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)

REPLY BRIEF FOR CLAIMANT-APPELLANT

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November 22, 2024

FORM 9. Certificate of Interest

Form 9 (p. 1)
March 2023

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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Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
David A. Hamill		

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SUMMARY OF THE ARGUMENT

This Court should reverse the Court of Appeals for Veterans Claims' decision and remand for further proceedings for the following reasons. First, Mr. Hamill had standing to file a petition for a writ of mandamus when VA failed to provide him notice of a character of discharge determination decision. Second, the statutory changes made by the Appeals Modernization Act (AMA) supersede the common law implicit denial doctrine because they require that VA provide explicit and detailed notice of its decision so that a veteran has a fair opportunity to challenge VA's decision using the appeal mechanisms provided by the AMA. Third, 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. Finally, Mr. Hamill's petition is not moot because the picking off and the transitory exception to mootness apply. VA picked off Mr. Hamill's petition with its February 2023 denial to reopen his COD determination, not the 2021 service connection decision.

ARGUMENT

I. MR. HAMILL HAD STANDING TO PETITION THE VETERANS COURT FOR EXTRAORDINARY RELIEF.

Mr. Hamill had standing to petition the Veterans Court for extraordinary relief when VA failed to provide him notice of a decision as to his character of discharge determination. The Secretary's argument assumes the answer he wishes this Court to reach: that VA's May 2021 decision implicitly denied either his character of discharge determination or his request to reopen (it is still unclear which). *See* Resp. Br. at 14-15. But that is the fundamental error of the Veterans Court's decision, and it is a question of law that this Court has jurisdiction to review.

The Secretary incorrectly attempts to cast the Veterans Court's legal conclusion about how the 2021 decision affected Mr. Hamill's standing as a factual finding outside of this Court's jurisdiction. Resp. Br. at 17-20. "Standing," however, "is a question of law that this court reviews de novo." *Shealey v. Wilkie*, 946 F.3d 1294, 1297 (Fed. Cir. 2020) (citing *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 1376 (Fed. Cir. 2012)). As the Secretary notes, the related question of mootness addresses whether a justiciable controversy exists throughout a case. Resp. Br. at 16. That, too, is a question of law reviewed de novo. *See Ford Motor Co. v. United States*, 688 F.3d 1319, 1329 (Fed. Cir. 2012) ("[T]his court reviews dismissals for non-justiciability de novo."); *Monk v. Dat Tran*, 843 F. App'x 275, 279 (Fed. Cir. 2021) (citing *Ford Motor Co.*, 688 F.3d 1319) ("Mootness is a question of law reviewed de novo."). Indeed, the Secretary

concedes that the fundamental issue in this case—the scope of the implicit denial doctrine, particularly after the enactment of the AMA—lies within this Court's jurisdiction. *See* Resp. Br. at 12.

As Mr. Hamill explained in his initial brief and further explains below, the Secretary failed to provide him notice of a decision as to his character of discharge determination, and the May 2021 rating decision issued by the Secretary was not an implicit denial on that issue for several independent reasons. Mr. Hamill did not receive a denial from VA until VA explicitly declined to reopen his character of discharge determination on February 21, 2023. Appx76-78. It follows that, when Mr. Hamill filed the petition for mandamus in this case in December 2022, a case or controversy did exist, his request was not moot, and he had standing to petition the Court for a writ of mandamus to require the VA to provide him with a decision.

Moreover, contrary to the Secretary's assertion, a writ of mandamus was the appropriate relief for Mr. Hamill to seek. *See* Resp. Br. at 46-48. If the May 2021 decision was not an implicit denial of Mr. Hamill's request to reopen his character of discharge determination—and it was not—that decision cannot provide the basis for an adequate alternative means to pursue the desired relief. Mr. Hamill's petition prompted the VA to attempt to moot the case *after filing* by providing Mr. Hamill with a decision for the first time on February 21, 2023. Appx73-78. As explained in Section IV below, that attempt to moot the case fails. However, the fact that

Mr. Hamill could (and did) appeal the February 2023 decision is completely irrelevant to whether Mr. Hamill had adequate alternative means to pursue his desired relief in December 2022 before the February 2023 decision existed.

II. THE IMPLICIT DENIAL DOCTRINE IS INCOMPATIBLE WITH THE AMA'S CHANGES TO THE VA APPEALS PROCESS.

With the AMA, Congress fundamentally changed the VA adjudicatory and appeals process to such a degree that it effectively rejects or reforms the common law implicit denial doctrine. The implicit denial doctrine is rooted in whether a veteran received notice of a decision and a fair opportunity to be heard. *Adams v. Shinseki*, 568 F.3d 956, 964-65 (Fed. Cir. 2009). Congress explicitly changed the timing and content of what notice is required when it passed the AMA, now requiring that veterans receive, at the outset, notice of the issues adjudicated, a summary of the evidence, a summary of the law, identification of favorable findings, and elements not satisfied. 38 U.S.C. § 5104(b). Congress mandates that VA give explicit notice of its findings so veterans can be fully informed, as the AMA intended. In § 5104(b), notice requirements expressly provide that the notice "shall also include" issues adjudicated. 38 U.S.C. § 5104(b). These requirements are not suggestions.

a. Congressional Action Supersedes Common Law

Congress's passage of the AMA trumps the implicit denial doctrine, which is a common law creation derived from the Federal Circuit's decision in *Deshotel v. Nicholson*. 457 F.3d 1258 (Fed. Cir. 2006). The Supreme Court has "always recognized that federal common law is subject to the paramount authority of Congress." *City of Milwaukee et al. v. Illinois et al.*, 451 U.S. 304, 313 (1981). The test for whether congressional legislation supersedes the declaration of common law is simply whether the statute speaks directly to the question. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 440 (2011) (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). Here, the implicit denial doctrine derives from the Federal Circuit's decision in *Deshotel*, not from statute. The AMA speaks directly to the question of whether VA can implicitly deny an issue without explicitly indicating that it decided a particular issue and the basis for its denial. This congressional legislation supersedes the VA's authority to deny a claim without giving clear notice to the veteran.

b. Application of the Implicit Denial Doctrine to an AMA Claim Would Violate Due Process and Fair Process

The AMA's required notice provisions and timing ensure that VA follows due process and fair process, so that VA is not providing less notice than in the legacy system. Specifically, the AMA's removal of the Statement of the Case

(SOC) and the requirement that a veteran specify the issues he intends to appeal further demonstrate that implicit denials no longer fit within the AMA. To hold otherwise would violate due process and fair process.

The Secretary contends that "nothing in the AMA changes [the] constitutional analysis" of the implicit denial rule articulated by this Court in the pre-AMA legacy system. Resp. Br at 36 (citing *Adams v. Shinseki,* 568 F.3d 956, 964-65 (Fed. Cir. 2009)). That is wrong.

In addressing the changes made by the AMA, the Secretary focuses exclusively on the explicit notice statute, 38 U.S.C. § 5104. The Secretary concedes that the AMA amended this statute to provide "enhanced notice" to veterans, but emphasizes nonetheless that the explicit notice statute required VA to provide written notice of the basic reasons for its decision both before and after enactment of the AMA.

However, the Secretary ignores the other changes made by the AMA on which Mr. Hamill relies and the context in which implicit denial doctrine plays a role. The doctrine is relevant only when the regional office has violated the explicit notice statute as it existed both before and after the AMA. Thus, to determine whether the AMA changes the due process analysis, the Court must examine the changes the AMA made to the VA adjudication process *after* the regional office issues a decision that implicitly denies the claim.

As Mr. Hamill's opening brief explains, Applnt. Br. at 21-22, the AMA deleted the critical parts of the preexisting VA adjudication structure that provided "notice and a fair opportunity to be heard" after the regional office issues its decision. In both the legacy and AMA systems, the claimant can initiate an appeal to the Board of Veterans' Appeals of the initial regional office decision by filing a Notice of Disagreement (NOD). 38 C.F.R. § 20.201. But although the Secretary's brief does not discuss it, the AMA drastically changed what occurs after the claimant files an NOD.

In the legacy system, after an initial decision by VA, a veteran would have the option to file an NOD. *Id.* Before 2014, the NOD only required that the veteran file a writing that expressed dissatisfaction or disagreement with the adjudication and could be reasonably construed as a desire for appellate review. *Id.*[1] There was no requirement in the legacy system to specifically identify which part of the decision the veteran disagreed with, but only required a desire for appellate review of a decision. *Gallegos v. Principi*, 283 F.3d 1309 (Fed. Cir. 2002). This allowed a veteran to appeal the decision broadly to include any potential implicit denials.

[1] In 2014, the VA changed its regulations and required the NOD to be on a form and required that "the specific determinations with which the claimant disagrees must be identified." 38 C.F.R. § 20.201 (2015).

In the legacy system, after filing the NOD, VA was required by statute to respond with a Statement of the Case that was complete enough to allow the appellant to present written or oral arguments to the Board. *See* 38 U.S.C. § 7105(d)(1) (2017); 38 C.F.R. § 19.29 (1992). The SOC provided a summary of the evidence, summary of the laws and regulations, and a determination on each issue. *Id.* The SOC ensured that a veteran would have sufficient information to decide whether to file a VA Form 9 to the Board and what written and oral testimony may be required on appeal. *Id*. Thus, the SOC provided the type of notice a veteran would need to receive to have a constitutionally fair opportunity to be heard at the Board in a case in which the regional office had provided an implicit, but not express denial of benefits.

With the AMA, Congress removed the SOC from the appeals process. Instead, VA must provide more expansive and explicit notice to the veteran earlier in the process—in its initial decision. 38 U.S.C. § 5104(b). This allows the veteran to make a decision based on that more expansive notice on whether to file a supplemental claim, seek higher level review, or appeal to the Board and if so, whether to choose a docket lane that allows submission of additional evidence. 38 U.S.C. § 5104C. Making that decision requires not just understanding *that* the VA denied a claim, but *why* the VA denied the claim. Without receiving the explicit notice required, veterans are not able to make an informed decision.

Presuming that the veteran chooses to appeal to the Board, the veteran must explain *why* the Board should reverse the regional office's decision—which the veteran cannot adequately do without the required AMA notice. VA's failure to explain its decisions could cause veterans to lose claims they might otherwise have been able to win, if only they understood VA's basis for denying their claims at the regional office level. Allowing implicit denials under the AMA is incompatible with due process and fair process.

Mr. Hamill's case provides a paradigm example of this problem. The May 2021 decision did not address whether the regional office (1) concluded that he had presented new and relevant evidence sufficient to reopen his COD determination, but his COD claim was denied on the merits based on the new and the old evidence, or (2) concluded that new and relevant evidence sufficient to reopen the COD matter had not been submitted. Thus, if this Court were to agree that the implicit denial rule applied to that regional office denial, Mr. Hamill would have to decide whether to appeal and present his case to the Board, without any understanding of the basis of VA's decision or why his claim failed.

Congress did not intend veterans to receive less notice in the AMA appeals process than in the legacy system. Rather, it intended for veterans to receive expanded notice at an earlier point in time. Veterans must be able to understand the VA's decision so they can adequately prepare arguments on appeal. The continued

application of the implicit denial doctrine to AMA claims like Mr. Hamill's is inconsistent with the right to notice and a fair opportunity to be heard. This Court should hold that the AMA overturned the implicit denial doctrine.

c. The Government is Not Entitled to Implicitly Deny Claims Simply Because Claims May Be Implicitly Raised

The Secretary argues in his brief that if the Court agreed with Mr. Hamill, the Veterans Court would be inundated with petitions for extraordinary relief. Resp. Br. at 28-33. To the contrary, if this Court requires VA follow the statute, VA will make explicit decisions with clear and statutorily mandated notices to veterans, thereby eliminating the need for extraordinary relief in the first place. The Secretary complains about the entirely avoidable consequences of his own actions in failing to follow the statutory notice requirements.

The Secretary argues that "just as claims can be implicitly raised, they can be implicitly denied." Resp. Br. at 18. This Court should not permit a shadow system of claim adjudication—one that denies veterans notice and a fair opportunity to be heard on denied claims—simply because a "tit for tat" system would be convenient for the government. The U.S. government is hardly entitled to the same deferential standard reserved for veterans, who are often unrepresented by counsel and unfamiliar with the legal system. The government is in a position of power to make decisions on benefits that have lifelong implications for disabled

veterans. Thus, adjudication of implicitly raised issues makes sense in a pro-veteran system. On the other hand, there is nothing "pro-veteran" about failing to follow statutory notice requirements.

The Secretary tries to shift the burden of notice to the veteran, arguing that a veteran can simply seek appellate review as an alternative route for relief if they do not receive the notice required under statute. *See* Resp. Br. at 30 (citing *Cowan v. McDonough*, 35 Vet. App. 232 (2022)). Seeking Board review of a failure to provide the notice required by Section 5104 is not an adequate alternative because the Board would be powerless to provide the required notice: it could only send the claim back to square one by remanding back to the regional office for that office to provide the required notice. Moreover, *Cowan* was not an implicit denial case. There, the veteran had an explicit decision on his claim and understood that his claim had been adjudicated, and challenged whether VA had provided all the notice required under the AMA by Section 5104(b). *Id.* at 234.

Here, by contrast, a veteran cannot be expected to appeal a decision about which he never received notice. When a veteran believes that they raised or reasonably raised a claim and the VA does not decide it, they can file a petition seeking writ of mandamus ordering a decision.

III. EVEN PRESUMING THE IMPLICIT DENIAL DOCTRINE APPLIES TO AMA CLAIMS, THE DOCTRINE DOES NOT EXTEND TO CHARACTER OF DISCHARGE DETERMINATIONS.

If the Court determines the implicit denial doctrine continues to be valid alongside the enhanced notice requirements of AMA, the doctrine nevertheless should not be expanded to permit implicit denials of COD determinations or requests to reopen through a service connection decision. Because the implicit denial doctrine is fundamentally about providing adequate notice to the veteran, the doctrine has always been limited to claims that involve closely related diagnoses or application of unemployability.[2] In other words, implicit denials can only exist where the "decision is clear but not expressed" because that "reflects an appropriate balance between the interest in finality and the need to provide notice to veterans when their claims have been decided." *Adams*, 568 F.3d at 963.

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[2] *See 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), *Grant v. Shinsek*i, 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"), *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) (denial for a disability rating increase implicitly denies a TDIU claim); *Bell v. McDonough*, No. 21-2348, 2022 U.S. App. Vet. Claims LEXIS 880 (Vet. App. June 7, 2022) (denial for a disability rating increase implicitly denies a TDIU claim).

Both the Veterans Court and this Court have explicitly rejected the application of the implicit denial doctrine to cases where, as here, the unaddressed claim is governed by a separate standard or regulation. *See Batson v. Shulkin*, 686 F. App'x 878 (Fed. Cir. 2017) (decision on pension claim is not an implicit denial of aid and attendance); *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). A COD determination requires the VA to conduct a detailed review of the veteran's service records, reason for discharge, and any mitigating circumstances and apply those facts to the standards set forth in 38 C.F.R. § 3.12. Service connection of a disability, whether under Chapter 17 or not, is determined using completely separate regulations and a wholly unrelated analysis of the nature of the veteran's claimed disability. *See* C.F.R. §§ 3.303, 3.360(c).

By equating the analysis required for a character of service determination and a service connected disability, the Veterans Court improperly expanded the implicit denial doctrine and stretched it beyond the doctrine's existing scope and purpose. Because nothing in the May 2021 decision provided a discussion of Mr. Hamill's request to reopen his character of discharge determination "in terms sufficient to put the claimant on notice that it was being considered and rejected." *Adams*, 568 F.3d at 963 (quoting *Ingram*, 21 Vet. App. at 255). The 2021 decision

cannot constitute an implicit denial, even under the pre-AMA version of the doctrine.

VA's issuance of its February 2023 decision demonstrates that even the government did not understand its May 2021 decision to be in implicit denial of his character of discharge. If VA did not understand that the 2021 decision implicitly denied his character of discharge determination, the court could not expect veterans to understand it.

IV. MR. HAMILL'S PETITION WAS NOT MOOTED BY THE FEBRUARY 2023 DECISION.

The parties agree that VA did provide Mr. Hamill with an appealable decision on his request to reopen his COD determination in February 2023. Thus, the Court must determine whether that decision mooted Mr. Hamill's and the putative class's claims. It did not.

a. The Relation Back Doctrine Means that Mr. Hamill Can Pursue Class Claims Regardless of The Status of His Individual Claim.

When a plaintiff or petitioner files on behalf of a class, the "relation back" doctrine means that the named plaintiff has standing to pursue class certification despite the intervening mootness of his individual claim, and the denial of class certification may be appealed even after an individual's case becomes moot. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980). This is

true even when a motion for class certification is filed after the individual claim was mooted. *See* Applnt. Br. at 39-41 (citing *Chen v. Allstate Ins. Co.,* 819 F.3d 1136 (9th Cir. 2016); *Pitts v. Terrible Herbst, Inc.,* 653 F.3d 1081 (9th Cir. 2011); *Weiss v. Regal Collections,* 385 F.3d 337 (3d Cir. 2004)).

The Secretary tries to distinguish this precedent by noting that Mr. Hamill filed an individual mandamus petition and not, as in *Chen, Pitts*, and *Weiss*, a class complaint. Resp. Br. at 45-46. This is a distinction without a difference. Veterans are not permitted to file "class complaints" in the Court of Appeals for Veterans Claims. U.S. Vet. App. R. 22. Instead, veterans seeking to represent a class in the Court of Appeals for Veterans Claims must follow Rule 22:

> **Relief from the Court on a class action basis** may only be sought by represented parties in an action commenced by the filing of (1) a Notice of Appeal or (2) a petition under the All Writs Act. A party seeking relief on a class wide basis must file a **Request for Class Certification and Class Action (RCA)** with the Clerk with proof of service on the respondent(s) and the Secretary (if not a respondent). . . RCAs filed in the context of a petition must be filed within 30 days after the filing of the petition. . . .

Id.

Pursuant to this rule, Mr. Hamill filed a Request for an Extension of Time to File a Request for Class Action within 30 days of filing his Petition—clearly expressing his intent to represent a class—and the Veterans Court granted it. *See* Appx23. Mr. Hamill was entitled to a chance to show that certification was

warranted. *Richardson v. Dir. Fed. Bureau of Prisons*, 829 F.3d 273, 289 (3rd Cir. 2016). Requiring Mr. Hamill to file his RCA before the court-imposed deadline would not constitute the requisite "fair opportunity" to pursue class claims. As the Third Circuit Court of Appeals said in *Richardson*,

> Without this "fair opportunity," there would be, as we explained in *Weiss*, 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. Such a race would often thwart proper factual development of class action claims and thus prevent courts from fully and fairly assessing the merits of class certification. *Id.*

b. Mootness Exceptions Apply in This Case.

The Secretary argues that this Court should decline to apply the "picking off" exception because the Secretary amended the applicable character of discharge standards for all veterans, and therefore did not moot Mr. Hamill's claim as a litigation strategy. Resp. Br. at 45. In fact, the Secretary's amendments to the M21-1 manual, which post-date both Mr. Hamill's petition and the February 2023 decision, demonstrates that VA attempted to moot the petition by providing Mr. Hamill with an appealable decision on his COD request. That is, the VA issued the February 2023 decision in Mr. Hamill's case *in response to the petition*, not as part of any pre-existing regular processing of his case.[3] This is classic "picking off,"

[3] The Secretary's citation to substantive changes to VA's COD regulation is inapposite to this case. *See* Resp. Br. at 44 (citing Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge (Regulatory Update), 89 Fed.

demonstrating that the Secretary was attempting to prevent judicial review of the class claims in this case.

Moreover, even assuming, as the Secretary contends, that VA did not intentionally "pick off" Mr. Hamill's claim, the facts of this case demonstrate perfectly the fleeting nature of such claims and why the case is not moot. This Court recently recognized that the inherently transitory exception to mootness can apply when VA moots out petitioners' claims before a class certification motion can be ruled upon. *Freund v. McDonough*, 114 F.4th 1371, 1379 (Fed. Cir. 2024). In *Freund*, VA had improperly closed petitioners' appeals in its electronic database. *Id.* at 1375. After petitioners filed a mandamus petition and a request for class certification in the CAVC, VA reactivated both petitioners' appeals and resumed consideration of their claims before petitioners' class certification motion had been ruled upon. *Id.* This Court found that the "inherently transitory" exception to mootness applied, so that the case was not moot as to the class, even after the petitioners' individual claims became moot. *Id.* at 1379.

Here, as in *Freund*, CAVC did "not have even enough time to rule on a motion for class certification before the proposed representative's individual

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Reg. 32,361 (Dep't of VA, April 26, 2024)). Mr. Hamill's petition seeks decisions on *already pending* requests to reopen COD determinations, not a chance to seek a new determination under new standards, which may result in a different effective date than VA adjudicating the already requested determination.

interest expire[d].” *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991). The nature of this case—a petition seeking a writ of mandamus to force VA to issue a decision—underscores the transitory nature of the claim and the applicability of an exception to mootness. When, as here, the alleged harms are ones that end “as soon as a decision . . . is made,” those harms are transitory, and petitioners obtaining some relief before class certification does not moot their claims. *Nielsen v. Preap*, 586 U.S. 392, 404 (2019). Therefore, the Court should hold that Mr. Hamill and the putative class’s claims are not moot because the inherently transitory exception applies.

Freund also directly contradicts the Secretary’s contention that the inherently transitory exception should not apply because VA has changed its procedures since Mr. Hamill’s case was filed. Resp. Br. at 44. As this Court stated in *Freund*, “[a] case does not become moot because the defendant contends that it has done everything possible to rectify unlawful conduct.” 114 F.4th at 1379 n.7. To the extent the Secretary is arguing that he has rendered the class claims moot through voluntary cessation—because the VA now has a policy to provide an “explicit new and relevant evidence determination upon the receipt of a subsequent claim by a claimant with a prior unfavorable character of discharge determination,” Resp. Br. at 44—that argument fails. A change to the M21-1 Manual, without any other proffer of information from the Secretary, does not meet the “heavy burden

of persuading" that all putative class members have received the determinations to which they are entitled and that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)).

Indeed, the Secretary's invocation of *Harris v. McDonough*, 33 Vet. App. 269, 274 (2021), undermines rather than supports the government's assertion of mootness. *See* Resp. Br. at 43. That February 2021 precedential decision from the Veterans Court requiring VA to provide veterans with appealable COD determinations was not enough to ensure that VA provide one to Mr. Hamill. It only provided an explicit new and relevant evidence determination more than two years later when VA was facing Mr. Hamill's petition for writ of mandamus and his imminent request for class certification. Again, this is classic picking off behavior, and the Court should permit Mr. Hamill's petition to proceed.

CONCLUSION

Mr. Hamill had standing to seek a writ of mandamus because he did not receive an implicit denial of his request to reopen his COD determination prior to filing his petition in the Veterans Court. The Court should hold that the Veterans Court erred because the implicit denial doctrine does not extend to this case, namely an AMA request to reopen a COD determination. Moreover, the petition

and class claims did not become moot when he finally received a decision in February 2023, because exceptions to mootness apply in this case. Mr. Hamill respectfully requests the Court reverse the Veterans Court's decision and remand for the lower court to adjudicate his request for class action and the merits of the request for a writ of mandamus for the class.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing filing complies with the relevant type volume 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 4,765 words.

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