court's

subject matter jurisdiction and relies on a number of contested factual assertions, Petitioners address this argument first.

A. The Secretary's Rewriting Of The Appeal Fails.

The Secretary attempts to recast this appeal as being about something it is not—whether the agency has undertaken what it self-assesses to be a "good faith" effort to reinstate some, but not all, of the erroneously closed appeals. AB9, 15-16, 33-34, 36. And the Secretary says Petitioners did not actually ask the Veterans Court for putative class members' wrongly closed appeals to be identified and reactivated. AB33-34. These arguments are unavailing, however, because they mischaracterize Petitioners' classwide requests for relief and are forfeited.

To start, the Secretary claims that Petitioners asked "only" that the Veterans Court "order the parties to negotiate in good faith and submit their respective positions to the Court." AB33; *see also* AB34 ("Nowhere did the petitioners suggest that the Court should order VA to actually identify and reactivate every single potentially impacted appeal."). This is incorrect.

Petitioners asked that the Veterans Court "order the parties … to meet and confer in good faith to attempt to reach agreement as to these matters and … to file a joint statement setting forth each party's positions as to: … [how] the Secretary *shall identify* … all claimants who satisfy the requirements of the Class definition, ... and *reactivate* all of the Closed Appeals." Appx263-264 (emphases added).

Furthermore, Petitioners asked that the Veterans Court

> retain jurisdiction until the Secretary certifies compliance with the Court's orders in this action; Class Counsel have received a meaningful opportunity to verify that compliance; and any dispute regarding that compliance has been resolved; and … that the Court order such other relief as may be appropriate in the interest of justice and in aid of the Court's jurisdiction.

Appx264.

These requests would be nonsensical if all Petitioners had asked for were a position paper. But they make perfect sense given that Petitioners in fact also asked the Court to order the same relief to the class as Petitioners requested for themselves: a determination of unlawfulness and reactivation of wrongly closed appeals. Appx263-264; *see also* Appx3, Appx6-7.

In any event, this argument is forfeited. VA never argued before the Veterans Court that it should dismiss the Petition as moot because

Petitioners' requests for classwide relief were "only" to ask for a meet and confer in good faith and that the agency had done so. "As a general rule, an appellate court does not consider an issue not passed upon below." *HTC Corp. v. IPCom GmbH & Co., KG*, 667 F.3d 1270, 1281 (Fed. Cir. 2012). "This rule fosters sound policies," among other things, "ensur[ing] finality in litigation by limiting the appealable issues to those a lower court had an opportunity to, and did, address," as well as "discourag[ing] parties from inviting an alleged error below only to raise it on appeal." *Id.* at 1281-82.

That rationale applies with special force here, since VA chose not to make this "good faith" argument to the Veterans Court. The agency's reasons are readily apparent. After all, this was the same Veterans Court that:

- admonished that the Secretary had "c[o]me perilously close to misleading the Court by suggesting that he was engaged in proactive steps to address the problem such that it negated any need for the Court's intervention," Appx3;
- expressed that it was "deeply disappointed that it took the Secretary so long to acknowledge the problem this petition highlighted," Appx23;
- noted that it "can't help but wonder what took the Secretary and his counsel so long to clearly explain what had been

done to address the problem and, more importantly, what had not been done," Appx12; and

- stated that, "Quite simply, it should not have taken multiple orders and the lengthy questioning of three Federal Judges at oral argument to have learned" what the Veterans Court wanted to know about what was actually being done, or not. Appx12.

Though the Secretary now professes "good faith" (repeatedly—*see* AB9, 15-16, 30, 33-34, 36), it failed to do so before the Veterans Court.

Even if this Court were inclined to entertain this newly raised argument, it would have to assess VA's professions of good faith in the first instance. But "[a]ppellate courts … do not find facts." *Golden Bridge Tech., Inc. v. Nokia, Inc.*, 527 F.3d 1318, 1323 (Fed. Cir. 2008). Remand would be required at a minimum to test the factual underpinnings of the agency's characterization of its efforts. *E.g.*, *Barkhorn v. Adlib Assocs., Inc.*, 345 F.2d 173, 175 (9th Cir. 1965) ("We have concluded that the case must be remanded for inquiry into the jurisdictional facts.").

B. Claimants Remain Subject To Erroneous Closures.

This appeal is also not moot because legacy appeals remain subject to erroneous closure. Relying on a new affidavit submitted on appeal, VA says the agency has reactivated 2,954 appeals following the

filing of the Veterans Court action. Appx1231-1233; AB14. The Secretary claims that "[n]o new claimants will be impacted by this issue moving forward," and "there are no new claimants that will be subject to the challenged conduct." AB27. The Secretary asks that this appeal be dismissed as moot "because the putative class members have received all feasible concrete relief requested in the petition." AB32. But VA's assertion falls short in several key respects.

For one, the 2,954 appeals VA reactivated were identified from a pool of appeals closed after May 2017. As explained below, VA has no plan to proactively identify and reactivate appeals closed before May 2017. *See infra* Part I.C. Even as to the post-May 2017 appeal closures, however, VA's affidavit on appeal shows that VA has adhered to the same limited search parameters that Petitioners challenged before the Veterans Court as potentially underinclusive. *See* Appx1096-1097 (noting VA affiant's failure to provide details on the "tracking data," "match function," or match parameters used).

Even assuming VA has properly identified and reinstated all appeals wrongly closed after May 2017, the appeal is still not moot. The Secretary has effectively conceded that erroneous closures continue to

occur. For the remaining legacy cases making their way from an initial decision to an appeal to the Board, nothing has been done to prevent VACOLS from erroneously closing additional appeals. *See* AB14, 27. Indeed, VA concedes that the "517 appeals left in the legacy system … can be subject to VACOLS's conversion function in the future." AB14 (counting cases left as of April 30, 2023); *see* Appx1233. And by VA's own admission, monthly monitoring is necessary to reinstate erroneously closed appeals. AB14, 27; Appx1231-1232 (noting 61 appeals reactivated in a 12-month period as part of "special monthly reviews"). But the review effort, while commendable, lacks reliability; an unspecified "coding error … affected 42 appeal files." Appx1232 n.2.

VA's ordinary operating procedures also do not moot the appeal. The Secretary repeatedly invokes the processes outlined in M21-5, "an internal VA manual for processing legacy appeals and AMA higher-level reviews," but that internal manual does not provide the requested classwide relief. AB3 n.4; *see* AB3, 4-6, 10, 29. The M21-5 manual only instructs VA employees to reactivate an erroneously closed appeal once it is discovered. *See* M21-5, 6.B.4.b (Feb. 3, 2022), https://tinyurl.com/2bf2n3f6. It does not set out procedures to prevent

erroneous closures from happening, nor does it instruct VA employees to conduct an affirmative review of files for wrongful closures.

Likewise with the "End Product" system the government invokes. *See* AB4-5. The end product system refers to "the primary workload monitoring and management tool for the Veterans Service Center." Appx5 n.36 (brackets omitted). It was "implemented during the investigation that led to the March 2018 [VA Office of Inspector General] report," and became "effective May 15, 2017." Appx8. Though the government vaguely asserts that "[t]he Inspector General had found VA's revision [in adopting the end product framework] sufficient," AB10, OIG only deemed the end product framework proposal "responsive to the recommendations," and made no assessment of the sufficiency, accuracy, or efficacy of the framework itself. Appx475.

The end product system merely helps to "track" appeals in VACOLS. Appx8; *see* Appx954. The system does nothing on its own to reopen an appeal file closed and marked "HIS" (for "history").[1] An

[1] The Secretary makes the semantic point that when a VACOLS sweep closes an appeal, with a status of HIS, the "VACOLS characterization has no legal significance." AB36; *see* AB6. But VA describes HIS appeals as "closed out," Appx418, and for which "BVA action is

appeal marked "HIS" will remain closed absent further action from an agency employee. *See* Appx418-421 (internal instructions for steps a VA employee must take to reactivate a closed appeal). But the end product system's missing and erroneous data is part of the problem. A tracking system that has erroneous data is a tracking system that cannot know, absent separate review, that it wrongly closed scores of appeals. *See* CAVC Oral Arg. at 1:00:23-42, https://tinyurl.com/4r4rbzw9 (VA counsel: "VA doesn't track the VA Form 9s which it doesn't know about.").

That is why VACOLS's automatic sweeping function closed Petitioners' timely appeals—perfected in December 2017 and March 2020—despite VA's implementation of the end product system in May 2017. Appx4-5; OB10. The end product system did nothing to help Petitioners, whose appeals remained closed for nearly four years and over a year (respectively), until the Petition led the Secretary to reactivate their appeals. Appx585; Appx664; Appx885.

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complete." Appx423. So the VACOLS sweep prevents further action on a claimant's appeal before it even gets to the Board. *See* Appx5 & n.29.

Because appeals continue to be subject to erroneous closure and require active efforts by VA to reactivate, this appeal remains live. An appeal is not moot if there can be "any effectual" relief issued. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). Here, an adjudication on the merits of the appeal would ensure a legal obligation for the Secretary to carry out what has been "anticipate[d]," "plan[ned]," "attempt[ed]," but not achieved, for years during this litigation. Appx17; Appx1063; Appx1071; AB34.

This is not to say existing regulatory and legal requirements should not act to bind VA to reactivate erroneously closed appeals. It has been Petitioners' consistent view that the agency is violating the law in refusing to identify and reactivate appeals it itself has wrongly closed. *See* Appx33-55. But the Secretary has vigorously opposed that view. *See, e.g.*, Appx545 ("VA's practice of automatically closing appeals is consistent with the law."); Appx551 (arguing "VA's policy of closing an appeal without notice gives effect to a claimant's choice to terminate an initiated appeal," even though putative class members sought the opposite by pursuing their appeals); AB16, 36 (stating that "[e]veryone agrees that timely substantive appeals must be processed," but also

arguing that it "would not be reasonable" to ask VA to reactivate appeals closed before May 2017). Where a defendant "dispute[s] … the legality of the challenged practices," and "is free to return to his old ways," a controversy is not moot. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

C. VA Refuses To Identify, Much Less Reactivate, Potentially Thousands Of Wrongly Closed Appeals.

Moreover, the appeal is not moot because the agency admits that the 2,954 wrongly closed appeals it has reinstated are culled from a limited universe—those appeals closed after May 2017. AB11, 13-14. VA has declined to even begin review of legacy appeals wrongly closed before May 2017, meaning that likely thousands of wrongly closed appeals remain closed. AB34-36.

The Secretary asserts that this appeal is moot because it is "not possible" for VA to identify and reactivate all wrongly closed appeals "submitted before May 2017." AB34-35. The agency asserts it implemented a database tracking system in May 2017 and that this database allows it to "data min[e]" files created after that date. AB11; *see also* AB4-5, 35. The Secretary argues "[i]t 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 such review would require "manual[] review." AB34-35. VA's complaint is that the illegal closures—which likely number in the thousands, Appx929-930; Appx1096—are simply too burdensome for the agency to even try to address.

Manual review is not the same thing as impossibility. Although VA claims it would have to review millions of files, AB35, it is conceivable that more efficient methods exist. The Secretary has not explained why, for instance, working with putative class counsel, the scope of the search cannot be narrowed, or why alternative methods of identifying potentially impacted claimants, such as sending notices of closure, are not possible measures.

Indeed, throughout this litigation, VA has wielded an asserted administrative burden as a reason to deny relief, even when such assertions were not fully accurate. At oral argument, the Veterans Court asked the Secretary's counsel, point blank, whether it was VA's position that it "couldn't do this without reviewing every single file individually. … There is no technological way to review?" CAVC Oral

Arg. at 59:44-1:00:24, https://tinyurl.com/4r4rbzw9. And counsel responded, "Yes, your honor." *Id.* at 1:00:24-27.

VA later backtracked, stating in response to the Veterans Court's order seeking additional information that, "following oral argument, … VBA analyzed [certain] appeals by using data mining techniques that compared historic appeals tracking data from VACOLS and the Veterans Benefits Management System (VBMS) with a third source of information in VBMS that tracks document source and timeliness of action in these systems." Appx1063; *see* Appx1071. In other words, additional scrutiny resulted in newfound technological solutions.[2]

VA then takes a different tack, suggesting that this Court dismiss the appeal as moot because affected claimants will reach out. The Secretary speculates that, if claimants' appeals were wrongly closed before May 2017, "[i]t is far more likely that, after such a long period of

[2] VA notes that, after datamining, it also undertook "manual quality review" requiring additional work hours. Appx1231. But VA does not explain whether all or a subset of files identified by datamining required manual review. Appx1231. In any event, asking the Veterans Benefits Administration, with 25,000 employees, to process appeals accurately and lawfully should not be considered beyond the agency's job description. *See* U.S. Office of Personnel Management, *VA - Department of Veterans Affairs*, *Veterans Benefits Administration* (June 2020), https://tinyurl.com/3janf37k.

silence, the claimant would have reached out to VA or filed a new claim." AB36.

The facts of Petitioners' cases should put this assertion to rest. Mr. Mathewson was 85 years old in 2017 when he perfected his appeal, and 88 when he passed away in 2020 waiting for his appeal to be docketed. Appx4; Appx630. This appeal was ultimately meritorious. *See* AB10; Appx1224 (Board granting Mrs. Mathewson, his surviving spouse substituted into his place, special monthly compensation with an effective date of February 29, 2016, based on a finding that "the Veteran's service-connected disabilities render[ed] him so helpless as to require regular aid and attendance of another person"). It is not reasonable to expect that Mr. Mathewson at 88, suffering from debilitating disabilities VA eventually recognized, "would have reached out to VA or filed a new claim."

Or take Ms. Freund. After VA reactivated Ms. Freund's case file following the Veterans Court's order to respond to the Petition, VA then ordered that Ms. Freund undergo an additional medical examination, but Ms. Freund requested that her examination be rescheduled. Appx1184 (VA employee call report noting that "[t]he veteran states she

is very sick and will not be able to attend that appointment. … She stated she would be able to do a phone appointment … if that is an option."). Ms. Freund then informed VA that she would not be able to attend the rescheduled examination. Appx1185 ("The Veteran stated she's been seriously ill and unable to make any appointments and she could not travel. She stated she'd lost 70 pounds and sounded very we[a]k on the phone."); *see also* AB9 (noting Freund's requests for rescheduling). A few months later, Ms. Freund passed away. Appx1 n.1 (July 2022). It was not until March 2023 that VA certified the appeal to the Board. *See* AB9; Appx1205-1206.

It is implausible that the entire affected claimant population would have learned of and acted to correct the agency's mistakes. Doing so would require assuming that claimants know that this particular delay is not due to ordinary-course waiting;[3] know how to research their electronic case files, since VA never provided notice of

[3] VA's delays in ordinary processing—even absent case-ending errors like this—are well-known. *See, e.g.*, *Ebanks v. Shulkin*, 877 F.3d 1037, 1038 (Fed. Cir. 2017) (noting that "the average delay just to schedule a [Board] hearing is three years").

these erroneous closures;[4] know how to contact VA to reinstate their appeals; and, most importantly, know to disbelieve VA's own regulations that say that the "[p]roper completion and filing of a Substantive Appeal" are, for the legacy system, "*the last actions* the appellant needs to take to perfect an appeal." 38 C.F.R. § 19.22 (emphasis added); Appx238. This Court should reject VA's assertion of mootness.

D. Alternatively, The Picking Off Exception Applies.

Petitioners did not press the so-called "picking off" exception before the Veterans Court, but because VA newly contends that this appeal is moot, and disclaims reinstating Petitioners' appeals in an attempt to moot the case, Petitioners now respond. *See* AB32-37, *see also* AB28-29; *Holmes v. Spencer*, 685 F.3d 51, 66 (1st Cir. 2012) (noting that where appellees raised new argument, "prudence dictated that appellants counter with a reply brief showing that the appellees were wrong") (quotation marks and brackets omitted); *cf. In re Apple Inc.*,

[4] Petitioners' counsel discovered their case closures, OB10, but the vast majority of claimants are likely proceeding pro se. Brief for NVLSP and NOVA in Support of Claimants-Appellants, Doc. 23 at 8.

979 F.3d 1332, 1337 (Fed. Cir. 2020) (permitting argument on reply responsive to a district court order postdating appellant's opening brief).

The picking off exception is a mootness "exception for voluntary conduct." William B. Rubenstein, Newberg on Class Actions § 2:15 (5th ed. 2015). It applies where, for instance, "the court perceives the defendant as strategically attempting to insulate the issue from judicial review by effectively 'picking off' named plaintiffs before the trial court could conceivably rule on a motion for class certification." *Id.* VA's conduct on appeal reflects this strategic mooting. There is no indication that any appeals have been reactivated "through an established, standard procedure such that [mootness] might more clearly be characterized as 'incidental' or 'a matter of standard operating procedure.'" *Unan v. Lyon*, 853 F.3d 279, 286 (6th Cir. 2017) (quoting *Wilson v. Gordon*, 822 F.3d 934, 950 (6th Cir. 2016)). As of the time of the Veterans Court's decision, notably, VA had no comprehensive procedure in place to affirmatively identify and reinstate any erroneously closed appeals. Appx3; Appx17; OB9.

Instead, the Secretary submits an affidavit executed for purposes of this appeal to describe the agency's present actions and plans.

Appx1231-1233. But where "the [government] created a new, ad hoc process, providing further support for the inference that the state was attempting to avoid a class action," the picking off exception applies. *Unan*, 853 F.3d at 285-86 (citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980)). As such, this Court should reject VA's assertion that it has not acted following the Veterans Court's decision to strategically moot this appeal.

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This appeal is not moot, and this Court should proceed to review the Veterans Court's denial of class certification and dismissal of the Petition as moot. *See infra* Parts II & III.

Should this Court agree that this appeal is moot, however, it should vacate the Veterans Court's ruling below, since Petitioners would lack the opportunity to challenge the decision. *See Camreta v. Greene*, 563 U.S. 692, 712 (2011) ("The equitable remedy of vacatur ensures that 'those who have been prevented from obtaining the review to which they are entitled are not treated as if there had been a review.'") (quoting *Munsingwear*, 340 U.S. at 39) (alterations adopted).

II. The Veterans Court Erred In Dismissing The Petition.

The reasons why this appeal is not moot also explain why the Veterans Court erred in dismissing the Petition as moot. Claimants remain subject to wrongful closures, VA has not fixed the issues causing the erroneous sweeps in VACOLS, and VA has refused to identify and reopen any appeals closed before May 2017. *Supra* Part I.A-C.

On appeal, the Secretary fails to meaningfully contest Petitioners' arguments on standing and class certification, because it asserts that "the Veterans Court's statements on standing, class representative adequacy, and class commonality … were purely dicta." AB31. These "statements" were, however, the bases of the Veterans Court's decision. Accordingly, the Secretary's failure to defend them means this Court should reverse the denial of class certification and reinstate the Petition for adjudication on the merits.

The Secretary resists this conclusion by arguing that the Declaratory Judgment Act, 28 U.S.C. § 2201, and the inherently transitory exception to mootness do not apply. AB21-30. These arguments fail. Petitioners do not invoke the Declaratory Judgment

Act. *See* OB. And, as the Veterans Court correctly recognized, the inherently transitory exception applies if a class is certified. Appx15.

This section reiterates the grounds for standing and class certification that the Secretary fails to address, and responds to the Secretary's arguments on the Declaratory Judgment Act and the inherently transitory doctrine.[5]

A. Petitioners Had Standing To Pursue Their Claims At The Outset Of The Action.

As explained in the opening brief, Petitioners had standing for all forms of relief they requested at the outset of the action. OB24-34. To be sure, the Veterans Court properly acknowledged that Petitioners had standing as to the injunctive relief requested—reinstatement of their appeals—which alone is enough to support Petitioners' request for class certification. Appx12-13. But the Veterans Court nevertheless erred in concluding that Petitioners "lack[ed] standing" for certain claims—their requests for a determination of unlawfulness. Appx13; Appx22.

[5] This Court should disregard the Secretary's passing citation (at 17) to the abuse of discretion standard. The Veterans Court did not exercise its discretion on the merits. It dismissed the Petition under the legal determination that it was moot. Appx1-24. De novo review applies to the Veterans Court's legal determinations, as the government agrees. OB22; AB17.

Specifically, Petitioners requested a determination that the closures of their timely appeals constituted agency action "unlawfully withheld" within the meaning of 38 U.S.C. § 7261(a)(2), OB24-31, and a determination that VA's closures of their appeals without notice violated 38 C.F.R. § 19.32 and fair process, OB31-34. Petitioners showed that the Veterans Court's rationale—that Petitioners somehow lacked standing to seek a determination that the closures of their appeals were unlawful and violated § 19.32 and fair process, because Petitioners' appeals were reactivated *after* they filed this action and request for class action—mistook mootness at a later stage of proceedings for a lack of standing at the outset of proceedings. OB24-34. The Veterans Court's erroneous determination that Petitioners lacked standing led it to conclude that Petitioners could not serve as class representatives on these claims. OB41-57; Appx19-22.

The Secretary now asks that this Court treat the Veterans Court's holding that Petitioners lacked standing to pursue a determination of unlawfulness as "dicta," and to "either disregard or vacate the Veterans Court's statements on these issues." AB31. Because the Secretary makes no attempt to defend it, this Court should reject the Veterans

Court's analysis that Petitioners lacked standing for a determination of unlawfulness.

The Secretary, however, mistakes Petitioners' arguments on their standing to seek a determination of unlawfulness, and contends on appeal that the Declaratory Judgment Act does not apply to the Veterans Court. AB21-24. This argument misses the mark. Petitioners do not invoke the Declaratory Judgment Act. Petitioners instead showed that their requests for a determination of unlawfulness remain live as to the class as much as the claims for reinstatement do. OB34-41 (explaining that Petitioners requested a determination of unlawfulness and reinstatement of erroneously closed appeals). Petitioners' requests for a determination of unlawfulness under § 7261(a)(2), and that no-notice closures violated § 19.32 and fair process, accompanied their requests for reactivation. *See* Appx13; Appx36-37; Appx52-54; Appx263-264; OB29-30. After all, absent a court order that such closures were unlawful, Petitioners could not compel the Secretary to reinstate their appeals. OB29. In the analogous Article III context, for instance, a "declaration of rights is normally a prerequisite to an award of injunctive relief." *PPG Indus.,*

Inc. v. Cont'l Oil Co., 478 F.2d 674, 678 (5th Cir. 1973) (citing *Meredith v. City of Winter Haven*, 320 U.S. 228, 231 (1943)).

Accordingly, this Court should reverse the Veterans Court's ruling on standing as to Petitioners' requests for a determination of unlawfulness and that the no-notice closures violated fair process. And, as explained in the next section, the Secretary also fails to show how Petitioners' classwide requests for relief are moot, compelling reversal and reinstatement of the Petition for adjudication on the merits.

B. Petitioners' Classwide Requests For A Determination Of Unlawfulness And Injunctive Relief Are Not Moot.

As explained in the opening brief, Petitioners requested on behalf of themselves and the proposed class a determination of unlawfulness and reinstatement of erroneously closed appeals, and these classwide requests remain live under the inherently transitory exception. OB34-41; Appx6-7.

The Secretary responds that the inherently transitory exception does not apply. AB24-30. The Secretary is wrong.

1. The inherently transitory exception is available where claims are mooted prior to class certification.

The Secretary does not contest that the inherently transitory exception is available in the veterans context as a general matter, but suggests it is unavailable where a named petitioner's claims are mooted prior to class certification. AB18-20; *but see* AB25 (stating that the exception can apply where a named plaintiff's claims are mooted prior to class certification).

As the opening brief explained, however, the Supreme Court has repeatedly recognized that the inherently transitory exception can apply in circumstances where the putative class representatives' claims are mooted prior to a ruling on class certification. OB35-37 (collecting cases). "That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction. … 'Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980) (alteration omitted); and

citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)). "In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *Id.* The government fails to address the Supreme Court's analysis in these decisions, even as it cites them. *See, e.g.*, AB25 (citing *McLaughlin*).

The Secretary instead relies solely on authorities reiterating the general application of the inherently transitory exception. *See* AB18. But the Secretary ignores the full discussion within those cases accounting for situations like this one, where a claim is mooted prior to certification.[6] The Secretary also cites § 2:11 of Newberg and

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[6] *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75-76 (2013) ("[W]here a named plaintiff's individual claim becomes moot before the district court has an opportunity to rule on the certification motion, and the issue would otherwise evade review, the certification might 'relate back' to the filing of the complaint."); *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975) ("There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion."); *Gerstein*, 420 U.S. at 110 n.11 ("[T]his case is a suitable exception" to the usual rule.); *contra* AB18. VA's other cases (at 18-19) are also distinguishable. *See Monk v. Shulkin*, 855 F.3d 1312, 1317 (Fed. Cir. 2017) (noting that where a plaintiff "*had not yet moved for* 'conditional certification' [under the Fair Labor Standards Act] when her claim became moot," the Supreme Court in *Genesis* found the plaintiff's case moot) (emphasis added); *Dolbin v. McDonough*, No. 2021-2373, 2023 WL 2981495, at *3 (Fed. Cir. Apr. 18, 2023) (noting

Rubenstein to assert the "usual[]" rule of mootness. AB19. But § 2:13 of the treatise addresses a notable "[e]xception" to this rule. William B. Rubenstein, Newberg and Rubenstein on Class Actions § 2:13 (6th ed. 2022) (noting six Supreme Court decisions and fourteen decisions from nine federal courts of appeals recognizing that a case may not be moot simply because the named plaintiff's claims are mooted prior to class certification).[7] In sum, the relation back of the inherently transitory doctrine "to the time when the representative had a live claim" is a "rule … securely set." 13C Wright & Miller, Fed. Prac. & Proc. Juris. § 3533.9.1 (3d ed. 2023).

The Secretary provides no rationale for rejecting Supreme Court precedent recognizing the availability of the inherently transitory

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denial of class certification based on petition's merits, which "would apply to any member of the putative class").

[7] Nor is Newberg an exhaustive catalogue. The remaining circuits have also recognized the availability of the inherently transitory exception where a claim is mooted prior to class certification. *See, e.g.*, *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 705-06 (11th Cir. 2014); *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1139 (10th Cir. 2009), *Bishop v. Comm. on Pro. Ethics & Conduct of Iowa State Bar Ass'n*, 686 F.2d 1278, 1285 n.13 (8th Cir. 1982); *Dolbin*, 2023 WL 2981495, at *3 (recognizing exception but concluding facts did not warrant it). Thus, all thirteen federal courts of appeals recognize the availability of the inherently transitory exception in circumstances like this one.

exception. Indeed, accepting the Secretary's view "would substantially undermine one of the central purposes of the class action device in precisely those cases that most require its protection," which is "to preserve transitory claims for judicial review." Newberg and Rubenstein on Class Actions § 2:13 (6th ed.). This Court should reject the Secretary's position.

2. Petitioners' claims are inherently transitory.

The Secretary next argues that the challenged conduct "is by its own definition not transitory." AB24-26. The Secretary asserts that "the petitioners' own claims demonstrate that the challenged conduct is not inherently transitory." AB26. But it is undisputed that the agency reinstated Petitioners' appeals shortly after the Veterans Court ordered a response to the Petition and request for class action, cutting off any possibility of certification prior to the Secretary's assertion of mootness. AB9.

In any event, the Supreme Court has made clear that the inherently transitory exception "applies when the pace of litigation and the inherently transitory nature of the claims at issue conspire to make that requirement difficult to fulfill." *United States v. Sanchez-Gomez*,

138 S. Ct. 1532, 1539 (2018). Here, the pace of proceedings and the fleeting nature of Petitioners' claims made those claims inherently transitory.

The Sixth Circuit's decision in *Unan v. Lyon*, 853 F.3d 279 (6th Cir. 2017), is instructive. There, hundreds of thousands of Michigan residents became eligible for Medicaid for the first time in 2014, but a "systemic computer problem" led many individuals eligible for comprehensive medical coverage to be misclassified to emergency services care only. *Id.* at 283. After plaintiffs filed a putative class action, the state defendants granted retroactive coverage to the plaintiffs and represented that they had fixed the computer problem. *Id.* at 284. But the Sixth Circuit found that the action was not moot. The Court noted that defendants had engaged in "picking off" the representative plaintiffs, and concluded that the class claims were "inherently transitory," because a named plaintiff could not know whether her claim would remain alive long enough, and because the computer system's misassignments continued to occur. *Id.* at 284-89.

Again, this case well illustrates that problem: the Secretary learned of the wrongful closure of Petitioners' appeals only as a result of

the filing of this action, Appx6, and reinstated Freund's appeal one day after the Veterans Court's order directing VA to respond to the Petition and class request (with Mathewson's appeal following twelve days later). Appx527; Appx585; Appx664. The transitory nature of Petitioners' claims permitted VA to act before the Veterans Court had any chance to certify a class.

3. Prudential reasons support, not undermine, the application of the inherently transitory exception to this case.

None of the Secretary's "prudential" arguments are availing. AB26-30. The Secretary claims that "no new claimants … will be subject to the challenged conduct because VA has established appropriate procedures to correct the erroneous VACOLS file closures." AB27. To be clear, VA has effectively conceded that the remaining cases at the initial decision stage in the legacy system face the same possible closure. AB14, 27. As explained, VA's proposed monthly quality review is only a means to possibly catch erroneous closures on the back end, not to prevent them in the first place. *Supra* 7-8.

VA also says this Court should not look to its litigation conduct in determining whether the inherently transitory mootness exception

applies. AB28. But VA also disclaims mooting the class claims as a litigation tactic, AB29, defeating its own assertion. And regardless, "[t]he end result is the same: a claim transitory by its very nature and one transitory by virtue of the defendant's litigation strategy share the reality that both claims would evade review." *Godsey v. Wilkie*, 31 Vet. App. 207, 219 (2019) (quoting *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011)); *see also id.* at 219-20 (noting application of the inherently transitory exception "because the petitioners' claims are not only unavoidably time-sensitive, but are also acutely susceptible to mootness due to the Secretary's history of mooting petitions before judicial resolution") (quotation marks omitted).

VA next suggests that granting Petitioners' classwide claims would require diverting agency resources to these claimants and "simply move[] all others back one space and produce[] no net gain." AB35 (quoting *Ebanks*, 877 F.3d at 1040). But *Ebanks* undermines VA's contention. There, this Court "question[ed] the appropriateness of granting individual relief to veterans who claim unreasonable delays in VA's first-come-first-served queue," and suggested instead that, "[u]nder [such] circumstances, the issue seems best addressed in the

class-action context, where the court could consider class-wide relief." 877 F.3d at 1039-40. Furthermore, VA's portrayal of the tradeoff is misleading: absent relief, it is undisputed that many appeals will simply not be reinstated at all, either by the agency's neglect or by the affected claimants' lack of knowledge of the issue. This case is not about line-jumping; it is about putting claimants back in the queue from which they were wrongly removed.

Accordingly, for the reasons explained in Part I, the thousands of potentially unresolved appeals means that this controversy remains live, and this Court should hold that the inherently transitory mootness exception applies.

III. The Veterans Court Erred In Denying Class Certification For Lack Of Adequacy And Commonality.

A. Plaintiffs Meet Class Certification Requirements.

Petitioners demonstrated that the Veterans Court's denial of class certification on adequacy and commonality grounds was erroneous. OB41-57. Petitioners further showed that this Court should certify the class because the remaining requirements for class certification are satisfied. OB57-61.

On appeal, the Secretary has abandoned the Veterans Court's reasoning on adequacy and commonality—reasoning it had urged upon the Veterans Court. *See* Appx705-712. The Secretary now says the Veterans Court's rulings on standing and class certification were "purely dicta." AB31.

Having declined to rehabilitate the Veterans Court's class certification on its reasoning, the Secretary instead insists that this Court should review only the Veterans Court's judgment, not its rationale. AB30. Of course, "[t]he analysis reflected in an opinion filed with the judgment appealed from may … be so flawed" as to "establish that the judgment was erroneously based." *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1540 (Fed. Cir. 1983). And in this case, the Secretary's failure to engage with the Veterans Court's reasoning—and Petitioners' arguments—reinforces the point.

Indeed, the opening brief explained the flaws of the Veterans Court's reasoning and the troubling implications of its certification decision should it be allowed to stand. Petitioners explained, for instance, that the Veterans Court's analysis that Petitioners could not adequately represent a class of claimants who never received notice of

their erroneous closures, on the rationale that Petitioners found out about their closures after the fact, effectively guts any class asserting a notice challenge. OB50-51. Furthermore, the Veterans Court's reasoning that Petitioners lacked commonality by virtue of being mooted out of the class would mean that no action could ever be certified to apply the inherently transitory exception. OB55-56. And Petitioners explained that the Veterans Court's ruling effectively eliminates the availability of the class-action device for mandamus petitions. OB3-4, 55-57. The Secretary provides no meaningful response. This Court should reverse the Veterans Court's denial of class certification.

B. This Court Should Reject An Ascertainability Requirement.

The Secretary belatedly requests that any remand for a redetermination of class certification include ascertainability. VA never raised the argument below, so it is forfeited. *In re Google Tech. Holdings LLC*, 980 F.3d 858, 862-63 (Fed. Cir. 2020).

The argument also fails on the merits. Ascertainability is not among the requirements of Rule 23 of the Veterans Court's Rules of Practice and Procedure. *See* U.S. Vet. App. R. 23. In the Article III

context, only "some" courts treat it as an "implicit" consideration under Rule 23 of the Federal Rules of Civil Procedure. Newberg and Rubenstein on Class Actions § 3:2 (6th ed.). This Court has never forced lower courts to adopt an ascertainability requirement. The Secretary provides no basis for this Court to import this factor into the Article I context and engraft it to U.S. Vet. App. R. 23. There is simply no reason for this Court to wade into "one of the most contentious issues in class action litigation." Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 Yale L.J. 2354, 2360 (2015) (quotation marks omitted).

To the extent the Secretary attempts to smuggle in a manageability concern through ascertainability, that too should be rejected. The Secretary suggests that the "potential impossibility of identifying class members who perfected an appeal prior to May 2017 could bear on" class certification. AB31. But "addressing [the] issue of manageability under umbrella of superiority is preferable to addressing it as a matter of ascertainability." *Mullins v. Direct Digital, LLC*, 795

F.3d 654, 664-65 (7th Cir. 2015) (citing Shaw, *supra*, 124 Yale L.J. at 2396-99).[8]

Regardless, Petitioners meet this factor. Ascertainability looks to a means to objectively define the class. *See Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012) ("[A]t least with respect to actions under Rule 23(b)(3) … the class must be currently and readily ascertainable based on objective criteria."). And here, the objective criteria are clear, looking to: (1) whether a claimant has a closed appeal file in VACOLS, (2) despite a timely appeal.

Because the Secretary fails to defend the Veterans Court's adequacy and commonality rulings, and identifies no other reason justifying denial, this Court should reverse. *See, e.g.*, *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 461 (1st Cir. 2009) (reversing denial of class certification resting on legal error and directing district court to certify class); OB43.

[8] The government has failed to contest Petitioners' showing that class certification is superior to a precedential opinion. OB60-61.

CONCLUSION

This Court should reverse the denial of class certification and remand for adjudication of the Petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limitation of Fed. Cir. R. 32(b)(1) because this brief contains 6,961 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Century Schoolbook 14-point font.

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