
No. 24-1543

IN THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DAVID A. HAMILL,

Claimant-Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in Vet. App. No. 22-7344, Judge Joseph L. Toth, Judge Scott J. Laurer, Judge Grant C. Jaquith (dissenting)

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October 24, 2024

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 24-1543

Short Case Caption Hamill v. McDonough

Filing Party/Entity David A. Hamill

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STATEMENT OF RELATED CASES

No other appeal in or from this action was previously before this or any other appellate court, other than the United States Court of Appeals for Veterans Claims (Veterans Court), the judgment of which is now on appeal.

Counsel knows of no other case pending in this Court or any other court that may directly affect, or be directly affected by, the Court's decision in this appeal.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Federal Circuit has subject matter jurisdiction to adjudicate this case. Under 38 U.S.C. § 7292(a), a party may appeal a decision from the Veterans Court upon entry of final judgment. Mr. Hamill appeals a final judgment from the Veterans Court dismissing his claims as moot.

The Veterans Court issued its final judgment in this case on January 9, 2024. Mr. Hamill timely appealed to this Court on February 29, 2024.

STATEMENT OF THE ISSUES

1. Whether the implicit denial doctrine is inapplicable to a claim subject to the Appeals Modernization Act (AMA) because the AMA's notice requirements, statutory structure, and principles of due process prohibit implicit denials of such claims.
2. Whether the implicit denial doctrine is inapplicable to a request to reopen a character of discharge (COD) determination when the VA provides only a service

connection decision for the purposes of health care benefits without a COD determination.

3. Whether Mr. Hamill's petition was not moot because the picking off exception to mootness applies.

STATEMENT OF THE CASE

I. Mr. Hamill's Requests for Disability Compensation Before the Agency

David Hamill served in the United States Marine Corps from January 2009 through March 2013 and was deployed to Afghanistan in Operation Enduring Freedom. *See* Appx26. He was discharged from service with a discharge characterized as under Other Than Honorable (OTH) conditions.¹ *Id.* Upon his discharge in 2013, he filed a claim with the VA for service-connected disability compensation for post-traumatic stress disorder (PTSD), other psychiatric issues, and back pain. *See* Appx28-29.

Because of Mr. Hamill's OTH discharge characterization, the VA did not automatically recognize Mr. Hamill as a Veteran eligible for disability compensation. 38 C.F.R. § 3.12(a) (defining Veteran). A veteran issued an OTH discharge is barred from most VA benefits, unless the VA determines that their

¹ When members of the military services are separated from service, they are typically issued a discharge certificate with one of five types of characterizations of service: Honorable; General (Under Honorable Conditions); Under Other Than Honorable Conditions; Bad Conduct; or Dishonorable.

discharge was “under other than dishonorable” conditions. 38 U.S.C. § 101. Thus, any time VA receives an application for benefits from a former service member with a less-than-honorable discharge, VA must conduct an analysis of whether their character of discharge is considered “other than dishonorable” under 38 U.S.C. § 101. This is referred to as a character of service determination or COD determination. *See* Adjudication Procedures Manual (M21-1), Ch. X.iv.1.A.1.b (defining “COD determination”).

A negative COD determination does not always end VA’s analysis, however. When VA determines that a veteran’s character of discharge bars them from certain benefits, the veteran may still be entitled to health care under Chapter 17 of Title 38 of the U.S. Code for service-connected disabilities. 38 C.F.R. § 3.360. Therefore, when a veteran with a less-than-honorable discharge submits a request for service-connected disability compensation and other benefits, a full adjudication of the claim generally requires two separate determinations: first, whether the veteran’s character of discharge constitutes a bar to benefits, and second, whether the conditions for which the veteran seeks benefits are service connected disabilities for which they may receive healthcare.

Because COD decisions and service-connection decisions are distinct, VA’s stated policy is to bifurcate the claim and provide two separate adjudication decisions: one for the COD determination and, if applicable, one for service

connection for the purposes of Chapter 17 health care benefits. That is, the VA provides veterans with COD determination decisions separately from any decision on service connection for a specific disability. *See* M21-1 Adjudication Procedures Manual (“M21-1”) Ch. X.iv.1.A.1.n. (2023) (stating that if the claimant sought disability benefits and is eligible for Chapter 17 benefits, the COD decision should “inform the claimant that [the rest of] the contentions listed on the claim form are being further processed, and a decision will be made on whether the claimed conditions are service connected (SC) for health care purposes”); *see also* M21-1 Ch. X.iv.1.A.1.k (providing the COD determination template letter).²

In May 2014, VA provided a COD determination that Mr. Hamill was ineligible for “all benefits,” but also stated that he was “entitled to health care under Chapter 17 of Title 38, U.S.C. for any disabilities determined to be service connected.” *See* Appx36-38. VA, however, never made a determination about whether any of the disabilities for which Mr. Hamill had originally sought disability

² The M21-1 Adjudication Procedures Manual is the VA’s internal handbook for adjudicators at the Agency of Original Jurisdiction. This manual is binding on Regional Office adjudicators. Prior to 2023, the M21-1 manual had similar language stating that, if the COD determination concludes that the veteran would be eligible for treatment under Chapter 17, the decision should “invite the former service member to claim entitlement to [service connection] for treatment purposes for any specific conditions believed to be related to service.” M21-1 Chapter X.iv.1.A.1 (2022); *see also* M21-1 Chapter III.v.1.B.3.i (2017).

compensation—PTSD, other psychiatric issues, and back pain—were service connected. Mr. Hamill did not appeal the May 2014 COD determination.

In 2017, Mr. Hamill filed a new claim for disability compensation and related benefits, listing PTSD and back pain again, but also requesting for the first time disability compensation based on chronic fatigue syndrome, fibromyalgia, depression, and hearing loss. *See Appx39-43*. The VA construed the claim as limited to a request to reopen his COD determination, not a request for service-connected benefits such as Chapter 17 health care benefits, and denied the request because Mr. Hamill had submitted no new and material evidence relating to his character of discharge. *See Appx45-48*. Again, Mr. Hamill did not appeal.

In 2021, assisted by counsel, Mr. Hamill filed yet again for disability compensation benefits, filing a supplemental claim and supporting evidence on the disabilities he had listed in his 2017 claim: PTSD, chronic fatigue syndrome, fibromyalgia, depression, lower back pain, and hearing loss. *See Appx49-50*. He also filed a new claim for compensation for a variety of additional disabilities. *See Appx51-55*.

This time, in a decision dated May 19, 2021, VA decided the service-connection issue for his claimed conditions, but made no mention of the COD issue. *See Appx56-65*. Instead, VA simply issued a decision granting service connection

for treatment purposes for PTSD under Chapter 17, but denied service connection for all other conditions. *Id.*

Because VA had not addressed the COD issue—either on the merits or on whether there was new and relevant evidence sufficient to reopen the issue under 38 U.S.C. § 5108—Mr. Hamill continued to wait for a decision on his eligibility for the disability compensation he had requested. In July 2022, Mr. Hamill sent a letter to the VA Regional Office (RO) asking for a decision on the request to reopen his character of discharge determination based on his 2021 filing. *See* Appx66. The VA responded, mischaracterizing Mr. Hamill’s request about VA’s COD determination as a “request to upgrade his DD 214”³ from the Department of Defense, and stating merely that he “can also ask the Service Department to change the character of discharge or [he] can apply for correction of military records.” *See* Appx67-75. The RO also enclosed the Department of Defense form for seeking a discharge upgrade before a discharge review board. *Id.* Nowhere did the VA indicate it had already decided not to reopen its prior COD determination or, if it had reopened the claim,

³ A DD-214 Form is a Certificate of Release or Discharge from Active Duty provided by the service department for which the veteran served. A DD-214 is “the official record of separation and characterization of service” for a former service member. Department of Defense Instruction 1336.01 ¶ 1.2(c). *See also LaBonte v. United States*, 43 F.4th 1357, 1359 n.1 (Fed. Cir. 2022) (describing DD-214 and its purpose). A veteran can seek to have a less-than-honorable discharge upgraded by the military department directly. 10 U.S.C. §§ 1552–1553a.

if it had decided that Mr. Hamill still was not eligible for benefits even with the new and relevant evidence of record.

II. Mr. Hamill's Petition for a Writ of Mandamus at the Veterans Court

Having been unsuccessful at getting the RO to issue a decision on his request to reopen his COD determination—and therefore having no COD determination to appeal to the Board of Veterans' Appeals (Board)—Mr. Hamill petitioned the Veterans Court for extraordinary relief in the nature of a writ of mandamus. *See Appx20-25.* Mr. Hamill requested that the court compel the Secretary to adjudicate his COD. *See Appx155-164.* Mr. Hamill also notified the court that he intended to seek relief on behalf of a class of similarly situated veterans and requested more time from the court to submit a request for class certification, which the court granted. *See Appx 23.*

On February 21, 2023, VA issued a new decision finding that he had not submitted new and relevant evidence to reopen his character of discharge determination. *See Appx 73-78.* On March 6, 2023—the same day on which Mr. Hamill's Request for Class Certification (RCA) was due—the Secretary responded to Mr. Hamill's individual petition, arguing it was moot because of the February 2023 decision that VA had sent to Petitioner. *See Appx3, Appx23.* VA made no argument that VA's May 2021 service connection decision had implicitly decided the COD issue. *See Appx3.*

On the same day, Mr. Hamill filed his RCA stating that the February 2023 decision had satisfied his request for an appealable decision but explaining that the petition was not moot because mootness exceptions apply. *See Appx17, Appx23.* Mr. Hamill requested that the Court certify a class of veterans who had not received explicit new and relevant or new and material evidence determinations like the one he received. *See Appx2.*

Four months later, in his July 2023 response to the RCA, the Secretary argued for the first time that the May 2021 service connection decision, not the February 2023 COD decision, had actually mooted Mr. Hamill's petition because the 2021 service connection decision constituted an implicit denial of the character of discharge determination. *See Appx16, Appx24.*

III. The Veterans Court's Decision

Writing for the majority of a split panel of the Veterans Court, Judge Laurer agreed with the government and held that the May 2021 service connection decision provided Mr. Hamill sufficient notice that the VA had denied his request to reopen his character of discharge determination, and thus it constituted an implicit denial. *See Appx6.* In so holding, the majority expanded the implicit denial doctrine set forth in *Cogburn v. Shinseki*, 24 Vet. App. 205, 212-13 (2010), to two new contexts: supplemental claims to reopen previously denied claims under the Appeals

Modernization Act (AMA), and to COD determinations when the VA only expressly adjudicates issues of service connection.

Because the panel majority held that the 2021 decision resolved Mr. Hamill's COD determination, the court also held that no exception to mootness applies. *See* Appx8. That conclusion follows because, if the 2021 decision was an implicit denial, Mr. Hamill's petition was moot before he filed it, and his claim was neither picked off nor inherently transitory. Appx8-9. Given its decision that the *Cogburn* factors applied to Mr. Hamill's 2021 decision, the majority also concluded that, given the individualized, factual nature of implicit denials, a class action would be inappropriate. Appx8.

Judge Jacquith dissented. *See* Appx11-19. He explained that the majority's decision expanded the implicit denial construct, showed "disregard for the AMA," and will result in "a loss of transparency that sows confusion among the parties and undermines confidence in the system." Appx11. Fair notice to claimants is required by statute, constitutional due process, and CAVC case law. *Id.* "The implicit denial construct is not a hole in the notice requirement," but is, "at bottom, a notice provision." Appx13 (quoting *Adams v. Shinseki*, 568 F.3d 956, 965 (Fed. Cir. 2009)). Even an implicit denial decision must "provide[] sufficient notice to the claimant that the pending claim [not explicitly addressed] has been finally resolved."

Id. (quoting *Jones v. Shinseki*, 619 F.3d 1368, 1372 (Fed. Cir. 2010)) (second alteration in original).

The dissent first explained that the majority’s decision to expand the implicit denial doctrine to Mr. Hamill’s May 2021 decision is incompatible with the AMA. Prior to the AMA, the statute “required only a general notice with the [regional office’s] reason for its decision.” Appx14. The AMA added a detailed list of elements that must be provided to a claimant in a decision. Judge Jacquith concluded that, although the majority “summarizes circumstances that sometimes have sufficed for notice [of an implicit denial] under the old rules,” “no one has advanced a credible explanation of how a decision that does not even mention a claim can satisfy the specific statutory elements required by the AMA for notice to be sufficient.” *Id.* The dissent further explained that the structure and purpose of the AMA notice rules, and corresponding requirements of claimants, are “incongruent” with the implicit denial rule. *Id.*

Next, the dissent explained that the majority “departs significantly” from the existing implicit denial doctrine set forth in *Cogburn*. Appx15. A determination about a veteran’s character of discharge is different from adjudicating whether disabilities are service connected, and “[t]he majority cannot identify even a hint in the May 2021 decision that the RO considered the veteran to have sought to reopen the RO’s character of discharge decisions from 2014 and 2017, and denied that

request.” *Id.* To conclude that the RO denied the request to reopen, instead of simply not adjudicating it, was “mere speculation.” Appx15-16.

Finally, Judge Jacquith opined that there was, in fact, no implicit denial here. The VA’s practice of providing a separate, explicit COD determination—including twice before for Mr. Hamill—means that “a reasonable person would expect to see a specific decision about his character of discharge if that was being considered again.” Appx16. Nor is there any reason to think that anyone at the VA thought it had implicitly decided the COD issue again until it became a convenient post hoc rationalization in the Secretary’s July 2023 response to the request for class action. Appx17.

As a result of his analysis of the implicit denial, Judge Jacquith concluded that Mr. Hamill’s petition was not moot because the picking off expectation applies, and Mr. Hamill acted promptly enough “to prevail over the pick off.” Appx18.

SUMMARY OF THE ARGUMENT

This Court should reverse the Court of Appeals for Veterans Claims’ decision and remand for further proceedings for three reasons. First, the existing implicit denial doctrine is contrary to the Appeals Modernization Act (AMA). The statutory language of 38 U.S.C. § 5104, the structure of the new appeals regime, and Congress’ intent in enacting the AMA all make it clear that the pre-AMA doctrine of implicit denial is incompatible with the AMA. Second, regardless of the doctrine’s

continued relevance under the AMA, the implicit denial doctrine cannot, as a matter of law, extend to finding an implicit denial to reopen a prior COD determination from a Chapter 17 service connection decision. Last, Mr. Hamill's petition is not moot because the picking off exception to mootness applies. VA picked off Mr. Hamill's petition with its February 2023 denial to reopen his COD determination, not the 2021 service connection decision.

STANDARD OF REVIEW

This Court "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions," 38 U.S.C. § 7292(d)(1), and reviews the Veteran's Court statutory interpretation de novo. *O'Brien v. Wilkie*, 948 F.3d 1339 (Fed. Cir. 2020). This Court "shall hold unlawful and set aside any regulation or any interpretation thereof... that was relied upon in the decision of the Court of Appeals for Veterans Claims that [this Court] finds to be... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 38 U.S.C. § 7292(d)(1).

This Court lacks jurisdiction to review any factual determination or the application of law to the facts of a particular case. 38 U.S.C. § 7292(d)(2). If, however, "the material facts are not in dispute and the adoption of a particular legal standard would dictate the outcome" of a claim, "this court has treated the question . . . as a matter of law" within its jurisdiction. *Bailey v. Principi*, 351 F.3d 1381, 1384 (Fed. Cir. 2003); *see also Szemraj v. Principi*, 357 F.3d 1370, 1375 (Fed. Cir. 2004)

(holding that this Court has “jurisdiction to determine whether the legal requirement of the statute or regulation has been correctly interpreted in a particular context where the relevant facts are not in dispute, that is, whether there is an error of law”).

ARGUMENT

This Court should reverse the Veterans Court’s decision that Mr. Hamill’s petition was mooted by his 2021 service connection decision. First, the implicit denial doctrine is contrary to the Appeals Modernization Act (AMA). The pre-AMA implicit denial doctrine conflicts with the statutory notice provisions; the AMA’s structure and purpose and principles of due process; and Congressional intent.

Second, regardless of the implicit denial doctrine’s continued application to requests to reopen claims under the AMA, a Chapter 17 service connection decision cannot constitute an implicit denial of a request to reopen a prior COD determination. The Veterans Court improperly extended the implicit denial doctrine to a category of decision that cannot, as a matter of law, form an implicit denial of a request to reopen a COD determination. Moreover, a failure to adjudicate a request to reopen a COD cannot be an implicit denial.

Last, because the 2021 service connection decision did not constitute an implicit denial, the picking off exception to mootness applies to Mr. Hamill’s petition. The Court should reverse the lower court’s decision and remand for a decision on Mr. Hamill’s request for class certification.

I. The Implicit Denial Doctrine is Contrary to the Appeals Modernization Act (AMA)

The Veterans Appeals Improvement and Modernization Act of 2017, known as the Appeals Modernization Act (AMA), has effectively overruled the implicit denial doctrine as it existed prior to the AMA's enactment. *See* Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (codified in scattered sections of 38 U.S.C.). The implicit denial doctrine is a judicially created construct designed to clarify when a claim has been adjudicated even though the VA decision did not specifically address it. *Adams v. Shinseki*, 568 F.3d 956, 961–962 (Fed. Cir. 2009). Under the test developed over the years by the Veterans Court and this Court, whether an implicit denial exists depends on: (1) the specificity and relatedness of the implicit and explicitly decided claims, (2) whether the adjudication alludes to the matter in a manner such that a person could reasonably infer that benefits were denied, (3) the timing of the matters, and (4) whether the veteran was represented. *See Cogburn v. Shinseki*, 24 Vet. App. 205, 212-13 (2010).

The implicit denial doctrine, however, was designed to fit a legal regime that no longer exists, in which the VA was required initially to provide “only a general notice with the RO’s reason for its decision,” *see* Appx14, after which the claimant had the right to obtain a separate, detailed statement of VA’s specific findings and reasons through a statement of the case. *See* 38 C.F.R. § 19.29 (statements of the case in appeals under the pre-AMA regime). Because the AMA enacted a wholesale

revision of the claims adjudication process, implicit denials can no longer validly exist in situations like Mr. Hamill's, in which the claimant cannot know or infer the information that the VA is required to provide under the AMA. The statutory text of the required notice, the structure of the AMA appeals regime, principles of due process, and Congressional intent all demonstrate that the implicit denial doctrine is inapplicable here.

A. The Statutory Language of Section 5104 is Incompatible with Extending the Implicit Denial Doctrine to Mr. Hamill's Claim

The AMA abrogates, or at least modifies, the common law doctrine of implicit denials. This is because the AMA “speaks directly to the question addressed by the common law” doctrine, namely, what notice is sufficient to provide veterans about what the VA has decided about their claims and why. *United States v. Texas*, 507 U.S. 529, 534 (1993).

The implicit denial doctrine developed to address “instances in which a veteran files several claims . . . [and] the [VA] does not expressly act upon each of the claims. In that setting it is necessary to decide whether the unaddressed claim is still pending or has been implicitly denied.” *Adams*, 568 F.3d at 958. The *Adams* Court held that the proper implicit denial standard was whether a VA decision provided sufficient information for a reasonable claimant to know they would not be awarded benefits on their claim even though VA had not explicitly addressed it. 568 F.3d at 963. The Court explained that finding an implicit denial where a VA “decision is clear but not

expressed . . . reflects an appropriate balance between the interest in finality and the need to provide notice to veterans when their claims have been decided.” *Id.*

That articulation of the implicit denial rule, however, reflected a system in which the VA was required to provide much less notice than it is now. Before the AMA, Section 5104(b) required only that VA provide a general notice to claimants and representatives of its reasons for denying a benefit that was sought. The decision needed to include (1) a statement of the reasons for the decision and (2) a summary of the evidence considered by the Secretary. *See* 38 U.S.C. § 5104 (2017). If a veteran disagreed with a regional office’s decision, the veteran filed a notice of disagreement, after which the VA had to provide a Statement of the Case (SOC), describing in more detail the RO’s decision so that the claimant would have enough information “to allow the appellant to present written and/or oral arguments before the Board of Veterans’ Appeals.” 38 C.F.R. § 19.29.

In 2017, however, Congress passed the AMA and overhauled the entire VA appeals system, including requiring more detailed notice and eliminating the Statement of the Case. The current version of section 5104 provides detailed elements that all VA notice of decisions must follow:

- (1) Identification of the issues adjudicated.
- (2) A summary of the evidence considered by the Secretary.
- (3) A summary of the applicable laws and regulations.
- (4) Identification of findings favorable to the claimant.
- (5) In the case of a denial, identification of elements not satisfied leading to the denial.

- (6) An explanation of how to obtain or access evidence used in making the decision.
- (7) If applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation.

38 U.S.C. § 5104(b).

Implicit denials conflict with the requirement for detailed notice, and thus the doctrine cannot survive in its current form. When a VA decision does not mention or provide any information about the basis for VA deciding a claim one way or the other, it cannot satisfy the heightened notice now required by statute.

The implicit denial doctrine particularly cannot survive in circumstances where, as here, the veteran seeks to reopen a previously final determination. When the VA does not expressly address a request to reopen, the claimant does not have enough information to proceed. Even if a reasonable claimant could determine that the VA “intended to dispose” of the request, *Adams*, 568 F.3d at 964, the claimant must know more than that under the AMA regime. Did the VA determine that the record lacked new and relevant evidence sufficient to reopen the claim? *See* 38 C.F.R. §3.156(d). Or did it determine that there was evidence sufficient to reopen the claim, but it denied it on the merits? If the VA decision is silent on the whole *concept* of reopening, no claimant could possibly know how to formulate a challenge to the “implied” decision.

When a claimant and their advocates reasonably know the basis of VA’s decision, they can decide the best course of action: if the claim was denied due to

lack of new and relevant evidence, the claimant could provide more evidence in a supplemental claim, or file a higher level review to point out that the VA failed to consider certain evidence when it decided there was no new and relevant evidence. Or, if the claimant knows the claim was reopened and denied on the merits, they may decide the best strategy is to file an appeal to the Board on the merits of the reopened claim. But with an implicitly denied request to reopen, their choice is stymied by a lack of the required AMA Section 5104 notice. Instead, any supposition about what the VA decided was lacking in the request is “mere speculation.” *See* Appx16. Allowing the implicit denial doctrine to apply in such circumstances conflicts with the AMA’s statutory notice requirements.

B. The Pre-AMA Implicit Denial Doctrine Is Incompatible With the AMA’s Statutory Scheme and Violates Due Process in the AMA Regime

Allowing the implicit denial doctrine to apply here also conflicts with the structure and purpose of the AMA. *See Holloway v. United States*, 526 U.S. 1, 6 (1999) (“In interpreting the statute at issue, ‘[w]e consider not only the bare meaning’ of the critical word or phrase ‘but also its placement and purpose in the statutory scheme.’”) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). Because the appeals process has fundamentally changed under the AMA, using the pre-AMA implicit denial rule violates both the structure of the AMA and the veteran’s due process rights.

1. The Implicit Denial Doctrine Is Incompatible with the AMA's Structure and Purpose

Previously, under the legacy system, if a veteran disagreed with a regional office's decision, the veteran would first file a notice of disagreement to the regional office (RO). 38 C.F.R. §§ 19.20, 19.21. The RO would then provide a Statement of the Case, describing in detail the RO's decision. Critically, the Statement of the Case was the first time the agency had to provide enough information "to allow the appellant to present written and/or oral arguments before the Board of Veterans' Appeals." 38 C.F.R. § 19.29. Then, in order to "perfect an appeal," a veteran had to file a second form—a Substantive Appeal form—on which the veteran "should set out specific arguments relating to errors of fact or law made by the agency of original jurisdiction in reaching the determination, or determinations, being appealed." 38 C.F.R. § 19.22.

The AMA completely overhauled this system. Now, after receiving an RO decision, the claimant has a choice of five appeal options: supplemental claim, higher level review, and three different appeal lanes at the Board. 38 U.S.C. §§ 5104C, 7105(b)(3). In exchange for veterans giving up certain advantages and protections from the old system—for example, the AMA closed the evidentiary record in certain types of appeals—the VA must now provide more information up front in its initial decisions so that "claimants have 'a clear understanding' of what was done" and they can "make more informed choices about whether to seek further

review and, if so, which of the new review lanes best fits the claimant's needs.” *See* Appx14 (quoting VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 141 (Jan. 18, 2019) and VA Claims and Appeals Modernization, 83 Fed. Reg. 39,818, 39,820 (proposed Aug. 10, 2018)).

The heightened notice requirements of Section 5104 are an integral part of the AMA's structure and purpose to streamline appeals. Gone are the days in which a veteran had to glean only the barest of information that a claim had been adjudicated so that they could decide whether to file a notice of disagreement. *Adams*, 568 F.3d at 964. Gone are the days of Statements of the Case and the need to file a Substantive Appeal form. Now, under the AMA, veterans must make specific choices—each of which has its own consequences—about whether and how to continue to pursue their claims after a decision. *See* 38 U.S.C. §§ 5104C; 7105(b)(3). Therefore, as part of the AMA's streamlining of the appeals process, the VA must now provide at the outset additional and more specific notice about its decisions. These elements are required in order to “‘help veterans better understand VA's decisions on their claims' and ‘help better inform the veterans' decision regarding whether to appeal VA's rating decision.’” *Greer v. McDonough*, 36 Vet. App. 220, 224 (2023) (quoting H.R. Rep No. 115-135, at 3 (2017), as reprinted in 2017 U.S.C.C.A.N. 97, 99). Permitting implicit denials where a veteran can only deduce that a claim has been adjudicated,

but not on what basis, does not comport with the AMA's explicit design to require VA to provide detailed notice.

2. The Implicit Denial Doctrine Is Incompatible with Due Process in the AMA Regime

Each of the appeal lanes has different risks and benefits that a veteran must weigh. For example, in a higher level review, the reviewer may only consider the evidence that was in the record at the time the RO issued the notice of the decision being reviewed. *See* 38 U.S.C. § 5104B(d). Thus, a veterans should not opt for a higher level review if they want to submit additional evidence on appeal. By contrast, if the veteran believes the VA failed to consider certain evidence and submits it in a supplemental claim, but the VA already considered it, the supplemental claim will be denied for a lack of new and relevant evidence. *See* 38 U.S.C. § 5108(a).

Therefore, if the VA does not provide the required elements of notice of Section 5104, a claimant cannot make an informed choice about which avenue to pursue. With an implicit denial, by definition, the veteran has no information about the basis for the denial, because the RO's decision did not mention the claim. Veterans and their advocates are therefore required to make decisions as to the appeal avenue without critical information about the basis for the denial, and it becomes impossible to make an informed decision about which appeal option to choose. That violates the veteran's due process right to notice and fair opportunity to be heard. *See Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009) ("Due

process of law has been interpreted to include notice and a fair opportunity to be heard.”). A fair opportunity to be heard cannot be predicated on having to guess the basis for the VA’s decision.

In short, under the AMA, veterans need to know not just *that* the VA denied their claim, but *on what basis*. If the veteran is forced to speculate whether and why the VA denied their claim, the veteran cannot make an informed decision about how to proceed.

C. Congress’ Legislative Intent Confirms that the VA Must Provide Explicit Decisions and Notices

Last, the continued use of the pre-AMA implicit denial doctrine conflicts with Congress’ intent in enacting the AMA, as reflected in the legislative history.

The purpose of the AMA was to expedite the VA’s appeals process while still protecting veterans’ due process rights. *See* H.R. Rep No. 115-135, at 2 (2017). A key part of that protection involved ensuring that VA provided explicit notice and thorough explanation of its initial decisions. *Id.* at 2–3.

The Senate report on the AMA provides insight into the Congressional intent behind the AMA changing the requirements of notice decisions. *See* S. Rep No. 115-126 (2017). The report discussed that § 5104 would be amended to require the VA to enhance the information included in notifications of decisions on claims for benefits, to “ensure that Veterans and their advocates cannot make a wrong turn in navigating the new appeals process.” *Id.* at 31. The report states that the purpose of

the amendment is to “require the VA to modify its claims decision notices, making them clearer and more detailed.” *Id.* The upgraded notice is meant to “help veterans and their advocates make informed choices as to which review option makes the most sense.” *Id.* The Senate explained that its goal was to establish a new process that is simple, fair, *transparent*, and, wherever possible, speedy. *Id.* at 30.

The legislative history in the House of Representatives also demonstrates that Congress intended to require VA to provide more notice than had been acceptable in the past. During the House’s legislative hearing in 2017, Congresswoman Elizabeth Esty stated that attorneys are “attempting to demystify this very vague notice” when representing veterans and that the notices must meet the needs of veterans. *See Legislative Hearing on the Veterans Appeals Improvement and Modernization Act of 2017: Hearing Before the H. Comm. on Veterans’ Affairs*, 115th Cong. 22 (2017). Congressman Mike Bost, added that this “bill would ensure that this transparency will continue by imposing rigorous reporting requirements so that [Congress] can ensure that the Department is treating all veterans fairly.” *Id.* at 4. Congresswoman Dina Titus declared that “[e]very day that we fail to bring real reform to this outdated system means that more veterans will be filing appeals in a broken system that does not meet their needs.” *Id.* at 5. Congressman David Roe stated that “Congress has to make some changes to give VA the tools it needs to ensure that veterans receive a fair and timely decision on their appeals.” *Id.* at 1.

Both VA officials and veterans service organizations also emphasized the importance of explicit, thorough decisions as a critical part of the AMA's reforms. As David C. Spickler, Executive in Charge and the Acting Vice Chairman for the Board of Veterans' Appeals stated, "The bill would require VA to modify its claims decision notices to ensure they are clearer and more detailed. This notice would help Veterans and their advocates make informed choices as to which review option makes the most sense." *Id.* at 33. The Director of the National Legislative Service of the Veterans of Foreign Wars of the United States, Ryan M. Gallucci, highlighted that improved explicit notices were vital to the success of appeal reform: "I can't stress the importance of improved notification notices enough. It is transparency, and it arms veterans to navigate their own benefits. I can't stress it enough." *Id.* at 22. The National Organization of Veterans' Advocates explained that "[b]ecause the new framework detailed in this bill would offer a veteran three choices after a denial of benefits, quality notice is critical. The proposed language to amend 38 U.S.C. Sec. 5104 is an important first step in reform, but only if properly implemented by VA." *Id.* at 51.

The continued use of the implicit denial doctrine therefore does not align with the Congressional intent in enacting the AMA to require transparent and detailed notice of decisions in order to facilitate a fair, transparent, and speedy appeals process. With the enactment of the AMA, Congress intended to greatly improve and

expand the information that claimants receive from the VA in the initial decisions on their claims. The pre-AMA implicit denial doctrine, constructed by judges to satisfy the prior notice requirements, does not afford veterans adequate notice and the opportunity to be heard under the AMA regime, particularly where a veteran seeks to reopen a previously final determination and the VA's decision is completely silent on that issue.

D. Because The May 2021 Decision Did Not Provide Adequate Notice Under the AMA, the pre-AMA Implicit Denial Doctrine Is Inapplicable

Any continued test for an implicit denial under the AMA must reflect the new requirements of the AMA. In addition to knowing that an adjudication has occurred, it must also be clear to a reasonable person how the Secretary disposed of the implicitly denied claim. Only then can a reasonable claimant make an informed decision how to proceed with their options under the AMA. Therefore, to find an implicit denial under the AMA, a court should be required to balance whether a reasonable claimant can infer each of the required notice elements of Section 5104. That includes the evidence and law considered, 38 U.S.C. § 5104(b)(2), (3); whether the implicitly denied claim included any favorable findings that will be binding on the VA in any future claims or appeals, 38 U.S.C. §§ 5104(b)(4), 5104A; which elements were not satisfied, 38 U.S.C. § (b)(5); and “the criteria that must be satisfied to grant service connection or the next higher level of compensation” id. §

(b)(7). A claimant can only know how to proceed with their options under the AMA if they reasonably have that information.

If the Veterans Court had used an implicit denial standard properly tailored to the notice requirements of the AMA, it would have been undeniable that Mr. Hamill did not receive an implicit denial. Not only does the May 2021 decision not mention the issue of a character of discharge determination, it does not list the standard for making such a determination or the standard for reopening a previously decided COD for new and relevant evidence. It does not list the evidence of record relevant to a character of discharge determination other than his DD-214 and the May 2014 administrative decision. It does not describe any favorable findings regarding Mr. Hamill's discharge. It does not reference any elements that were missing to establish entitlement to a positive character of discharge determination or how to obtain evidence to establish those elements. Finally, the decision does not provide what criteria he must satisfy to receive a positive character of discharge determination. *See Appx56-65.*

In short, even if Mr. Hamill could reasonably assume that his request to reopen his COD determination had been adjudicated—which he could not—he could not possibly know enough to make an informed decision about his appeal options. The implicit denial rule under the legacy system that the CAVC applied, as reflected in the *Cogburn* test, only evaluates four factors to make one simple conclusion:

whether “it would be clear to a reasonable person that the [Secretary’s] action that expressly refers to one claim is intended to dispose of others as well,” *Adams*, 568 F.3d at 964. Under the AMA, that is not enough. Therefore, the May 2021 decision cannot constitute an implicit denial.

II. The Veterans Court Improperly Extended the Implicit Denial Doctrine to Requests to Reopen Character of Discharge Determinations

As explained above, the AMA’s notice requirements effectively eliminate the pre-AMA implicit denial doctrine for cases like Mr. Hamill’s. Mr. Hamill should prevail for a second, independent reason: under both the AMA and legacy frameworks, the implicit denial doctrine cannot extend to finding an implicit denial of a request to reopen a COD determination from a decision that only grants or denies Chapter 17 health care benefits for specific disabilities. In such cases, a reasonable person cannot infer whether the Chapter 17 decision is intended to dispose of the character of discharge issue for the simple reason that veterans like Mr. Hamill with an OTH can be entitled to Chapter 17 benefits regardless of whether VA engaged in a character of discharge determination. Nor does the implicit denial doctrine extend to cases where, as here, the uncontroverted facts demonstrate that the agency did not adjudicate the claim at all, and the implicit denial doctrine is used as a *post hoc* rationalization for refusing relief.

A. A Chapter 17 Service Connection Decision Does Not Implicitly Decide Whether To Reopen A Character of Discharge Determination

When a veteran with a previous negative COD determination files a new claim for service-connected benefits, and the VA only adjudicates whether each claimed condition is service-connected for Chapter 17 health care benefits, that decision does not, implicitly or otherwise, deny the COD issue. A decision on whether a disability is service-connected lacks reference to whether there is new and relevant evidence in the VA claims file concerning the character of a veteran's discharge. The implicit denial doctrine therefore cannot apply. In short, it cannot be clear to a reasonable person that the Secretary's express adjudication of one claim (the Chapter 17 service-connected health care) "is intended to dispose of others as well" (that is, the request to reopen the COD determination, and all other related benefits). *Adams*, 568 F.3d at 964.

The implicit denial doctrine is, "at bottom, a notice provision." *Munro v. Shinseki*, 616 F.3d 1293, 1299 (Fed. Cir. 2010). "[T]he key question in the implicit denial inquiry is whether it would be clear to a reasonable person that the [Secretary's] action that expressly refers to one claim is intended to dispose of others as well." *Adams*, 568 F.3d at 964. With a Chapter 17 decision of a veteran with a prior COD decision, it is not clear what the Secretary has done, or what he intended on the COD determination.

Implicit denial occurs only when the regional office decision “discusses a claim in terms sufficient to put the claimant on notice that it was being considered and rejected.” *Id.* at 963 (quoting *Ingram v. Nicholson*, 21 Vet. App. 232, 255 (2007)). In other words, the VA decision should contain language that can reasonably be construed as recognizing the implicit claim and providing the basic rationale for why that claim was denied. *See Deshotel v. Nicholson*, 457 F.3d 1258, 1259-60 (Fed. Cir. 2006) (finding implicit denial when RO decision did not address any secondary claim for psychiatric disability but did note there was “no psychiatric symptomatology”); *Adams*, 568 F.3d at 963. For example, the implicit denial doctrine has most commonly been applied to claims that are reviewing the effective date of Total Disability and Individual Unemployability (TDIU) claims, where a denial to increase a disability rating, which would make the veteran eligible for TDIU, also constitutes an implicit denial of a TDIU claim. The VA denies the TDIU claim because the veteran lacks the predicate disability rating, which is discussed in the explicit decision. *See, e.g., Hampton v. McDonough*, No. 20-4075, 2021 U.S. App. Vet. Claims LEXIS 1871 (Vet. App. Oct. 26, 2021) (denial for a disability rating increase implicitly denies a TDIU claim); *Penley v. McDonough*, No. 19-8656, 2021 U.S. App. Vet. Claims LEXIS 723 (Vet. App. Apr. 27, 2021) (same); *Bell v. McDonough*, No. 21-2348, 2022 U.S. App. Vet. Claims LEXIS 880 (Vet. App. June 7, 2022) (same). Similarly, an implicit denial can exist when the decision

explicitly adjudicates an intertwined or associated condition. *E.g.*, *Adams*, 568 F.3d at 961 (decision on rheumatic heart condition implicitly denied informal claim for endocarditis); *Bond v. McDonald*, No. 14-1067, 2015 U.S. App. Vet. Claims LEXIS 392 (Vet. App. Mar. 31, 2015) (a denial of claim for PTSD implicitly denied anxiety). Or the notice can be sufficient for an implicit denial when the VA decision did analyze the claim but failed to list it as a decided claim, *Grant v. Shinseki*, No. 11-3332, 2013 U.S. App. Vet. Claims LEXIS 150 (Vet. App. Jan. 31, 2013) (decision that stated it was denying a PTSD claim but that also explained its denial of a schizophrenia claim “at least implicitly adjudicated [the] schizophrenia claim”).

In all of these cases, the implicitly denied claim was so linked to an explicitly decided claim that the VA’s written decision provided enough of an analysis of the evidence and findings for a reasonable claimant to understand the implicit decision as well as the explicit one.

By contrast, an implied denial does not exist where the unaddressed claim turns on separate regulations and findings that are not addressed by the explicit decision. *See Ingram v. Nicholson*, 21 Vet. App. 232 (2007) (decision on non-service connected pension is not a decision on a claim for benefits from harm caused by VA medical case under 38 U.S.C. § 1151); *Batson v. Shulkin*, 686 F. App’x 878 (Fed. Cir. 2017) (decision on pension claim is not an implicit denial of aid and attendance). This is because, in such cases, the explicit decision does not provide enough

information for the claimant to proceed. This is particularly true for reopened claims in both the AMA and legacy claim systems. In both systems, the VA can deny a reopened claim for one of two independent reasons: (1) the reopen claim does not contain new and relevant or material evidence, or (2) although the reopened claim does contain new and relevant or material evidence, the claim should be denied on the merits based on the new and old evidence of record. *See Manio v. Derwinski*, 1 Vet. App. 140, 145 (1991). When the VA decision does not even mention the reopened claim, the claimant would not know on which of the two bases the reopened claim was denied, if indeed, it was denied. “Without some indication in the RO decision as to the basis of the denial, it would be impossible for a claimant to know whether he has obtained ‘new and material evidence’ as required [for a reopened or supplemental claim] or evidence that ‘establishes the error’ [for a claim of clear and unmistakable error].” *Ingram*, 21 Vet. App. at 253.

Thus, Mr. Hamill’s May 2021 decision cannot constitute an implied denial of the COD issue because the service connection and COD determinations are not intertwined, and a decision on one does not provide an implied decision on the other. Indeed, the VA’s own manual directs adjudicators *not* to decide the two issues in the same decisional document, and instead to provide a COD determination separately from a service-connection decision. *See* M21-1 Chapter X.iv.1.A.1.n. Even in this very case, VA followed this practice by issuing a separate COD determination in

2014, 2017, and finally in February 2023, after Mr. Hamill petitioned the Veterans Court for relief. *See Appx76-78.*

Extending the implicit denial doctrine to Mr. Hamill's case is an unprecedented step that fundamentally changes the doctrine itself from one that determines if adequate notice existed to one that creates a loophole that, for veterans with less-than-honorable discharges, VA is not required to provide adequate notice on their COD determinations.

B. A Failure To Adjudicate Is Not An Implicit Denial

The undisputed facts demonstrate that, far from impliedly denying Mr. Hamill's COD request in 2021, VA failed to adjudicate it until months after Mr. Hamill petitioned the Veterans Court for a writ of mandamus. "Implicit denial simply cannot be stretched to include a circumstance when the adjudicator believed that there was no claim in need of adjudication or no evidence in the decision gave notice to the veteran that the adjudicator was considering and adjudicating the claim." *Andrews v. Shinseki*, 552 F. App'x 985, 1007 (Fed. Cir. 2014); *see also Batson*, 686 F. App'x at 880 ("It defies logic to argue that there was no claim in need of adjudication, and then hold if there was, it was implicitly denied."). VA's post hoc rationalization in July 2023 that for the first time framed the May 2021 service connection decision as an implicit denial of the COD issue is insufficient under the implicit denial doctrine.

It is clear that the VA did not consider its May 2021 decision an adjudication of the request to reopen the COD determination. In July 2022 and again in March 2023, VA officials made no argument that the COD issue had been decided by the May 2021 decision. *See* Appx67-68; 166-171. Only in July 2023, over two years after the relevant decision, did the Secretary arrive at the implicit denial rationale as a convenient litigating position in response to Mr. Hamill’s class action request. As Judge Jaquith pointed out, “That is a post hoc rationalization the Court should not accept.” *See* Appx17.

Allowing VA to evade its duty to adjudicate COD determinations by issuing post hoc rationalizations claiming that such duty has already been fulfilled contradicts this Court and Supreme Court precedent. “[C]ourts may not accept appellate counsel’s post hoc rationalization for agency action.” *In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). “It is well established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself,” rather than that of the agency’s lawyers on appeal of the agency action to a court. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983).

There are good reasons not to permit attorneys to conjure post hoc rationalizations of their client agency’s action (or inaction) when the agency itself failed to provide the same reasons. As the Supreme Court has stated “[f]or the courts

to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review" and "propel[s] the court into the domain which Congress has set aside exclusively for the administrative agency." *Burlington Truck Lines v. United States*, 371 U.S. at 169. It furthermore puts the aggrieved party at a disadvantage, "depriv[ing it] of a fair opportunity to support its position." *In re Lee*, 277 F.3d at 1345.

The majority below acknowledges that the Secretary initially relied on the February 2023 letter which explicitly determined that Mr. Hamill had submitted no new and relevant evidence to reopen his claim for COD determination. *See Appx7*. The majority also acknowledges that the Secretary later switched his position to maintain that, in fact, the earlier May 2021 letter, which made no mention of a COD determination, served as an implicit denial of Mr. Hamill's request to have his character of discharge adjudicated as not dishonorable for VA purposes. *Id.* at 7-8. But despite the fact that these circumstances clearly implicate the rule against post hoc rationalizations, the majority does not address it.

This Court should not permit such a clear violation of the rule against post hoc rationalizations.

III. Because Mr. Hamill's Claim Was Not Implicitly Denied Prior To Filing His Mandamus Petition, The Picking Off Exception to Mootness Applies

If the Court holds that the May 2021 decision is not an implicit denial of the COD issue, it follows that Mr. Hamill's petition was not mooted. The February 2023

COD determination picked off Mr. Hamill’s claim, and a decision on class action certification should relate back to the filing of the petition.

To reach certification, the named plaintiff in a prospective class action generally must have a live claim when the class action is certified by the trial court. *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). But “where a named plaintiff’s claim is ‘inherently transitory,’ and becomes moot prior to certification, a motion for certification may ‘relate back’ to the filing of the complaint.” *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 569 (2013) (quoting *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991)); *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1539 (2018) (citing *Sosna*, 419 U.S. at 402 n.11, and *Gerstein v. Pugh*, 420 U.S. 103, 110-111 n.11 (1975)). The Supreme Court has held that in such inherently transitory cases, the case may be litigated and decided even though the named plaintiff’s claim was moot by the time of judgment. This exception enables judicial review in situations where otherwise “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.” *McLaughlin*, 500 U.S. at 52 (quoting *United States Parole Commission v Geraghty*, 445 US 388, 399 (1980)); see also *Genesis Healthcare*, 569 U.S. at 76.

Mootness with respect to the named plaintiff is especially problematic when it arises due to a unilateral move by the defendant—often an offer of full relief to the

plaintiff—that is commonly described as “picking off.” This issue is crucial to the viability of class action suits. Courts, including the Supreme Court, express great concern over the ability of defendants to “pick off” or “buy off” named plaintiffs through settlement offers and thus dismantle potential class action suits. *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980). If defendants are allowed to pick off would-be class representatives, the defendants might be able to ensure “that no remedy could ever be provided for continuing abuses.” *Blankenship*, 587 F.2d 329, 333 (6th Cir. 1978).

The picking off exception ensures orderly adjudications rather than “a race between the plaintiff and the defendant to see who could act first—the plaintiff in moving for class certification or the defendant in mooting the claims of would-be class representatives.” *Richardson v. Dir. Fed. Bureau of Prisons*, 829 F.3d 273, 289 (3d Cir. 2016).

A. The VA Picked Off Mr. Hamill’s Petition to Moot Out His Request for Class Certification

As the Veterans Court acknowledged, “if VA mooted Mr. Hamill’s petition in February 2023—after he had already filed his petition with this Court—then Mr. Hamill could reasonably argue that, although he’d received his requested relief, the inherently transitory and picking off exceptions to mootness might allow the class he described to go forward.” *See Appx5*. In fact, this is a textbook case of the “picking off” exception to mootness. VA attempted to evade judicial review by

deciding Mr. Hamill’s particular matter before the Veterans Court had the chance to rule on class certification. Mr. Hamill filed his Writ of Mandamus with the Veterans Court on December 19, 2022 and his Motion for Extension of Time to File a Request for RCA just 24 days later, on January 12, 2023. *See* Appx23. CAVC gave Mr. Hamill until March 6, 2023 to file the RCA, but before the deadline—and on notice that a request for class certification was coming—VA resolved his case on February 21, 2023 by issuing a decision on his request to reopen his COD determination.

As Judge Jaquith noted in his dissent at the Veterans Court, “[t]he picking off problem is a recurrent one.” *See* Appx18. VA evaded review of the challenged conduct in Mr. Hamill’s petition by simply issuing the requested decision for his particular case, and then continuing to engage in the same conduct for other class members’ claims. Thus, the issue here is capable of repetition, yet evades review, and the petition is not moot.

The purpose of the “picking off” exception to mootness is to prevent the VA from selectively mooting the lead plaintiff’s claims before judicial resolution. That is exactly what happened here. Because the May 2021 decision was not an implicit denial, Mr. Hamill’s claim was not resolved until he received a decision in February 2023. As Judge Jaquith noted in his dissent,

[t]he veteran’s January 2023 motion for an extension of time made clear that he was seeking class certification and class action, and he was entitled to a fair opportunity to file his RCA with the Court. His filing

of the RCA on the same day that the RO issued its February 2023 letter was prompt enough to prevail over the pick off. *Id.*

Because the Secretary was on notice of Mr. Hamill's Request for Class Certification, the exception to mootness applies here. VA cannot simply provide the requested relief to one veteran and thereby avoid fulfilling its legal duties to other veterans.

B. This Court Should Apply Relation Back Where a Plaintiff's Claim Is Mooted Before a Decision on Class Certification

A majority of circuit courts have held that, where a plaintiff's claim is mooted before a class certification motion has been filed or ruled upon, the motion can relate back to the date the plaintiff filed his complaint. This is the law of the Second, Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits. The Federal Circuit should join this majority, and allow this class action to proceed.

In *Blankenship v. Secretary of HEW*, in the Sixth Circuit, plaintiffs brought a class action against the Social Security Administration challenging its delays in scheduling disability hearings. 587 F.2d 329, 335 (6th Cir. 1978). The plaintiffs were mooted by receiving hearings for their benefits before the case was certified as a class. *Id.* The Sixth Circuit found that "the class members retain a live interest in a case and the class certification should relate back to the date of the filing of the complaint." *Id.* at 333.

A would-be class representative must have a “fair opportunity” to show that certification is warranted, and if he does not have such opportunity—because his individual claim is mooted before he could reasonably have been expected to file for class certification—he should be permitted to continue seeking class certification for some period of time after his claim has become moot. *Richardson*, 829 F.3d 283; *see also Haro v. Sebelius*, 729 F.3d 993, 1003 (9th Cir. 2013) (although named plaintiff’s claim expired before district court certified class, class claims were not moot because court could not reasonably have been expected to rule on class certification in that period); *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1142 (9th Cir. 2016) (permitting mooted plaintiff to seek class certification, and emphasizing that plaintiffs should have a fair opportunity to show that certification is warranted); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1250 (10th Cir. 2011) (named plaintiff in a proposed class action may proceed to seek timely class certification where claim is mooted before the court can reasonably be expected to rule on the class certification motion).

Several other circuits permit relation back where class certification has not yet been certified. *Jonathan R. v. Justice*, 41 F.4th 316 (4th Cir. 2022) (in action brought on behalf of West Virginia’s foster children challenging the State’s administration of child welfare services, class certification will relate back to the filing of the complaint even though individual class claims were moot before certification);

Robidoux v. Celani, 987 F.2d 931, 938–939 (2d Cir. 1993) (in class action by applicants for Vermont public assistance benefits alleging delay in processing applications, fact that named plaintiffs received their benefits after suit commenced but before certification did not mean class action was moot). *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (plaintiffs had standing to bring a class action alleging racial discrimination and segregation in public housing and assistance programs, despite individual claims being moot before the class was certified); *Sos v. State Farm Mut. Auto. Ins. Co.*, 2023 U.S. App. LEXIS 22986, 45-46 (11th Cir. 2023) (in action by State Farm policy holders who sued State Farm for failure to pay sales taxes and title transfer fees under car insurance contracts, named plaintiff had standing to pursue certification even if his individual claim was moot).

Importantly, the Third Circuit has noted that while “most of the cases applying the relation back doctrine have done so after a motion to certify has been filed[,] . . . reference to the bright line event of the filing of the class certification motion may not be well-founded.” *Weiss v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004) (internal citations and quotation marks omitted) (plaintiff’s individual claims not mooted because subsequent certification relates back to the filing of the complaint, even where motion for class certification not yet filed). The Court continued:

Of course, the federal rules do not require certification motions to be filed with the class complaint, nor do they require or encourage premature certification determinations. It seems appropriate, therefore, that the class action process should be able to “play out” according to

the directives of Rule 23 and should permit due deliberation by the parties and the court on the class certification issues.

Id. at 347-348. *See also Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011) (holding that an unaccepted pre-motion-to-certify Rule 68 offer of judgment in full satisfaction of the named plaintiff’s individual claims does not moot the claims of the class because subsequent certification relates back to the filing of the complaint).

Allowing relation back for claims that became moot before certification prevents “pick off attempts” and furthers the objectives of class actions. It preserves judicial resources by avoiding successive suits brought by litigants with the same harm, and it prevents plaintiffs from being forced to file premature motions for certification. Because Mr. Hamill’s petition for a writ of mandamus was not moot when he filed it, and the VA attempted to pick it off with its February 2023 COD determination, the case is not moot and should be allowed to proceed.

CONCLUSION

WHEREFORE, David A. Hamill asks this Court to hold that, as a matter of law, VA’s May 2021 service connection decision did not constitute an implicit denial of his request to reopen his prior COD determination, and therefore his petition was not mooted because VA picked off his claim with its February 2023 decision. The Court should reverse the Veterans Court decision and remand for further proceedings.

Respectfully submitted,

/s/ Yelena Duterte

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No: 22-7344

DAVID A. HAMILL, PETITIONER,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

JUDGMENT

The Court has issued a decision in this case. The time allowed for motions under Rule 35 of the Court's Rules of Practice and Procedure has expired.

Under Rule 36, judgment is entered and effective this date.

Dated: January 9, 2024

FOR THE COURT:

TIFFANY M. WAGNER
Clerk of the Court

By: /s/ Sean Moldowan
Deputy Clerk

Copies to:

Yelena Duterte, Esq.

VA General Counsel (027)

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 22-7344

DAVID A. HAMILL, PETITIONER,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before TOTH, LAURER, and JAQUITH, *Judges*.

ORDER

LAURER, *Judge*, filed the opinion of the Court. JAQUITH, *Judge*, filed a dissenting opinion.

On December 19, 2022, David A. Hamill, through counsel, petitioned the Court for extraordinary relief in the nature of a writ of mandamus. He argued that VA had refused to decide whether he'd submitted new and material evidence related to his other than honorable (OTH) character of discharge (COD). He relied on *Harris v. McDonough*¹ to ask the Court to order VA to issue an appealable decision readjudicating his COD.

After the Secretary responded, Mr. Hamill filed a request for class certification and class action (RCA). He acknowledged that his request for relief had been satisfied because he'd received a new and material evidence determination after he filed his petition. But he argues that, even so, his petition isn't moot, and his class action request isn't either, based on certain exceptions to mootness. He urges the Court to certify a class of veterans who received OTH characters of discharge then applied for VA benefits but received decisions that adjudicated only healthcare eligibility, not COD. The Secretary opposes certification, arguing that the class Mr. Hamill describes has no live case or controversy. The Court convened a panel to decide the matter.² As explained below, we dismiss Mr. Hamill's petition and deny his RCA.

I. BACKGROUND

Mr. Hamill served in the United States Marine Corps from January 2009 to March 2013. He was discharged from service under OTH conditions.³ Upon discharge, he filed a claim for disability compensation for post-traumatic stress disorder (PTSD), other psychiatric issues, and back pain.⁴ VA denied his application in May 2014 because his OTH COD made him ineligible for "all benefits administered by the Department of Veterans Affairs under the provisions of 38

¹ *Harris v. McDonough*, 33 Vet.App. 269 (2021) (per curiam order).

² See U.S. VET. APP. INTERNAL OPERATING PROCEDURES XV.

³ Petition (Pet.) at Exhibit (Ex.) A.

⁴ Pet. at Ex. B.

C.F.R. § 3.12(c)(6) and 38 U.S.C. § 5303(a).”⁵ VA noted that petitioner’s COD didn’t bar him from receiving healthcare under chapter 17 of title 38, U.S. Code, “for any disabilities determined to be service connected” for his period of service.⁶

In May 2017, Mr. Hamill filed a new claim for disability benefits based on PTSD, chronic fatigue syndrome, fibromyalgia, chronic depression, lower back pain, and hearing loss.⁷ VA responded in July 2017 and construed Mr. Hamill’s filing as an attempt to reopen the May 2014 decision that had concluded that his COD barred him from service connection except in limited circumstances under chapter 17. VA explained that it couldn’t reopen the May 2014 decision because (1) the time to appeal that decision had expired and (2) Mr. Hamill hadn’t submitted new and material evidence to warrant reopening his claim.⁸ VA included a notice of appellate rights with its July 2017 decision, and Mr. Hamill didn’t appeal.

Four years later, on March 12, 2021, Mr. Hamill submitted two new claims to VA.⁹ First, he filed a claim seeking compensation for the same disabilities he described in his 2017 claim, thereby implicitly seeking to reopen those claims.¹⁰ That same day, he also filed a new benefits application seeking compensation for several other disabilities.¹¹ VA adjudicated both sets of claims in a May 19, 2021, decision and granted service connection for PTSD for treatment purposes only.¹² VA denied service connection for the rest of the claimed disabilities and included a notice of appellate rights with its decision.¹³ Again, Mr. Hamill didn’t appeal.

In response to a July 2022 letter from Mr. Hamill’s attorney, asking VA to “make a decision regarding [Mr. Hamill’s] discharge characterization,” VA notified Mr. Hamill that he should contact his service department to upgrade his COD.¹⁴ Five months later, in December 2022, Mr. Hamill petitioned the Court, arguing that VA had violated *Harris* because it hadn’t adjudicated whether he’d submitted new and material evidence relevant to his COD when it granted chapter 17 benefits.

On March 6, 2023, the Secretary moved to dismiss the petition as moot and included a copy of a February 2023 letter that VA had sent to Mr. Hamill, explicitly finding that he hadn’t submitted new and material evidence to warrant reopening the May 2014 COD decision.¹⁵ Mr. Hamill filed his RCA that same day, recognizing that VA’s February 2023 letter had “satisfied” his request for an appealable decision, but contending that the Court should still certify a class of

⁵ Pet. at Ex. D.

⁶ Pet. at Ex. D. There seems to be a discrepancy within VA’s letter over whether petitioner was eligible for chapter 17 benefits since the May 2014 decision contains conflicting statements. Because petitioner was eventually granted chapter 17 benefits and neither party argues over the discrepancy in the May 2014 decision, the Court determines that the discrepancy is irrelevant, and the parties have waived any argument on that point.

⁷ Pet. at Ex. E.

⁸ Pet. at Ex. F.

⁹ The Court notes that Mr. Hamill submitted his claims on March 12, 2021, but VA didn’t mark them as uploaded into their system until May 10, 2021.

¹⁰ Pet. at Ex. G.

¹¹ Pet. at Ex. G.

¹² Pet. at Ex. H.

¹³ Pet. at Ex. H.

¹⁴ Pet. at Exs. I, J.

¹⁵ Secretary’s Response to Pet. at Attachment A.

veterans who hadn't received explicit new and material evidence determinations like the one he'd received.¹⁶

The Secretary opposes the RCA because he believes the purported class has no live case or controversy. First, he argues that Mr. Hamill's claim is moot since VA implicitly declined to reconsider its COD determination in the May 2021 decision that granted limited chapter 17 benefits for PTSD but denied all other claims. The Secretary reasons that the May 2021 decision mooted Mr. Hamill's petition and satisfied *Harris* because it included a notice of appellate rights. Next, the Secretary maintains that the purported class is inherently moot because its members—by virtue of their membership—would've already received implicit new and material evidence adjudications from VA, with attached notices of appellate rights, so they haven't suffered any harm under *Harris*. And last, the Secretary contends that Mr. Hamill hasn't shown that proceeding by class action would be superior to proceeding by precedential decision, and since the implicit determination question is case specific, a class action would prove an unwieldy tool.

II. ANALYSIS

A. The Petition Is Moot

The Court adheres to Article III of the U.S. Constitution's case-or-controversy jurisdictional requirements¹⁷—meaning that there must be a live issue for the Court to review a case.¹⁸ “[W]hen the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome,” the case or controversy becomes moot.¹⁹ And when a petitioner receives the relief sought, the appropriate course is to dismiss the petitioner's case as moot.²⁰

Here, the parties essentially agree that there's no case or controversy for the Court to rule on with respect to the petitioner. While Mr. Hamill contends that his petition isn't moot, he admits that “his individual request for an appealable decision has been satisfied,” which amounts to acknowledging that his petition is moot since there's no more relief that he could receive or that the Court could direct VA to provide.²¹ Putting that aside, the parties fundamentally disagree on *why* the petition is moot and where the relief that Mr. Hamill has received flows from. That divergence dictates the disposition for both Mr. Hamill's petition and his class action request.

Mr. Hamill points to VA's February 2023 letter as the source of the relief he received. That letter explicitly stated that “no new and relevant evidence [has been] submitted to reopen your claim for [COD] determination.”²² The Secretary frames Mr. Hamill's position as a concession and argues that his petition is moot “[b]ecause the [VA regional office] has issued an appealable

¹⁶ Petitioner's RCA at 7.

¹⁷ *Cardona v. Shinseki*, 26 Vet.App. 472, 474 (2014) (per curiam order); *Mokal v. Derwinski*, 1 Vet.App. 12, 13 (1990).

¹⁸ *Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam) (“When there is no case or controversy, or when a once live case or controversy becomes moot, the Court lacks jurisdiction.”).

¹⁹ *Godsey v. Wilkie*, 31 Vet.App. 207, 218 (2019) (per curiam order) (quoting *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979)).

²⁰ *Thomas v. Brown*, 9 Vet.App. 269, 270-71 (1996) (per curiam order).

²¹ Petitioner's RCA at 7.

²² Secretary's Response to Pet. at Attachment A.

decision,” so there’s no case or controversy.²³ Although the Secretary first relied on the same February 2023 letter that Mr. Hamill cites, the Secretary now maintains that Mr. Hamill’s petition is moot based on the May 2021 letter that included a notice of appellate rights. In that letter, VA implicitly denied reopening its COD determination and provided a notice of appellate rights, which satisfied *Harris*.²⁴ Thus, the Secretary concludes that Mr. Hamill hasn’t described a cognizable harm because he received his requested relief back in May 2021.

The diverging positions clearly have high stakes: if VA mooted Mr. Hamill’s petition in February 2023—after he had already filed his petition with this Court—then Mr. Hamill could reasonably argue that, although he’d received his requested relief, the inherently transitory and picking off exceptions to mootness might allow the class he described to go forward.²⁵ On the other hand, if the May 2021 letter mooted Mr. Hamill’s petition before he filed it, his petition falls away, as does the possibility of certifying a class, since both were moot from the jump.

The implicit denial doctrine, plus a close reading of *Harris*, resolves the controversy. Based on *Harris*, Mr. Hamill argues that VA must explicitly decide whether a claimant has submitted new and material evidence sufficient to reopen a COD decision. He contends that, in his case, VA didn’t comply with its adjudicatory obligation until February 2023, when it explicitly stated that he hadn’t submitted new and material evidence. But the crux of *Harris* describes and remedies a harm that’s distinct from what Mr. Hamill describes. The *Harris* Court stated that, in essence, the relief Mr. Harris sought was “a decision subject to appeal.”²⁶ The Court acknowledged that VA adjudicators must “make a formal [COD] determination when presented with a claim for benefits predicated on a service member’s [OTH] service.”²⁷ But the Court included that reasoning only to explain why the option for “administrative relief from a service department” couldn’t excuse VA from issuing a decision with a notice of appellate rights.²⁸ The Court emphasized the relief that Mr. Harris sought and that VA refused to provide: “a VA decision that will allow him to avail himself of the regular appeals process, not a substitute for that process.”²⁹

Harris must be read in tandem with the implicit denial doctrine since that doctrine is already a well-established part of the framework that VA adjudicators operate within. The United States Court of Appeals for the Federal Circuit has explained that, in some cases, “a claim for benefits will be deemed to have been denied, and thus finally adjudicated, even if the [Department of Veterans Affairs] did not expressly address that claim in its decision.”³⁰ “[T]he implicit denial rule is, at bottom, a notice provision.”³¹ By its nature, the rule arises when a veteran receives notice that doesn’t comply with the strictures of an applicable notice provision. And that makes sense

²³ Secretary’s Response to Pet. at 4; *see also* Secretary’s Response to RCA at 3-7.

²⁴ Pet. at Ex. I.

²⁵ *See Godsey*, 31 Vet.App. at 218-20 (applying the inherently transitory exception to mootness to allow a class action to go forward even though the claims had resolved because the claims were “unavoidably time-sensitive” and “acutely susceptible to mootness”).

²⁶ *Harris*, 33 Vet.App. at 275.

²⁷ *Harris*, 33 Vet.App. at 273 (quoting *Robertson v. Shinseki*, 26 Vet.App. 169, 175 (2013), *aff’d sub nom. Robertson v. Gibson*, 759 F.3d 1351 (Fed. Cir. 2014)).

²⁸ *Harris*, 33 Vet.App. at 273.

²⁹ *Harris*, 33 Vet.App. at 274.

³⁰ *See Adams v. Shinseki*, 568 F.3d 956, 961 (Fed. Cir. 2009).

³¹ *Adams*, 568 F.3d. at 965.

since implicit denial can be invoked only when a claimant’s notice isn’t explicit or when it fails to comply with a regulatory—or even statutory—notice provision. Technically noncompliant notice can still provide a veteran with the substantive information that he’s due, which is why implicit denial has repeatedly received the Federal Circuit’s sanction.³² Yet the dissent parts ways with us here. His departure stems from a commendable desire to ensure that veterans receive adequate notice. But implicit denial folds in his concern because the doctrine only applies when a court is convinced that the notice that a claimant received was adequate, even if it wasn’t textbook.³³

Deciding whether VA implicitly denied a claim depends on notice and hinges on whether a reasonable claimant could conclude, from the notice that he received, that his claim had been implicitly denied.³⁴ Notice inquiries under the implicit denial doctrine are circumstance-specific, so they look to what a reasonable claimant in a particular veteran’s position would be expected to understand.³⁵ Applying the implicit denial doctrine allows a court to balance a claimant’s right to know how his claim has been decided with VA’s interest in finality.³⁶ Our Court in *Cogburn v. Shinseki* fleshed out how to strike that balance based on (1) “the specificity of the claims or the relatedness of the claims”; (2) the “specificity of the adjudication,” with an eye to whether “the adjudication allude[s] to the pending claim in such a way that it could be reasonably inferred that the prior claim was denied”; (3) the “timing of the claims” and whether they’re closely associated time-wise; and (4) whether the claimant was represented by counsel.³⁷

Applied to Mr. Hamill’s case, all four *Cogburn* factors weigh one way: VA implicitly denied his request to reopen his prior COD determination and said enough in its May 2021 decision to notify Mr. Hamill how it had decided the issue.

First, Mr. Hamill’s claims are closely tied—both in timing and in content. On the same day, March 12, 2021, he filed one application seeking new disability benefits and another application seeking to reopen claims for disability claims VA previously denied based on the adverse COD determination. VA’s May 2021 decision more than alludes to the relationship between the claims and petitioner’s OTH discharge—it specifically turns on the fact that an adverse COD bars VA from granting benefits beyond chapter 17. The one directly controls the other. VA denied Mr. Hamill’s new benefits application because of his adverse COD, which

³² See, e.g., *Adams*, 568 F.3d at 961; *Jones v. Shinseki*, 619 F.3d 1368, 1373 (Fed. Cir. 2010); *Deshotel v. Nicholson*, 457 F.3d 1258, 1262 (Fed. Cir. 2006); *Williams v. Peake*, 521 F.3d 1348, 1351 (Fed. Cir. 2008); *Munro v. Shinseki*, 616 F.3d 1293, 1299 (Fed. Cir. 2010); *Cogburn v. McDonald (Cogburn III)*, 809 F.3d 1232, 1236-37 (Fed. Cir. 2016), *aff’g Cogburn v. Gibson (Cogburn II)*, No. 12-3323, 2014 WL 2600052 (Vet. App. June 11, 2014) (mem. dec.), *aff’g after remand Cogburn v. Shinseki (Cogburn I)*, 24 Vet.App. 205 (2010); *Hampton v. McDonough*, 68 F.4th 1376, 1381-82 (Fed. Cir. 2023), *petition for cert. filed*, No. 23-543 (U.S. Nov. 21, 2023).

³³ *Cogburn III*, 809 F.3d at 1236 (“[W]hen the implicit denial rule applies, the claimant necessarily ‘received adequate notice of, and an opportunity to respond to, the [VA’s] decision . . . [and therefore] was not deprived of any due process rights.’” (quoting *Adams*, 568 F.3d at 965)).

³⁴ See *Adams*, 568 F.3d at 962-64.

³⁵ See *Munro*, 616 F.3d at 1299 (holding that the implicit denial rule properly applied because the veteran “had multiple reasons to know” that his claims had been denied); *Jones*, 619 F.3d at 1373 (reaching the same conclusion because the veteran in the case “reasonably [could] be expected to understand” that his claim had been denied based on the particular procedural history).

³⁶ See *Adams*, 568 F.3d at 963.

³⁷ *Cogburn I*, 24 Vet.App. at 212-13.

remained in place and which VA cited as evidence it had considered.³⁸ Had VA reached a different conclusion on the COD question, it would've had to address his disability claims on the merits rather than granting only limited chapter 17 benefits and denying his new disability claims outright. Furthermore, only a few months separated petitioner's filings and VA's adjudication, leaving little doubt about what VA was adjudicating. Finally, Mr. Hamill was represented by his current counsel when he filed the applications that prompted VA's May 2021 letter. Because an attorney providing competent representation would advise a veteran "of any claim [or issue] that was unadjudicated in a regional office decision, and the possible consequences of not directly addressing the claim at the time of the original rating action," we must presume that Mr. Hamill had a reasonable understanding of the implications of VA's actions.³⁹ All told, there's only one way to read VA's May 2021 decision: since it hinged on his adverse COD, it gave Mr. Hamill sufficient notice that VA had declined to revisit the COD issue.

This conclusion is reinforced by the history of VA proceedings over the COD issue. VA explicitly adjudicated Mr. Hamill's COD in May 2014, and he didn't appeal.⁴⁰ Three years later, Mr. Hamill tried to reopen the 2014 decision. In its July 2017 decision, VA explicitly found that Mr. Hamill hadn't submitted new or material evidence, and it included a notice of appellate rights.⁴¹ Again, Mr. Hamill didn't appeal. In March 2021, appellant filed a new application for benefits and another claim. Two months later, VA adjudicated both filings, granted chapter 17 benefits for PTSD, denied the remaining claims, and implicitly adjudicated the COD question. VA included another notice of appellate rights.⁴² To date, petitioner has received two decisions with notices of appellate rights, either explicitly or implicitly adjudicating his COD.

VA certainly must adjudicate every claim that's been raised, but Mr. Hamill misreads the caselaw in saying that VA's failure to explicitly decide every issue leaves a claim or request pending. Reading our precedent that way would undercut the implicit denial doctrine. *Harris* doesn't displace the applicability of implicit denial in this context or in any other. The decisions VA issued put petitioner on notice of the Agency's determination on the character of his discharge and thereby gave him access to the regular appeals process, so *Harris* doesn't afford him an avenue for any more relief than what he's already received. Since Mr. Hamill received a COD determination and a notice of appellate rights—all before he filed his petition—no harm remains for the Court to remedy, so his petition is moot.

Petitioner asserts that applying the implicit denial doctrine to the May 2021 decision would require the Court to presume that VA violated the more robust notice obligations made part of 38 U.S.C. § 5104 by the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), which would conflict with the presumption of administrative regularity.⁴³ But the same allegation could be leveled against the doctrine and the preamendment version of section 5104, yet the two coexisted. At bottom, petitioner suggests that the revised version of section 5104 does "not allow

³⁸ See RCA at Ex. D (listing the "Administrative Decision received on May 15, 2014" as one of the pieces of evidence it had reviewed).

³⁹ *Cogburn I*, 24 Vet.App. at 213.

⁴⁰ Pet. at Ex. D.

⁴¹ Pet. at Ex. F.

⁴² Pet. at Ex. H.

⁴³ Petitioner's Reply at 8-9.

for implicit denials,”⁴⁴ but he doesn’t adequately develop an argument that Congress intended through the AMA to sweep away this longstanding aspect of veterans law.⁴⁵

B. No Mootness Exception Applies

The claims of the proposed class members don’t survive our holding that Mr. Hamill’s petition is moot. Although he acknowledges that he has received his requested relief, Mr. Hamill argues that the class should still go forward because the inherently transitory exception to mootness, as well as the related picking off exception, applies to the injuries sustained by the proposed class members.⁴⁶

A class action can continue after the “named plaintiff’s claim” has been rendered moot if an exception to mootness applies.⁴⁷ Here, petitioner argues that the inherently transitory exception to mootness applies, so the Court should still certify the class he describes even though he’s received his requested relief. The Court has adopted the inherently transitory exception to mootness, which deals with classes comprised of claims that are “unavoidably time-sensitive” and “acutely susceptible to mootness.”⁴⁸ Inherently transitory claims are those that “a trial court will not have enough time to rule on” before they become moot.⁴⁹ To let claimants litigate those harms, courts can certify classes that consist of inherently transitory claims even after a named plaintiff’s claim has become moot. That way, the short-lived nature of the claim doesn’t shield a defendant—VA here—from litigating a case just because it’s susceptible to a quick remedy. The picking off exception to mootness is a near cousin to the inherently transitory exception. It refers to those scenarios in which a defendant would like to avoid litigation, and to do so, gives an injured claimant the relief that he was seeking to moot his claim and close off the possibility of litigation.⁵⁰ Though distinct, the exceptions end in the same spot. One deals with claims that are moot because they’re “transitory by [their] very nature,” and the other deals with claims that are made “transitory by virtue of the defendant’s litigation strategy.”⁵¹ In either case, without an operative exception, mootness could insulate those claims from judicial review.

Mr. Hamill cites both exceptions to argue for the certification of the class of claimants he’s described.⁵² But neither exception applies here. Take the second exception first. We’ve concluded that the May 2021 letter—not the February 2023 letter—mooted Mr. Hamill’s petition. VA issued its May 2021 letter in the ordinary course of business, well before Mr. Hamill filed his petition in December 2022. Since no litigation was pending in May 2021, VA couldn’t have issued the May

⁴⁴ *Id.* at 8 (capitalization altered).

⁴⁵ The dissent insists that we are taking an “expansive view of the implicit denial” doctrine. *Post* at p. 10. But we are simply applying the well-established *Cogburn* factors to the COD dispute in this case. Rather, it is the dissent that seems to adopt the sweeping position that implicit denials cannot be sanctioned in the AMA context. *See id.*

⁴⁶ Petitioner’s RCA at 7-8 (citing *Godsey*, 31 Vet.App. at 217-20).

⁴⁷ *Godsey*, 31 Vet.App. at 218-20 (citing *Monk v. Shulkin (Monk I)*, 855 F.3d 1312, 1317 (Fed. Cir. 2017), *class certification denied sub nom. Monk v. Wilkie (Monk II)*, 30 Vet.App. 167 (2018) (en banc order), *aff’d, Monk III*, 978 F.3d 1273 (Fed. Cir. 2020)).

⁴⁸ *Godsey*, 31 Vet.App. at 219 (quoting *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011)).

⁴⁹ *Godsey*, 31 Vet.App. at 219 (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991)).

⁵⁰ *Godsey*, 31 Vet.App. at 219 (quoting *Pitts*, 653 F.3d at 1091).

⁵¹ *Pitts*, 653 F.3d at 1091.

⁵² Petitioner’s RCA at 7-8.

2021 decision to moot Mr. Hamill’s petition and avoid litigation. Thus, the picking off exception doesn’t apply. The same goes for the inherently transitory exception to mootness. That exception has only limited usefulness: it only works to capture claims that don’t last long enough for the Court to get a chance for review. The alleged injury here—VA’s inaction related to a request to revisit a COD determination—isn’t by its nature a transitory one that would permit us to ignore mootness.

Because Mr. Hamill’s petition was mooted before he sought aggregate litigation, and since no exception to mootness applies, the Court denies the RCA.⁵³

C. A Class Action Wouldn’t Be Superior to a Precedential Decision

The Court doesn’t have to walk through the strictures of Rule 23, but we’ll address one issue for the sake of completeness. When it reviews an RCA, the Court considers whether the proposed class meets the requirements for class certification laid out in Rule 23 of our Rules of Practice and Procedure.⁵⁴ The Court also considers whether a class action would be superior to a “precedential decision granting relief on a non-class action basis.”⁵⁵ Prospective class representatives must make this showing.⁵⁶ And it’s no small feat because this Court has limited factfinding abilities, so class actions here are the exception, not the rule.⁵⁷ To that end, the Court presumes that “classes should not be certified because our ability to render binding precedential decisions ordinarily will be adequate.”⁵⁸

When considering whether this presumption has been rebutted, some of the factors that the Court considers include the litigation’s factual complexity, whether the record has been fully developed, and whether the class has alleged enough facts to warrant remedial enforcement.⁵⁹ These factors go to the question of manageability, a prime concern given our appellate posture and limited factfinding ability.⁶⁰

Proceeding by class action isn’t the right way to go here. Implicit adjudication questions are case specific, so they’re ill-suited to both class-wide review and class-wide relief. Although

⁵³ *Kernz v. McDonough*, ___ Vet.App. ___, ___, No. 20-2365, 2023 WL 6459373, at *13 (Oct. 4, 2023) (en banc order), *appeal docketed*, No. 24-1171 (Fed. Cir. Nov. 21, 2023).

⁵⁴ *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (holding that a court should first assess whether a requested class action satisfies procedural requirements under Rule 23 of the Federal Rules of Civil Procedure before conducting an inquiry into the merits of the claims advanced); *see also* U.S. VET. APP. R. 23(a).

⁵⁵ U.S. VET. APP. R. 22(a)(3).

⁵⁶ *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (“An appellant bears the burden of persuasion on appeals to this Court . . .”), *aff’d per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

⁵⁷ *Gardner-Dickson v. Wilkie*, 33 Vet.App. 50, 62-63 n.9 (2020) (order) (quoting *Skaar v. Wilkie*, 32 Vet.App. 156, 196 (2019) (en banc order), *class certification aff’d*, 33 Vet.App. 127 (2020), *reversed on other grounds sub nom. Skaar v. McDonough*, 48 F.4th 1323 (Fed. Cir. 2022)), *aff’d per curiam sub nom. Gardner-Dickson v. McDonough*, No. 2021-1462, 2021 WL 5144367 (Fed. Cir. Nov. 5, 2021) (nonprecedential R. 36 judgment).

⁵⁸ *Skaar*, 32 Vet.App. at 196.

⁵⁹ *Skaar*, 32 Vet.App. at 197.

⁶⁰ *Godsey*, 31 Vet.App. at 223 n.4 (acknowledging that the Court considers manageability when it certifies a class, even though it won’t “categorically decline to certify classes because class or aggregate actions may be more difficult to manage than cases involving individual petitions”); *see also Monk II*, 30 Vet.App. at 184-200 (Allen, J., concurring in part, dissenting in part).

Mr. Hamill alleges that VA has a practice of failing to adjudicate whether a claimant has submitted new and material evidence, an allegation that resonates in the language of Federal Rule of Civil Procedure 23(b)(2), he hasn't shown that the Court could fashion relief for all the class members without conducting an individualized review of each claimant's records. The common issue facing the potential class members is a legal one—whether the implicit denial doctrine applies—and that issue is bound tightly to individualized facts—whether each veteran received notice that could reasonably alert the claimant that his or her attempt to reopen a COD determination had been implicitly denied.

To the extent that any prospective class member has a live case or controversy—and to be clear, the Court isn't saying whether that's the case for any claimant here—that theoretically live claim wouldn't be fit to resolve by class action. Here's why. If any particular prospective class member didn't receive a decision that implicitly adjudicated whether he'd submitted new and material evidence related to a prior COD decision, that claim's merits would revolve around case-specific facts that would best be handled by an individual appeal. Setting aside all the mootness concerns the Court has discussed, Mr. Hamill hasn't persuaded the Court that a class action would be a better vehicle for proceeding than a precedential decision—which would then guide individualized litigation—given the fact-specific nature of the claims he's described as similarly situated to his own.

One final note. The Secretary has informed the Court that he's updated the relevant portion of the *Veterans Affairs Adjudication Procedures Manual, M21-1*, so VA now must issue explicit new and material evidence determinations when it decides whether a prior COD decision can be reopened.⁶¹ And the Secretary assures the Court that VA is trying to locate veterans and issue separate COD determinations—presumably like the one Mr. Hamill received in February 2023.⁶² The policy change the Secretary describes takes the wind out of Mr. Hamill's sails since it shows that the Secretary is doing what Mr. Hamill wanted done—though it's not dispositive since the class doesn't survive our holding that Mr. Hamill's petition was moot well before he filed it.

III. CONCLUSION

Based on the above, it is

ORDERED that petitioner's March 6, 2023, request for class certification and class action is denied. It is also

ORDERED that the Secretary's March 6, 2023, motion to dismiss the petition is granted, and petitioner's December 19, 2022, petition is DISMISSED.

DATED: December 18, 2023

⁶¹ Secretary's Response to RCA at 13, Appendix 2.

⁶² Secretary's Response to RCA at 13, Appendix 2; *see also* Secretary's Response to Pet. at Attachment A.

JAQUITH, *Judge*, dissenting: Though I appreciate my colleagues' thorough and well-written opinion, I disagree with their dismissal of the veteran's petition and denial of his class action request, so I respectfully dissent. In my view, the majority's expansive view of the implicit denial construct and disregard for the AMA neutralize the veteran's right to notice, and the majority's narrow reading of *Harris*⁶³ neutralizes that case's prescribed remedy. Sanctioning silent denials of implied claims relegates the real adjudicatory work to the shadows, with a loss of transparency that sows confusion among the parties and undermines confidence in the system.

I. THE VETERAN'S CLAIMS AND VA'S DECISIONS

The majority holds that a May 2021 decision by a VA regional office (RO) implicitly denied the veteran's request to reopen his prior character of discharge determination, and that the RO "said enough in its May 2021 decision to notify Mr. Hamill how it had decided the issue."⁶⁴ The RO's May 2021 decision purportedly was responsive to two documents signed by the veteran's representative on March 12, 2021, and received by VA on May 10, 2021. One was an application for disability compensation for eight disabilities: irritable bowel syndrome, acid reflux/gastroesophageal reflux disease (GERD), equilibrium issues, stuttering, memory issues, sensitivity to light, headaches/migraines, and traumatic brain injury (TBI).⁶⁵ The application had a section for service information, but it was left blank. The other document was a supplemental claim listing six issues: PTSD, chronic fatigue syndrome, fibromyalgia, depression, lower back, and hearing loss.⁶⁶ Neither document said anything about the veteran's discharge.

The RO's May 2021 decision granted "[s]ervice connection for treatment purposes only under 38 USC chapter 17 for [PTSD]" and denied service connection for four other disabilities.⁶⁷ The disabilities adjudicated were combinations of the disabilities claimed: PTSD "(also claimed as memory issues)"; GERD "(also claimed as acid reflux)"; irritable bowel syndrome; "migraine headaches (also claimed as sensitivity to light)"; and TBI "(also claimed as equilibrium issues and stuttering)."⁶⁸ The combinations covered all eight disabilities on the veteran's compensation application but only PTSD on his supplemental claim. The May 2021 decision explained that service connection was granted for PTSD because the records show that the veteran had earned a Combat Action Ribbon and had been diagnosed with PTSD. The decision specified that "[c]ompensation is not payable for this condition. (38 CFR 17.109)."⁶⁹ The explanation for the denials of service connection for each of the other four disabilities was that the records showed no complaint of or treatment for the disability during service.

The May 2021 decision was accompanied by a letter that said the rating decision explained the reasons for the RO's decision, and that the letter and rating decision constituted VA's decision

⁶³ *Harris v. McDonough*, 33 Vet.App. 269 (2021) (per curiam order).

⁶⁴ See discussion *ante* at p. 5.

⁶⁵ RCA Ex. B at 1-5 (VA Form 21-526EZ, Application for Disability Compensation and Related Compensation Benefits).

⁶⁶ RCA Ex. B at 6-5 (VA Form 20-0995, Decision Review Request: Supplemental Claim).

⁶⁷ RCA Ex. D.

⁶⁸ *Id.* at 1.

⁶⁹ *Id.* at 6.

“based on [the veteran’s] claim received on May 10, 2021” and “all claims [VA] understood to be specifically made, implied, or inferred in that claim.”⁷⁰

The cited regulation, 38 C.F.R. § 17.109, provides certain veterans with presumptive eligibility for medical benefits for psychosis and active mental illness other than psychosis; the regulation does not concern the character of a veteran’s discharge.⁷¹ The regulatory provision that applies to the veteran’s status is not even in chapter 17 of the statute or the regulation; it is in 38 C.F.R. § 3.360. Section 3.360(a) provides as follows:

The health-care and related benefits authorized by chapter 17 of title 38 U.S.C. shall be provided to certain former service persons with administrative discharges under other than honorable conditions for any disability incurred or aggravated during active military, naval, or air service in line of duty.⁷²

The only mention of the veteran’s discharge in the May 2021 decision and notice letter is the listing in the rating decision of “Certificate of Release or Discharge from Active Duty” among seven items of evidence—with no indication of the nature of the discharge or its import or effect.

II. NOTICE

Notice is the linchpin of our nonadversarial, pro-claimant system for adjudicating veterans benefits.⁷³ “The entire thrust of the VA’s nonadversarial claims system is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process.”⁷⁴ Notice is a foundational requirement grounded in the Due Process Clause of the Fifth Amendment of the United States Constitution, which fully protects veterans’ property interest in benefits.⁷⁵ Appropriate notice is “[a]n essential principle of procedural due process.”⁷⁶

Beyond their constitutional rights, veterans “have a right to fair process in the development and adjudication of their claims and appeals before VA.”⁷⁷ Even “where no particular procedural process is required by statute or regulation, the principle of fair process may nonetheless require additional process if it is implicitly required when ‘viewed against [the] underlying concepts of procedural regularity and basic fair play’ of the VA benefits adjudicatory system.”⁷⁸ The principle of fair process applies throughout the process of a veteran’s case and requires VA to properly provide content-complying notice and an opportunity to respond.⁷⁹ Moreover, “[t]his Court’s

⁷⁰ Pet. at Ex. H; RCA at Ex. D. RCA at Ex. D includes both the RO’s notice letter and the RO’s rating decision. Though the pages of exhibit D are not numbered, the notice letter is at pages 1-3, and the rating decision is at pages 4-6.

⁷¹ See 38 C.F.R. § 17.109 (2023).

⁷² 38 C.F.R. § 3.360(a) (2023).

⁷³ See *Bryant v. Wilkie*, 33 Vet.App. 43, 46 (2020); *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (highlighting “the importance of systemic fairness” in the “uniquely pro-claimant” system for awarding veterans benefits).

⁷⁴ *Thurber v. Brown*, 5 Vet.App. 119, 122 (1993).

⁷⁵ *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009).

⁷⁶ *Noah v. McDonald*, 28 Vet.App. 120, 129 (2016). Even rudimentary due process demands timely and adequate notice. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

⁷⁷ *Bryant*, 33 Vet.App. at 46.

⁷⁸ *Smith v. Wilkie*, 32 Vet.App. 332, 337 (2020) (quoting *Thurber*, 5 Vet.App. at 123).

⁷⁹ *Smith*, 32 Vet.App. at 337-38; *Pelegri v. Principi*, 18 Vet.App. 112, 123 (2004).

caselaw requires us to ensure compliance with reasonable notice and fair process.”⁸⁰ In my view, the majority opinion’s application of the implicit denial construct in this case fails to fulfill the Court’s obligation.

The implicit denial construct is not a hole in the notice requirement that “VA’s nonadversarial claims system is predicated upon.”⁸¹ “[T]he implicit denial rule is, at bottom, a notice provision.”⁸² So implicit denial is acceptable only if the decision “provides sufficient notice to the claimant that the pending claim [not explicitly addressed] has been finally resolved.”⁸³ As this Court has said, “the key to an implicit denial inquiry is whether there was notice to the claimant that the Secretary has acted on the claim.”⁸⁴ The RO’s May 2021 decision provided no such notice.

III. THE AMA

To address the most obvious shortcoming first, it cannot seriously be argued that the RO’s May 2021 decision complies with the AMA’s expanded notice requirements—to the extent that the Secretary and my colleagues attribute a character of discharge determination to that decision. The AMA added a detailed, itemized list of requirements for each VA notice of a decision affecting the provision of benefits. To “‘help veterans better understand VA’s decisions on their claims’ and ‘help better inform the veteran’s decision regarding whether to appeal VA’s rating decision,’”⁸⁵ each notice of decision must include

- (1) Identification of the issues adjudicated.
- (2) A summary of the evidence considered by the Secretary.
- (3) A summary of the applicable laws and regulations.
- (4) Identification of findings favorable to the claimant.
- (5) In the case of a denial, identification of elements not satisfied leading to the denial.
- (6) An explanation of how to obtain or access evidence used in making the decision.
- (7) If applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation.⁸⁶

This notice requirement applies to decisions by VA’s ROs, such as the May 2021 decision at issue in this case.⁸⁷

⁸⁰ *Roberts v. McDonald*, 27 Vet.App. 108, 111 (2014).

⁸¹ *Thurber*, 5 Vet.App. at 123.

⁸² *Adams v. Shinseki*, 568 F.3d 956, 965 (Fed. Cir. 2009).

⁸³ *Jones v. Shinseki*, 619 F.3d 1368, 1372 (Fed. Cir. 2010).

⁸⁴ *Locklear v. Shinseki*, 24 Vet.App. 311, 314-15 (2011).

⁸⁵ *Greer v. McDonough*, 36 Vet.App. 220, 224 (2023) (quoting H.R. REP. NO. 115-135, at 3 (2017), as reprinted in 2017 U.S.C.C.A.N. 97, 99.).

⁸⁶ *Id.*; 38 U.S.C. § 5104(b).

⁸⁷ *See Greer*, 36 Vet.App. at 224 (“Congress explained that [the change to section 5104(b)] was intended to ‘help veterans better understand VA’s decisions on their claims’ and ‘to help better inform the veteran’s decision regarding whether to appeal VA’s rating decision.’” (quoting H.R. REP. NO. 115-135, at 3 (2017)), *Id.* at 227 (“In its discussion of the ‘detailed decision notification letters’ mandated by [the AMA], Congress clearly stated that ‘[t]he intent of this provision is to help better inform the veteran’s decision regarding whether to appeal VA’s rating decision.’” (quoting H.R. REP. NO. 115-135, at 3)); Pet. at Ex. H; RCA at Ex. D.

The statute does not prescribe the form for informing claimants of the section 5104(b) notice elements; “it only requires that those elements be clearly conveyed to claimants.”⁸⁸ By regulation, the Secretary has added, as a procedural due process right, that the notice required by section 5104(b) must be provided to claimants in writing.⁸⁹ These statutory and regulatory requirements apply to Mr. Hamill’s March 2021 claims and the RO’s May 2021 decision adjudicating them.⁹⁰ Since the RO’s decision does not address the character of the veteran’s discharge at all, the decision falls woefully short of meeting the AMA’s notice mandate. Neither the Secretary nor the majority opinion contends otherwise. The Secretary does not address the AMA’s notice requirements at all. The majority opinion relies only on the coexistence of the implicit denial construct with the pre-AMA version of section 5104.⁹¹ The silence and terseness are understandable.

Before the AMA, section 5104 required only a general notice with the RO’s reason for its decision; the AMA’s systemic overhaul added six specific notice elements that apply to all decisions.⁹² The majority opinion summarizes circumstances that sometimes have sufficed for notice under the old rules. But no one has advanced a credible explanation of how a decision that does not even mention a claim can satisfy the specific statutory elements required by the AMA for notice to be sufficient. The Secretary’s invocation of the implicit denial rule is incongruent with his prior assurances that (1) “[t]his new process will provide veterans with timely, fair, and high quality decisions”⁹³; (2) all decision notices “must now include seven specified data elements,” including a summary of the evidence considered, to ensure that claimants have “a clear understanding” of what was done⁹⁴; (3) “[e]nhanced decision notices will allow claimants and their representatives to make more informed choices about whether to seek further review and, if so, which of the new review lanes best fits the claimant’s needs”⁹⁵; and (4) requiring the use of standard claims forms will enable VA “to cut processing time in identifying and developing claims, which will result in faster delivery of benefits to all veterans.”⁹⁶

VA’s recent emphasis on requiring claims to be explicitly spelled out on forms so they can be expressly addressed expeditiously, with any lingering issues repackaged in supplemental claims subject to the same requirements, goes hand in hand with VA’s obligation to provide specific notice of the decision that resolves those issues. If the AMA’s requirements are not enough, this is a poster case showing why the expansive view of the implicit denial construct adopted by the majority is unworkable. Sanctioning implicit denials of implicit claims relegates the real adjudicatory work to the shadows, with a loss of transparency that sows confusion among the parties and undermines confidence in the system.

⁸⁸ *Cowan v. McDonough*, 35 Vet.App. 232, 242 (2022).

⁸⁹ 38 C.F.R. § 3.103(f) (2019).

⁹⁰ See *Mattox v. McDonough*, 34 Vet.App. 61, 69 (2021) (holding that the AMA applies to an initial decision on a claim for which an administrative appeal is being processed has been issued on or after February 19, 2019), *aff’d*, 56 F.4th 1369 (Fed. Cir. 2023).

⁹¹ See discussion *ante* at pp. 6-7.

⁹² *Greer*, 36 Vet.App. at 224; *Cowan*, 35 Vet.App. at 239.

⁹³ VA Claims and Appeals Modernization, 83 Fed. Reg. 39,818, 39,819 (proposed Aug. 10, 2018).

⁹⁴ VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 141 (Jan. 18, 2019) (codified at 38 C.F.R. pts. 3, 8, 14, 19, 20, 21).

⁹⁵ VA Claims and Appeals Modernization, 83 Fed. Reg. at 39,820.

⁹⁶ *Veterans Just. Grp., LLC v. Sec’y of Veterans Affs.*, 818 F.3d 1336, 1351 (Fed. Cir. 2016) (quoting Standard Claims and Appeals Forms, 79 Fed. Reg. 57,660, 57,661 (Sept. 25, 2014) (codified at 38 C.F.R. pts. 3, 19, 20)).

IV. THE INGRAM STANDARD

This Court’s admonition more than 16 years ago was prescient: “[A]ccepting a broadly interpreted doctrine of sub silentio denials has grave implications for due process and protecting the appellate rights of veterans.”⁹⁷ The problem is most acute when the implicit denial is of an implied claim, as the *Ingram* Court highlighted.

Treating the Secretary’s failure to sympathetically read and adjudicate a reasonably raised claim as a pending claim benefits veterans because it protects their appellate rights and works no hardship on the Secretary in that it requires only that each claim be specifically addressed. If a veteran is aware of a particular benefit and makes an unambiguous claim for it, the Secretary’s duty to sympathetically read [the veteran’s] submissions is irrelevant. That duty primarily helps those veterans who have not clearly articulated that they are seeking a particular benefit. It is illogical to expect such veterans to immediately recognize when the Secretary has failed to adjudicate a reasonably raised claim because it is ignorance of the intricacies of potential claims that makes the duty necessary. Hence, if the law equates a VA failure to adjudicate a reasonably raised claim to a sub silentio denial of the claim, then it is unlikely that the veteran would have sufficient notice of the disposition of his claim to assert error on direct appeal.⁹⁸

So the *Ingram* Court set a workable standard for the implicit denial of an implied, reasonably raised claim: “[W]here an RO decision discusses a claim in terms sufficient to put the claimant on notice that it was being considered and rejected, then it constitutes a denial of that claim even if the formal adjudicative language does not ‘specifically’ deny that claim.”⁹⁹ In this case, as in *Ingram*, there was no such denial.¹⁰⁰

The majority rests its reliance on implicit denial on the *Cogburn* factors.¹⁰¹ But the majority’s analysis departs significantly from the Court’s analysis in *Cogburn*. The veteran’s two March 2021 claims for disability compensation are related in timing and content, and the RO’s decision explicitly addresses 9 of the 14 disabilities claimed, but the nature of his discharge issue is different and was raised 4 and 7 years before. Most importantly, the RO’s May 2021 decision completely fails the “specificity of the adjudication” test in that the decision does not allude to any discharge claim at all. The majority cannot identify even a hint in the May 2021 decision that the RO considered the veteran to have sought to reopen the RO’s character of discharge decisions from 2014 and 2017, and denied that request. The majority’s conclusory assertion that the RO’s

⁹⁷ *Ingram v. Nicholson*, 21 Vet.App. 232, 254 (2007) (per curiam).

⁹⁸ *Id.* at 253.

⁹⁹ *Id.* at 255.

¹⁰⁰ The Federal Circuit cases the majority trumpets likewise require more than was afforded the veteran here, where there was nothing to indicate that the May 2021 decision considered evidence regarding the veteran’s discharge or addressed the merits of that evidence. *See, e.g., Hampton v. McDonough*, 68 F.4th 1376, 1381 (Fed. Cir. 2023), *petition for cert. filed*, No. 23-543 (U.S. Nov. 21, 2023).

¹⁰¹ *See Cogburn v. Shinseki*, 24 Vet.App. 205, 212-13 (2010), *aff’d after remand sub nom. Cogburn v. Gibson*, No. 12-3323, 2014 WL 2600052 (Vet. App. June 11, 2014) (mem. dec.), *aff’d sub nom. Cogburn v. McDonald*, 809 F.3d 1232 (Fed. Cir. 2016). To the extent that *Cogburn* rests on its indication that the non-adversarial, pro-claimant nature of the veterans benefits system leaves veterans with watered-down due process rights, *see id.* at 210, *Cogburn* has not stood the test of time. *See supra* at 11-12. Veterans are entitled to both constitutional due process and the fair process deeply rooted in the nature of the veterans benefits system. *Id.*

May 2021 decision specifically turns on an adverse character of discharge determination is mere speculation that the RO would, could, or should have decided on that basis. But such woulda-coulda-shoulda analysis is not what is required for veterans. They are entitled to notice in or with the RO's decision. Even if the implicit denial construct somehow survives the AMA's specific notice requirements, the reasonable notice of the implicit denial cannot be found in the RO's May 2021 decision. There is nothing in the May 2021 decision and notice letter that makes it clear to a reasonable person that the decision is intended to dispose of any renewed challenge by the veteran to his character of discharge.¹⁰² That decision specifies the RO's reasons—Mr. Hamill is a combat veteran diagnosed with PTSD, but his records showed no complaint of or treatment for GERD, irritable bowel syndrome, migraine headaches, or TBI during service.¹⁰³ None of the reasons given relate to the veteran's character of discharge.

V. THERE WAS NO IMPLICIT DENIAL REGARDING DISCHARGE

The history of this case demonstrates that there was no implicit denial in the May 2021 decision regarding the veteran's character of discharge. When he applied for disability compensation in April 2013,¹⁰⁴ VA responded (in September 2013) that the military said that his service was not honorable, so VA had to decide whether he was eligible for VA benefits.¹⁰⁵ In May 2014, VA explicitly decided that it considered the veteran's other than honorable discharge to be a bar to all VA benefits.¹⁰⁶

The veteran applied for disability compensation again in May 2017.¹⁰⁷ VA specifically construed the veteran's application as a request to reopen the issue of the character of his discharge, and VA explicitly denied that request in July 2017.¹⁰⁸ VA's history of highlighting the veteran's character of discharge and explicitly deciding that issue as a condition precedent to his eligibility for disability compensation is incompatible with the Secretary's invocation of implicit denial now (and the Court's embrace of it). Since the RO had twice explicitly separated and addressed the character of the veteran's discharge as a prerequisite to adjudicating his disability compensation claims, a reasonable person would expect to see a specific decision about his character of discharge if that was being considered again.¹⁰⁹

In this case, it is obvious from their conduct that neither the veteran nor the Secretary viewed the issue of the veteran's character of discharge determination to have been resolved by VA's May 2021 decision. In July 2022, the veteran asked VA to make a written decision regarding his character of discharge.¹¹⁰ The RO responded in 6 days, mischaracterizing the veteran's letter

¹⁰² See, e.g., *Adams*, 568 F.3d at 964.

¹⁰³ RCA at Ex. D at 6-7.

¹⁰⁴ Pet. at Ex. B.

¹⁰⁵ Pet. at Ex. C.

¹⁰⁶ Pet. at Ex. D. Oddly, the May 2014 decision says both that the veteran "is entitled to health care under Chapter 17 of Title 38 U.S.C. for any disabilities determined to be service connected for [the] period of service from February 26, 2009 through March 15, 2013," *Id.* at 1, and that he "is not entitled to health care under Chapter 17 of Title 38 U.S.C. for any disabilities determined to be service connected for period of service from February 26, 2009 through March 15, 2013," *Id.* at 3.

¹⁰⁷ Pet. at Ex. E.

¹⁰⁸ Pet. at Ex. F.

¹⁰⁹ See *Locklear*, 24 Vet.App. at 316-18.

¹¹⁰ Pet. at Ex. I.

as a “request to upgrade his DD 214.”¹¹¹ The RO did not say that it had read the veteran’s March 2021 disability claims as implicit requests to reopen the character of his discharge, nor did the RO say that it had implicitly decided such a request. The RO did not even indicate whether VA would act on the veteran’s request for a decision. Instead, the RO stated that he “can also ask the Service Department to change the character of discharge or [the veteran] can apply for correction of military records.”¹¹²

In December 2022, the veteran filed the petition at hand, asking the Court to order the Secretary “to make a character of service determination on the decision of the Supplemental Claim that rendered in May 2021.”¹¹³ The veteran asserted that VA had “refused to acknowledge, let alone adjudicate, [his character of discharge] claim on the merits despite having a statutory obligation to do so.”¹¹⁴ The veteran relied on *Harris*, which held that the veteran was “entitled to a writ compelling the Secretary to issue an appealable decision as to whether the evidence submitted since [his] COD determination is new and material with respect to whether his COD is a bar to VA benefits.”¹¹⁵

As in July 2022, the Secretary did not respond by saying that the RO’s May 2021 decision had addressed the veteran’s character of discharge, implicitly or otherwise. Having been confronted with the *Harris* holding in the veteran’s December 2022 petition, the RO did as *Harris* dictated. In February 2023, VA informed the veteran that it had “made a decision regarding [his] discharge from military service,” deciding that “[t]here ha[d] been no new and relevant evidence submitted to reopen [his] claim for Character of Discharge determination,” and that his military service was “dishonorable for VA purposes.”¹¹⁶ In the Secretary’s July 2023 response to the veteran’s class action request, the Secretary argued that VA’s May 2021 decision “meets the criteria for an implicit denial as to [the veteran’s COD determination].”¹¹⁷ That is a post hoc rationalization the Court should not accept.¹¹⁸

VI. THE VERERAN’S PETITION IS NOT MOOT

The only reasonable conclusion is that VA overlooked *Harris* in May 2021 (and in July 2022) and realized in December 2022, when the petition highlighted the *Harris* requirement, that the RO needed to issue a decision addressing whether the veteran had submitted new and relevant evidence warranting readjudication of his character of discharge determination.¹¹⁹ On January 12, 2023, the veteran moved for an extension of time to file his request for class certification and class action. On February 21, 2023, the RO decided that the character of the veteran’s discharge was

¹¹¹ Pet. at Ex. J.

¹¹² *Id.*

¹¹³ Pet. at 10.

¹¹⁴ *Id.*

¹¹⁵ *Harris*, 33 Vet.App. at 273.

¹¹⁶ Secretary’s Response to Pet. at Attachment A.

¹¹⁷ Secretary’s Response to RCA at 5.

¹¹⁸ *See In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) (“[C]ourts may not accept appellate counsel’s post hoc rationalization for agency action.” (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))); *Simmons v. Wilkie*, 30 Vet.App. 267, 277 (2018).

¹¹⁹ *See Harris*, 33 Vet.App. at 276-77; 38 U.S.C. § 5108 (reflecting the AMA standard for readjudicating a claim). As previously noted, the RO had issued a benefits decision in May 2021 but had ignored any implied challenge to the character of discharge determination.

dishonorable. The Secretary filed the RO's February 2023 letter with his petition response on March 6, 2023.¹²⁰ The veteran filed his RCA the same day.

The veteran alleges that VA engages in a pattern of inaction on character of discharge claims.¹²¹ His proposed class is comprised of claimants

who are former service members with less than-honorable discharges who: i. applied for VA benefits and VA denied some or all benefits based on a COD determination, and that decision became final; ii. later filed for disability compensation, health care, pension benefits, or a character of service determination; iii. received a determination as to whether the veteran's condition is eligible for Chapter 17 healthcare; and iv. did not receive a decision as to whether there is new and material or new and relevant evidence to readjudicate the COD determination.¹²²

The Secretary contends that the petition is moot,

and the veteran has not demonstrated that a class action is superior to a precedential decision, largely because "the purported class members have all received appealable decisions that implicitly denied their COD determinations."¹²³ The Secretary otherwise concedes that the purported class would meet the requirements set forth in U.S. VET. APP. R. 23(a).¹²⁴

As the majority acknowledges, the picking off exception to mootness applies when claims are rendered transitory by the tactic of mooting petitions before judicial resolution.¹²⁵ "[C]lass actions . . . help prevent the VA from mooting claims scheduled for precedential review."¹²⁶ The picking off problem is a recurrent one.¹²⁷ In my view, the picking off exception applies here, so the veteran's RCA is not moot. The veteran's January 2023 motion for an extension of time made clear that he was seeking class certification and class action, and he was entitled to a fair opportunity to file his RCA with the Court.¹²⁸ His filing of the RCA on the same day that the RO issued its February 2023 letter was prompt enough to prevail over the pick off.

Though the veteran's RCA is not moot, and the implicit denial construct runs into both *Ingram* and *Harris*, those issues have received nearly all the attention in this case, and there is more to deciding whether a class should be certified. Before acting on the RCA, I would require

¹²⁰ Secretary's Response to Pet. at Attachment A.

¹²¹ RCA at 2-3.

¹²² RCA at 9.

¹²³ Secretary's Response to RCA at 12.

¹²⁴ *Id.* at 14.

¹²⁵ See *Godsey v. Wilkie*, 31 Vet.App. 207, 219 (2019) (per curiam order).

¹²⁶ *Monk v. Shulkin*, 855 F.3d 1312, 1321 (Fed. Cir. 2017), *class certification denied sub nom. Monk v. Wilkie*, 30 Vet.App. 167 (2018) (en banc order), *aff'd*, 978 F.3d 1273 (Fed. Cir. 2020).

¹²⁷ See *Godsey*, 31 Vet.App. at 219; *Monk*, 855 F.3d at 1321; *Kernz v. McDonough*, ___ Vet.App. ___, ___, No. 20-2365, 2023 WL 6459373, at *21 (Oct. 4, 2023) (en banc order) (Jaquith, J., dissenting) (decrying the Court's practice of empowering VA to manufacture mootness whenever VA fears an adverse precedential decision), *appeal docketed*, No. 24-1171 (Fed. Cir. Nov. 21, 2023).

¹²⁸ See *Richardson v. Bledsoe*, 829 F.3d 273, 286-88 (3d Cir. 2016).

further briefing and oral argument on the issues that remain, including granting the Secretary's request for an opportunity to provide a supplemental response on the merits of whether a writ of mandamus is warranted for the proposed class.¹²⁹

VII. CONCLUSION

In a system that is supposed to be nonadversarial and pro-claimant, notice is a primary foundational requirement that should not be neutralized so unstated claims can be denied in silence. Constitutional due process, systemic fair process, and the AMA require no less. If the implicit denial construct survives the AMA, it must only apply when the denial is evident in the decisional document. It is obvious from the course of this case that the parties saw no implicit denial in the RO's May 2021 decision—for good reason, as there was none to see. I respectfully dissent.

¹²⁹ Secretary's Response to RCA at 1 n.1.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing filing complies with the relevant typevolume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because the filing has been prepared using a proportionally spaced typeface and includes 10,171 words.

October 24, 2024

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