No. 22-____

IN THE

Supreme Court of the United States

VICTOR B. SKAAR,

Petitioner,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress established the United States Court of Veterans Appeals (Veterans Court) and granted it "exclusive jurisdiction to review adverse decisions of the Board of Veterans' Appeals" (Board), a component of the Department of Veterans Affairs (VA). 38 U.S.C. § 7252. After VA acknowledged "that the Veterans Court has authority to certify a class for class action or similar aggregate resolution procedure," *Monk v. Shulkin*, 855 F.3d 1312, 1318 (2017), the Veterans Court promulgated rules for class practice.

Petitioner Victor B. Skaar is a veteran of the U.S. Air Force who was exposed to radiation at Palomares, Spain, where he and about 1,400 other airmen worked as a unit to clean up after a military nuclear accident. In 2019, VA denied his claim for benefits, relying on a flawed methodology that VA has used to calculate the radiation exposure of each Palomares veteran. On appeal, the Veterans Court certified a class of Palomares veterans subject to that methodology whose disability claims have been or will be denied, then held that VA had failed to justify its reliance on the methodology. A Federal Circuit panel reversed the class certification order. It held Section 7252 makes exhaustion a jurisdictional requirement and thus the Veterans Court may not include in the class veterans who have not yet received a "decision of the Board," even as an exercise of its authority under the All Writs Act, 28 U.S.C. § 1651(a). By a 7-5 vote, a divided Federal Circuit denied rehearing *en banc.* The question presented is:

Does the Veterans Court have statutory or inherent authority to include veterans whose individual claims are not yet exhausted in a class seeking injunctive relief, where the court has jurisdiction over a named representative's claim?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Victor B. Skaar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the Federal Circuit (App. 16a) is reported at *Skaar v. McDonough*, 48 F.4th 1323 (Fed. Cir. 2022). The decision of the Federal Circuit denying Petitioner's combined petition for panel rehearing and rehearing *en banc* (App. 1a) is reported at 57 F.4th 1015 (Fed. Cir. 2023).

The class certification decision of the Court of Appeals for Veterans Claims (App. 95a) is reported at *Skaar v. Wilkie*, 32 Vet. App. 156 (2019) (*en banc*), and the merits decision (App. 39a) is reported at 33 Vet. App. 127 (2020). The decisions of the Board of Veterans' Appeals are unreported and reproduced at App. 216a and App. 230a.

JURISDICTION

The Federal Circuit entered judgment on September 8, 2022. App. 16a. The Federal Circuit denied Petitioner's combined petition for panel rehearing and rehearing *en banc* on January 17, 2023. App. 3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case primarily concerns the Veterans Court's judicial review statute, 38 U.S.C. § 7252, as supplemented by its authority under the All Writs Act, 28 U.S.C. § 1651(a). Relevant statutory provisions and regulations are reproduced at App. 249a.

INTRODUCTION

In 1966, a B-52 Bomber collided with another Air Force plane over the coast of Palomares, Spain. Two thermonuclear bombs fell over the Spanish countryside, resulting in non-nuclear explosions that spread radioactive plutonium dust throughout the air. Chief Master Sergeant Victor Skaar, the petitioner in this case, was one of approximately 1,400 airmen deployed to clean up the debris.

Mr. Skaar and many of his fellow servicemembers—the Palomares veterans—have developed cancers and other radiogenic conditions. For decades, VA has refused to recognize the severity of radiation exposure at Palomares and denied the disability compensation claims of these veterans. In his own case, Mr. Skaar eventually introduced expert testimony from distinguished nuclear physicists to challenge the radiation dose estimate methodology that VA applies to evaluate and adjudicate Palomares veterans' claims. After first certifying a class of those who have been or will be subjected to this flawed methodology, the Veterans Court found VA's methodology unjustified.

The Palomares veterans are now in their 70s and 80s. Many, like Mr. Skaar, suffer from conditions that VA still does not treat as presumptively service connected. Yet VA continues to apply its same deficient methodology for calculating radiation exposure, leaving the Palomares veterans with few mechanisms for redress in light of the Federal Circuit's decision denying them access to class-wide relief. Decisions of the Board of Veterans' Appeals are by rule not precedential. *See* 38 C.F.R. § 20.1303. Exacerbating this issue, the Federal Circuit has recognized that VA engages in strategic mooting of specific veterans' appeals to avoid precedential decisions by the Veterans Court,

s*ee Monk v. Shulkin*, 855 F.3d 1312, 1320–1321 (Fed. Cir. 2017), and has stated that Veterans Court decisions are not even binding on the VA. *Wolfe v. McDonough*, 28 F.4th 1348, 1358 (Fed. Cir. 2022). Moreover, VA has a history of failing to implement those Veterans Court precedents that exist. *See, e.g.*, *Wolfe v. Wilkie*, 32 Vet. App. 1, 33 (2019). Palomares veterans developed their conditions from operations they conducted as a unit and they are harmed by a common VA error. Yet the Federal Circuit's holding, which limited the class to veterans with appeals pending before the Veterans Court, would require that each Palomares veteran perfect their administrative appeals and receive a Board decision *one by one*—every man and woman for themselves.

To reach its holding, the Federal Circuit misinterpreted the jurisdictional provision of the Veterans Judicial Review Act (VJRA), 38 U.S.C. § 7252(a), imposing a cramped construction of the judicial power conferred on the Veterans Court by Congress. The Federal Circuit construed the requirement of a "decision of the Board" as a jurisdictional exhaustion requirement that applies to each and every absent class member—here, hundreds of elderly, disabled veterans, many of whom lack access to counsel and the scientific experts necessary to mount individual challenges to the same faulty VA methodology. However, for an injunction-only class, the requirement of exhausting administrative remedies is met when the named class representative has a "decision of the Board." The statute imposes no further jurisdictional requirement on absent class members. And as five dissenting judges of the Federal Circuit explained, the Veterans Court also has authority under the All Writs Act, 28 U.S.C. § 1651(a), to aggregate claims pending in the

VA system in aid of its prospective jurisdiction over those claims. App. 7a.

By stripping the Veterans Court of this power, the Federal Circuit's decision will also worsen VA's already massive administrative backlog—there are 745,051 pending claims and an additional 194,467 backlogged claims (those pending for longer than 125 days)—harming veterans inside and outside the class by requiring them to litigate repeated individual challenges to common errors of law or fact. *See Veterans Benefits Administration Reports: Detailed Claims Data*, U.S. Dep't of Veterans Affs. (current as of Feb. 18, 2023), https://www.benefits.va.gov/reports/detailed_claims_data.asp.

Left undisturbed, the Federal Circuit's decision effectively denies the Veterans Court its power to aggregate claims and certify an injunctive class action, even where necessary to effectively resolve common errors in VA adjudications and enforce its decisions through class-wide relief. As five judges of the Federal Circuit concluded in dissenting from denial of rehearing *en banc*, the decision below is error several times over—it departs from the text of Section 7252, ignores the separate statutory authority of the All Writs Act, and misreads this Court's precedents. Most importantly, the decision imperils the claims of veterans who risked their lives during a Cold War-era nuclear clean-up nearly 60 years ago.

STATEMENT

A. Statutory and Regulatory Background

From the American Revolution until the late 1980s, executive branch decisions on individual veteran benefits applications were exempt from judicial review. In this period, district courts nevertheless heard

collateral challenges to VA laws or policies, including constitutional claims. *See Johnson v. Robison*, 415 U.S. 361 (1974). District courts heard a number of these challenges as class actions. *See, e.g.*, *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113 (N.D. Cal. 1987); *Wayne State Univ. v. Cleland*, 440 F. Supp. 811 (E.D. Mich. 1977). Apart from these limited circumstances, however, VA and its predecessor agencies operated with little judicial oversight. *See* Barton F. Stichman, *The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings*, 73 Adm. Law Rev. 365, 366 (1989).

That changed in 1988, when Congress enacted the VJRA. The VJRA established judicial review of individual veterans' benefits decisions for the first time in history. Pub. L. No. 100–687, 102 Stat. 4105 (1988). As one member of Congress remarked in the lead up to the law's passage, "[i]t is time to bring our veterans under the broad umbrella of constitutional and statutory protections that shield every other American from the arbitrary and capricious decisions of the Federal bureaucracy." Judicial Review of Veterans Claims: Hearing on H.R. 1959 Before the Subcomm. On Oversight and Investigations of the H. Comm. on Veterans' Affairs, 98th Cong. 7 (1983) (statement of Rep. LaFalce). Congress channeled this review of VA decisions into a new Article I court, the Veterans Court, the decisions of which are reviewable by the Federal Circuit. *See* 38 U.S.C. §§ 7252, 7292. The purpose of the VJRA, evident in its text and history, was to expand the previously limited judicial review of issues related to veterans' benefit claims.

In particular, Congress intended the VJRA to authorize Administrative Procedure Act (APA) style

review of VA decisions, and it accordingly modeled the Veterans Court's scope of review closely on that of the APA. Indeed, prior to the VJRA's enactment, members of Congress had criticized VA's judicial immunity with respect to veterans benefits decisions for violating "the principle of the Administrative Procedures Act." 122 Cong. Rec. S16,345 (June 3, 1976) (statement of Sen. Hart). In 1988, the Senate Report on the final bill re-affirmed the "Committee's intention that the [Veterans] court shall have the same authority as it would in cases arising under the APA to review and act upon questions other than matters of material fact made in reaching a decision on an individual claim for VA benefits . . ." S. Rep. No. 100–418, at 60 (1988).

Today, a veteran seeking service-connected disability compensation and other benefits applies to a VA Regional Office, which adjudicates the claim. A veteran unsatisfied with VA's decision may appeal to the Board of Veterans' Appeals, staffed by administrative Veterans Law Judges. 38 U.S.C. § 7104.[1] Board decisions are non-precedential and binding only on the individual veteran. 38 C.F.R. § 20.1303. Veterans may appeal an adverse Board decision to the Veterans Court within 120 days. 38 U.S.C. § 7266. The Veterans Court has exclusive jurisdiction to review decisions of the Board, *id.* § 7252, and its decisions are reviewable on appeal to the Federal Circuit. *Id.* § 7292.

In 2017, the Secretary of Veterans Affairs acknowledged that the Veterans Court has the authority to

[1] A veteran on the simplest Board review track currently waits 440 days for a decision. *See Board of Veterans' Appeals – Decision Wait Times*, U.S. Dep't of Veterans Affs., https://www.bva.va.gov/decision-wait-times.asp (last visited on Feb. 22, 2023).

certify class actions for aggregate resolution of systemic VA errors. *See Monk*, 855 F.3d at 1318. The Veterans Court has since promulgated rules for class practice, Vet. App. R. 22, 23, and Congress has endorsed the practice, appropriating funds for a Special Master and staff to assist the court in managing class actions.[2]

B. Factual Background

Petitioner Victor Skaar is an Air Force veteran who, along with nearly 1,400 fellow service members, participated in the U.S. military's cleanup of radioactive debris following a 1966 nuclear accident at Palomares, Spain. App. 19a. His unit worked, lived, and slept on the site for months, picking up wreckage by hand and shoveling away soil contaminated with radioactive plutonium and other radiogenic materials, largely without protective equipment. Two years after the accident the Air Force concluded its limited monitoring of only a small number of Palomares veterans, including Mr. Skaar. App. 53a. The Air Force assured Mr. Skaar that his "health [was] in no jeopardy from retention of radioactive materials as a result of

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[2] *See Further Consolidated Appropriations Act of 2020, Hearing on H.R. 1865* Before the H. Comm. on Appropriations, Subcomm. on Military Construction, Veterans Affairs, and Related Agencies at 2 (2019) (statement of Chief Judge Robert N. Davis requesting funding for Special Master and staff) *with* Further Consolidated Appropriations Act of 2020, Pub. L. No. 116-94, Division F, Title III, 133 Stat. 2534, 2810 (appropriating full amount sought); *see also* Court of Appeals for Veterans Claims Fiscal Year 2023 Budget Estimate at 7 (March 28, 2022) (noting that in FY 2021, Veterans Court "contracted for the services of a Special Master to support a class action filed at the Court."). That Special Master was Thomas Griffith, former judge of the U.S. Court of Appeals for the D.C. Circuit. *See Wolfe v. McDonough*, 34 Vet. App. 162 (2021).

participation in the [Palomares cleanup] operation." *Id.*

Today, Mr. Skaar suffers from leukopenia (a condition that can be caused by exposure to radiation) and his skin cancer is in remission. App. 19a, 67a. While Mr. Skaar and other Palomares veterans were undisputedly exposed to dangerous nuclear radiation at Palomares, for decades VA denied them benefits for radiation-related illnesses. App. 100a–104a. VA's benefits denials rely on a flawed methodology that grossly undercounts the amount of radiation to which Mr. Skaar and his fellow Palomares veterans were exposed.

C. Proceedings Before the VA

Mr. Skaar and his fellow Palomares veterans have faced a hostile VA claims process for over fifty years. Doctors diagnosed Mr. Skaar with leukopenia, a radiogenic condition, in 1998. App. 100a. But when Mr. Skaar filed a claim for service-connected disability benefits, VA informed him that he needed to present additional evidence to link his condition to his service at Palomares. App. 8a–11a. Such evidence was not easily available—Palomares veterans had to sue under the Freedom of Information Act to obtain basic records related to their radiation exposure. *See, e.g., Vietnam Veterans of Am. v. Dep't of Def.*, 453 F. Supp. 3d 508 (D. Conn. 2020).

VA regulations provide that disability compensation claims for radiation-related conditions be adjudicated using dose estimates based in "sound scientific and medical evidence." 38 C.F.R. § 3.311(c)(1)(i). VA relies on a single, uniform methodology to estimate the amount of radiation to which each Palomares veteran

was exposed.[3] This methodology grossly underestimates the Palomares veterans' exposure to radiation by arbitrarily excluding the highest radiation measurements, according to analysis by a Princeton University nuclear physicist in this case. App. 55a. VA nevertheless accepted the results generated by the flawed methodology, using them to deny Mr. Skaar's claim at the Board. App. 222a, 241a. Mr. Skaar timely appealed the Board's decision to the Veterans Court.

D. The Veterans Court's Certification Order and Merits Decision

At the Veterans Court, Mr. Skaar moved for class certification. He sought to challenge VA's uniform methodology for calculating the radiation exposure at Palomares on behalf of himself and all other similarly affected Palomares veterans with radiogenic conditions whose claims had been or would be denied. App. 96a.

The *en banc* Veterans Court first ordered a limited remand, because the Board had erred by "fail[ing] to adjudicate or address" Mr. Skaar's challenge to its methodology under § 3.311 "whatsoever." *Skaar v. Wilkie*, 31 Vet. App. 16, 17 (2019). Despite the remand order, the Board again failed to critically examine the methodology, including in light of Mr. Skaar's own expert evidence. The Board said only that it was "not in a position to exercise such independent judgment on

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[3] Congress recently designated Palomares as a "radiation-risk activity," Pub. L. 117-168, Title IV, § 402(b), Aug. 10, 2022, 136 Stat. 1780 (codified at 38 U.S.C. § 1112(c)(3)(B)(vi)), thereby establishing some Palomares veterans' conditions as presumptively service-connected. 38 C.F.R. § 3.309(d). For Palomares veterans like Mr. Skaar, however, whose disabilities are not presumptively service-connected, VA still adjudicates their service-connection by relying on the methodology set out at *id.* § 3.311.

matters involving scientific expertise" and was "bound by the regulations of the Department." App. 221a–222a.

After the limited remand, the Veterans Court sitting *en banc* certified the following class:

> All U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, and whose application for service-connected disability compensation based on exposure to ionizing radiation VA has denied or will deny by relying, at least in part, on the findings of dose estimates requested under 38 C.F.R. § 3.311, except those whose claims have been denied and relevant appeal windows of those denials have expired, or those whose claims have been denied solely based on dose estimates obtained before 2001.[4]

App. 166a.

The *en banc* majority reasoned that 38 U.S.C. § 7252(a) does not require every absent class member to have already obtained a final Board decision in their individual claim for benefits prior to class certification. App. 134a–136a. Rather, veterans with claims pending in earlier stages at the VA may be included in a class as long as the class representative has satisfied the requirement of a final Board decision on the common question on which the class is certified, and the challenged VA conduct is collateral to each member's entitlement to benefits. *Id.* One judge concurred in

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[4] The Veterans Court excluded veterans from the class whose claims had been denied by the Board or the VA Regional Office but who did not timely appeal further. App. 137a–142a. On Mr. Skaar's cross-appeal, the Federal Circuit affirmed this portion of the decision. App. 36a-38a. Mr. Skaar does not seek further review of this issue in this petition.

part and dissented in part, App. 167a, and three judges dissented. App. 181a.

The Veterans Court then returned the case to a three-judge panel, which subsequently concluded that the Board had failed to justify its reliance on the radiation dose estimate methodology. The panel ordered a remand to the Board to consider on a class-wide basis whether the methodology constitutes "sound scientific evidence" as required by law. App. 41a–42a.

E. The Federal Circuit's Decision

Before the Board could examine VA's dose methodology, however, VA appealed the class certification order.[5] App. 18a. On September 8, 2022, a panel of the Federal Circuit reversed. App. 18a. The panel held that where the named representative has reached the Veterans Court by appealing a decision of the Board under 38 U.S.C. § 7252(a), each and every member of a certified class must individually "satisfy the jurisdictional requirements of having requested a benefit and of having received a Board decision on that request." App. 33a.

The Federal Circuit did not mention, much less address, Mr. Skaar's argument that the All Writs Act authorizes the Veterans Court to aggregate claims in its prospective jurisdiction. And it rejected Mr. Skaar's argument that district courts routinely certify classes challenging agency action that include claimants who

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[5] At the Federal Circuit, as it had earlier in *Monk,* VA agreed that the Veterans Court may aggregate appeals. App. 257a n.17 ("For instance, if numerous individuals have received a board decision on a particular issue and meet the necessary requirements for class certification, the court could certainly certify those individuals as a class in the interest of promoting the efficiency of appellate review.").

have not yet exhausted their administrative remedies. The court distinguished those cases because, it wrote, district court jurisdiction over class actions against government agencies other than the VA arises from the supplemental jurisdiction statute, 28 U.S.C. § 1367(a). App. 35a (observing that "Congress has not enacted any comparable jurisdictional statute for the Veterans Court."). Accordingly, the panel vacated the class certification order insofar as it included Palomares veterans whose claims were not yet exhausted. App. 38a.

Mr. Skaar petitioned for rehearing *en banc*. App. 1a. In a 7–5 decision, the Federal Circuit denied the petition without opinion. App. 2a. Judge Dyk, joined by four other judges, dissented, concluding that "[t]he panel decision here effectively eliminates [benefits] class actions for veterans and in doing so contradicts established Supreme Court precedent." App. 3a. Judge Dyk explained that a "class action mechanism under the All Writs Act . . . may reach future [VA] claims over which jurisdiction has not yet been perfected but would be perfected in the future." App. 7a. Thus, the All Writs Act authorizes the Veterans Court to aggregate claims, including those not yet exhausted, because they are within the court's prospective jurisdiction—a statutory authority that the Federal Circuit panel simply disregarded.

The dissent also criticized the panel's interpretation of this Court's precedent in Social Security cases. It observed that this Court "specifically approved classes including both individuals who had filed claims but who had not yet secured a decision from the Secretary and those who had not yet even filed claims but would do so in the future" in *Califano v. Yamasaki*, 442 U.S. 682 (1979). App. 9a.

Finally, the dissenting opinion clarified that the federal supplemental jurisdiction statute, 28 U.S.C. § 1367, is irrelevant to the power of district courts to include persons whose claims are not yet exhausted in a class action against the government: "District courts did not, and to this day do not rely on § 1367 in certifying such class actions. . . . 'No federal court—not one—has ever said that [§ 1367] provides a basis to review federal class actions, asserting federal claims, against the federal government.'" App. 12a–13a (quoting Adam S. Zimmerman, *Exhausting Government Class Actions*, U. Chi. L. Rev. Online (Oct. 20, 2022)).

REASONS FOR GRANTING THE PETITION

Review is warranted because the decision below undermines the Veterans Court's statutory jurisdiction and manifestly departs from this Court's precedents in analogous contexts. Review is also appropriate because the Federal Circuit's decision will cause substantial harm to veterans, many of whom lack access to legal counsel and scientific experts, by frustrating their ability to act collectively to hold VA accountable to law.

I. The Federal Circuit's Decision Is Wrong.

The Federal Circuit's decision disregards the Veterans Court's authority under Section 7252, the All Writs Act, and its inherent judicial power to include absent class members with unexhausted claims in a class action for injunctive relief. In doing so, the Federal Circuit deprived the Veterans Court of its authority to manage and aggregate cases on its docket. Its decision is also inconsistent with this Court's precedents.

A. The Federal Circuit's Decision Usurps the Veterans Court's Statutory and Inherent Authority.

In curtailing the Veterans Court's authority to certify an injunctive class that includes veterans whose claims are not yet exhausted, the Federal Circuit committed three errors.

First, the Federal Circuit wrongly held that Section 7252 contains a jurisdictional exhaustion requirement applicable to absent class members. *See* App. 33a. The text of Section 7252 grants the Veterans Court jurisdiction over "decisions of the Board of Veterans' Appeals." It is undisputed that this requirement is met by the class representative in this case. Mr. Skaar has a decision of the Board, including on the legal question on which the class is certified. *See* App. 113a. Nothing in the plain language of Section 7252 requires more than that because, as Judge Dyk explained, the decision of the Board on the common question is collateral to the question of class members' entitlement to benefits based on each individual's particular disabilities.[6] App. 11a n.5. The Federal Circuit accordingly erred when it read into the text of Section 7252 an additional jurisdictional requirement that all absent

[6] The common question in this case is whether VA may lawfully rely on the methodology that it used to adjudicate the Palomares veterans' claims. This question is collateral to the question of individual entitlement to benefits because it affects every veteran whose claim was or will be subject to that methodology, but every individual veteran must still pursue and receive a VA decision on invidualized questions, such as the presence of a disability, in order to prevail on a benefits claim. Accordingly, because Mr. Skaar seeks to certify a class on a legal question on which there is a final decision but which would be replicated in future cases, the administrative exhaustion requirement for future claimants and its purpose are not implicated.

class members must have exhausted their individual claims in order to be included in the class. App. 33a.

The Federal Circuit's extratextual reading is particularly inappropriate given this Court's repeated warnings against misconstruing statutory conditions as jurisdictional requirements, in light of the enormous consequences to litigants and the courts themselves. *See Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 1493, 1497 (2022) (determining that the Court would "bring some discipline to use of the jurisdictional label" because "jurisdictional requirements cannot be waived or forfeited, must be raised by courts sua sponte, and . . . do not allow for equitable exceptions."); *see also Fort Bend Cnty., Texas v. Davis*, 139 S. Ct. 1843 (2019) (holding that an exhaustion requirement was a mandatory claims processing rule, but it was not jurisdictional); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145 (2013) (holding that a statutory time limit on appeals to a review board was non-jurisdictional); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (holding that 120-day statutory deadline to appeal to the Veterans Court is non-jurisdictional). As these cases demonstrate, finding that a statutory prerequisite to review is jurisdictional risks waste of judicial resources and unnecessary abdication of judicial power.

Given the "harsh consequences" of treating a statutory condition as a jurisdictional limit, "the Government must clear a high bar." *United States v. Wong*, 575 U.S. 402, 409 (2015); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2006) (a statutory limitation should not be treated as jurisdictional unless clearly stated); *Boechler*, 142 S. Ct. at 1497. *Wong's* "high bar" is not met in this case. Nowhere in the VJRA is there an explicit jurisdictional exhaustion requirement that

absent class members must individually satisfy in order for a class to be certified. *See also* Vet. App. R. 23 (Veterans Court rule, adopted pursuant to its statutory rulemaking authority, containing no requirement that absent class members exhaust individual claims). If Congress intended to cabin the court's jurisdiction in the manner the Federal Circuit suggested, it certainly did not clearly state as much.

Moreover, in reading Section 7252 to require that all absent class members have a "decision of the Board," the Federal Circuit's decision ignores and undermines the purpose of the VJRA, which was to expand judicial review for veterans and to afford them access to court comparable to civilians challenging agency action. *See supra* Statutory and Regulatory Background.

Because Congress looked to the APA when drafting the VJRA, *id.*, it was well aware that APA class actions are an important means to hold federal agencies accountable to law. Mirroring the APA's adjudicative procedures, *see, e.g., R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 369 (S.D.N.Y. 2019) ("The fact that the proposed [APA] class includes members at various stages of administrative review does not defeat class certification."), the VJRA permits the Veterans Court to certify future-oriented classes of veterans whose claims VA has denied or will deny.[7]

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[7] The class in this case, like many other government benefits classes, is "future-oriented" because, while all class members are presently injured by the same agency policy or practice that has caused or will cause their claims to be denied, some absent members have not yet exhausted their claims. These class members are labeled "future" members because the relief they seek is prospective in nature—an injunction prevents VA from

Before Congress enacted the VJRA, district courts regularly certified future-oriented classes of veterans on issues collateral to individual entitlement to benefits. *See, e.g., Nehmer*, 118 F.R.D. 113 (APA class action of Vietnam veterans exposed to dioxins, including those who had not yet applied for VA benefits); *Wayne State Univ. v. Cleland*, 440 F. Supp. 811 (E.D. Mich. 1977) (APA class action of veterans enrolled in college programs, including those who had not yet enrolled in the program); *Johnson v. Robison*, 415 U.S. 361 (1974) (APA class action of conscientious objectors who were denied benefits, even those who had not yet applied for them). When drafting the VJRA, Congress did not intend to *reduce* already-existing procedural rights for veterans or limit the means available for judicial oversight of veterans benefits legislation and administration. Its intention was the opposite. *See supra* Statutory and Regulatory Background.

The VJRA provides more, not less, procedural protection to veterans than is afforded to other classes of benefits litigants. *See Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (explaining that, "in the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight."). Yet the Federal Circuit's decision below effectively deprives veterans alone of a procedural tool that enables better and more efficient access to justice.

Second, the Federal Circuit's decision completely ignores the Veterans Court's statutory authority pursuant to the All Writs Act (AWA), 28 U.S.C. § 1651(a).

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applying the same flawed radiation dose estimate methodology to their claims for benefits when they are adjudicated by VA.

See App. 6a (Dyk, dissenting) ("[T]he [Veterans Court] class action mechanism is not created by § 7252(a), nor is it cabined to only those who presently satisfy the jurisdictional requirements of that section. Rather, the class action mechanism is created by the All Writs Act . . ."). The AWA dates to the First Judiciary Act of 1789 and empowers courts to enter necessary orders in aid of jurisdiction elsewhere conferred. "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute." *Pa. Bureau of Corr. v. U.S. Marshal Svc.*, 474 U.S. 34, 43 (1985). Importantly, it extends to cases "within [a court's] appellate jurisdiction *although no appeal has been perfected*." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) (emphasis added); *see also F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (same).

"The All Writs Act unquestionably applies in the Veterans Court," *Monk v. Shulkin*, 855 F.3d at 1318, and veterans with claims pending in the VA system are within that court's *prospective* jurisdiction. The Federal Circuit erred in utterly disregarding Mr. Skaar's argument that the AWA supplies statutory authority to certify an injunctive class that includes veterans whose claims are not yet exhausted. *See* App. 7a (Dyk, dissenting) ("A class action mechanism under the All Writs Act can be 'in aid of' the court's jurisdiction . . . and may reach future claims over which jurisdiction has not yet been perfected but would be perfected in the future."); *Monk*, 855 F.3d at 1318–19 (observing "no limitation in the All Writs Act precluding it from forming the authoritative basis to entertain a class action."); *see also* Adam S. Zimmerman, *The Class Appeal*, 89 U. Chi. L. Rev. 1419, 1452 (2022) (examining Veterans Court authority and concluding the AWA "extends to writs in aid of a court's prospective jurisdiction—that is, over claims

not yet before the court but pending in an administrative agency or lower court.").[8] The Federal Circuit should have recognized that the All Writs Act allows the Veterans Court to aggregate claims within the court's prospective jurisdiction together with the fully-exhausted claim of Mr. Skaar, where, as here, the common question is collateral to review of an individual class member's entitlement to benefits.

Third, and finally, the Federal Circuit erred by overlooking the Veterans Court's inherent judicial power to resolve legal issues in an efficient and effective manner. The Veterans Court is an Article I court that possesses inherent powers similar to those of Article III district courts, because Article I courts also "exercise the judicial power of the United States." *Freytag v. Comm'r*, 501 U.S. 868, 889 (1991). Article III district courts regularly certify classes of government benefits claimants that include claimants with unexhausted claims, *see infra* Section I(B), invoking their inherent power to manage and control their own dockets to do so. *See, e.g.*, *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 559 (6th Cir. 2007) ("The district court maintains substantial discretion in determining whether to certify a class, as it possesses the inherent power to manage and control its own pending litigation.") (internal quotation omitted).

Article I courts also have inherent judicial power to employ procedural tools like claim aggregation to manage their dockets. Just as in Article III courts, the class mechanism allows for the efficient disposition of

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[8] Federal courts have previously relied on the AWA to aggregate claims. *See United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1118, 1125–26 (2d Cir. 1974) (affirming district court authority under the AWA to provide class-wide habeas corpus relief when Fed. R. Civ. P. 23 did not apply).

cases, consistent enforcement of court judgments, and accountability of government agencies. *Monk*, 855 F.3d at 1320.

The Federal Circuit attempted to distinguish class certification at the Veterans Court from that in federal district courts by reasoning that district courts rely on 28 U.S.C. § 1367 when including absent members whose claims are not yet exhausted. App. 35a. In reality, Section 1367 has nothing to do with these cases. App. 12a ("Section 1367 is meant for cases in which a district court would not otherwise have subject matter jurisdiction. But district courts have long been held to have subject matter jurisdiction over class members who will only later suffer injury or otherwise qualify for the class."); s*ee also* Adam S. Zimmerman, *Exhausting Government Class Actions*, U. Chi. L. Rev. Online (Oct. 20, 2022) ("Nothing about the supplemental jurisdiction statute enlarges or narrows federal district courts' power to hear class actions against the federal government under a federal cause of action."). The Federal Circuit's reliance on 28 U.S.C. § 1367 reflected a basic error of federal jurisdiction.

Since the supplemental jurisdiction statute was enacted in 1990, "[n]o federal court—not one—has ever said that [§ 1367] provides a basis to review federal class actions, asserting federal claims, against the federal government." Adam S. Zimmerman*, Exhausting Government Class Action,* U. Chi. L. Rev. Online (Oct. 20, 2022). Nor did district courts rely on the supplemental jurisdiction statute's predecessor doctrines, ancillary and pendent jurisdiction, when certifying future-oriented classes of government benefits claimants. In fact, before 1990, courts routinely certified classes against the government that included persons whose claims were not yet exhausted, without

referencing pendent or ancillary jurisdiction. *See, e.g.*, *Nehmer*, 118 F.R.D. 113 (certifying class challenging VA's compensation rules for veterans exposed to Agent Orange that included veterans with not-yet-exhausted claims); *Hill v. Sullivan*, 125 F.R.D. 86, 87–88 (S.D.N.Y. 1989) (certifying class of "widows or widowers who have or will apply for disability benefits"); *Aiken v. Obledo*, 442 F. Supp. 628, 657–58 (E.D. Cal. 1977) (certifying class of those "whose application for food stamps was denied, delayed, or never made" and "who have been or will be affected by" the agency rule at issue).

Aggregation of claims, in appropriate circumstances, is an indispensable aspect of the judicial power of the Veterans Court under Section 7252(a), the All Writs Act, and its inherent authority. Its exercise vindicates separation of powers principles and ensures that VA acts in accordance with law. Not least, it reduces the situations in which men and women disabled in military service are obliged to struggle alone to correct recurring VA errors. The Federal Circuit erred in severely constraining that judicial power.

B. The Federal Circuit's Decision is Inconsistent with This Court's Precedent.

The decision below is also inconsistent with this Court's precedent.

First, the Federal Circuit's holding is contrary to this Court's decision in *Califano v. Yamasaki*, 442 U.S. 682 (1979). *Califano* addressed whether beneficiaries who were overpaid under the Social Security Act were owed the opportunity for an oral hearing before recoupment of the overpayment, and whether § 205(g), 42 U.S.C. § 405(g) of the Social Security Act permitted

a federal district court to certify a nationwide class to provide injunctive relief. *Id.* at 684. *Califano* held the district court did not abuse its discretion in certifying a class that included claimants over whom the court would have lacked jurisdiction at the time of class certification, had they asserted individual claims. *Id.* at 703–04. As this Court explained, the inclusion of future claimants in the class was permissible because specific injunctive relief would only be available to claimants after they satisfied statutory jurisdictional prerequisites. *Id.* at 704 ("[R]ecipients are entitled to [relief] 'when they claim a waiver.' Because the procedure for claiming waiver involves filing a written request with the Secretary, we cannot agree that the Court of Appeals ordered this relief for those who do not meet the jurisdictional prerequisites of § 205(g).") (internal citations omitted).

Contravening *Califano*, the Federal Circuit held that the Veterans Court exceeded its jurisdiction in certifying the class in this case because "the requirements of having requested a benefit and of having received a Board decision on that request are purely jurisdictional[.]" App. 33a. The opinion relied on cases from the Social Security benefits context for the proposition that exhaustion is a jurisdictional requirement for all class members. App. 34a (citing *Matthews v. Eldridge*, 424 U.S. 319, 328 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 750, 764 (1975)). But as Judge Dyk observed, these cases found only that the court lacked jurisdiction over absent class members because they had never filed a claim at the agency, not because they had failed to exhaust administrative remedies. App. 8a (citing *Smith v. Berryhill*, 139 S. Ct. 1765, 1773 (2019)). The Federal Circuit's reliance on these cases was further misplaced because these cases do not address class action authority under the All Writs Act.

App. 8a–9a ("*Weinberger* did not consider the All Writs Act, which . . . provides the Veterans Court the ability to certify class actions with members whose claims in the future could come within the court's jurisdiction.").

Like in *Califano*, the Veterans Court here certified a class that includes individuals who will in the future meet the statutory jurisdictional prerequisite: a decision by the Board. *See* App. 166a (defining the class as: "All U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, and whose application for service-connected disability compensation based on exposure to ionizing radiation VA *has denied or will deny* . . .") (emphasis added). As *Califano* held, such a class is permissible because the absent future class members will not become entitled to class-wide relief unless and until they have a Board decision. *See* 442 U.S. at 703–04.

The outcome in *Califano* was not isolated or unique. Consistent with *Califano*'s holding, district courts routinely certify class actions under the Administrative Procedure Act that include government benefits claimants who *will in the future* present a claim and receive a final decision of the relevant agency. *See, e.g.*, *Newkirk v. Pierre*, No. 19-cv-4283, 2020 WL 5035930 at *12 (E.D.N.Y. Aug. 26, 2020) ("[t]he fact that the class includes future members . . . does not pose an obstacle to certification") (quoting *Westchester Indep. Living Ctr., Inc. v. State Univ. of New York, Purchase Coll.*, 331 F.R.D. 279, 299 (S.D.N.Y. 2019)). *See also* App. 35a ("[D]istrict courts routinely certify classes including future claimants."). The Federal Circuit incorrectly attempted to distinguish this common practice by pointing to the supplemental jurisdiction statute. *See supra* Section I(A).

Second, the Federal Circuit's decision is inconsistent with this Court's precedents interpreting the All Writs Act. *See supra* Section I(A). The AWA "has served since its inclusion, in substance, in the original Judiciary Act as a legislatively approved source of procedural instruments designed to achieve the rational ends of law." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1997) (internal citations omitted). This Court has repeatedly held that the AWA grants courts broad, flexible authority to enter necessary orders in aid of their jurisdiction, including over claims within their prospective jurisdiction. *See, e.g.*, *Dean Foods Co.*, 384 U.S. at 603; *Roche v. Evaporated Milk Ass'n*, 319 U.S. at 25. Contrary to these precedents, however, the Federal Circuit held that the AWA's authorization to deploy "procedural instruments" in aid of its prospective jurisdiction does not permit aggregation of veterans' claims that are not yet exhausted with those that are.

The Veterans Court properly certified a mixed class of exhausted and unexhausted claims, consistent with decisions of this Court. There is no sound basis for the Federal Circuit's rejection of this Court's holding in *Califano* and its AWA precedents, which together permit injunctive classes against the government that include future claimants.

II. The Federal Circuit's Decision Will Cause Substantial Harm to Veterans.

This case arises within the exclusive jurisdiction of the Federal Circuit. 38 U.S.C § 7292(c). No other court will re-consider this erroneous and destructive decision. Moreover, the order denying rehearing *en banc* by a vote of 7–5 illustrates sharp disagreement within the Federal Circuit. The dissenters emphasized that "[t]he unhappy adverse consequence of eliminating

class actions speaks to the importance of this case." App. 6a. The division in the Federal Circuit and the high stakes of this case confirm that certiorari is warranted.

Without correction by this Court, the Federal Circuit's decision will cause substantial harm to veterans and limit their access to justice. It will require that veterans rely on precedential opinions by the Veterans Court, which are no substitute for class-wide injunctive orders. The decision will leave the interests of countless aging and disabled veterans in the hands of an overwhelmed, backlogged VA. Finally, the decision strips the Veterans Court of jurisdiction to aggregate claims even when the values of fairness, efficiency, accountability, and access to justice are advanced.

A. Precedential Decisions Are an Inadequate Alternative to Aggregation.

As a practical matter, the Federal Circuit's holding that each class member must individually satisfy Section 7252's requirement of a "decision[] of the Board" severely curtails veterans' ability to aggregate their claims before the Veterans Court. As it stands, only veterans who have received a decision from the Board and appealed, or and are within the 120-day window of appeal to the Veterans Court, 38 U.S.C. § 7266, may ever join together as a class to pursue common legal challenges. *See also* App. 19a. The Federal Circuit decision will immunize VA illegality from meaningful judicial review.

Perhaps recognizing the threat to veterans, the Federal Circuit suggested that aggregation is unnecessary because a precedential decision by the Veterans Court might address VA illegality just as well. App.

28a–29a. This misses the mark. As Judge Dyk notes in his dissent, for several reasons, "[p]recedential decisions of the Veterans Court are no substitute for the class action mechanism." App. 5a.

To begin, decisions of the Board of Veterans Appeals are by rule never precedential. 38 C.F.R. § 20.1303. The Veterans Court itself issues few precedential decisions, and the Federal Circuit has recently suggested that even when it does, its decisions are "not binding on the government." App. 5a–6a; (citing *Wolfe v. McDonough*, 28 F.4th 1348, 1358 (Fed. Cir. 2022)). If correct, then *only* a class decision could bind VA in like cases.

Moreover, the VA adjudication system's extreme backlogs and unique complexity often deter veterans from pursuing challenges before the Veterans Court. *See George v. McDonough*, 142 S. Ct. 1953, 1968 (2022) (Gorsuch, J., dissenting) (discussing VA's seven-year backlog, and massive number of improperly denied benefits claims); Adam S. Zimmerman, *Exhausting Government Class Actions*, U. Chi. L. Rev. Online (Oct. 20, 2022) ("[T]he VA process is sprawling and Kafkaesque.").

VA conduct also undercuts the Federal Circuit's faith in precedential decisions as an alternative to aggregation in appropriate cases. VA has a well-known practice of strategically mooting cases appealed to the Veterans Court, which prevents the Veterans Court from issuing precedential decisions in high-impact cases. *See Monk*, 855 F.3d at 1320–21. VA also has a history of failing to implement even those Veterans Court precedents that exist. *See, e.g, Wolfe v. Wilkie*, 32 Vet. App. 1, 33 (2019) ("Petitioner Wolfe's allegations uniquely highlight the inferiority of a precedential decision. . . . VA could circumvent another decision—

as it allegedly did in *Staab*—without concern about enforcement beyond another appellate proceeding.") (citing *Staab v. McDonald*, 28 Vet. App. 50 (2016)), *rev'd on other grounds sub nom. Wolfe v. McDonough*, 28 F.4th 1348 (Fed. Cir. 2022); *see also* Adam S. Zimmerman, *The Class Appeal,* 89 U. Chi. L. Rev. 1419, 1463 (2022) (noting *Wolfe* ruling "that a class-wide judgment was the only realistic answer for unrepresented veterans challenging the VA's refusal to follow the court's precedent.").

Finally, many veterans lack access to representation due to limitations on attorney's fees. 38 C.F.R. § 14.363. Nor can many individual veterans secure the assistance of scientific or technical experts able to meaningfully scrutinize VA practices and methodologies, as Mr. Skaar managed to do in this case. App. 55a–56a. And even when equipped with an applicable precedential decision, unrepresented veterans generally lack the resources or knowledge to understand the meaning of a complex legal ruling and litigate its application to their factual claim on their own. *See Monk*, 855 F.3d at 1320–21.

In an appropriate case, the oversight, monitoring, and enforcement aspects of class practice ensure that each veteran actually receives the benefit of a favorable judicial ruling. *See* Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 Cardozo L. Rev. 2017, 2038 (2015) ("[A] defendant in an individual case might refuse to apply a system-wide remedy to anyone other than the plaintiff; under those circumstances, the other potential claimants (as nonparties) would have no power to enforce the injunction."); *see also Wolfe v. McDonough*, 34 Vet. App. 162, 168–70 (2021) (appointing retired Judge Thomas Griffith as Special Master to monitor VA compliance with court's class-wide order).

The importance of a class mechanism goes beyond the Palomares veterans seeking relief today. Indeed, inclusion in an injunctive class action is the only way in which many veterans will be able to effectively challenge systemic agency failures or receive the benefit of a favorable appellate ruling.

B. The Federal Circuit's Decision Will Exacerbate Administrative Backlog at VA.

Veterans routinely face significant delays in the adjudication of their disability compensation and pension claims at VA. As of filing, VA has around 745,000 pending claims. *See Veterans Benefits Administration Reports: Claims Inventory*, U.S. Dep't of Veterans Affs. (current as of Feb. 18, 2023), https://www.benefits.va.gov/reports/detailed_claims_data.asp. Inefficiency and delay at VA are notorious and undermine veterans' access to benefits. *See George v. McDonough*, 142 S. Ct. 1953, 1968 (2022) (Gorsuch, J., dissenting) ("Veterans already face challenges enough in dealing with the Department. On average, the agency takes seven years to process their administrative appeals.").

The class in this case consists of sick, aging veterans who were exposed to significant radiation without protective equipment over fifty years ago. They cannot afford to wait seven years for a fair adjudication of their individual claims. Without the ability to aggregate their claims, veterans who are subjected to the same illegal policies and procedures at VA would have to individually endure the lengthy adjudication process, just so VA can deny their claims before they can seek relief in court. The decision below functions to drive the Palomares veterans and others like them back into VA's broken, backlogged administrative appeals system.

Aggregation of claims, in an appropriate case, can help alleviate this problem. *See Monk*, 855 F.3d at 1320 (class actions at the Veterans Court "promot[e] efficiency, consistency, and fairness, and improv[e] access to legal and expert assistance by parties with limited resources"); *see also* 1 Newberg and Rubenstein on Class Actions § 1:9 (6th ed.) ("Class actions promote administrative efficiency . . . by avoiding a multiplicity of actions, by enabling claim processing through representatives, and by preventing inconsistent adjudications.").

In this case, the Veterans Court properly considered the burden to veterans of fully exhausting agency review should VA not promptly conform its behavior to respect the holding of a precedential decision. The Veterans Court explained, "one need not find that the Agency is likely to disobey. . . . Instead, a special need for remedial enforcement might be the result of the class members' age or some similar factor suggesting the need for especially timely relief." App. 161a. Here, Palomares veterans' age makes relief through a class-wide injunctive order their last best chance at lawful adjudication of their individual benefits claims.

The delays at VA deny justice to countless veterans. As the Veterans Court has remarked, class actions "help [the Veterans Court] consistently adjudicate cases by increasing its prospects for precedential opinions," App. 121a, and they "help 'prevent VA from mooting claims scheduled for precedential review.'" *Id.* (quoting *Monk*, 855 F.3d at 1320). In other words, aggregation "permit[s] the Veterans Court to serve as lawgiver and error corrector simultaneously, while also reducing the delays associated with individual appeals." *Monk*, 855 F.3d at 1321 (internal quotations omitted).

C. The Federal Circuit's Decision Will Improperly Shield VA from Claims for Systemic Relief.

This Court's review is also critical because the Federal Circuit's ruling leaves veterans as one of the only groups of benefits recipients in the country without meaningful access to the class action mechanism. There are numerous types of systemic VA issues that might benefit from aggregate treatment:

First, as is the case for Mr. Skaar and the Palomares veterans, class actions would efficiently resolve common questions that depend on complex evidence. For example, VA's routine denial of combat-related special compensation for drone operators due to its interpretation of its definition of "combat" may be resolved by expert evidence showing that the mental health effects of drone and conventional combat can be the same. *See*, *e.g.*, Dave Philipps, *The Unseen Scars of Those Who Kill Via Remote Control*, N.Y. Times (April 15, 2022), https://www.nytimes.com/2022/04/15/us/drones-airstrikes-ptsd.html. And as with Palomares, VA has time and again delayed recognizing the physical effects of military toxic exposures. Aggregation can allow veterans to mobilize expert scientific or medical testimony (typically unavailable to an individual veteran) on behalf of the group, and thereby better subject VA methodologies to adversarial testing.

Second, class actions can address the unlawful effects of faulty VA algorithms or automated procedures. For example, the Veterans Court recently considered a proposed class of veterans whose benefits appeals were inappropriately closed without notice as a result of an automated "sweeping" function in its database, even though the claimants had submitted timely substantive appeals. *Freund v. McDonough*, 35

Vet. App. 466, 470 (2022) (denying class certification), *appeal pending*, No. 23-1387 (Fed. Cir. Jan. 13, 2023).

Third, class actions may be the only viable path to systemic relief where class representatives seek to challenge VA practices or sub-regulatory guidance, especially in cases where there is immediate, class-wide harm that precedential decisions are ill-suited to address. In *Beaudette v. McDonough*, for example, a blind combat veteran and his wife attempted to appeal their summary removal from a program that paid her to care for him, and sought class certification on behalf of others similarly situated when VA argued the removal was non-reviewable. 34 Vet. App. 95, 100–01, 105–08 (2021), *appeal pending*, No. 22-1264 (Fed. Cir. Dec. 15, 2021). In certifying the class, the Veterans Court noted both the urgent need for "centralized relief," and the necessity for judicial enforcement to remedy the harm caused to veterans by VA's "adjudicative blockade." *Id.* at 107.

Class actions in these and similar scenarios could result in injunctive relief to compel VA to properly apply the law. The Federal Circuit's decision imperils an important means for veterans and the Veterans Court to hold VA accountable to law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 24, 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2021-1757, 2021-1812

VICTOR B. SKAAR,
Claimant-Cross-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellant

Appeals from the United States Court of Appeals for Veterans Claims in No. 17-2574, Chief Judge Margaret C. Bartley, Judge Amanda L. Meredith, Judge Michael P. Allen.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

MICHAEL JOEL WISHNIE, Veterans Legal Services Clinic, Jerome N. Frank Legal Services Organization, Yale Law School, New Haven, CT, for claimant-cross-appellant. Also represented by MEGHAN BROOKS, NATHAN HERNANDEZ, CAROLINE MARKOWITZ, CAMILLA REED-GUEVARA. Also represented by LYNN K. NEUNER, ANTHONY PICCIRILLO, Simpson Thacher & Bartlett LLP, New York, NY.

SOSUN BAE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellant. Also represented by BRIAN M. BOYNTON, MARTIN F. HOCKEY, JR., PATRICIA M. MCCARTHY; BRIAN D.

GRIFFIN, JONATHAN KRISCH, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

DYK, *Circuit Judge*, with whom REYNA, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*, dissents from the denial of the petition for rehearing en banc.

PER CURIAM.

ORDER

Victor B. Skaar filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by Denis McDonough. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service. The court conducted a poll on request, and the poll failed.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue January 24, 2023.

January 17, 2023
Date

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2021-1757, 2021-1812

VICTOR B. SKAAR,

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v.

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Respondent-Appellant

Appeals from the United States Court of Appeals for Veterans Claims in No. 17-2574, Chief Judge Margaret C. Bartley, Judge Amanda L. Meredith, Judge Michael P. Allen.

DYK, *Circuit Judge*, with whom REYNA, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*, join, dissenting from the denial of the petition for rehearing en banc.

This case centrally concerns the availability of class actions for veterans' benefits claims. The panel decision here effectively eliminates such class actions for veterans and in doing so contradicts established Supreme Court precedent. We respectfully dissent from the denial of en banc rehearing.

I

For many years the system for processing veterans' claims has been inefficient and subject to substantial delays to the disadvantage of our nation's veterans. The Department of Veterans Affairs ("VA") currently has over 685,000 pending disability compensation and pension claims. *See Veterans Benefits Administration Reports: Claims Inventory*, U.S. Dep't of Veterans Affs. (current as of Dec. 17, 2022), https://www.benefits.va.gov/reports/mmwr_va_claims_inventory.asp (hereafter "*Claims Inventory*"). This backlog causes significant delays in adjudicating claims, as we concluded in *Ebanks v. Shulkin*, 877 F.3d 1037, 1038 (Fed. Cir. 2017). The Committee Report to the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105, noted that, at the time, there were approximately 470,000 pending *appeals* to the Board, and the VA projected that, without changes, by 2027 the wait for claimants to receive a final appeals decision would be ten years. *See* H.R. Rep. No. 115-135, at 5 (2017). The Committee Report concluded "VA's current appeals process is broken." *Id.*

While there have been some improvements in the last five years to the number of appeals pending at the Board of Veterans' Appeals, there are still about 210,000 appeals pending before the Board. *Board of Veterans' Appeals: Decision wait times*, U.S. Dep't of Veterans Affs. (last visited Dec. 12, 2022), https://www.bva.va.gov/decision-wait-times.asp. The number of claims awaiting an initial decision from the VA has more than doubled in the last five years, from about 320,000 in mid-2017 to more than 680,000 in 2022. *See Claims Inventory*, *supra.*

The class action mechanism, first approved in our decision in *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir.

2017), promised to help ameliorate these problems to some significant extent, enabling veterans in a single case to secure a ruling that would help resolve dozens if not hundreds of similar claims. In *Monk*, we recognized that aggregate treatment of claims at the Veterans Court could "promot[e] efficiency, consistency, and fairness, and improv[e] access to legal and expert assistance by parties with limited resources." *Id.* at 1320.

The decision here will effectively eliminate class actions in the veterans' context by limiting the class to those who have already appealed and those who have secured a Board decision and can (indeed must) file appeals with the Veterans Court within 120 days, a step that would make them named parties to an appeal. The majority of claimants—all others with pending or future claims—would not be eligible for class treatment.[1]

The panel opinion here does not suggest that class actions for veterans are undesirable or of limited utility but rather rests on the mistaken notion that the jurisdiction of the Veterans Court over class actions is limited to situations where the class members had already secured a final decision from the Board of Veterans' Appeals. *Skaar v. McDonough*, 48 F.4th 1323, 1325 (Fed. Cir. 2022); *see* 38 U.S.C. § 7252(a) (granting the Veterans Court "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate").

Precedential decisions of the Veterans Court are no substitute for the class action mechanism—those

[1] The only exception would seem to be class actions for petitions for writs of mandamus, for example, challenging undue delay in processing claims. That was the situation in *Monk* itself.

decisions are rare, *see Monk*, 855 F.3d at 1321, not binding on the government, *see Wolfe v. McDonough*, 28 F.4th 1348, 1358 (Fed. Cir. 2022), and, in any event, ill-suited to resolving factual disputes such as those involved here. Nor are precedential decisions of this court. *See* 38 U.S.C. § 7292(d)(2) (barring Federal Circuit jurisdiction, in the absence of a constitutional issue, to "review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case").

The unhappy adverse consequence of eliminating class actions speaks to the importance of this case.

II

Review is particularly important since there are substantial flaws in the panel's analysis, which is at odds with Supreme Court decisions.

First, the very purpose of class actions is to bring before the court claimants who have not perfected their claims by bringing their own individual suits. Class actions can be beneficial and superior to individual litigation precisely because they permit the aggregation of claims not yet filed in court. Class actions do not merely consolidate claims already filed in court, but aggregate in a single suit claims that have not been filed. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 310-11 (3d Cir. 2011) (en banc) (recognizing a class action's ability to achieve "global peace" including "potential plaintiffs who had not yet filed cases").

Second, the class action mechanism is not created by § 7252(a), nor is it cabined to only those who presently satisfy the jurisdictional requirements of that section. Rather, the class action mechanism is created by the All Writs Act, 28 U.S.C. § 1651, as our decision in

Monk concluded, and as at least one other circuit has held in similar circumstances in which Federal Rule of Civil Procedure 23 is unavailable.[2] A class action mechanism under the All Writs Act can be "in aid of the court's jurisdiction, 28 U.S.C. § 1651(a), and may reach future claims over which jurisdiction has not yet been perfected but would be perfected in the future. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) ("[A circuit court's] authority is not confined [under the All Writs Act] to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected."); *Klay v. United Healthgroup*, *Inc.*, 376 F.3d 1092, 1099 (11th Cir. 2004) ("[T]he [All Writs] Act allows [courts] to safeguard not only ongoing proceedings, but potential future proceedings . . . ." (citation and footnotes omitted)); 16 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3932 (3d ed. 2022).

Third, the panel's reading of the Supreme Court's decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975), and later cases, as barring class actions where all class members have not yet satisfied the requirements of § 7252 is clearly mistaken. In *Weinberger*, the court

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[2] The Second Circuit has affirmed the certification of a class action in the *habeas* context under the All Writs Act. *See United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974) (concluding that the All Writs Act enables courts to adopt "appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage" (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969))).

Since it certified the class at issue here, the Veterans Court has adopted a class action rule modeled after Federal Rule of Civil Procedure 23, which governs class actions in district courts. *See* U.S. Vet. App. R. 23.

considered a Social Security Act jurisdictional provision similar to § 7252(a), providing that "[a]ny individual, after any final decision of the Secretary [of the Department of Health, Education, and Welfare] made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision." 42 U.S.C. § 405(g) (1976).[3] The panel concluded that *Weinberger* held: "[W]hile [the court] had jurisdiction of the claims of the named appellees under the provisions of 42 U.S.C. § 405(g), it had no jurisdiction over the claims asserted on behalf of unnamed class members." *Skaar*, 48 F.4th at 1332 (quoting *Weinberger*, 422 U.S. at 753) (alterations in *Skaar*).

While this is accurate, the panel failed to note that the reason that the court lacked jurisdiction over the unnamed class members was that they had not even filed a claim with the agency. As the Supreme Court concluded shortly thereafter in *Mathews v. Eldridge*, "the complaint [in *Weinberger*] was found to be jurisdictionally deficient since it 'contained no allegations that [unnamed members of the class] ha[d] even filed an application with the Secretary . . . .'" 424 U.S. 319,329 (1976) (ellipses in original and modification omitted) (quoting *Weinberger*, 422 U.S. at 764); *see also Smith v. Berryhill*, 139 S. Ct. 1765, 1773 (2019). Further, the Supreme Court in *Weinberger* did not consider the All Writs Act, which, as discussed above, provides the Veterans Court the ability to certify class

[3] Section 405(g) has been amended to replace the Secretary with the Commissioner of Social Security. *See* 42 U.S.C. § 405(g) (2020).

actions with members whose claims in the future could come within the court's jurisdiction.

In any event, in *Califano v. Yamasaki*, 442 U.S. 682 (1979), involving the same jurisdictional provision that was at issue in *Weinberger*, 42 U.S.C. § 405(g), the Supreme Court revisited *Weinberger* and specifically approved classes including both individuals who had filed claims but who had not yet secured a decision from the Secretary and those who had not yet even filed claims but would do so in the future. The Supreme Court discussed the earlier case, while making clear that class action relief was available in the Social Security context in appropriate circumstances. *See Califano*, 442 U.S. at 698-703. The Supreme Court rejected the argument "that Congress contemplated a caseby-case adjudication of claims under [§ 405(g)] that is incompatible with class relief." *Id.* at 698-99. The Court noted that "every Court of Appeals that has considered this issue has concluded that class relief is available under [§ 405(g)]." *Id.* at 699. It explained that "a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them." *Id.* at 700.

The classes at issue in *Califano* involved individuals who had been determined by the Secretary to have been overpaid Social Security benefits. *Id.* at 684. Recipients determined to have been overpaid could either seek reconsideration to contest the accuracy of that determination or seek waiver of recovery by the Secretary. *Id.* at 686. The Supreme Court explained that the certified classes at issue in *Califano* (all those whom the Secretary had determined had been overpaid) were overbroad, but only with regard to those Social Security claimants "who had not filed

requests for reconsideration or waiver in the past *and would not do so in the future*" because "[a]s to them, no 'final decision' concerning the right to a prerecoupment hearing has been *or will be made*." *Id.* at 704 (emphasis added); *see also id.* at 688-89. The Supreme Court approved classes that included claimants who had not yet secured a final decision of the Secretary after a hearing, despite the requirements of § 405(g).

Contrary to the panel opinion,[4] exhaustion of administrative remedies (here, securing a final decision of the Board of Veterans' Appeals) is not a jurisdictional requirement under *Weinberger* and its progeny even for named plaintiffs. The Supreme Court made this explicit in the Social Security context only three years ago in *Smith v. Berryhill*, in which the Court stated that the only "'jurisdictional' requirement [is] that claims be presented to the agency.'" 139 S. Ct. at 1773 (quoting *Mathews*, 424 U.S. at 328). "[E]xhaustion itself is not a jurisdictional prerequisite." *Id.* at 1779. Here, the class included individuals who have satisfied the jurisdictional requirement by filing a claim with the VA; even if they were named plaintiffs, there would be no jurisdictional requirement that they exhaust administrative remedies.

There is, moreover, class action jurisdiction even as to class members who have not filed claims but who will do so in the future. The Court in *Califano* held that the class members who could file claims "in the future" had been properly included by the lower courts. *Califano*, 442 U.S. at 704. The D.C. Circuit has

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[4] *See Skaar*, 48 F.4th at 1333 n.3 ("We emphasize that the requirements of having requested a benefit *and of having received a Board decision on that request* are 'purely "jurisdictional" in the sense that [they] cannot be 'waived.'" (quoting *Mathews*, 424 U.S. at 328) (emphasis added) (alteration in original)).

confirmed that *Califano* permits Social Security classes to include future claimants. *Tataranowicz v. Sullivan*, 959 F.2d 268, 272 (D.C. Cir. 1992) (approving future claimants' membership in a social security class because "the Court [in *Califano]* appeared to approve a class including persons who had not yet satisfied § 405(g), but would ultimately do so"). In order to prevail in their individual cases, the class members would, of course, have to exhaust administrative remedies by securing a decision by the Board on their individual claims in due course, but such exhaustion is not a requirement for class action resolution of the common issue—whether the VA's dose estimate methodology for Palomares veterans was based on sound scientific evidence. There is no jurisdictional requirement that bars a class action by veterans who have filed claims but have not yet secured final decisions by the Board.[5]

Fourth, while admitting that class actions involving future claimants may be brought in district court,

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[5] To be sure, exhaustion of the statutorily prescribed procedures is only excused where the class claim is collateral to the merits of any individual benefits determination. *See Bowen v. City of New York*, 476 U.S. 467, 483 (1986) ("The claims in this lawsuit are collateral to the claims for benefits that class members had presented administratively. The class members neither sought nor were awarded benefits in the District Court, but rather challenged the Secretary's failure to follow the applicable regulations."). The claim here is collateral in the same sense as the claim in *Bowen.* In *Bowen*, the claim was that the Secretary was using an improper standard to adjudicate benefits claims. So here, as described in Section III, the claim is that an improper standard is being applied for veterans to demonstrate service-connected radiation exposure from the Palomares clean-up. The class action will not determine the individual benefit claims—only the common claim regarding the dose estimate methodology for Palo-mares veterans.

Skaar, 28 F.4th at 1333-34, the panel mistakenly attributes that anomaly to the fact that the district courts have supplemental jurisdiction under 28 U.S.C. § 1367, a statute that is inapplicable to the Veterans Court. The panel opinion states: "While district courts may indeed exercise jurisdiction over future claimants, that is because Congress explicitly conferred the district courts with supplemental jurisdiction encompassing such claims." *Id.* (citing § 1367(a)).

With respect, that is a misunderstanding of the role § 1367(a) plays in class action lawsuits. Section 1367 is meant for cases in which a district court would not otherwise have subject matter jurisdiction. But district courts have long been held to have subject matter jurisdiction over class members who will only later suffer injury or otherwise qualify for the class. Indeed, § 1367 was only passed in 1990, and class action lawsuits with future claimant members were common before it was passed. *See*, *e.g.*, *Sullivan v. Zebley*, 493 U.S. 521, 527 (1990) (citation omitted) (ruling, before § 1367 become law, in favor of the "class of all persons 'who are now, or who in the future will be, entitled to'" a certain administrative determination from the Social Security Administration); *Califano*, 442 U.S. at 704; Amicus Br. of 15 Admin. L., Civ. Proc., and Fed. Cts. Professors in Support of Claimant-Cross-Appellant and Affirmance at 9-13.

District courts did not, and to this day do not, rely on § 1367 in certifying such class actions.[6] *See* Adam

[6] The opinion cites for support *Exxon Mobil Corp. v. Allapattah Services*, *Inc.*, which states "§ 1367 confers supplemental jurisdiction over claims by . . . Rule 23 plaintiffs." 545 U.S. 546, 560 (2005). But *Exxon* only held that § 1367 permitted individual claims to be aggregated in a class action without every claim's meeting the amount in controversy requirement for diversity

S. Zimmerman, *Exhausting Government Class Action*, U. Chi. L. Rev. Online (Oct. 20, 2022) ("No federal court—not one—has ever said that [§ 1367] provides a basis to review federal class actions, asserting federal claims, against the federal government.").

III

This case is a particularly appropriate vehicle for class action treatment. The case arises from an incident in which approximately 1,400 United States servicemembers were exposed to radiation following a nuclear accident. On January 17, 1966, two Air Force planes collided and dropped four hydrogen bombs near the small fishing village of Palomares, Spain. The non-nuclear explosives in two of the bombs detonated, dispersing plutonium dust over miles of the Spanish countryside. A rotating team of United States servicemembers, including the named plaintiff in this action—Air Force veteran Victor Skaar—worked for months cleaning up the radioactive contamination from the accident.

In 1998, Mr. Skaar was diagnosed with leukopenia—a low white blood cell count that he claims may be caused by radioactive exposure. Mr. Skaar alleges in this suit that, for decades, the VA has employed a flawed dose estimate methodology that dramatically underestimated his and other veterans' radioactive exposure during the Palomares clean-up and, on that ground, has denied disability compensation benefits

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jurisdiction, so long as one claim met the amount in controversy requirement. *See id.* at 549. *Exxon* does not suggest that without § 1367 class actions cannot include absent class members who have yet to file their own claims. And *Exxon* did not question the longstanding practice of district courts of certifying such classes with future claimants.

that he is entitled to receive. The Secretary confirmed that 1,388 service members had participated in the Palomares clean-up. Mr. Skaar noted at least 19 veterans have already filed claims. Mr. Skaar's claim is representative of many other veterans who had been involved in the clean-up, whose claims are at various stages in the process.

Mr. Skaar's contention is that the challenged dose estimate methodology was not based on "actual recorded dose intakes" for individual Palomares veterans, but, rather, on "environmental measurements" and other generalized data, and was then applied broadly to "subcategories of veterans." J.A. 6 (citation omitted). Whether this dose estimate methodology was based on sound scientific evidence would appear to be a textbook example of a common question that would be amenable to aggregate resolution, since "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores*, *Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Class action treatment of these veterans' claims serves the purpose of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxins Act of 2022 ("PACT Act"), passed in response to some of the challenges Palomares veterans and other veterans with service-related exposure to toxic materials had faced in receiving benefits from the VA. Pub. L. No. 117-168, 136 Stat. 1759. Specifically, § 402, titled "Palomares or Thule Veterans Act of 2022," granted a presumption of service connection for certain disabilities of Palomares veterans. *Id*. § 402, 136 Stat. at 1780. The report from the House Committee on Veterans' Affairs noted the challenges faced by Palomares veterans in obtaining relief from

the VA, and cited this class action as an example. H.R. Rep. No. 117249, pt. 1, at 9 (2022). The Report states:

> Air Force dosing estimates have also been challenged by veterans and advocacy groups in a class action suit led by one participant, Victor Skaar. In *Skaar v. Wilkie*, the [Veterans Court] . . . found that VA had not fulfilled its legal responsibility to determine whether the method it uses to assess Palomares veterans' radiation exposure is scientifically sound.

Id.

* * *

For the foregoing reasons, we respectfully suggest that the panel's legal analysis is contrary to Supreme Court precedent and that en banc review should have been granted.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2021-1757, 2021-1812

VICTOR B. SKAAR,

Claimant-Cross-Appellant

V.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellant

Appeals from the United States Court of Appeals for Veterans Claims in No. 17-2574, Chief Judge Margaret C. Bartley, Judge Amanda L. Meredith, Judge Michael P. Allen.

Decided: September 8, 2022

CAROLINE MARKOWITZ, Veterans Legal Services Clinic, Jerome N. Frank Legal Services Organization, Yale Law School, New Haven, CT, argued for claimant-cross-appellant. Also represented by MEGHAN BROOKS, MATTHEW HANDLEY, ADAM HENDERSON, JOSHUA HERMAN, MICHAEL JOEL WISHNIE. Also argued by ANTHONY PICCIRILLO, Simpson Thacher & Bartlett LLP, New York, NY. Also represented by LYNN K. NEUNER.

SOSUN BAE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellant. Also represented by BRIAN M. BOYNTON, MARTIN F. HOCKEY, JR., PATRICIA M. MCCARTHY; BRIAN D. GRIFFIN, JONATHAN KRISCH, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

JONATHAN D. SELBIN, Lieff, Cabraser, Heimann & Bernstein, LLP, New York, NY, for amici curiae Maureen S. Carroll, Zachary Clopton, Brooke D. Coleman, Robin Effron, Maria Glover, Andrew Hammond, Deborah R. Hensler, Helen Hershkoff, Alexandra D. Lahav, Elizabeth G. Porter, Alexander Reinert, Judith Resnik, Michael D. Sant'Ambrogio, Joan E. Steinman, Adam S. Zimmerman. Also represented by YAMAN SALAHI, Edelson PC, San Francisco, CA.

DORIS JOHNSON HINES, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, DC, for amicus curiae National Veterans Legal Services Program.

Before MOORE, *Chief Judge*, NEWMAN and HUGHES, *Circuit Judges*.

HUGHES, *Circuit Judge*.

United States Air Force veteran Victor B. Skaar was exposed to ionizing radiation while participating in a cleanup operation in Palomares, Spain. Thirty years later, he was diagnosed with leukopenia. He filed a claim with the Department of Veterans Affairs for service-connected benefits, and the Board of Veterans' Appeals denied his claim. Mr. Skaar appealed the

Board's denial to the United States Court of Appeals for Veterans Claims. There, he challenged the soundness of the radiation dose estimates provided by the Air Force and relied upon by the Board in denying his claim. By motion for class certification, Mr. Skaar sought to make this challenge on behalf of all similarly situated veterans who had participated in the Palomares cleanup operation. The Veterans Court certified a class, with Mr. Skaar serving as its representative, that includes veterans who had not received a Board decision and that excludes veterans whose claims had been denied but not timely appealed. *See Skaar v. Wilkie*, 32 Vet. App. 156, 201 (2019) (*Class Certification*). The Secretary of Veterans Affairs appeals, and Mr. Skaar cross-appeals, the Veterans Court's class definition.

On appeal, the Secretary asserts that the Veterans Court lacked authority to certify a class that includes veterans who had not received a Board decision—a statutory prerequisite for the court's jurisdiction pursuant to 38 U.S.C. § 7252(a)—because jurisdiction over Mr. Skaar's individual claim did not create further jurisdiction over a class of similarly situated veterans whose individual claims were beyond the court's jurisdiction. We agree. By certifying a class that includes veterans who had not received a Board decision, the Veterans Court exceeded its jurisdiction. We accordingly vacate the court's class certification and remand for further proceedings.

On cross-appeal, Mr. Skaar contends that the Veterans Court should have equitably tolled the appeal period for veterans whose claims had been denied but not timely appealed and thus should have included such veterans as members of the certified class. We disagree. The Veterans Court rightly declined to equitably toll the appeal period for claimants who

had not timely appealed their denied claims since none of the claimants had alleged, let alone established, the requisite due diligence in pursuing their rights. *See Toomer v. McDonald*, 783 F.3d 1229, 1237–38 (Fed. Cir. 2015). Thus, should the Veterans Court choose to reconsider on remand whether class certification is appropriate, the court shall confine the proposed class to include only Palomares veterans who had timely appealed, or were still able to timely appeal, Board decisions denying their radiation exposure claims.

I

A

In January 1966, a United States Air Force B-52 bomber carrying four thermonuclear weapons collided midair with another aircraft. Two of the weapons crashed into the ground near Palomares, Spain, and released "radioactive plutonium dust over the area, contaminating soil and crops, and spreading radioactive debris for miles." *Class Certification*, 32 Vet. App. at 168. "Mr. Skaar, along with nearly 1,400 other U.S. military personnel," assisted in the cleanup. *Id.* They also provided urine and nasal swab samples while on site "to assess possible radioactive exposure." *Id.* A group of service members "determined to be among the most exposed," including Mr. Skaar, were monitored for signs of radiogenic conditions for 18 to 24 months after the accident. *Id.*

Monitoring efforts for Mr. Skaar continued until December 1967, when the Air Force concluded that his health was not in "jeopardy from retention of radioactive materials as a result of participation in the [Palomares cleanup] operation." *Id.* (alteration in original) (citation omitted). Three decades later, in 1998, Mr. Skaar was diagnosed with leukopenia, a blood disorder characterized by a decrease in white

blood cell count. His doctor opined that exposure to ionizing radiation "appear[s] to be the positive agent" that historically causes leukopenia, but "concluded [that] 'we have been unable to prove this.'" *Id.* Mr. Skaar subsequently filed a claim for service-connected benefits, which the agency denied in February 2000.

Mr. Skaar moved to reopen his claim in March 2011, and the regional office requested a radiation exposure opinion. The Air Force—the service branch responsible for providing the agency with exposure data and dose estimates for Palomares veterans—estimated "that Mr. Skaar's maximum total effective dose during the Palomares cleanup was 4.2 rem with a bone marrow committed dose of 1.18 rem, compared to annual dose limits of 5 and 50 rem, respectively, for occupations typically involving radiation exposure." *Id.* at 169. Relying on these estimates, the Under Secretary for Benefits found it unlikely that Mr. Skaar's leukopenia was caused by radiation exposure while in military service and shared these findings in a dose estimate opinion provided to the regional office in May 2012. Shortly thereafter, the regional office denied Mr. Skaar's claim, and he appealed the denial to the Board.

"In October 2013, a private physician opined that Mr. Skaar's leukopenia 'is likely related to exposure to heavy radioactive material in [1966].'" *Id.* at 170 (alteration in original) (citation omitted). Two months later, while Mr. Skaar's appeal was still pending before the Board, the Air Force discovered errors in its radiation dose methodology, which was underestimating doses for some individuals including Palomares veterans. Consequently, "the Air Force intended to 'formally standardize [its] response methodology for radiation dose inquiries involving Palomares participants' by establishing dose estimates based on each

veteran's specific duties." *Id.* (alteration in original) (citation omitted).

After reevaluating its dose estimate methodology, the Air Force provided the agency with revised dose estimates for Mr. Skaar, "assigning him a new maximum total effective dose of 17.9 rem and a bone marrow committed dose of 14.2 rem." *Id.* The Board found that these revised dose estimates amounted to new and material evidence warranting another dose estimate opinion and remanded the claim. The regional office obtained and considered a new dose estimate opinion from August 2016. Nonetheless, the regional office again found it unlikely that Mr. Skaar's "leukopenia was caused by exposure to ionizing radiation during military service," and denied his claim. *Id.* Mr. Skaar appealed to the Board.

"[I]n September 2016, a private physician opined that Mr. Skaar's leukopenia was 'a result of exposure to ionizing radiation/plutonium.'" *Id.* Even so, the Board denied Mr. Skaar's claim. In the Board's view, the August 2016 dose estimate opinion was "'highly probative' because it 'was based on a review of the entire record,' while Mr. Skaar's private medical opinions were not as probative because 'none offered any rationale for their statements.'" *Id.* (citation omitted). Mr. Skaar appealed the Board's decision denying his claim.

B

Before the Veterans Court, Mr. Skaar challenged the agency's "omission of the Palomares cleanup from the . . . radiation-risk activities" listed in 38 C.F.R. § 3.309(d)(3)(ii), as well as the Board's reliance on allegedly unsound dose estimates, in violation of 38 C.F.R. § 3.311(c), "when adjudicating Palomares veterans' claims." *Class Certification*, 32 Vet. App. at

171. Mr. Skaar moved to make these challenges on behalf of similarly situated veterans who were present during the Palomares cleanup. *Id.* at 170. The Veterans Court granted in part Mr. Skaar's motion and certified a class to litigate the § 3.311 challenge.[1] *Id.* at 201.

Relying on its existing authority to certify class actions in the petition context under *Monk v. Shulkin*, 855 F.3d 1312, 1318–20 (Fed. Cir. 2017), the Veterans Court determined that it "possess[es] the power to aggregate claims and certify class actions in the appeal context." *Class Certification*, 32 Vet. App. at 178. The court further acknowledged that class composition depends on whether it has jurisdiction over each class member, that the court has "only one source of jurisdiction: 38 U.S.C. § 7252," and that "a final Board decision operates as the jurisdictional 'trigger' that gives [the Veterans Court] the authority to hear a particular appeal." *Id.* at 180. Breaking down the proposed class into five subgroups, the court then considered whether it has jurisdiction over the putative class comprising all veterans who were present at the 1966 Palomares cleanup that

> (1) had filed a radiation exposure claim with the agency, but had not timely appealed the regional office's denial to the Board (past claimants);
>
> (2) had filed a radiation exposure claim with the agency and appealed the regional office's denial to the Board, but had not timely

[1] The Veterans Court held that Mr. Skaar lacks standing to bring the § 3.309 challenge but has standing to pursue the § 3.311 challenge. *Class Certification*, 32 Vet. App. at 172. He has not appealed this holding.

> appealed the Board's denial to the Veterans Court (expired claimants);
>
> (3) had appealed, or were still able to timely appeal, the Board's denial of a radiation exposure claim to the Veterans Court (present claimants);
>
> (4) had filed a radiation exposure claim that was still pending either before the regional office or the Board (present-future claimants); or
>
> (5) have developed a radiogenic condition but have not yet filed a radiation exposure claim with the agency (future-future claimants).

Id. at 179–180. The court determined that it has jurisdiction over present claimants "because they possess final Board decisions and either their 120-day windows to appeal those decisions to [the Veterans] Court have not yet expired or these claimants have already appealed within the 120-day time period." *Id.* at 180 (citing 38 U.S.C. §§ 7252(a), 7266(a)).

As for present-future and future-future claimants, the Veterans Court recognized that these claimants "pose a unique jurisdictional issue" since none of them have received final Board decisions. *Id.* Still, the court concluded that its "jurisdictional statute does not prohibit the[] inclusion" of such claimants as class members. *Id.* Instead, the Veterans Court held that, "pursuant to [its] statutory authority under 38 U.S.C. §§ 7252 and 7261," it has "the authority to certify class actions that include veterans who have not yet received a final Board decision and those who have not yet filed a claim." *Id.* (citing *Monk*, 855 F.3d at 1318). In the court's view, "Mr. Skaar, as class representative, ha[d] obtained a final Board decision pursuant to

[§] 7252," and his "satisfaction of [this] jurisdictional requirement" vested the court with jurisdiction over other class members, "much in the same way a named plaintiff's consent to proceed before a magistrate is sufficient to grant the magistrate jurisdiction to enter final judgment as to all class members." *Id.* at 181–82. Moreover, the court explained, Mr. Skaar's Board decision had opened a "jurisdictional door" that allowed the Veterans Court to "use [its] other authorities, as explained in *Monk* [], to aggregate Mr. Skaar's claims with those of the remaining class members." *Id.* at 181.

Then, turning to *Bowen v. City of New York*, 476 U.S. 467 (1986) for support, the Veterans Court held that it has "jurisdiction to certify a class action that includes members who do not have a final Board decision" so long as "(i) the challenged conduct is collateral to the class representative's administratively exhausted claim for benefits—i.e., the class representative has obtained a final Board decision; (ii) enforcing the exhaustion requirement would irreparably harm the class; and (iii) the purposes of exhaustion would not be served by its enforcement." *Id.* at 184–85. The court applied this standard here, and determined that it had jurisdiction over present-future and future-future claimants "and [need] not require exhaustion of administrative remedies by each and every class member." *Id.* at 185. The Veterans Court accordingly included present-future and future-future claimants, along with present claimants, in the class. *Id.* at 186.

Next considering past and expired claimants, the court declined to equitably toll the appeal period for claimants who failed to timely appeal their denied claims and excluded both subgroups from the proposed class on that basis. *Id.* at 189. These claimants, the

court observed, "could have challenged [the agency's] treatment of Palomares veterans just like Mr. Skaar, yet each chose not to." *Id.* at 187. And, the court noted, Mr. Skaar did not present any reason "to depart from *Bove*'s principle that the 120-day Notice of Appeal window to [the Veterans Court] will only be waived 'when circumstances precluded a timely filing despite the exercise of due diligence.'" *Id.* (quoting *Bove v. Shinseki*, 25 Vet. App. 136, 140 (2011) (per curiam), *overruled on other grounds by Dixon v. McDonald*, 815 F.3d 799 (Fed. Cir. 2016)). Thus, the court confined the class to present, present-future, and future-future claimants.

The Veterans Court then invoked Federal Rule of Civil Procedure 23 "as a guide for class certification in the appeal context," and considered whether the class met the requisites for class certification pursuant to Rule 23. *Id.* at 189. Finding that it did, the court certified the class, excluding past and expired claimants. *Id.* at 201. It defined the class as follows:

> [a]ll U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, and whose application for service-connected disability compensation based on exposure to ionizing radiation [the agency] has denied or will deny by relying, at least in part, on the findings of dose estimates requested under 38 C.F.R. § 3.311, except those whose claims have been denied and relevant appeal windows of those denials have expired . . . .

Id. at 189.

A year after certifying the class, the Veterans Court issued a decision on the merits of Mr. Skaar's § 3.311

challenge on behalf of the certified class. *Skaar v. Wilkie*, 33 Vet. App. 127 (2020) (*Merits Decision*). The court held that the Board had "provided an inadequate statement of reasons or bases for concluding that the Air Force's dose estimate constituted sound scientific evidence." *Id.* at 141. And as a result, the court set aside the April 2017 Board decision denying service connection for leukopenia and remanded the matter for the Board to readjudicate Mr. Skaar's § 3.311 challenge, further stating that "[t]his portion of [its] decision applies to the class certified in this matter." *Id.* at 143–44, 149. Following its merits decision, the Veterans Court entered judgment on January 12, 2021 and denied Mr. Skaar's motion for immediate issuance of mandate. Judgment at 1, *Skaar v. Wilkie*, 33 Vet. App. 127 (2020) (No. 17-2574); Judge's Stamp Order, for the Panel, Denying Appellant's Opposed Motion for Immediate Issuance of Mandate at 1, *Skaar v. Wilkie*, 33 Vet. App. 127 (2020) (No. 17-2574).

The Secretary appeals and Mr. Skaar cross-appeals, both challenging the Veterans Court's class definition.

II

A

Our jurisdiction to review decisions of the Veterans Court is governed by 38 U.S.C. § 7292. Unlike other statutory provisions that govern our jurisdiction, § 7292 does not expressly premise appellate review on the finality of the Veterans Court's decision. *Compare* 28 U.S.C. § 1295(a)(1) (conferring jurisdiction over "an appeal from a final decision of a district court"), *with* 38 U.S.C. § 7292(a) ("After a decision of the [Veterans Court] is entered in a case, any party to the case may obtain a review of the decision . . . ."). Nevertheless, we have "generally declined to review non-final orders of the Veterans Court." *Williams v. Principi*, 275 F.3d

1361, 1363 (Fed. Cir. 2002) (citation omitted). So "remand orders from the Veterans Court ordinarily are not appealable because they are not final." *Adams v. Principi*, 256 F.3d 1318, 1320 (Fed. Cir. 2001). We will, however, depart from this strict rule of finality when the Veterans Court remands a matter for further proceedings if the following conditions are satisfied:

> (1) there must have been a clear and final decision of a legal issue that (a) is separate from the remand proceedings, (b) will directly govern the remand proceedings[,] or, (c) if reversed by this court, would render the remand proceedings unnecessary;
>
> (2) the resolution of the legal issues must adversely affect the party seeking review; and
>
> (3) there must be a substantial risk that the decision would not survive a remand, i.e., that the remand proceeding may moot the issue.

Williams, 275 F.3d at 1364 (footnotes omitted). The class certification satisfies these criteria.

First, the Veterans Court issued a clear and final decision regarding its jurisdiction to certify a class that includes veterans who had not received a Board decision. *See Travelstead v. Derwinski*, 978 F.2d 1244, 1247–49 (Fed. Cir. 1992) (holding that when "the court rendered a 'decision' interpreting a statute . . . and compelling action of the Secretary, on remand, . . . [t]his 'decision' was a final disposition of the proceeding," and was appealable). That decision addressed a legal issue involving the Veterans Court's jurisdictional statute that is separate from the remand proceeding involving 38 C.F.R. § 3.311(c) and dose estimates. *Compare Class Certification*, 32 Vet. App. at 166 ("We do not today address the merits of Mr. Skaar's claim."),

with Merits Decision, 33 Vet. App. at 132 ("Today we address the merits of Mr. Skaar's appeal . . . . Beginning with the class claim concerning radiation dose estimates, we hold that the Board failed to meet its obligation under 38 C.F.R. § 3.311(c) to ensure that dose estimates [the agency] received from the Air Force constitute 'sound scientific evidence.' We will remand this issue to the Board . . . .").

Second, the Veterans Court's resolution of the jurisdictional issue will adversely affect the Secretary by requiring the Secretary to expend time and resources addressing individuals beyond the Secretary's statutorily-permitted reach, i.e., veterans who have not filed claims for benefits.[2] *See* 38 U.S.C. § 5101(a)(1)(A); *Travelstead*, 978 F.2d at 1248.

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[2] The Veterans Court's resolution of the jurisdictional issue not only affects the Secretary but also affects Mr. Skaar and similarly situated Palomares veterans who might benefit from a precedential opinion regarding the § 3.311 challenge. *See Merits Decision*, 33 Vet. App. at 151 (Meredith, J., concurring in part and dissenting in part) ("I am compelled to comment that the result here demonstrates that the en banc Court's resurrection of the limited remand mechanism, for the purpose of deciding [Mr. Skaar's] motion for class certification, turned out not to be an effective tool. More than 3 years after [Mr. Skaar] appealed the April 2017 Board decision, the panel is left with no choice but to conclude that the Board provided an inadequate statement of reasons or bases for its decision and to remand the matter for readjudication—the same relief that the en banc Court could have, and in my view, should have initially provided. Instead, the parties and the en banc Court expended considerable time and resources debating the efficacy of conducting class actions in the appellate context and the bounds of the Court's jurisdiction, without bringing [Mr. Skaar] any closer to receiving a decision that adequately addresses the merits of whether the dose estimates relied on by [the agency] are based on a methodology that complies with 38 C.F.R. § 3.311(c)." (citations omitted)); *see*

Third, there is a substantial risk that the remand proceeding may deprive the Secretary of an opportunity to later contest the Veterans Court's jurisdiction over the certified class since the Secretary is statutorily precluded from appealing to the Veterans Court any Board decision, including a grant of the class claim. *See* 38 U.S.C. § 7252(a); *see also Merits Decision*, 33 Vet. App. at 154 (Meredith, J., concurring in part and dissenting in part) ("[T]he Board's inadequate statement of reasons or bases frustrates judicial review, precluding [the Veterans Court's] ability to provide the requested class-wide relief and compelling [the court] to remand the matter for full readjudication without retaining jurisdiction. And, [the court] ha[s] no reason to assume that further adjudication of the [veteran's] claim will lead to a final Board decision adverse to the [veteran] or subsequent appellate review of the class issue for which he is the representative."). Thus, we may exercise jurisdiction over the court's class certification decision. *See Dambach v. Gober*, 223 F.3d 1376, 1379 (Fed. Cir. 2000) ("We do have jurisdiction . . . when there is a statutory interpretation that will affect the remand proceeding and that legal issue might evade our future review.").

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also Class Certification, 32 Vet. App. at 209 (Falvey, J., dissenting) ("We believe that the majority has created a class that exceeds our jurisdiction and offers a comparable outcome to members of that class that a precedential decision could provide without the manageability and preclusion problems inherent in class litigation."); *id.* at 221 ("If we had an adequate record, a panel might have, months ago, found that the dose methodology [the agency] used in Mr. Skaar's case was flawed and counter to 38 C.F.R. § 3.311. Its decision, a nationwide precedent, would have fixed any such systemic dose estimate problem and [the agency] would have been required to apply the Court's holding consistently to all veterans' cases.").

B

By statute, we may "review and decide any challenge to the validity of any statute or regulation or any interpretation thereof . . . and . . . interpret constitutional and statutory decisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). But our jurisdiction does not extend to challenges either to factual determinations or to the application of the law to the facts of a particular case, absent a constitutional issue. *Id.* § 7292(d)(2). Whether the Veterans Court had jurisdiction is a matter of statutory interpretation, *see id.* § 7252(a) (defining the Veterans Court's jurisdiction), which we review de novo, *In re Wick*, 40 F.3d 367, 370 (Fed. Cir. 1994). Likewise, whether the Veterans Court applied the correct legal standard for equitable tolling is a question of law we review de novo. *James v. Wilkie*, 917 F.3d 1368, 1372 (Fed. Cir. 2019).

III

The Veterans Court certified a class that includes present, present-future, and future-future claimants but excludes past and expired claimants. The primary question before us, on appeal and cross-appeal, is which subgroups of claimants should the Veterans Court have included in, or excluded from, the certified class. The Secretary would have us confine the class to only present claimants, while Mr. Skaar would define the class broadly to include past, expired, present, present-future, and future-future claimants. We agree with the Secretary. The certified class should have included only present claimants because the Veterans Court did not have jurisdiction over past, present-future, or future-future claimants, and because the expired claimants cannot benefit from equitable

tolling to revive claims that they could have timely appealed following the Board's denial.

A

The Veterans Court exceeded its jurisdiction when it certified a class to include veterans who had not received a Board decision and veterans who had not yet filed a claim. While the Veterans Court correctly acknowledged that "a final Board decision operates as the jurisdictional 'trigger' that gives [it] the authority to hear a particular appeal," the court held "that because Mr. Skaar, as class representative, ha[d] obtained a final Board decision pursuant to [§] 7252, the jurisdictional door ha[d] been opened, and [the Veterans Court] may use [its] other authorities, as explained in *Monk* [], to aggregate Mr. Skaar's claims with those of the remaining class members." *Class Certification*, 32 Vet. App. at 181. This was error. *See Weinberger v. Salfi*, 422 U.S. 749, 753 (1975) ("[W]hile [the court] had jurisdiction of the claims of the named appellees under the provisions of 42 U.S.C. § 405(g), it had no jurisdiction over the claims asserted on behalf of unnamed class members.").

The Veterans Court cannot predicate its jurisdiction over the claims of unnamed class members on its jurisdiction over Mr. Skaar's claim or its power to aggregate claims and certify class actions. *See Burris v. Wilkie*, 888 F.3d 1352, 1361 (Fed. Cir. 2018) ("[T]he Veterans Court cannot invoke equity to *expand* the scope of its statutory jurisdiction. Indeed, a court cannot write its own jurisdictional ticket." (cleaned up)). Class certification is merely a procedural tool that allows the court to aggregate claims, *see Wick*, 40 F.3d at 1370 (explaining that neither the Veterans Court's scope of review nor its rules of practice and procedure "provide an independent basis for jurisdic-

tion"); it does not itself confer on the court jurisdiction to review individual claims it would otherwise lack, *Chula Vista City School District v. Bennett*, 824 F.2d 1573, 1579 (Fed. Cir. 1987) ("The claim of each member of the class must be examined separately to determine whether it meets the jurisdictional requirement."). Nor does our decision in *Monk*, in which we held only that the "Veterans Court has the authority to establish a class action mechanism or other method of aggregating claims." 855 F.3d at 1322; *id.* at 1321–22 (declining to decide or address the circumstances in which a class certification would be appropriate). *Monk* does not provide a cognizable basis for circumnavigating the limits of the Veterans Court's statutory jurisdiction. *Cf. Mahaffey v. Sec'y of Health & Hum. Servs.*, 368 F.3d 1378, 1381 (Fed. Cir. 2004) (explaining that neither the Court of Federal Claims' scope of review nor its rules of practice and procedure confer authority on a court "to enlarge its jurisdiction" (citation omitted)). And the Veterans Court cannot invoke its authority to certify a class action in the appeal context unless the court has "jurisdiction over the claim of each individual member of the class." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("[C]lass relief is consistent with the need for case-by-case adjudication emphasized by the Secretary, *at least so long as the membership of the class is limited to those who meet the requirements of [the judicial review statute]. Where the district court has jurisdiction over the claim of each individual member of the class*, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding." (emphasis added) (citation omitted)).

Here, the Veterans Court has "only one source of jurisdiction: 38 U.S.C. § 7252(a)." *Class Certification*,

32 Vet. App. at 180 (citing *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011)); *see Burris*, 888 F.3d at 1357 ("The Veterans Court, as an Article I tribunal, is a creature of statute by definition. As such, the court can only act through an express grant of authority from Congress." (citations omitted)). This jurisdictional statute empowers the Veterans Court to review decisions of the Board and confers upon the court "the power to affirm, modify, or reverse *a decision of the Board* or to remand the matter, as appropriate." 38 U.S.C. § 7252(a) (emphasis added). Thus, the Veterans Court's jurisdiction is "premised on and defined by the Board's decision concerning the matter being appealed," *Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998), where "'decision' of the Board, for purposes of the Veterans Court's jurisdiction under [§] 7252, is the decision with respect to the benefit *sought by the veteran*," *Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000) (emphasis added). This means that "a veteran must first present a request for a benefit to the Board, then receive a decision on that request, in order to vest jurisdiction in the Veterans Court to consider the veteran's request and arguments in support thereof." *Id.* By definition, therefore, a class must be limited to veterans who satisfy the jurisdictional requirements of having requested a benefit and of having received a Board decision on that request.[3]

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[3] We emphasize that the requirements of having requested a benefit and of having received a Board decision on that request are "purely 'jurisdictional' in the sense that [they] cannot be 'waived.'" *Matthews v. Eldridge*, 424 U.S. 319, 328 (1976). Both the statutory language and the provision's "placement within the [Veterans' Judicial Review Act]" make clear "that Congress wanted that provision to be treated as having jurisdictional attributes," since § 7252 "governs [the Veterans Court's] adjudicatory capacity." *Henderson*, 562 U.S. at 434–35, 439–40 (comparing

See, e.g., *Matthews v. Eldridge*, 424 U.S. 319, 328 (1976) ("The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no 'decision' of any type. And some decision by the Secretary is clearly required by the statute."); *Salfi*, 422 U.S. at 750, 764 ("The [d]istrict [c]ourt had no jurisdiction over the unnamed members of the class under 42 U.S.C. [§] 405(g), . . . since the complaint as to such class members is deficient in that it contains no allegations that they have even filed an application for benefits with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought.").

Thus, the Veterans Court exceeds its jurisdiction when it certifies a class to include, as it did here, veterans who have not yet filed a claim—over whom even the Board would not have jurisdiction, *see* 38 U.S.C. §§ 7104(a) (jurisdiction of the Board to review the Secretary's final decisions), 511 (decisions of the Secretary)—and veterans who have not received a Board decision, *see id.* § 7252(a). That is, the Veterans Court lacked jurisdiction over past, present-future, and future-future claimants, since none of these claimants had received a Board decision. *Cf. Wick*, 40 F.3d at 370 ("Since it is clear that the action of the Secretary in denying payment to Wick was not a decision of the Board, it would seem equally clear that the court lacks jurisdiction over Wick's petition from that denial.").

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§ 7252 with § 7266 and holding that § 7266 is not jurisdictional). Thus, in relying on *Bowen* as a basis for jurisdiction over present-future and future-future claimants, *see Class Certification*, 32 Vet. App. at 184, the Veterans Court erroneously conflated jurisdiction and exhaustion, *see Matthews*, 424 U.S. at 328.

Mr. Skaar argues that the Veterans Court can exercise jurisdiction over class members who have not received Board decisions because district courts routinely certify classes including future claimants. Cross-Appellant's Br. 26–30 (collecting cases). While district courts may indeed exercise jurisdiction over future claimants, that is because Congress explicitly conferred the district courts with supplemental jurisdiction encompassing such claims. *See* 28 U.S.C. § 1367(a) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . . Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 560 (2005) (explaining that "§ 1367 confers supplemental jurisdiction over claims by . . . Rule 23 plaintiffs," i.e., members of a class action, over which it may lack original jurisdiction as long as it has original jurisdiction over at least one class member's claim). Critically, Congress has not enacted any comparable jurisdictional statute for the Veterans Court. While district courts may exercise supplemental jurisdiction over future claimants by virtue of their explicit statutory authority, the Veterans Court lacks such jurisdictional authority. Each court is limited to the jurisdiction bestowed upon it by Congress. Thus, the cases Mr. Skaar cites about the scope of district court jurisdiction are inapplicable where, as here, the Veterans Court has its own jurisdictional statute.

We accordingly vacate the Veterans Court's class certification. Should the court choose to reconsider on remand whether class certification is appropriate, the

court shall exclude past, present-future, and future-future claimants, since no such claimants have received a Board decision.

B

On cross-appeal, Mr. Skaar contends that the Veterans Court should have included past and expired claimants as members of the certified class. He challenges the Veterans Court's decision declining to equitably toll the statutory period to appeal for these claimants. According to Mr. Skaar, the court misconstrued the legal standard for equitable tolling—set out in *Bowen*—"as creating a categorical rule that challenged policies must be 'secretive' to grant equitable tolling and waiver of exhaustion," and then improperly applied this rule to the "more claimant-friendly [Veterans' Judicial Review Act]." Cross-Appellant's Br. 46–47. We disagree.[4]

To benefit from equitable tolling, a claimant must demonstrate "(1) extraordinary circumstance; (2) due diligence; and (3) causation." *Toomer*, 783 F.3d at 1238; *see also Holland v. Florida*, 560 U.S. 631, 649

[4] Although we vacate the class certification for lack of jurisdiction, our decision does not bar the Veterans Court from considering again on remand whether class certification is appropriate, provided that the court has jurisdiction over each individual member of the proposed class. The court could, for example, consider whether certifying a class of present claimants is proper. It follows then that our decision to vacate the class certification does not moot Mr. Skaar's cross-appeal challenging the class definition. Thus, we still must consider whether expired claimants the only other subgroup of claimants, besides present claimants, that satisfies the jurisdictional requirements under 38 U.S.C. § 7252—were improperly excluded from the certified class, i.e., whether the court should have tolled the appeal period for expired claimants.

(2010) (requiring a petitioner to show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing" (cleaned up)). We have made clear that "due diligence must be shown in addition to an extraordinary circumstance." *Toomer*, 793 F.3d at 1238 (cleaned up). We have also acknowledged, as Mr. Skaar points out, "the need for flexibility," "for avoiding mechanical rules," and for "proceed[ing] on a 'case-by-case basis.'" *Id.* at 1239; CrossAppellant's Br. 49.

Contrary to Mr. Skaar's contentions, the Veterans Court suggested neither that *Bowen* established a categorical rule restricting equitable tolling to challenges involving "secretive" policies nor that *Bowen* dictated the court's decision. Indeed, it was Mr. Skaar who had requested that the Veterans Court "equate [the agency's] adjudication of Palomares veterans' claims with the secretive conduct the Supreme Court found so reprehensible in [*Bowen*]" and permit equitable tolling for past and expired claimants on this basis. *Class Certification*, 32 Vet. App. at 187. And the Veterans Court unambiguously denied this request. The court instead identified several examples of the extraordinary circumstances for which waiver may be warranted, clarified that these examples do not present "an exhaustive list because there are no bright line rules in the equitable tolling context," and reiterated that "the extraordinary circumstances element [of equitable tolling] necessarily requires a case-by-case analysis and not a categorical determination." *Id.* (alteration in original) (quoting *James v. White*, 917 F.3d 1368, 1373 (Fed. Cir. 2019)).

Moreover, the Veterans Court observed that Mr. Skaar had never alleged that past and expired claimants "were precluded from timely filing appeals . . . for any

reason other than [the agency's] historical practice in adjudicating claims from Palomares veterans." *Class Certification*, 32 Vet. App. at 187–89. And, as the court correctly reasoned, it's hardly surprising that the agency "will always (presumably) adjudicate claims in accord with its own interpretation of that law and [the Veterans Court's] legal pronouncements" "before a claimant succeeds in changing the law." *Id.* at 187. So "there is no principled way to distinguish" these claimants from "*any* other claimants who have been denied benefits, failed to appeal to [the Veterans] Court, and later discovered their benefits denial was based on an incorrect reading of the law." *Id.* at 187–88. Thus, the Veterans Court's analysis does not evince any legal error or misinterpretation of the law surrounding equitable tolling. We conclude that the court did not err in declining to equitably toll the appeal period for past and expired claimants and thus rightly excluded such claimants from the class.

IV

The Veterans Court's jurisdictional statute limits its authority to certify a class action in the appeal context, and the court must have jurisdiction over the claims of every member of a class the court certifies. By certifying a class that includes veterans who had not received a Board decision and veterans who had not yet filed a claim, the Veterans Court exceeded its jurisdiction. We vacate the court's class certification and remand for further proceedings consistent with this opinion. Because we vacate the class certification, we also limit the application of the merits decision to Mr. Skaar's claim.

VACATED AND REMANDED

COSTS

No costs.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 17-2574

VICTOR B. SKAAR,

Appellant,

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS,

Appellee.

On Appeal from the Board of Veterans' Appeals

(Argued September 2, 2020 December 17, 2020)

Lily Halpern and *Molly Petchenik*, law students, with whom *Michael J. Wishnie*, all of New Haven, Connecticut, appeared for the appellant.

Mark D. Vichich, with whom *William A. Hudson, Jr.*, Acting General Counsel; *Mary Ann Flynn*, Chief Counsel; and *Megan C. Kral*, Deputy Chief Counsel, all of Washington, D.C., were on the brief for the appellee.

Before BARTLEY, *Chief Judge*, and ALLEN and MEREDITH, *Judges*.

ALLEN, *Judge*, filed the opinion of the Court. MEREDITH, *Judge*, filed an opinion concurring in part in the result and dissenting in part.

ALLEN, *Judge*: In January 1966, a United States Air Force B-52 bomber carrying four thermonuclear

weapons collided with another aircraft over Spain. Two of the nuclear weapons the B-52 was carrying crashed into the ground and exploded near the village of Palomares. The non-nuclear explosions of these devices spread radioactive plutonium over the Spanish countryside. Appellant Victor B. Skaar was one of approximately 1,400 U.S. servicemembers, most from the Air Force, who responded to this tragic event and participated in cleanup activities.

In an April 14, 2017, decision, the Board of Veterans' Appeals denied Mr. Skaar service connection for leukopenia, which he claimed was due to exposure to ionizing radiation during the cleanup activities near Palomares. In addition to contesting the Board's denial of service connection for leukopenia before the Court, Mr. Skaar contends that the Board erred because it did not adjudicate what he claims is a pending appeal of a denied claim for service connection for skin cancer, also claimed as due to exposure to ionizing radiation.

Mr. Skaar sought to proceed as a representative of a class of veterans who had participated in the Palomares cleanup challenging both the exclusion of Palomares from the list of "radiation risk activities" under 38 C.F.R. § 3.309 as well as the accuracy of radiation dose estimates the Air Force provided in the context of 38 C.F.R. § 3.311.[1] On December 6, 2019, this Court, sitting en banc, held for the first time in its history that it may certify classes in the context of an individual appeal of a Board decision.[2] In doing so, as

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[1] *See* Appellant's Motion for Class Certification or Aggregate Resolution.

[2] *Skaar v. Wilkie* (*Skaar II*), 32 Vet.App. 156, 177-78 (2019) (en banc order). We had previously held that, in appropriate circumstances, we would certify classes in the context of

we explain in more detail below, we rejected Mr. Skaar's request to proceed as a representative of a class challenging the exclusion of Palomares as a "radiation risk activity" under § 3.309.[3] However, we concluded that his appeal could proceed as a class action with respect to his claim under § 3.311. The Court defined the class for which Mr. Skaar could serve as a representative as the following:

> All U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, and whose application for service-connected disability compensation based on exposure to ionizing radiation VA has denied or will deny by relying, at least in part, on the findings of dose estimates requested under 38 C.F.R. § 3.311, except those whose claims have been denied and relevant appeal windows of those denials have expired, or those whose claims have been denied solely based on dose estimates obtained before 2001.[4]

Today we address the merits of Mr. Skaar's appeal both on the claim for which we granted class certification as well as the issues he presses on an individual basis. We summarize our holdings here. Beginning with the class claim concerning radiation dose estimates, we hold that the Board failed to meet its obligation under 38 C.F.R. § 3.311(c) to ensure that dose estimates VA received from the Air Force constitute "sound scientific evidence." We will remand this issue to the Board so it may assess whether the dose estimates

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petitions. *See Monk v. Wilkie*, 30 Vet.App. 167, 174 (2018) (en banc).

[3] *Skaar II*, 32 Vet.App. at 173-74.

[4] *Id.* at 201.

the Air Force has provided are based on such sound scientific evidence, providing an adequate statement of reasons or bases for the conclusion it reaches.

The questions before us concerning Mr. Skaar's individual claims fall into two categories: (1) The various arguments appellant advances concerning his skin cancer claim, and (2) whether VA has unlawfully failed to include Palomares as a "radiation risk activity" under 38 C.F.R. § 3.309.[5] As to appellant's skin cancer arguments, we are unable to reach the merits of those claims because the Board did not address them. But though we lack jurisdiction to address the skin cancer claim on the merits, we do have jurisdiction to determine whether the Board erred in failing to address it. We hold that we must remand the skin cancer claim because VA failed to provide a Statement of the Case (SOC) in response to a valid Notice of Disagreement (NOD) appellant filed. Concerning the radiation risk activity under § 3.309, we hold that we lack jurisdiction to address the arguments that remain after the Court's class certification decision because appellant did not raise them before the Agency. And, as we explain, our class certification decision resolves the appeal on that issue as to all other matters.

We will proceed as follows. First, we will set out a basic statement of facts that applies generally to all the claims and that explains how this matter reached the Court. We will, however, provide more detailed facts in the context of our discussion of the specific

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[5] As we noted, the en banc Court denied Mr. Skaar's request to represent a class with respect to the radiation risk activity issue under § 3.309. *See id.* at 173-74. However, as we explain below, the denial of class certification did not fully resolve this claim on an individual level.

claims later in our opinion. Second, we will describe the legal framework for awarding service connection for conditions claimed to be caused by exposure to ionizing radiation. Third, we will address the claim concerning radiation dose estimates under § 3.311 for which appellant represents a class. And finally, we will discuss appellant's two sets of individual claims concerning skin cancer and the lack of designation of the Palomares cleanup as a radiation risk activity under § 3.309.

I. GENERAL BACKGROUND

A. Factual Background

Appellant served in the United States Air Force from November 1954 to July 1981,[6] and he participated in and was present at the Palomares cleanup. In fact, as explained further below, he was in the "High 26" group of service members who had test results that, compared to test results of other Palomares cleanup workers, showed the highest exposure to radiation, and who were monitored for a period after the cleanup ended.[7] In 1998, he was diagnosed with leukopenia, a decrease in white blood cell count.[8] His doctor opined that exposure to ionizing radiation "[h]istorically does appear to be the positive agent" causing leukopenia, but his doctor concluded that "we have been unable to prove this."[9] Appellant filed a claim for service connection for leukopenia in August 1998.[10] In February 2000, VA denied his claim because

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[6] Record (R.) at 2.

[7] R. at 2124-28.

[8] R. at 2157.

[9] *Id.*

[10] R. at 2155.

leukopenia is not a radiogenic disease VA recognizes as resulting from a "radiation-risk activity."[11]

In March 2011, appellant requested that VA reopen his claim.[12] The regional office (RO) requested a radiation exposure opinion from the Air Force.[13] In April 2012, the Air Force estimated that appellant's maximum total effective dose was 4.2 rem with a bone marrow committed dose of 1.18 rem, compared to annual dose limits of 5 and 50 rem, respectively, for those working in occupations typically involving radiation exposure.[14] Based on these estimates, the director of the Post 9/11 Environmental Health Program, writing for the Under Secretary for Benefits, advised in May 2012 that "it is unlikely that [appellant's] leukopenia . . . can be attributed to radiation exposure while in military service."[15] The RO denied appellant's claim in June 2012.[16] Appellant disagreed with the RO's denial and eventually perfected an appeal to the Board.[17]

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[11] R. at 2098.

[12] R. at 2077.

[13] R. at 1886. We will discuss the procedure for obtaining dose estimates in more detail below.

[14] R. at 1888-89. A rem (roentgen equivalent man) is a unit of measurement for radiation. One unit represents "the dosage of an ionizing radiation that will cause the same biological effect as one roentgen of X-ray or gamma-ray exposure." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/rem (last visited Sept. 9, 2020).

[15] R. at 1877.

[16] R. at 1869.

[17] During this time, appellant raised a skin cancer claim based on his exposure to ionizing radiation. We will discuss the

In October 2013, a private physician opined that appellant's leukopenia "is likely related to exposure to heavy radioactive material in [1966]."[18] In June 2014, after the Air Force reevaluated its dose estimate methodologies, the Air Force provided VA with appellant's revised dose estimate, assigning him a new maximum total effective dose of 17.9 rem and a bone marrow committed dose of 14.2 rem.[19]

In a May 2015 decision, the Board found the Air Force's revised dose estimates were new and material evidence warranting the reopening of appellant's claim.[20] The Board remanded the claim to the RO because the Air Force's "revised assessment [was] significantly higher than the April 2012 assessment," and therefore, "another [dose estimate] opinion [was] warranted."[21] In August 2016, the Director of Compensation Service provided a dose estimate opinion based on a memorandum from the Deputy Chief Consultant, Post Deployment Health Services, who had reviewed the June 2014 Air Force dose estimate,[22] and medical literature about the medical effects of ionizing radiation.[23] The director found appellant's dose estimate "did not exceed 175.7 rem for the bone surface, 69.3 for the lungs and 8.4 rem for the liver" and that appellant's leukopenia was less likely than not related

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procedural history of that claim below in our analysis of that matter.

[18] R. at 39-40.

[19] R. at 1301, 1274-75.

[20] R. at 695-99.

[21] R. at 698.

[22] R. at 132.

[23] R. at 131.

to his radiation exposure.[24] The RO again denied appellant's claim.[25] In September 2016, a private physician opined that appellant's leukopenia was "a result of exposure to ionizing radiation/plutonium."[26]

In the April 2017 decision on appeal, the Board denied appellant's claim seeking service connection for leukopenia.[27] The Board first noted that leukopenia was "not listed as a disease specific to radiation-exposed veterans," and thus presumptive service connection under 38 C.F.R. § 3.309 was "not for consideration."[28] In considering the dose estimate evidence under 38 C.F.R. § 3.311, the Board found the May 2012 dose estimate opinion lacked probative value "as it was based on an inaccurate dose estimate."[29] But, the Board found the August 2016 dose estimate "highly probative" because it "was based on a review of the entire record," while appellant's private medical opinions were not as probative because "none offered any rationale for their statements."[30] Recall that the 2016 dose estimate from the Director of VA's Compensation Service was based on the revised 2014 dose estimate from the Air Force. Appellant appealed the Board's decision to the Court.

In February 2019, the Court, retaining jurisdiction over this appeal, remanded the matter to the Board for the limited purpose of providing a supplemental

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[24] *Id.*

[25] R. at 113-14.

[26] R. at 38.

[27] R. at 2-12.

[28] R. at 5.

[29] R. at 10.

[30] R. at 10-11.

statement of reasons or bases addressing arguments appellant raised about whether the dose estimates constituted sound evidence under 38 C.F.R. § 3.311, but that the Board had failed to address.[31] In a March 2019 supplemental statement, the Board found that "on its face [the June 2014 revised dose estimate the Air Force provided] is based on sound scientific evidence" because it "was based on then recently re-evaluated internal processes which were initiated to ensure a comprehensive and consistent approach to dose estimates," and because the revised dose estimate "considered [appellant's] previously reported intake values based on the application of contemporary modes in his bioassay data collected in the 1960's."[32]

With respect to prior inconsistencies in the Air Force's dose methodologies, the Board stated that "just as it is prohibited from exercising its own independent judgment to resolve medical questions, the Board is not in a position to exercise such independent judgment on matters involving scientific expertise."[33] The Board explained it "is bound by regulations of the Department," and those regulations "provide specific instructions for obtaining dose estimates."[34] Thus, "[w]ithout an independent dose estimate, and without a rational basis to reject the competent findings of the Air Force," the Board found no evidentiary basis on which to grant service connection. [35] The Board also

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[31] *Skaar v. Wilkie* (*Skaar I*), 31 Vet.App. 16 (2019).

[32] Appellee's Response (Resp.) to the Court's February 1, 2019, Order at 4 (Mar. 29, 2019).

[33] *Id.* at 5 (citing *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991)).

[34] *Id.* at 6.

[35] *Id.* at 5.

acknowledged that appellant could have submitted his own independent dose estimate but that he failed to do so.[36]

After we received this supplemental statement from the Board, the Court certified a class with respect to the dose estimates but found that appellant lacked standing to pursue various other claims on behalf of the class, including those he asserted under 38 C.F.R. § 3.309. The en banc Court then returned this matter to a panel to address the merits. After the Court approved a joint notice plan, we held oral argument. We now decide both the class matter regarding dose estimates and the remainder of appellant's individual arguments.

B. Legal Landscape for Claimed Exposure to Ionizing Radiation

Congress recognized that for veterans who were exposed to radiation during military service, the procedure for establishing direct service connection was "unduly burdensome because many veterans were having difficulties supporting their claims for compensation."[37] Thus, for veterans seeking compensation for diseases related to in-service exposure to radiation, Congress mandated and VA established special procedures to follow.[38]

With these provisions in place, a veteran may establish service connection for certain disabilities claimed as due to in-service exposure to ionizing radiation in

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[36] *Id.* at 6.

[37] *Hilkert v. West*, 12 Vet.App. 145, 148 (1991) (en banc) (citing *Wandel v. West*, 11 Vet.App. 200 (1998)).

[38] *See* Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984).

one of three ways: (1) Via the presumption of service connection for radiation-exposed veterans under 38 U.S.C. § 1112(c) and 38 C.F.R. § 3.309(d)(3)(ii); (2) by meeting certain conditions specified in 38 C.F.R. § 3.311(b) for veterans with radiogenic diseases; or (3) by satisfying the elements of standard, direct service connection.[39] We note that in its decision the Board addressed a theory of standard, direct service connection, but appellant did not challenge the Board's findings before the Court. Therefore, this theory is not at issue.[40]

The first regulatory provision, 38 C.F.R. § 3.309(d), provides a presumption of service connection for radiation-exposed veterans with certain listed disabilities. The regulation defines "radiation-exposed veteran" as one who "participated in a radiation-risk activity" and lists specific radiation-risk activities.[41] For the purposes of this appeal, we note that the regulation does not include the Palomares cleanup in the regulation's list of radiation risk activities; nor does the regulation include leukopenia in the regulation's list of presumptive disabilities.

Under the second regulation, 38 C.F.R. § 3.311, the veteran must first establish that he or she suffers from a radiogenic disease that manifested within a certain time period.[42] Once a claimant has established a diagnosis of a radiogenic disease within the specified period and claims that the disease is related to his

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[39] *See Rucker v. Brown*, 10 Vet.App. 67, 71 (1997) (citing *Combee v. Brown*, 34 F.3d 1039, 1043 (Fed. Cir. 1994)).

[40] *See Pederson v. McDonald*, 27 Vet.App. 276, 281-86 (2015) (en banc).

[41] 38 C.F.R. § 3.309(d)(3)(i) (2020).

[42] 38 C.F.R. § 3.311(b)(2), (5) (2020).

radiation exposure while in service, VA must obtain a dose assessment and request exposure data from the veteran's service branch.[43] For those claims that meet these threshold requirements, the RO is required to refer the case to the Under Secretary for Benefits.[44] If a condition is not recognized by regulation as a "radiogenic disease," the claim nevertheless must be referred to the Under Secretary for Benefits when a claimant "has cited or submitted competent scientific or medical evidence that the claimed condition is a radiogenic disease."[45]

The Under Secretary for Benefits "shall consider the claim with reference to the factors specified in paragraph (e) of this section and may request an advisory opinion from the Under Secretary for Health."[46] These factors include the probable dose, sensitivity of the involved tissue, and the time-lapse between exposure and onset of the disease.[47] How VA assesses these factors – requiring sound medical and scientific evidence – is critical to the matter before the Court, and we will return to that assessment in a moment. In making the required determination, the Under Secretary for Benefits may request an advisory opinion from the Under Secretary for Health because consideration of the claim "relies heavily on medical and scientific findings and analysis."[48] The Court has held that the Under Secretary for Benefits "is not explicitly required

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[43] 38 C.F.R. § 3.311(a)(1)-(2); *see Hilkert*, 12 Vet.App. at 148.

[44] 38 C.F.R. § 3.311(b).

[45] 38 C.F.R. § 3.311(b)(5); *see also Parrish v. Shinseki*, 24 Vet.App. 391, 395 (2011).

[46] 38 C.F.R. § 3.311(c)(1).

[47] 38 C.F.R. § 3.311(e).

[48] *Hilkert*, 12 Vet.App. at 149; *see also* 38 C.F.R. § 3.311(c)

to refer to the factors listed in [§] 3.311(e), but should, rather, consult those factors as a point of reference when making recommendations to the [RO]."[49]

The final determination of the Under Secretary for Benefits is then sent to the agency of original jurisdiction, which considers the opinion as evidence.[50] In *Stone*, the Court held that although the Under Secretary for Benefits was not required to explicitly consider each of the factors in § 3.311(e), "the cursory explanation provided . . . did not provide adequate rationale for the conclusion that there was no reasonable possibility that the veteran's cancer was caused by his in-service exposure as required by 38 C.F.R. § 3.311(c)(ii)."[51] Thus, the Court held that the Board erred in relying on that opinion.[52]

At oral argument, the Secretary's counsel argued that in subsections (1) and (2), § 3.311(c) provides the Under Secretary for Benefits with two choices: The Under Secretary may find either that there is sound evidence to support radiation exposure or there is no reasonable possibility that a veteran's disease is related to exposure.[53] Though the Secretary's counsel initially appeared to suggest that the requirement of sound scientific and medical evidence applies only to subsection (1) when the evidence supports granting

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[49] *Stone v. Gober*, 14 Vet.App. 116, 120 (2000) (discussing *Hilkert*, 12 Vet.App. at 149-50).

[50] 38 C.F.R. § 3.311(f).

[51] *Stone*, 14 Vet.App. at 120.

[52] *Id.*

[53] Oral Argument (O.A.) at 46:33-47:47, 47:50-48:14, *Skaar v. Wilkie* (*Skaar III*), U.S. Vet. App. No. 17-2574 (oral argument held Sept. 2, 2020), https://www.uscourts.cavc.gov/oral_arguments_audio.php.

the claim, but not to subsection (2) when the evidence supports denying the claim,[54] the Secretary later conceded that the sound-evidence requirement functionally applies to both subsections.[55]

We agree that the "sound evidence" requirement applies to both subsections (1) and (2) of § 3.311(c). To hold otherwise would mean that the standard for granting a claim based on exposure to ionizing radiation is different than the standard for denying a claim in a way that is materially adverse to veterans. And to hold otherwise would allow VA to deny a veteran benefits based on science that is not sound but only grant benefits only when the science is deemed sound. Such an interpretation would lead to absurd results, something courts should avoid.[56] Furthermore, it is clear from the Board's supplemental statement and the Secretary's filings throughout this appeal that both understood that whether the dose estimates were sound evidence was a key consideration under the regulation. Our decision will proceed on this interpretation of the regulation. We have no occasion in this appeal to consider whether, given the regulation's express language, the quality of evidence under subsection (1) differs from the quality of the evidence under subsection (2), and, therefore, we express no views on that question.

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[54] *Id.*

[55] *Id.* at 48:14-46.

[56] *See, e.g.*, *McNeill v. United States*, 563 U.S. 816, 822 (2011); *United States v. Wilson*, 503 U.S. 329, 334 (1992); *Timex V.I., Inc. v. United States*, 157 F.3d 879, 886 (Fed. Cir. 1998); *Atencio v. O'Rourke*, 30 Vet.App. 74, 83 (2018).

II. THE CLASS CLAIM: DOSE ESTIMATES AND 38 C.F.R. § 3.311

A. Additional Factual Background

In our December 2019 order dealing with class certification, the Court provided a detailed history of the Palomares incident and radiation exposure, and we incorporate that history here.[57] However, we will summarize that history as it relates to the matter before us. Following the accident involving the B-52 bomber and the detonation of the two thermonuclear bombs near Palomares, Spain, appellant, along with nearly 1,400 U.S. military personnel, assisted in the cleanup efforts. To aid the effort to monitor possible radioactive exposure, many of those who worked in the cleanup effort gave urine and nasal swab samples. A group of 26 service members, including appellant, referred to as the "High 26,"were exposed to the greatest amount of radiation and were monitored for 18 to 24 months following the cleanup for signs of radiogenic conditions.[58] The Air Force discontinued these monitoring efforts in December 1967 when it determined these service members' "health is in no jeopardy from retention of radioactive materials as a result of participation in the [Palomares cleanup] operation."[59]

In evaluating disability claims based on ionizing radiation exposure, VA turns to the Air Force for information. In April 2001, a consulting firm, Labat-Anderson, evaluated the Air Force's dose methodology[60]

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[57] *Skaar II*, 32 Vet.App. at 167-72.

[58] R. at 2124-28.

[59] R. at 2430.

[60] *See* R. at 2682-2818.

and provided a report to the Air Force that established preliminary dose estimates for various subcategories of veterans.[61] The Labat-Anderson Report (LA Report or the Report) stated that the recorded urine dose intakes for Palomares veterans "seemed unreasonably high" compared to "environmental measurements" derived from air samples gathered 15 years after cleanup and "estimates prepared for other plutonium exposure cases – persons residing in the Palomares vicinity and Manhattan Project workers."[62] The LA Report found that these air samples and comparisons "provided a basis for preparing independent estimates of intake and dose using representative scenarios" rather than actual recorded dose intakes.[63] After comparing the "independent estimates" with the actual recorded dose intakes, the Report "excluded data from the on-site samples and attributed more significance to samples collected at later dates for the High 26 Group."[64]

The LA Report noted its findings "represent preliminary estimates that cannot be considered as definite" and "recommended further study to develop credible estimates of doses that are compatible with those calculated from environmental data."[65] Despite the caveats, the Air Force adopted the Report's dose estimate methodology in full.[66]

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[61] R. at 2691.

[62] R. at 2701.

[63] R. at 2691.

[64] R. at 2795.

[65] *Id.*

[66] R. at 1580-81, 3508-511.

In December 2013, the Air Force concluded that an evaluation of its radiation dose methodology revealed "inconsistencies in dose assignment over the past 12 years" since the LA Report.[67] The Air Force found its methodology, which was based on the Report, "appeared to underestimate doses for some individuals" and thus the Air Force intended to "formally standardize [its] response methodology for radiation dose inquiries involving Palomares participants" by establishing dose estimates based on each veteran's specific duties.[68] The Air Force further stated it would reevaluate individual dose estimates it had already provided Palomares veterans.[69]

In the course of this appeal, further information related to the dose estimates the Air Force provides VA has become available. In February 2019, this Court issued a limited remand for the Board to provide a supplemental statement of reasons or bases addressing the dose estimates VA relies on for Palomares veterans.[70] Appellant had the opportunity to submit more information about the dose estimates to VA, which he did. Included in that information was a December 2017 report from Dr. Frank von Hippel that called into question the Air Force's reliance on the LA Report.[71] Dr. von Hippel concluded that "the Air Force's dose estimates have huge uncertainties and the maximum doses incurred by those not in the 'High 26,' could be hundreds of times higher than those

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[67] R. at 1580.

[68] *Id.*

[69] R. at 1581.

[70] *Skaar I*, 31 Vet.App. at 18-20.

[71] R. at 2635-50.

that the Air Force has recommended to the VA for determination of benefits."[72]

Additionally, in August 2020, the Secretary provided the Court with a recent report from the Air Force that, in part, responds to Dr. von Hippel's paper.[73] In the report, the Air Force defends its use of dose estimate methodologies and notes that it "provides significant benefit of doubt in favor of veterans."[74] Both the Secretary and appellant note that this recent report was not before the Board and that the Court lacks jurisdiction to evaluate it in the first instance.[75] We refer to this submission merely to acknowledge its existence. In no way do we base our decision on this recent report.

B. Parties' Arguments

On behalf of the class the Court certified, appellant challenges the Air Force dose estimates based on the LA Report that VA relies on for Palomares veterans. He argues that pursuant to 38 C.F.R. § 3.311(c)(2)(ii), VA is required to rely on sound scientific and medical evidence and that the Air Force dose estimates do not meet that standard. Thus, he asserts that VA's reliance on those estimates is arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law, or, in the alternative, that VA's reliance on the estimates violates the Due Process Clause of the Fifth Amendment. The Secretary counters that in relying on the Air Force's dose estimates the Board made no clear errors of fact. He urges that we affirm the decision on

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[72] R. at 2650.

[73] *See* Secretary's Notice of Case Development (Aug. 25, 2020).

[74] *Id.* Exhibit at 61.

[75] *See id.* at 2; O.A. at 4:55-5:15.

appeal. Because the Board failed to explain whether the dose estimates constituted sound evidence, we will set aside the Board's decision and remand the matter for the Board to consider this issue and explain the bases for its determinations.

C. Legal Background

As we noted, a veteran may seek service connection for a disability caused by exposure to ionizing radiation by establishing the standard elements of direct service connection. But direct service connection is not at issue here. Rather, here we consider that for a veteran with a disability caused by exposure to ionizing radiation, two regulatory paths can lead to service connection. The first path, provided in 38 C.F.R. § 3.309, with its focus on radiation risk activities, is not relevant to the class claim. The second, provided in 38 C.F.R. § 3.311, applies to Palomares veterans and is central to the claims of Mr. Skaar and the class he represents.

Specifically at issue, § 3.311(c) requires the Under Secretary for Benefits to determine whether "sound scientific and medical evidence supports the conclusion [that] it is at least as likely as not" that a claimant's condition is the result of ionizing radiation exposure. "[S]ound scientific evidence" is defined as "observations, findings, or conclusions which are statistically and epidemiologically valid, are statistically significant, are capable of replication, and withstand peer review," and "sound medical evidence" is defined as "observations, findings, or conclusions which are consistent with current medical knowledge and are so

reasonable and logical as to serve as the basis of management of a medical condition."[76]

The specific question whether a dose estimate is "sound scientific evidence" is a factual determination that the Court reviews for clear error.[77] We may overturn the Board's factual findings only if there is no plausible basis in the record for the Board's decision and the Court is "'left with the definite and firm conviction'" that the Board's decision was in error.[78] However, if the Court determines that the Board failed to follow applicable regulatory provisions when making its factual assessment about dose estimates, we will hold such a decision unlawful and set it aside as being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[79] Finally, the Board must include in its decision a written statement of the reasons or bases for its findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's decision as well as facilitate review in this Court.[80]

D. Analysis

Appellant contends that the dose estimates the Air Force provided to VA and on which VA relied, in part, to deny service-connection claims to Mr. Skaar and the class do not constitute the sound medical or scientific

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[76] 38 C.F.R. § 3.311(c)(3).

[77] 38 U.S.C. § 7261(a)(4); *see Dyment v. West*, 13 Vet.App. 141, 144 (1999).

[78] *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[79] 38 U.S.C. § 7261(a)(3)(A).

[80] 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57.

evidence that § 3.311(c) requires. He provides detailed arguments regarding the science behind the Air Force's methodologies and the LA Report in particular. The Court, however, is limited in considering the scientific evidence presented in this matter. First, we have no jurisdiction to directly review what the Air Force has done to provide VA with dose estimates because our jurisdiction is limited to the review of final Board decisions.[81] We have no authority to dictate to the Air Force how dose estimates are created and nothing we say should be construed as doing so.

We are also constrained by our statutory duty to *review* what the Board has done.[82] No matter how deferential our standard of review may be, when the Board does not explain its reasons for reaching a factual finding, the Court's ability to review anything is frustrated. As the United States Court of Appeals for the Federal Circuit held, "[t]he Court of Appeals for Veterans Claims, as part of its clear error review, must *review* the Board's weighing of the evidence. It may not weigh any evidence itself."[83]

With these constraints in mind, we turn to how the Board assessed the dose estimates the Air Force provided for Mr. Skaar. In the April 2017 decision on appeal, the Board failed to address the methodology the Air Force used to measure appellant's radiation exposure, despite his direct challenge concerning that issue.[84] Recognizing this error, the en banc Court

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[81] *See* 38 U.S.C. § 7266(a); *see also Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order).

[82] *See* 38 U.S.C. § 7261(a)(3).

[83] *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (emphasis in original).

[84] R. at 106-07, 778-83.

retained jurisdiction and remanded the matter for the Board to address appellant's argument.[85] In the March 2019 supplemental statement of reasons or bases in response to our remand, the Board found that "on its face" the Air Force's dose estimate constituted sound scientific evidence.[86] However, the Board also noted that it could not make an independent judgment on "matters involving scientific expertise" and that it was "bound by regulations of the Department," which provided specific instructions on obtaining dose estimates.[87] The Board provided an inadequate statement of reasons or bases for concluding that the Air Force's dose estimate constituted sound scientific evidence.

First, the Board's finding that the dose estimate is sound evidence "on its face" without more detail essentially amounts to the Board saying the dose estimate is sound "because I say so." In different contexts the Court has held that such a conclusion without reasoning is unacceptable and does not allow for meaningful judicial review.[88] Relatedly, the Board's statement of reasons or bases for accepting the Air Force dose estimate seems internally contradictory. If the Board is unable to make an independent judgment on such matters, then it is unclear to the Court how it could also find the dose estimate sound "on its face."

Perhaps most critically, the Board's statement of reasons or bases on this issue is deficient because the Board appeared to believe it was bound to accept uncritically the dose estimate the Air Force provided.

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[85] *Skaar I*, 31 Vet.App. at 18-20.

[86] Appellee's Resp. to the Court's February 1, 2019, Order at 5 (Mar. 29, 2019).

[87] *Id.*

[88] *See, e.g.*, *Cantrell v. Shulkin*, 28 Vet.App. 382, 392 (2017).

The Board commented that it was "bound by the regulations of the Department."[89] That is certainly true.[90] But the relevant regulation imposes on VA the duty to base its determinations on sound scientific evidence. At oral argument, the Secretary appeared to adopt the Board's flawed view of its responsibility, arguing that VA is unable to change the information it receives from the Air Force and is bound by it.[91] This view is flawed because it is not consistent with § 3.311, which, as we have noted, provides that *VA* is responsible for determining whether the evidence on which it relies is sound. It may be that VA cannot change the estimate the Air Force provides, but that does not mean it may ignore its obligation to ensure that the evidence on which it relies is sound. After all, the dose estimate is at base nothing more than a piece of evidence that the Board must consider in its role as factfinder. Other regulations specifically mandate that on various matters VA is bound by findings of the Department of Defense or the service branches.[92] VA knows how to write regulations making other agencies' determinations binding on itself. But VA did not do so in § 3.311, and VA is therefore required to do more

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[89] Appellee's Resp. to the Court's February 1, 2019, Order at 5.

[90] 38 U.S.C. § 7104(c).

[91] O.A. at 39:24-59.

[92] *See* 38 C.F.R. § 3.1(m) (2020) (providing that a "service department finding that injury, disease, or death occurred in line of duty will be binding" on VA); 38 C.F.R. § 3.12(a) (2020) ("A discharge under honorable conditions is binding on [VA] as to character of discharge."); *see also Duro v. Derwinski*, 2 Vet.App. 530 (1992) (holding that pursuant to 38 C.F.R. § 3.203 a service department finding as to qualifying service for VA benefits is binding on VA).

than simply accept the Air Force's determinations as to dose estimates.

We agree with the Board's determination that whether the dose estimate evidence before it is sound may require scientific expertise beyond what the Board can provide independently.[93] But that does not mean that the Board may abdicate its responsibility to assess whether the evidence before it is "sound." After all, it is the Board's responsibility, as factfinder, to determine the credibility and weight to be given to the evidence before it.[94] In fact, the definition of "sound scientific evidence" in § 3.311(c) requires an understanding of what is statistically significant in dose estimate testing and whether such testing is capable of replication and can withstand peer review. And though the Court recognizes that it may not be proper for the Board to opine on such scientific determinations, just as it may not make its own independent medical judgments,[95] that recognition does not mean that the Board can simply accept what the Air Force or any entity says about a dose estimate. Rather, it means that the Board should seek appropriate evidence to make its decision, just as it does with respect to medical matters. The type of expert assistance the Board may need will depend on

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[93] *Cf. Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (holding that the Board "must consider only independent medical evidence to support [its] findings rather than provide [its] own medical judgment in the guise of a Board opinion").

[94] *See Washington v. Nicholson*, 19 Vet.App. 362, 369 (2005); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

[95] *See Kahana v. Shinseki*, 24 Vet.App. 428, 434-35 (2011); *Colvin*, 1 Vet.App. at 172.

the facts before it, just as it does when the Board assesses medical matters.

The problem here is that the Board did not provide any explanation beyond asserting that it could not make an independent determination about whether the Air Force dose estimate was sound, other than an unexplained finding that it was sound "on its face." In sum, the Board must provide more in the way of explaining how and why it found the Air Force dose estimate sound evidence if the Board relies on that evidence to deny appellant's claim. Because it did not do so, remand is required.[96]

To guide the Board on remand,[97] we underscore that if the Board without analysis simply accepts the Air Force's determinations, the Board fails to follow an applicable regulatory provision. Such a lack of reasoning renders a Board decision "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[98] In determining whether agency action is arbitrary and capricious under the Administrative Procedures Act (APA), courts look to the agency's reasoned decisionmaking concerning the action at issue.[99] Under section 7261, our review of Board decisions is functionally equivalent to "arbitrary and

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[96] *See Stone*, 14 Vet.App. at 120.

[97] *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009).

[98] 38 U.S.C. § 7261(a)(3)(A) (requiring the Court to hold unlawful and set aside Board decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[99] *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Ins.*, 480 U.S. 29, 42-43 (1983).

capricious" review under the APA.[100] In *Motor Vehicle Manufacturers Association of the United States v. State Farm Insurance*, perhaps the leading case on "arbitrary and capricious" review, the Supreme Court held that the National Highway Traffic Safety Administration's (NHTSA's) rescission of crash protection requirements was arbitrary and capricious,[101] because the NHTSA had failed both to address the change fully and to explain why it had ignored some of the research before it.[102] The Court explained that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[103]

VA has "never provided a clear and coherent explanation" for relying on the Air Force dose estimates, despite the regulatory requirement, that is, the requirement in § 3.311, that VA determine whether the evidence on which it relies is sound.[104] When reviewing a different agency action, the Court of Appeals for the District of Columbia Circuit captured well the situation we face: "We do not mean to suggest that the record mandates a conclusion contrary to the agency's. Rather we simply find that [the agency] has never articulated the standards that guided its analy-

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[100] *See Gilbert*, 1 Vet.App. at 58 (relying on the definition of "arbitrary and capricious" provided in *State Farm).*

[101] *Id.*

[102] *Id.* at 43.

[103] *Id.* at 43 (internal quotation marks omitted).

[104] *See Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437F.3d 75, 81 (D.C. Cir. 2006) (applying the "reasoned decisionmaking" standard).

sis."[105] As we have said, here remand is required for the Board to provide an informed analysis about whether the Air Force dose estimate is sound medical or scientific evidence sufficient to facilitate judicial review and avoid arbitrary and capricious decisionmaking.[106]

We recognize that, at oral argument, the Secretary's counsel offered a detailed explanation of the history of the Air Force dose estimate methodology.[107] The Court appreciates the time and effort counsel put into gaining an understanding the complex science at issue here and into discussing this issue during oral argument. However, it ultimately is not his prerogative to explain what the Board did not. As we have often said, the Secretary cannot make up for the Board's deficient statement of reasons or bases.[108]

In sum, we hold that § 3.311(c) requires that VA determine whether the dose estimates provided by the Air Force constitute sound medical and scientific evidence. Because the Board did not provide an ade-

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[105] *Id.*

[106] *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

[107] O.A. at 29:10-33:40.

[108] *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))); *McCray v. Wilkie*, 31 Vet.App. 243, 258 (2019) ("[T]he Secretary's impermissible post-hoc rationalization cannot make up for shortcomings in the Board's assessment."); *Simmons v. Wilkie*, 30 Vet.App. 267, 277 (2018) (holding that the "Court cannot accept the Secretary's post-hoc rationalizations" to cure the Board's reasons-or-bases errors); *Smith v. Nicholson*, 19 Vet.App. 63, 73 (2015) ("[I]t is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court.").

quate statement of reasons or bases for its determination regarding this question, remand is required.

Because this holding applies to the certified class, we pause for a moment to address the our dissenting colleague's concerns with respect to certifying the class and applying our holding as to the class members. First, our colleague disputes our jurisdiction to decide the claims of class members and to consider information obtained as result of the Court's limited remand. The en banc Court has addressed these matters in its class certification proceedings, and we are not at liberty to revisit them today. Relatedly, our dissenting colleague suggests that the Court decertify the class in light of our decision to remand Mr. Skaar's claim. Again, we are not inclined to revisit the class certification, because neither party has asked us to do so. Furthermore, we see no change in the circumstances that led the en banc Court to certify the class in the first place. Finally, to the extent that our dissenting colleague raises concerns as to our applying our holding to the class, at this stage in the litigation these concerns are premature. Our holding at this stage is unremarkable – the decision on the class claim applies to the class. It may be that at some point this panel or another could be called on to interpret how this decision applies in another context, perhaps in connection with an action brought to enforce our decision. On the other hand, there may never be a case in which the Court is called on to address the issue. And though we cannot predict such a situation will arise, we know one thing for certain: The time to consider the dissent's concerns is decidedly not today.

III. INDIVIDUAL CLAIM: SKIN CANCER

A. Additional Factual Background

During a January 2013 VA examination, the examiner diagnosed appellant with skin cancer.[109] Appellant requested that his case be reviewed to determine whether his skin cancer was linked to his exposure to ionizing radiation. VA obtained a dose estimate. That dose estimate found the total probability of causation between his skin cancer and his radiation exposure to be 35.13%.[110] In March 2014, the RO denied appellant's skin cancer claim.[111]

In a May 2014 statement, appellant requested that VA "move on with the important issues" and noted his radiation exposure and skin cancer.[112] Based on the Air Force's revised dose estimates, VA sought additional opinions regarding appellant's skin cancer. In a statement VA received in August 2014, appellant generally contested the adjudication of his Palomares-related claims and the regulations that governed that adjudication.[113] He did not, however, identify any specific disability.

In a September 2014 rating decision, VA continued to deny appellant's skin cancer claim.[114] Later that same month, appellant acknowledged receipt of that

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[109] R. at 1645.

[110] R. at 1530-35.

[111] R. at 1358-79.

[112] R. at 1305.

[113] R. at 1252-53.

[114] R. at 1180-97.

rating decision but noted he had not received the March 2014 rating decision.[115]

In November 2014, appellant submitted several documents to VA related to his skin cancer claim. First, he submitted an "Application for Disability Compensation and Related Compensation Benefits," requesting that his skin cancer claim be reopened and adjudicated based on his exposure to Agent Orange.[116] Additionally, he submitted a letter noting that his skin cancer claim was denied in March and September 2014 and stating that he had "reopened the claim for service connected compensation as a result of [his] exposure to Agent Orange."[117] With his letter he included medical evidence and other documents. VA construed these documents as a request to reopen the previously denied claim for service connection for skin cancer. In a February 2015 letter, appellant again disputed the denial of his skin cancer claim and provided a summary of the evidence he believed warranted granting the claim.[118]

In an August 2015 rating decision, the RO denied reopening.[119] The evidence of record does not show, nor does appellant argue, that he appealed the August 2015 rating decision.

B. Parties' Arguments

Appellant raises several substantive arguments regarding how VA adjudicated his skin cancer claim. First, he contends that VA's refusal to include basal

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[115] R. at 1153.

[116] R. at 819-21.

[117] R. at 758.

[118] Supplement to the Record of Proceedings at 727.

[119] R. at 178-209.

cell skin cancers and melanomas as radiation-exposure diseases under 38 C.F.R. § 3.309(d)(2) is arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law under the APA.[120] He also asserts that VA violated the APA by changing its skin cancer causation analysis without providing him notice. He further argues that the Board violated its duty to assist by failing to consider all evidence of record in denying his skin cancer claim. Recognizing that the Court may not be able to reach these substantive arguments, appellant argues in the alternative that the Board erred in failing to consider whether he had appealed the denial of his skin cancer claim. He points to several different documents that he alleges could be construed as NODs challenging the March and September 2014 rating decisions that denied his skin cancer claim.[121] The Secretary responds that the Court does not have jurisdiction over this matter in any respect because the Board did not address it.

We hold that we are unable to reach appellant's arguments on the merits because the Board did not consider the skin cancer claim; the Board addressed only appellant's claim for service connection for leukopenia. Our jurisdiction is limited to review of final Board decisions, and here, there is nothing to review about skin cancer.[122] However, we conclude that appellant submitted a valid NOD with respect to

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[120] As we explained above, section 7261, not the APA, governs this Court's review of whether VA action was arbitrary and capricious. However, the standard under both statutes is materially the same. In his reply brief, appellant clarified that he raised his challenge under both the APA and section 7261. *See* Reply Brief at 9.

[121] Reply Br. at 2-5.

[122] *See* 38 U.S.C. § 7252(a).

the skin cancer denial and will remand the matter for the issuance of an SOC.

C. Legal Background

Under the regulations in effect when appellant submitted the documents he argues are NODs,[123] VA defined an NOD as "[a] written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result."[124] An NOD "must be in terms which can be reasonably construed as disagreement with that determination and a desire for appellate review," but "special wording is not required."[125] As with all submissions, in determining whether an NOD has been filed, "'VA has always been, and will continue to be, liberal in determining what constitutes [an NOD].'"[126] Thus, "[i]n determining whether a written communication constitutes an NOD, the Court looks at both the actual wording of the communication and the context in which it was written."[127]

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[123] The Court notes that, in September 2014, VA amended § 20.201 to require the filing of an NOD on a standard form. *See* Standard Claims and Appeals Forms, 79 Fed. Reg. 57,660 (Sept. 25, 2014). That requirement applies "only with respect to claims and appeals filed 180 days after the date th[e] rule [was] published in the Federal Register as a final rule," i.e., after March 24, 2015. *Id.* at 57,686. This revision is not applicable here.

[124] 38 C.F.R. § 20.201 (2014).

[125] *Id.*

[126] *Palmer v. Nicholson*, 21 Vet.App. 434, 437 (2007) (quoting 57 Fed. Reg. 4088, 4093 (Fed. 3, 1992)).

[127] *Jarvis v. West*, 12 Vet.App. 559, 561 (1999).

"[A]n NOD initiates appellate review in the VA administrative adjudication process."[128] If a claimant files an NOD and no SOC is furnished in response, then the claim remains pending in appellate status.[129] The Court reviews de novo whether a timely NOD has been filed.[130] When presented with evidence of a timely NOD to which the RO has not responded, the proper remedy is for the Court to vacate the Board decision and remand the matter for the Board to address it and order the appropriate procedural compliance.[131] Thus, the Secretary's arguments regarding the Court's lack of jurisdiction are not correct. We have jurisdiction "where the Board failed to address a claim or matter even though a valid NOD has been filed as to an RO's adverse decision on that claim or matter."[132]

D. Analysis

Our analysis turns on the November 2014 letter appellant submitted to VA, along with the evidence he attached to it and the claim form he submitted that same month.[133] Although in his November 2014 submission appellant requested that his denied skin

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[128] *Mason v. Brown*, 8 Vet.App. 44, 54 (1995) (citing 38 U.S.C. § 7105); *Holland v. Gober*, 10 Vet.App. 433, 436 (1997).

[129] *See Tablazon v. Brown*, 8 Vet.App. 359, 361 (1995).

[130] *See Fenderson v. West*, 12 Vet.App. 119, 132 (1999); *Beyrle v. Brown*, 9 Vet.App. 24, 28 (1996).

[131] *Anderson v. Principi*, 18 Vet.App. 371, 374 (2004); *Manlincon v. West*, 12 Vet.App. 238, 240-41 (1999); *Fenderson*, 12 Vet.App. at 132; *Holland*, 10 Vet.App. at 36.

[132] *Anderson*, 18 Vet.App. at 378 (Steinberg, J., concurring); *see also Barringer v. Peake*, 22 Vet.App. 242, 244 (2008) (Court has jurisdiction to review whether the Board erred in failing to address a reasonably raised claim).

[133] *See* R. at 758, 819-21.

cancer claim be reopened and considered in light of his exposure to Agent Orange, his submission could not constitute a request to reopen a previously denied claim because the submission was filed within the 1-year period to appeal the March and September 2014 denials and those denials had not yet become final.[134] "[A] claim becomes final and subject to a motion to reopen only after the period for appeal has run."[135]

In *Jennings v. Mansfield*, the appellant challenged a Board decision finding no clear and unmistakable error in a 1954 rating decision that found a doctor's letter was not a request to reopen.[136] The Federal Circuit affirmed a decision of this Court affirming the Board because it held that the rating decision would not have become final at the time the letter was submitted.[137] The court held that "a claim becomes final and subject to a motion to reopen only after the period for appeal has run. Any interim submissions before finality must be considered by the VA as part of the original claim."[138] Relying on *Jennings*, this Court in *Young* held that a document received within one year of a September 1996 rating decision could not constitute a claim to reopen because the rating decision was not yet final.[139] Because the Board and the Court on de novo review also found the document did not constitute an NOD, appellant in that case was

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[134] 38 U.S.C. § 7105(b); *see Young v. Shinseki*, 22 Vet.App. 461, 466-67 (2009).

[135] *Jennings v. Mansfield*, 509 F.3d 1362, 1367-68 (Fed. Cir. 2007).

[136] *Id.* at 1367.

[137] *Id.* at 1368.

[138] *Id.*

[139] 22 Vet.App. at 466.

not entitled to an earlier effective date based on a unadjudicated claim.[140]

Similarly, here, appellant's November 2014 letter was received within 1 year of the March and September 2014 rating decisions, when neither had yet become final. Thus, at the time of the November 2014 letter, there was no prior final decision to reopen and his submission cannot constitute a request to reopen. Instead, the filing must be considered by VA as part of the original claim.[141] Having determined that the November 2014 letter was improperly adjudicated as a request to reopen, we now turn to whether it constitutes an NOD.

When we view the November 2014 letter in the context of the record as a whole, we hold that appellant's November 2014 letter, considered with the new claim form and medical evidence attached to the letter, qualifies as a valid NOD.[142] Appellant was pro se at the time, requiring us to sympathetically read his submissions.[143] Doing so, it seems to us that he disagreed with the RO's denial of his claim.[144] In the document, he explicitly refers to the March and September 2014 rating decisions that denied service connection for his skin cancer claim and expresses disagreement with those decisions. Appellant does not expressly call his submission an NOD, instead requesting reopening, but the regulation does not require any

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[140] *Id.* at 466-67.

[141] *Jennings*, 509 F.3d at 1368.

[142] *See* R. at 758.

[143] *See Comer v. Peake*, 552 F.3d 1362, 1367 (Fed. Cir. 2009).

[144] R. at 758.

special wording.[145] Furthermore, in VA's pro-veteran, nonadversarial system, if there was a question as to what he intended to do in submitting the letter, VA could have inquired as to his intentions.

Although appellant requested reopening of his skin cancer claim in the November 2014 letter, we hold that the submission could not be a request to reopen because the March and September 2014 rating decisions had not yet become final. Because the November 2014 letter was a written communication that expressed disagreement with the RO's denial of his skin cancer claim, referenced the March and September 2014 rating decisions, and showed an intent to continue to pursue benefits for his skin cancer, we further hold that the November 2014 letter meets the applicable regulatory requirements for an NOD instead. And, because no SOC was ever issued regarding appellant's skin cancer claim and the Board did not address the matter, the proper remedy is to remand the matter for the Board to address it and, if needed, order the required procedural development.[146]

IV. INDIVIDUAL CLAIM: RADIATION RISK ACTIVITY

A. Parties' Arguments

Finally, appellant argues that the Palomares incident should be a radiation-risk activity recognized in 38 C.F.R. § 3.309(d) and that its exclusion is arbitrary

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[145] 38 C.F.R. § 20.201.

[146] *See Anderson*, 18 Vet.App. at 374; *Fenderson*, 12 Vet.App. at 132; *Holland*, 10 Vet.App. at 436; *see also* 38 C.F.R. § 19.38 (2020) ("When a case is remanded by the Board of Veterans' Appeals, the agency of original jurisdiction will complete the additional development of the evidence or procedural development required.").

and capricious or constitutes a violation of due process. We have already held in the context of our class certification order that he lacks standing to make this argument based on his leukopenia diagnosis because leukopenia is not included as a condition presumptively caused by exposure to ionizing radiation.[147] That decision meant appellant could not represent a class challenging § 3.309's exclusion of Palomares as a radiation risk activity based on the denial of a benefit for a presumptive condition. It also effectively validated the Board's conclusion that appellant was not entitled to service connection because leukopenia was not a listed condition under § 3.309.[148] But our decision on that question left one argument from appellant unresolved because it was not relevant to the class certification question issue the Court addressed.

Specifically, appellant contends that even though he does not have one of the conditions under § 3.309 for which service connection based on ionizing radiation exposure is presumed, VA still should have considered whether the Palomares cleanup was a radiation risk activity to allow his inclusion on the Ionizing Radiation Registry (IRR). The IRR, maintained by the Veterans Health Administration (VHA), allows access to health examinations for those who are part of the program. Although he acknowledges that leukopenia is not a presumptive condition included in § 3.309, appellant asserts that he should have access to the periodic examinations under the IRR program. The Secretary contends that the Court lacks jurisdiction over this matter because the Board did not address it. We agree with the Secretary that this issue raises a jurisdic-

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[147] *Skaar II*, 32 Vet.App. at 173-74.

[148] R. at 5.

tional impediment and we will dismiss this aspect of the appeal.

B. Analysis

The VHA established the IRR to provide "free clinical evaluations (history, physical and ancillary testing) and health risk communication for eligible Veterans with a history of ionizing radiation exposure during qualifying military service."[149] The IRR was also set up to maintain a database of those exposed to ionizing radiation during military service.[150] The IRR's definition of "radiation risk activity" is the same as that provided in § 3.309, which, as we have made clear, does not include Palomares.[151] The VHA directive establishing the program notes that

> [e]nrolled Veterans with health concerns related to ionizing radiation who do not qualify as participating in "radiation at-risk activities" are encouraged to discuss their concerns with their primary care provider who may consult or schedule an appointment with an Environmental Health Clinician to discuss their concerns. However, these Veterans are not eligible for inclusion in the registry database.[152]

In the April 2017 decision on appeal, the Board addressed service connection for leukopenia and no other claim. The Board acknowledged that leukopenia was not a presumptive condition and ended its discus-

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[149] VHA Directive 1301 (Apr. 6, 2017).

[150] *Id.*

[151] *Id.* at 1.

[152] *Id.* at 8.

sion of § 3.309.[153] Appellant makes no argument about this finding and we see no error with it. Because appellant does not argue that he has a presumptive condition under § 3.309, he makes no argument about the decision the Board actually made. So, we deem him to have abandoned an appeal as to that decision.[154]

As to his IRR-exclusion argument, the Board did not address this issue, nor did appellant or the record reasonably raise it below. Indeed, there is no evidence in the record that suggests that appellant has ever applied to be included on the IRR or that he mentioned the issue to VA. Because (1) participation in the Palomares cleanup is not considered a radiation-risk activity, (2) leukopenia, the disability before the Board, is not a presumptive condition under § 3.309, and (3) appellant was not eligible for inclusion in the IRR, the issue was not reasonably raised below. Therefore, the Board was not obligated to address it, and the Court cannot reach this issue.[155]

V. APPELLANT'S RIGHTS ON REMAND

Because the Court is remanding appellant's leukopenia and skin cancer claims, on remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's postremand notice.[156] The Board must consider any such additional

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[153] R. at 5.

[154] *See Pederson*, 27 Vet.App. at 281-86.

[155] *See* 38 U.S.C. § 7252(a) (providing this Court with "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals"); *see also Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) ("[T]he court's jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed.").

[156] *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

evidence or argument submitted.[157] The Board must also proceed expeditiously.[158]

VI. CONCLUSION

After consideration of the parties' briefs, oral arguments, the record on appeal, and the governing law, the Court takes the following actions concerning the class and individual claims on appeal concerning the April 14, 2017, Board decision:

CLASS CLAIM

The Court SETS ASIDE the April 14, 2017, Board decision denying service connection for leukopenia and REMANDS the matter for the Board to readjudicate appellant's claim under § 38 C.F.R. § 3.311 in accordance with this opinion. This portion of our decision applies to the class certified in this matter, specifically to the following:

> All U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, and whose application for service-connected disability compensation based on exposure to ionizing radiation VA has denied or will deny by relying, at least in part, on the findings of dose estimates requested under 38 C.F.R. § 3.311, except those whose claims have been denied and relevant appeal windows of those denials have expired, or those whose claims have been denied solely based on dose estimates obtained before 2001.

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[157] *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

[158] 38 U.S.C. §§ 5109B, 7112.

INDIVIDUAL CLAIMS

The Court SETS ASIDE the Board's April 14, 2017, decision with respect to appellant's skin cancer claim and REMANDS the matter for further proceedings consistent with this opinion. We DISMISS for lack of jurisdiction the Board's decision with respect to appellant's claims concerning 38 C.F.R. § 3.309.

MEREDITH, *Judge*, concurring in part in the result and dissenting in part: I agree with the majority that the April 14, 2017, decision of the Board of Veterans' Appeals (Board) denying the appellant's disability compensation claim for leukopenia must be set aside and the matter remanded for further adjudication and development, and I agree that the Court lacks jurisdiction to address the appellant's arguments related to 38 C.F.R. § 3.309 based on potential inclusion in the Ionizing Radiation Registry (IRR).[159] I write separately for three reasons: First, I cannot join the majority's analysis concerning the appellant's leukopenia claim and the scientific validity of dose estimates obtained by VA pursuant to 38 C.F.R. § 3.311, because of the

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[159] Although I concur in the determination regarding the Court's lack of jurisdiction, I do not adopt the panel's analysis or ultimate conclusion to "*DISMISS for lack of jurisdiction the Board's decision* with respect to appellant's claims concerning 38 C.F.R. § 3.309." *Ante* at 27 (emphasis added). The Board addressed § 3.309 solely with respect to the appellant's claim for leukopenia, finding that presumptive service connection was not warranted because leukopenia is not a presumptive condition, Record (R.) at 5, a theory the appellant abandoned here on appeal. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). The Board did not address inclusion in the IRR or a claim for skin cancer. Because the appellant has not, in my view, established that the Board erred by not addressing those matters, the Court lacks jurisdiction to consider his arguments. However, there is no Board decision to dismiss.

materials on which the majority relies and the majority's treatment of the class. My position remains, as stated throughout these proceedings, that the Court does not have jurisdiction over most of the class members and further lacks jurisdiction to consider the nearly 3400 pages of evidence and argument submitted to the Board following the Court's limited remand, including any Board reference to that evidence in its supplemental analysis and the parties' arguments based on that evidence.[160] *See Henderson v. Shinseki*, 562 U.S. 428, 434-35 (2011) (reaffirming that objections to subject matter jurisdiction may be raised at any time); *see also Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). Moreover, although I agree that the appellant's claim for leukopenia must be remanded, the majority states that "[t]his portion of our decision applies to the class certified in this matter," *ante* at 27, without explaining what that means in application to the class or without discussing the propriety of continuing the class action.

Second, I must respectfully dissent from the Court's conclusion that the appellant had submitted a valid Notice of Disagreement (NOD) with the VA regional office's (RO's) decision denying disability benefits for skin cancer. As explained below, the appellant's arguments concerning a pending NOD are late-raised and undeveloped and, in my view, legally incorrect.[161]

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[160] In this regard, I incorporate by reference Judge Pietsch's and Judge Falvey's respective dissents to the Court's limited remand order and order certifying the class, which dissents I completely joined. *See Skaar v. Wilkie* (*Skaar I*), 31 Vet.App. 16, 22-32 (2019) (en banc order) (Pietsch, J., dissenting); *see also Skaar v. Wilkie* (*Skaar II*), 32 Vet.App. 156, 208-25 (2019) (en banc order) (Falvey, J., dissenting).

[161] In the absence of an NOD placing a skin cancer claim into appellate status and a Board decision addressing that claim, I

And, finally, I am compelled to comment that the result here demonstrates that the en banc Court's resurrection of the limited remand mechanism, for the purpose of deciding the appellant's motion for class certification, turned out not to be an effective tool. More than 3 years after the appellant appealed the April 2017 Board decision, the panel is left with no choice but to conclude that the Board provided an inadequate statement of reasons or bases for its decision and to remand the matter for readjudication—the same relief that the en banc Court could have, and in my view, should have initially provided. *See Skaar I*, 31 Vet.App. at 29-30, 32 (Pietsch, J., dissenting); *see also Skaar II*, 32 Vet.App. at 217-18 (Falvey, J., dissenting); *Skaar v. Wilkie* (*Skaar III*), No. 17-2574, 2020 WL 3564269, at *3 n.6 (July 1, 2020) (Meredith, J., dissenting). Instead, the parties and the en banc Court expended considerable time and resources debating the efficacy of conducting class actions in the appellate context and the bounds of the Court's jurisdiction, without bringing the appellant any closer to receiving a decision that adequately addresses the merits of whether the dose estimates relied on by VA are based on a methodology that complies with 38 C.F.R. § 3.311(c).

I. LEUKOPENIA CLAIM: VALIDITY OF DOSE ESTIMATES PURSUANT TO 38 C.F.R. § 3.311

It is well settled that the Board is required to consider all theories of entitlement to VA benefits that are either raised by the claimant or reasonably raised by the record. *Robinson v. Peake*, 21 Vet.App. 545, 553

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agree with the majority's conclusion that the Court cannot address the merits of any of the appellant's substantive arguments related to skin cancer and § 3.309. *See ante* at 21.

(2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). For that reason, I fully concur in the majority's decision to set aside the Board's April 2017 decision; the Board, at that time, did not address the appellant's 38 C.F.R. § 3.311 arguments. *See* R. at 1-12, 106-07, 778-83. I, however, would draw that conclusion based solely on the content of the April 2017 Board decision, the evidence and arguments then before the Agency, and the contentions raised in the appellant's initial briefing to the Court.[162]

As for proceedings since that time, for the reasons stated more fully by Judge Pietsch in her dissent to the Court's limited remand order, *see Skaar I*, 31 Vet.App. at 30-32 (Pietsch, J., dissenting), I continue to believe that the Court exceeded the bounds of its jurisdiction by remanding the matter to the Board to address the scientific validity of the methods applied in arriving at a dose estimate and by permitting the appellant to submit additional evidence and argument, yet constraining the broad discretion ordinarily afforded to the Secretary in developing a claim. *See Douglas v. Shinseki*, 23 Vet.App. 19, 22-23 (2009) (discussing the statutory and regulatory provisions supporting the Secretary's broad authority to develop a claim); *Shoffner v. Principi*, 16 Vet.App. 208, 213 (2002) (stating that 38 C.F.R. § 3.304(c) provides the Secretary "the discretion to determine how much development is necessary for a determination of service connection to be made"); 38 C.F.R. § 3.304(c) (2020)

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[162] For the reasons stated in my dissent to the panel's order denying the Secretary's motions to strike the attachments and related arguments to the appellant's briefs, my review would be limited to those arguments that do not rely on the documents attached to his briefs. *See Skaar III*, 2020 WL 3564269, at *3-8 (Meredith, J., dissenting).

("The development of evidence in connection with claims for service connection will be accomplished *when deemed necessary*." (emphasis added)). And, regardless of the propriety of the scope of the limited remand, "[b]ecause the [Notice of Appeal] triggering our jurisdiction relates only to the April 2017 Board decision," our review remains constrained by statute to the 2017 Board decision and the materials then before the Board. *Skaar I*, 31 Vet.App. at 31 (Pietsch, J., dissenting); *see Skaar II*, 32 Vet.App. at 216-17 (Falvey, J., dissenting).

Further, even assuming that the Court has jurisdiction to review the Board's supplemental statement of reasons or bases and the evidence added to the record following the Court's limited remand, the Board's supplemental analysis demonstrates that the Court's limited remand did not allow for meaningful review of the appellant's challenges to the methodologies employed by the Air Force and the dose estimates relied on by VA in adjudicating his claim. In this regard, it is noteworthy that the majority faults the Board for finding, "on its face," that the June 2014 dose estimate "is based on sound scientific evidence," Board Mar. 26, 2019, Supplemental Statement at 5, but agrees at the same time "with the Board's determination that whether the dose estimate evidence before it is sound may require scientific expertise beyond what the Board can provide independently." *Ante* at 16.

I do not disagree that scientific expertise may be required to adequately address the appellant's arguments and evidence, including the Labat-Anderson report and Dr. Frank von Hippel's December 2017 opinion regarding that report and the Air Force's radiation dose estimates. *Cf. Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (finding that the Board is

prohibited from "provid[ing] [its] own medical judgment in the guise of a Board opinion"), *overruled on other grounds by Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998); 38 C.F.R. § 3.311(a)(3) (2020) (requiring VA to obtain an independent expert radiation dose estimate "[w]hen necessary to reconcile a material difference between an estimate of dose, from a credible source, submitted by or on behalf of a claimant, and dose data derived from official military records"). But, by retaining jurisdiction, the en banc Court, in its limited remand, prevented the Board from developing the evidence the panel now agrees may be necessary to adjudicate the scientific validity of the disputed dose estimates. *See Skaar I*, 31 Vet.App. at 19 (remanding the case "*solely* for the Board to provide a supplemental statement of reasons or bases" and ordering that, "regardless of the outcome of the Board's determination on remand, the **Board shall not take any further action** beyond the response required by this order unless and until the Court relinquishes jurisdiction over the matter" (bold emphasis added)). Indeed, the Board recognized these restrictions on its jurisdiction,[163] and the effect

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[163] The Board stated in relevant part:

> [A]t no time ***prior to*** the Board's April 2017 decision did the appellant offer his own independent dose estimate. Such a report would have been considered by the Board, and the Board would have been required to determine its probative value in making a decision. Without an independent dose estimate, and without a rational basis to reject the competent findings of the Air Force which were relied on by various VA personnel, the Board could not find that the lay opinions offered by the appellant prior to the April 2017 decision outweigh the opinions offered by experts in the field.

of those restrictions were not lost on the parties. *See* Appellant's Response to the Court's Feb. 1, 2019, Order at 1-2 (asserting that the Board ignored 3390 pages of evidence submitted on limited remand); Secretary's Response to the Court's Feb. 1, 2019, Order at 7-9 (arguing that the Board lacks authority to render decisions requiring specialized expertise and that the Board was precluded from obtaining any additional evidence interpreting the highly technical Labat-Anderson report). Thus, I would not, under the unusual circumstances of this case, conclude that the Board "abdicate[d] its responsibility to assess whether the evidence before it is 'sound.'" *Ante* at 16.

The remand ordered today, including the Court's relinquishment of jurisdiction, affords the appellant the relief he should have received initially and the Board the opportunity to obtain and consider all the evidence deemed necessary to decide the claim. I would expect, after the protracted nature of these

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Board Mar. 26, 2019, Supplemental Statement at 5. And, regarding the arguments submitted following the Court's limited remand, the Board concluded as follows:

> [W]hile the appellant has since raised numerous challenges to the methodology used, in evaluating the evidence **the Board is limited to the evidence that is available to it at the time a decision is rendered**. While the appellant's October 2014 and September 2016 letters raised challenges to the dose estimate there was no evidence that the claimant has any expertise in the field of preparing dose estimates, or that he had access to the evidence considered by the United States Air Force when they offered their revised opinion in June 2014. **As such, in April 2017 the Board had no evidentiary basis to reject the opinion offered by the Air Force.**

Id. (bold emphasis added).

proceedings, that the Secretary will fulfill his statutory obligation to proceed expeditiously, fully consider the post-April 2017 evidence and argument added to the record, and develop evidence, as necessary, to fully and fairly adjudicate the appellant's § 3.311 claim.[164]

II. CLASS CLAIM: REMEDY

Next, although I agree that the April 14, 2017, Board decision denying disability compensation for leukopenia must be set aside and the appellant's individual claim remanded for readjudication, I cannot join the majority's conclusion that "[t]his portion of our decision applies to the class certified in this matter." *Ante* at 27. To begin, the majority provides no context for its declaration and, considering that this is the first time that the Court has certified a class in an individual appeal of a Board decision, some explanation is required. Further, although my position remains, as stated by Judge Falvey in his dissent to the class certification order, *see Skaar II*, 32 Vet.App. at 210-15,

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[164] As to whether § 3.311(c)(1)(i)'s requirement that VA rely on "sound scientific and medical evidence" applies equally to subsection (c)(2), the majority seems to provide conflicting statements regarding the scope of its opinion. On the one hand, the majority states that the requirement applies to both subsections and that "[t]o hold otherwise would mean that the standard for granting a claim based on exposure to ionizing radiation is different than the standard for denying a claim." *Ante* at 9. On the other hand, the majority states as follows: "We have no occasion in this appeal to consider whether, given the regulation's express language, the quality of evidence under subsection (1) differs from the quality of the evidence under subsection (2), and, therefore, we express no views on that question." *Ante* at 10. In either case, the majority's discussion in this regard appears to be dicta because the discussion is unnecessary to its decision, which sets aside the Board's decision based on an inadequate statement of reasons or bases.

that the en banc majority exceeded our jurisdiction when it certified a class to include veterans who have not yet filed a claim and veterans who have filed claims that remain pending before VA at any level—the so-called "Future-Future claimants" and "Present-Future claimants"—we are now left to surmise how the Court's decision today will affect the certified class. For example, given that the class issue has not yet been resolved and the Court is not retaining jurisdiction, who will have jurisdiction over the class after mandate issues? Is it possible for the class to be "pending" before VA? Would the class travel with the appellant's claim to the Board and, if additional development is required, to the RO? And, what effect would that have on the status of any class members' pending claims, or the Agency's ability to process a new claim? Are the class members in limbo until the Agency adjudicates, on a fully developed record, the appellant's challenges to the dose estimates relied on by VA?

Under the circumstances, I would suggest that the Court instead, pursuant to its duty to monitor its class decision, sua sponte consider the continued propriety of maintaining the class action. *See Amara v. CIGNA Corp.*, 775 F.3d 510, 520 (2d Cir. 2014) (noting that Rule 23 of the Federal Rules of Civil Procedure "requires courts to 'reassess . . . class rulings as the case develops,' and to ensure continued compliance with Rule 23's requirements" (citation omitted)); *Kingery v. Quicken Loans, Inc.*, 2014 U.S. Dist. LEXIS 75811, at *2 (S.D. W. Va. June 4, 2014) ("Even after the court has certified a class, it 'is duty bound to monitor its class decision and, where certification proves improvident, to decertify, subclassify, alter, or otherwise amend its class certification.'" (quoting *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 544 (E.D. Va.

2000))). As stated by the en banc majority in its class certification order, "[t]he class seeks a single class-wide injunction ordering VA to comply with the provisions of § 3.311." *Skaar II*, 32 Vet.App. at 194. But that is not the decision that the Court reaches today. *Compare ante* at 13-18, 26-27, *with Skaar II*, 32 Vet.App at 194 (stating that, "if the class succeeds on the merits, 'injunctive relief or corresponding declaratory relief'—in the form of an order from this Court to the Secretary that he comply with the provisions of § 3.311—'is appropriate respecting the class as a whole'" (quoting FED. R. CIV. P. 23 (b)(2))). Rather, the Board's inadequate statement of reasons or bases frustrates judicial review, precluding our ability to provide the requested class-wide relief and compelling us to remand the matter for full readjudication without retaining jurisdiction. And, we have no reason to assume that further adjudication of the appellant's claim will lead to a final Board decision adverse to the appellant or subsequent appellate review of the class issue for which he is the representative. How, then, would the substantive issue be resolved for the class members?

Further, in certifying the class, the en banc majority recognized that "class actions before this Court are the exception, not the rule," and laid out a nonexhaustive set of factors for consideration on a case-by-case basis. *Skaar II*, 32 Vet.App. at 196; *see id*. at 194-99. Although no one factor was identified as determinative, it is noteworthy that a factor found to weigh in favor of certification was the purported completeness of the record. *Id.* at 199. Specifically, the en banc majority emphasized that (1) the appellant and the class submitted scientific evidence challenging the validity of the Air Force's dose estimates, (2) the Court is "equipped with the Board's supplemental statement

addressing [the appellant's] challenge to VA's adherence to § 3.311," and (3) the Court "require[s] no additional information to decide the class challenge on the merits." *Id.*

As set forth above, the panel now reaches an appropriate but opposite conclusion. We lack sufficient factfinding by the Board and, as alluded to by the majority and the Board, additional expert scientific evidence may be required to adequately address the appellant's arguments. *See ante* at 16 (agreeing that it may not be proper for the Board to make scientific determinations and suggesting that the Board seek appropriate expert evidence to render an informed decision); Mar. 26, 2019, Supplemental Statement at 5. *But see Skaar II*, 32 Vet.App. at 199 (recognizing that class certification "could prove impractical" if the Court required a significant amount of additional information).

In sum, although some of my colleagues previously considered the class action device a superior method for litigating the class claim, it has become even more apparent now that the statutory limits on our appellate jurisdiction, our lack of factfinding abilities, and an incomplete record render class treatment of this issue at best impractical and raise a spectrum of jurisdictional, procedural, and substantive complications. The Court should decertify the class.

III. SKIN CANCER

As for the appellant's claim for skin cancer, the majority on de novo review concludes that he filed a timely NOD with the RO's March 2014 denial and remands the matter for issuance of a Statement of the Case. I disagree both with the substance of the decision as well as the majority's implicit acceptance

of the appellant's failure to comply the Court's Rules of Practice and Procedure and willingness to address this late-raised argument.

In that regard, I would stress that the represented appellant did not raise this argument in his opening brief.[165] *But see* U.S. VET. APP. R. 28(a)(5). Rather, he first raised this issue of an unaddressed NOD in response to the Secretary's motion to strike his brief, in which the Secretary asserted in part that, because the Board adjudicated only a claim for leukopenia and the appellant failed to explain in his opening brief the basis for the Court's jurisdiction over a claim for skin cancer, the Court should not consider his arguments relating to skin cancer. *See* Secretary's Apr. 18, 2018, Motion To Strike at 1-2. Further, in his opposition, the appellant argued only that the Court has jurisdiction over the claim because May 16 and June 23, 2014, letters were sufficient to constitute an NOD, and the Board implicitly denied the claim. *See* Appellant's May 14, 2018, Opposition to Motion To Strike at 1-2. Not until he filed his reply brief, after the Secretary's limited opportunity to argue why the Court lacks jurisdiction over the skin cancer claim, did he point to several letters in the record—including the November 2014 letter, which the majority now deems a valid NOD. *Compare* Secretary's Br. at 13-14 (asserting that "[n]owhere in his [opening] brief does [a]ppellant identify any documents in the record" initiating an

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[165] To be clear, the appellant raised arguments in his opening brief with regard to *the merits* of his skin cancer claim; he did not, however, explain how the Court would have jurisdiction to address the merits of a claim not adjudicated in the Board decision on appeal or request remand on procedural grounds. Appellant's Brief (Br.) at 9-16, 25-30 (in part requesting that the Court direct VA to grant disability benefits for skin cancer).

appeal as to skin cancer and, in support of his argument that the Court lacks jurisdiction, noting that, in November 2014 correspondence, the appellant informed VA that his "'intention and desire was to have [skin cancer] considered within the parameters of exposure to Agent Orange, *not radiation*'" (emphasis added) (quoting R. at 758)), *with* Reply Br. at 3-4 (referencing six letters from May 2014 through February 2015 as potential NODs). And, with regard to the November 2014 letter, the appellant's entire argument is as follows: "Mr. Skaar sent a letter on November 20, 2014[,] disagreeing with the denial of his skin cancer claim and asking that the VA reconsider it." Reply Br. at 4. He does not explicitly discuss the actual wording of that letter, clarify the context in which it was written, or otherwise explain why it meets the requirements of an NOD. *See id*.

Unlike other cases in which the Court has exercised its discretion to hear late-raised arguments, *see, e.g.*, *Crumlich v. Wilkie*, 31 Vet.App. 194, 202 (2019) (addressing a late-raised argument where "the Court was presented with a compelling allegation that the regulation VA ask[ed the Court] to apply conflict[ed] with the appellant's statutory rights and the Secretary's concessions appeared to confirm that allegation," and the Court thereafter obtained a written response from the Secretary), the circumstances of this case do not warrant similar treatment.[166] *See Wait v. Wilkie*, 33

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[166] In this regard, I would note that declining to address this issue is consistent with decades of caselaw from our Court and higher courts and would not leave the appellant without an available remedy. *See Evans v. Shinseki*, 25 Vet.App. 7, 18 (2011) (citing *DiCarlo v. Nicholson*, 20 Vet.App. 52, 55 (2006), *aff'd sub nom. Dicarlo v. Peake*, 280 F. App'x 988 (Fed. Cir. 2008)) (concluding that it was not apparent from the record whether the appellant filed an NOD concerning claims not decided by the

Vet.App. 8, 19 (2020) (declining to address matters first raised during the rebuttal portion of oral argument); *see also Carbino v. Gober*, 10 Vet.App. 507, 511 (1997) (declining to review an argument first raised in the appellant's reply brief), *aff'd sub nom. Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("[I]mproper or late presentation of an issue or argument . . . ordinarily should not be considered.").

However, even assuming that consideration of this issue is warranted, I cannot agree that the appellant's November 2014 correspondence constitutes an NOD. *See ante* at 22-24. The majority holds that "[w]hen we view the November 2014 letter in the context of the record as a whole, . . . [the] appellant's November 2014 letter, considered with the new claim form and medical evidence attached to the letter, qualifies as a valid NOD." *Ante* at 23. The majority states that the letter "explicitly refers to the March and September 2014 rating decisions, . . . expresses disagreement with those decisions[, and] . . . . showed an intent to continue to pursue benefits for his skin cancer." *Ante* at 23-24. Yet, neither the appellant nor the majority identify which language in the letter "can be reasonably construed as disagreement with [the rating decisions] and a desire for appellate review." 38 C.F.R. § 20.201 (2014); *see ante* at 23-24; Reply Br. at 4.

Further, in my view, even liberally construing the letter, when read in context, it reflects that the appellant did *not* express a desire for appellate review. Rather, after noting that his claim for skin cancer "began a long journey through the VA process," the

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Board, but that the appellant remained free to raise the issue to VA).

appellant provided the following clarification regarding his intent:

> I received a phone call from a live person at the Muskogee [o]ffice informing me that my claim was being forwarded to the Jackson, M[ississippi] Regional Center as they process all radiation-related claims. *My intention and desire was to have that disease considered within the parameters of exposure to Agent Orange*, ***not radiation***.
>
> The skin cancers were both denied on [March 27, 2014,] and again on September []4, 2014, as not having been caused as a result of documented exposure to RADIATION.
>
> Therefore[,] I have reopened the claim for service[-]connected compensation *as a result of my exposure to Agent Orange*.

R. at 758 (italics and bold emphasis added).

The foregoing demonstrates that, to the extent that the appellant expressed disagreement with the rating decisions, his disagreement centered on the RO's adjudication of the wrong theory of entitlement. Instead of seeking appellate review of the RO's denial, the appellant unequivocally twice expressed his desire and intent to pursue benefits for skin cancer based on an alternative theory—exposure to Agent Orange. *See Jarvis v. West*, 12 Vet.App. 559, 561 (1999) ("In determining whether a written communication constitutes an NOD, the Court looks at both the actual wording of the communication and the context in which it was written.").

Finally, because the appellant's arguments regarding the remaining letters are undeveloped, *see* Reply

Br. at 3-5, I would conclude that he has not shown that the Board possessed jurisdiction over his claim for skin cancer. And, where the Board lacks jurisdiction, so does this Court. *See Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) (holding that "the court's jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed"); *see also Tyrues v. Shinseki*, 23 Vet.App. 166, 178 (2009) (en banc) ("[T]his Court's jurisdiction is controlled by whether the Board issued a 'final decision'—i.e., denied relief by either denying a claim or a specific theory in support of a claim and provided the claimant with notice of appellate rights."), *aff'd*, 631 F.3d 1380 (Fed. Cir. 2011), *vacated*, 565 U.S. 802 (2011), *reinstated as modified*, 26 Vet.App. 31 (2012) (en banc) (per curiam order), *aff'd*, 732 F.3d 1351 (Fed. Cir. 2013); *cf. Manlincon v. West*, 12 Vet.App. 238, 240-41 (1999) (exercising jurisdiction and concluding that, because the appellant had filed an NOD, the Board erred by referring a matter to the RO rather than remanding for issuance of an SOC).

IV. CONCLUSION

For these reasons, I concur in the result with respect to the appellant's individual claim for leukopenia under § 3.311. I further agree with the majority's conclusions that the Court lacks jurisdiction to address the appellant's substantive arguments concerning skin cancer, the IRR, and § 3.309. I respectfully dissent from the remainder of the Court's opinion, including its application of the remedy to the class.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 17-2574

VICTOR B. SKAAR,

Appellant,

v.

ROBERT L. WILKIE, SECRETARY OF
VETERANS AFFAIRS,

Appellee.

Before BARTLEY, *Chief Judge*, and PIETSCH, GREENBERG, ALLEN, MEREDITH, TOTH, FALVEY, *Judges*; and DAVIS and SCHOELEN, *Senior Judges*.[*]

ALLEN, *Judge*, with BARTLEY, *Chief Judge*, and GREENBERG, TOTH, *Judges*; and DAVIS, *Senior Judge*.

SCHOELEN, *Senior Judge*, concurring in part and dissenting in part.

FALVEY, *Judge*, with PIETSCH and MEREDITH, *Judges*, dissenting.

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[*] Judges Davis and Schoelen are Senior Judges acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDERS 16-19, 17-19 (Dec. 4, 2019).

ORDER

United States Air Force veteran Victor B. Skaar was exposed to ionizing radiation while participating in the cleanup of plutonium dust in Palomares, Spain, following a midair aircraft collision. He later developed a blood disorder, leukopenia, which he believes was caused by in-service radiation exposure, even though an Air Force radiation dose estimate found the levels of exposure he suffered far below those required to cause his disability. In an April 14, 2017, decision the Board of Veterans' Appeals (Board) denied him service connection. This appeal followed.

We do not today address the merits of Mr. Skaar's claim. Rather, we consider his motion to certify a class of similarly situated veterans to proceed in an aggregate action. The issue we confront here—class certification in the context of an appeal of an individual Board decision—is one of first impression. For many years, we held this Court categorically lacked the power to certify classes. *See Monk v. McDonald*, No. 15-1280, 2015 WL 3407451, at *3 (May 27, 2015) (*Monk I*); *Harrison v. Derwinski*, 1 Vet.App. 438, 439 (1991) (en banc) (per curiam); *Lefkowitz v. Derwinski*, 1 Vet.App. 439, 440 (1991) (en banc) (per curiam). This changed when the United States Court of Appeals for the Federal Circuit (Federal Circuit) held we possess, at least in certain contexts, the authority to certify class actions. *Monk v. Shulkin*, 855 F.3d 1312, 1321-22 (Fed. Cir. 2017) (*Monk II*). We then held we would, in appropriate cases, certify classes seeking writs of mandamus under the All Writs Act. *Monk v. Wilkie* (*Monk III*), 30 Vet.App. 167, 174 (2018); *see, e.g.*, *Godsey v. Wilkie*, 31 Vet.App. 207, 220-25 (2019); *see also Wolfe v. Wilkie*, __ Vet.App. __, No. 18-6091, 2019 WL 4254039, at *14-19 (Sept. 9, 2019).

This brings us to Mr. Skaar's motion for class certification. We hold (1) the Court may, in appropriate situations, certify classes in the context of an individual appeal of a Board decision; (2) our jurisdiction allows us to include in such classes both persons who have obtained a final Board decision as well as those who have not; and (3) as in the petition context, we will use Federal Rule of Civil Procedure 23 as a guide when deciding whether to grant class certification. Finally, class certification will be reserved for those cases where appellants demonstrate the class device is a superior vehicle for litigating the class claim than a precedential decision. Applying these principles, we grant in part and deny in part the motion for class certification.

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I. BACKGROUND

In the early morning hours of January 17, 1966, a U.S. Air Force B-52 Superfortress bomber, armed with four thermonuclear weapons, collided with a KC-135 refueling tanker over the small fishing village of Palomares, Spain. *See* Record (R.) at 28-29, 560, 796-98, 1878-80, 3509, 3557-802. Part of Operation Chrome Dome, a U.S. military plan calling for continuous patrol by nuclear bombers around the airspace of the

former Soviet Union, the bomber was supposed to refuel with the tanker for the trip home. R. at 3574-76. The midair collision destroyed both aircraft, and the bomber's atomic payload was scattered across the Spanish countryside. R. at 3605-07. Eventually, one weapon was recovered intact and another fished from the depths of the Mediterranean. R. at 3613-32. Emergency parachutes attached to the other two bombs, however, failed to deploy. R. at 3603-04. Both bombs impacted at high speeds, causing internal, nonnuclear explosives in the devices to detonate. R. at 3606-07. The resulting explosions released a cloud of radioactive plutonium dust over the area, contaminating soil and crops, and spreading radioactive debris for miles. R. at 1878.

Mr. Skaar, along with nearly 1,400 other U.S. military personnel, was sent to the accident site to assist in cleanup and monitoring efforts. While there, to assess possible radioactive exposure, the military personnel gave urine and nasal swab samples. Mr. Skaar was a member of a group of the 26 service members (the High 26) who were determined to be among the most exposed and who were monitored for a period of 18 to 24 months after the accident for signs of radiogenic conditions. R. at 2124-28. The monitoring efforts were discontinued, however, in December 1967 when the Air Force informed Mr. Skaar his "health is in no jeopardy from retention of radioactive materials as a result of participation in the [Palomares cleanup] operation." R. at 2430.

But in 1998, 32 years after the Palomares cleanup, Mr. Skaar was diagnosed with leukopenia, a decrease in white blood cell count. R. 2157. The diagnosing physician opined that exposure to ionizing radiation "[h]istorically does appear to be the positive agent"

causing leukopenia, but concluded "we have been unable to prove this." *Id.* Mr. Skaar then filed a claim with VA, seeking service connection for that condition. R. at 2155. In February 2000, VA denied his claim. *See* R. at 2090-99. This was so, VA explained, because leukopenia is not a radiogenic disease VA recognizes as resulting from a "radiation-risk activity," and because Mr. Skaar had not presented sound scientific or medical evidence linking the disease to radiation exposure. R. at 2097.

Two separate regulatory paths lead to to service connection for veterans who suffer a disability they believe was caused by exposure to ionizing radiation. Both are at issue here as part of Mr. Skaar's motion for class certification. Under 38 C.F.R. § 3.309(d)(3)(ii), VA recognizes certain nuclear incidents as "radiation-risk activities." Those who participated in a radiation-risk activity listed in § 3.309 and who later developed one or more of the radiogenic diseases enumerated in § 3.309(d)(1) benefit from a presumption of service connection. § 3.309(a). For those who did not participate in a listed radiation-risk activity, § 3.311(a) is available. *See Hilkert v. West*, 12 Vet.App. 145, 148-49 (1999) (en banc). Under that provision, VA requests exposure data from a veteran's service branch. 38 C.F.R. § 3.311(a)(1)-(2). For those claims that meet certain threshold requirements, the Under Secretary for Benefits then reviews the gathered information and determines whether "sound scientific and medical evidence supports the conclusion [that] it is at least as likely as not" the condition is the result of ionizing radiation exposure. § 3.311(a), (c). The regulation defines "sound scientific evidence" as "observations, findings, or conclusions which are statistically and epidemiologically valid, are statistically significant, are capable of replication, and withstand peer review,"

and "sound scientific medical evidence" as "observations, findings, or conclusions which are consistent with current medical knowledge and are so reasonable and logical as to serve as the basis of management of a medical condition." § 3.311(c)(3). In making that determination, the Under Secretary for Benefits may request an advisory opinion from the Under Secretary for Health. § 3.311(c)(1). The Under Secretary's final determination is then sent to the agency of original jurisdiction, which considers the opinion as evidence. § 3.311(f). For Palomares veterans, § 3.309's presumption of service connection is unavailable because VA does not recognize the Palomares plutonium dust cleanup as a radiation-risk activity. So instead, veterans such as Mr. Skaar must seek service connection under § 3.311's less favorable provisions. *See Ramey v. Gober*, 120 F.3d 1239, 1242-43 (Fed. Cir. 1997).

The Air Force provides VA with dose estimates for Palomares veterans. In April 2001, a consulting firm, Labat-Anderson, evaluated the Air Force's dose methodology. *See* R. at 2682 2818. This evaluation culminated in a report (the LA Report or the Report) establishing preliminary dose estimates for various subcategories of veterans. R. at 2691. The LA Report stated that the recorded urine dose intakes for Palomares veterans "seemed unreasonably high" compared to "environmental measurements" derived from air sampling some 15 years after the cleanup and "estimates prepared for other plutonium exposure cases – persons residing in the Palomares vicinity and Manhattan Project workers." R. at 2701. These air samples and comparisons "provided a basis for preparing independent estimates of intake and dose using representative scenarios" rather than actual recorded dose intakes. R. at 2691. After comparing those "independent estimates" with the actual recorded dose intakes, the

Report "excluded data from the on-site samples and attributed more significance to samples collected at later dates for the High 26 Group." R. at 2795. This exclusion of "unreasonably high" dose estimates forms the basis for Mr. Skaar's allegation that the Air Force's dose estimates do not constitute "sound scientific evidence" as required by law. *See* Appellant's Apr. 23, 2019, Response (Resp.) at 4. The Report noted its findings "represent preliminary estimates that cannot be considered as definitive" and recommended further study "to develop credible estimates of dose that are compatible with those calculated from environmental data." *Id.* Despite these reservations, the Air Force adopted the LA Report's dose estimate methodology in full. *See* R. at 1580-81, 3508-511.

After VA's initial denial in 2000, Mr. Skaar requested that VA reopen his claim in March 2011. R. at 2077. Based on that claim and per § 3.311, the regional office (RO) requested a radiation exposure opinion. R. at 1886. In response, the Air Force estimated in April 2012 that Mr. Skaar's maximum total effective dose during the Palomares cleanup was 4.2 rem with a bone marrow committed dose of 1.18 rem, compared to annual dose limits of 5 and 50 rem, respectively, for occupations typically involving radiation exposure.[1] R. at 1888-89. Based on these estimates, the director of the Post 9/11 Environmental Health Program, writing for the Under Secretary for Benefits, advised in May 2012 that "it is unlikely that [Mr.

[1] A rem (roentgen equivalent man) is the unit of measurement for radiation. One unit represents "the dosage of a ionizing radiation that will cause the same biological effect as one roentgen of X-ray or gamma-ray exposure." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/rem (last visited Oct. 31, 2019).

Skaar's] leukopenia . . . can be attributed to radiation exposure while in military service." R. at 1877. And, based on this opinion, the RO in June 2012 denied Mr. Skaar's claim. R. at 1869. Mr. Skaar timely disagreed with the RO's denial, but the RO continued to deny the claim in September 2013. R. at 1690-91. He then perfected an appeal to the Board. R. at 1588-89.

In October 2013, a private physician opined that Mr. Skaar's leukopenia "is likely related to exposure to heavy radioactive material in [1966]." R. at 39-40. And 2 months later, the Air Force concluded an evaluation of its radiation dose methodology that revealed "inconsistencies in dose assignment over the past 12 years" since the LA Report. R. at 1580. The Air Force's methodology, derived from the LA Report, "appear[ed] to underestimate doses to some individuals" and, thus, the Air Force intended to "formally standardize [its] response methodology for radiation dose inquiries involving Palomares participants" by establishing dose estimates based on each veteran's specific duties. *Id.* Finally, the Air Force stated it would reevaluate the individual dose estimates it had already provided for Palomares veterans. R. at 1581. And in June 2014, the Air Force provided VA with Mr. Skaar's revised dose estimate, assigning him a new maximum total effective dose of 17.9 rem and a bone marrow committed dose of 14.2 rem. *See* R. at 1301, 1274-75.

Meanwhile, the Board in May 2015 found the Air Force's revised dose estimates were new and material evidence warranting reopening of Mr. Skaar's claim. R. at 695-99. The Board then remanded the claim to the RO because the Air Force's "revised assessment [was] significantly higher than the April 2012 assessment" and, thus, "another [dose estimate] opinion [was] warranted." R. at 698. That opinion was

provided in August 2016. The RO found that, based on the revised bone marrow committed dose estimate of 14.2 rem, "it is not likely that the Veteran's leukopenia was caused by exposure to ionizing radiation during military service." R. at 131-35. The RO then again denied Mr. Skaar's claim, citing the results of the August 2016 revised dose estimate. R. at 113-14. Nonetheless, in September 2016, a private physician opined that Mr. Skaar's leukopenia was "a result of exposure to ionizing radiation/plutonium." R. at 38.

Mr. Skaar then returned to the Board, which, on April 14, 2017, again denied his claim. *See* R. at 2-12. The Board concluded VA's May 2012 dose estimate opinion lacked probative value "as it was based on an inaccurate dose estimate." R. at 10. But the Board found the August 2016 dose estimate "highly probative" because it "was based on a review of the entire record," while Mr. Skaar's private medical opinions were not as probative because "none offered any rationale for their statements." R. at 10-11. Mr. Skaar then appealed to this Court, and filed the pending motion for class certification. The Secretary moved to stay proceedings in this matter pending our resolution of *Monk III*, a request we denied. This matter was assigned to a panel of the Court for decision on the merits but, given the novelty of the issue, the motion for class certification was submitted to the full Court for decision.

Mr. Skaar asks us to certify a class of "all U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain[,] and whose application for service-connected disability compensation based on exposure to ionizing radiation the VA has denied or will deny." Motion (Mot.) for Class Certification at 1. He later clarified the proposed class

encompasses (i) "veterans whose claims for service-connected disability benefits related to exposure to ionizing radiation at Palomares the VA has denied at any level, from the RO through the [Board], except for those who have appealed to this Court and received a decision for which the mandate has issued;" (ii) "veterans whose claims the RO or [Board] has denied and for which the deadline for appeal has expired, as well as veterans whose claims are currently pending before a [decision review officer] or the [Board] after an initial RO denial;" and (iii) "Palomares veterans with an appeal currently pending before this Court[.]" Appellant's Apr. 16, 2018, Resp. at 2. The proposed class also includes "veterans with claims that have not yet been filed at the RO," including "those who have not filed a claim for an existing condition, including because they are aware of the VA's history of denial of Palomares veterans' claims or the methodology used to calculate dose exposure" and "those who have only recently developed a radiogenic condition, and those whose claims have been delayed at the RO." *Id.*

The proposed class raises two claims. The first challenges VA's omission of the Palomares cleanup from the list of radiation-risk activities in 38 C.F.R. § 3.309(d)(3)(ii) (the § 3.309 claim), while the second centers around VA's compliance with § 3.311(c)'s command that when adjudicating Palomares veterans' claims VA rely on dose estimates based on "sound scientific and medical evidence" (the § 3.311 claim). Mr. Skaar's proposed class alleges VA's actions regarding both claims are invalid under the Administrative Procedure Act and violate class members' due process and equal protection rights. The putative class asks us to order VA to (i) recognize the Palomares cleanup as a "radiation-risk activity;" (ii) apply dose estimate

methodology that is supported by "sound scientific and medical evidence;" and (iii) re-adjudicate the benefits claims of those class members whose claims have already been denied.

During the Court's review of this matter, it became clear the Board had failed to address several of Mr. Skaar's arguments regarding the § 3.311 claim. *See* R. at 106-07, 778-83. Thus, we ordered a limited remand to the Agency for it to "provide a supplemental statement of reasons or bases addressing the appellant's expressly raised argument in the first instance." *Skaar v. Wilkie*, 31 Vet.App. 16, 18 (2019). The Board faithfully complied with our order. In its supplemental statement, the Board stated Mr. Skaar's arguments based on the first, lower 2012 dose estimate "appear moot" as "the Board's April 2017 decision specifically did not rely on [the] May 2012 findings . . . since those findings were based on the April 2012" Air Force dose estimate that had since been found to have inconsistencies. Secretary's Mar. 29, 2019, Resp. at 4.

Regarding the June 2014 revised dose estimate, the Board found that "on its face it is based on sound scientific evidence" because it "was based on then recently re-evaluated internal processes which were initiated to ensure a comprehensive and consistent approach to dose estimates," and because it "considered the Veteran's previously reported intake values based on the application of contemporary models to his bioassay data collected in the 1960's." *Id.* at 5. As to whether the previous inconsistencies in the Air Force's dose methodology that plagued its earlier April 2012 estimate still plagued the June 2014 revised dose estimate, the Board stated that "just as it is prohibited from exercising its own independent judgment to resolve medical questions, the Board is not in a

position to exercise such independent judgment on matters involving scientific expertise." *Id.* (citing *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991)).

Finally, the Board explained it "is bound by regulations of the Department," and those regulations "provide specific instructions for obtaining dose estimates." *Id.* at 6 (citing 38 U.S.C. § 7104(c); 38 C.F.R. §§ 19.5, 20.101(a) (2018)). Thus, "[w]ithout an independent dose estimate, and without a rational basis to reject the competent findings of the Air Force," the Board had no evidentiary basis on which to grant service connection. *Id.* at 5. Armed with a record sufficient for the Court to consider the class certification motion, we turn to that endeavor now.

II. ANALYSIS

First, we confront a threshold issue. We must decide whether Mr. Skaar has the requisite standing to assert the claims on which he seeks to represent a class. We conclude he lacks standing to bring the § 3.309 claim, but has standing to pursue the § 3.311 claim.

We then assess whether we have the power to use the class action device as a matter of law. We conclude we do. We then consider whether, as a normative matter and given our status as an appellate court with the power to issue precedential opinions, we will exercise our discretion to certify class actions in appropriate appeals. We conclude, as we did in the petition context, class actions have a role to play in appeals in appropriate situations.

Returning to the proposed class, we examine the proposed class definition and modify it to exclude those claimants with adverse decisions who chose not to appeal (i.e., their claims have expired). We then

address whether we should certify the modified class as to the § 3.311 claim. In this regard, we first make clear, as we did with petitions, *see Monk III*, 30 Vet.App. at 174, we will use Federal Rule of Civil Procedure 23 as a guide for determining whether class certification is appropriate. We then conclude the modified class satisfies Rule 23(a)'s requirements and is consistent with the functional requirements of Rule 23(b)(2). But we also recognize Rule 23 is only a guide. We are not similarly situated to the Federal district courts, for which Rule 23 was written. Thus, we consider whether our status as an appellant court (both in terms of the use of precedential opinions and the challenges we may face in managing a class action) counsels against certification. We conclude, in the context of this case, our appellate role does not counsel against certification. But we also hold we will presume class actions should not be certified because of our ability to render binding precedential decisions. Claimants seeking class certification can rebut this presumption by showing by a preponderance of the evidence that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy" before we will exercise our discretion in certifying a class.

Having determined class certification is appropriate, we next consider appointment of class counsel. Following the guidance of Federal Rule of Civil Procedure 23(g), we appoint Michael Wishnie, Esq., of the Jerome N. Frank Legal Service Organization at Yale Law School as class counsel.

Our final consideration concerns whether class members may elect to opt out of this action and what notice, if any, the class should receive of our certification decision. In line with the overwhelming

weight of Federal jurisprudence, we hold the nature of this class is such that opt out rights are not required. And, because class members may not opt out, there is no need to provide individualized notice of certification. However, we conclude generalized notice of class certification designed to reach as many class members as possible is appropriate and order the parties to develop a joint plan for effecting such notice.

Having summarized our holdings, we now address each point in detail in the balance of this order.

A. Standing

"[S]tanding is a threshold inquiry in all actions," including class actions.[2] *Allen v. Wright*, 468 U.S. 737, 750 (1984). "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). "Standing is one of the keys necessary to open the door to the federal courthouse." *Matte v. Sunshine Mobile Homes, Inc.*, 280 F. Supp. 805, 826 (W.D. La. 2003). The appellant has the burden of showing standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Simon v. E. Ky. Welfare Rights Org.*, 426

[2] This Court has adopted Article III of the Constitution's case-or-controversy requirement. *See Mokal v. Derwinski*, 1 Vet.App. 12, 13 (1990).

U.S. 26, 40 n.20 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975)). "[S]tanding cannot be acquired through the back door of a class action." *Allee v. Medrano*, 416 U.S. 802, 829 (1974) (Burger, C.J., concurring in part and dissenting in part). "If the individual plaintiffs lack standing, the court need never reach the class action issue." *Hawecker v. Sorensen*, No. 1:10-cv-00085 OWW JLT, 2011 WL 98757, at *2 (E.D. Cal. Jan. 12, 2011).

Standing requires the appellant show (1) an injury-in-fact; (2) traceability; and (3) redressability. *See Defs. of Wildlife*, 504 U.S. at 560-61; *see also Friends of the Earth, Inc. v. Laidlow Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). An injury-in-fact is one that is "concrete," "particularized," "not abstract," and "actual or imminent." *Defs. of Wildlife*, 504 U.S. at 560-61. Claimants cannot simply "allege a bare procedural violation, divorced from any concrete harm" to satisfy the injury requirement. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Standing is determined on a claim-by-claim basis. *See, e.g.*, *McGuire v. BMW of N. Am., LLC*, No. 13-7356 (JLL), 2014 WL 2566132, at *6 (D.N.J. June 6, 2014). In class actions with multiple claims, at least one named representative must have standing with respect to each claim. *See Keepseagle v. Veneman*, No. Civ.A.9903119EGS1712, 2001 WL 34676944 (D.D.C. Dec. 12, 2001); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000). Without it, the claims must be dismissed. *See, e.g.*, *King Cty. v. IKB Deutsche Industriebank AG*, Nos. 09 Civ. 8387(SAS), 09 Civ. 8822(SAS) 2010 WL 2010943 (S.D.N.Y. May 18, 2010). Accordingly, we separately analyze Mr. Skaar's standing to challenge both §§ 3.309 and 3.311.

1. Mr. Skaar lacks standing to pursue the § 3.309 claim on behalf of the class.

The § 3.309 claim alleges VA's omission of the Palomares incident from its list of recognized radiation-risk activities under § 3.309 is arbitrary and capricious, violates the Administrative Procedure Act, and is unconstitutional. Section 3.309 establishes a presumption of service connection for veterans who have (i) a listed radiogenic disease (ii) resulting from a recognized radiation-risk activity. So, for Mr. Skaar to show an injury-in-fact he must demonstrate VA's exclusion of Palomares from the regulation's list of radiation-risk activities harmed him in a concrete and particularized way. *See Defs. of Wildlife*, 504 U.S. at 560-61. But the Board decision before us denied service connection for leukopenia, which is not one of § 3.309's enumerated radiogenic conditions. Thus, if we were to grant the requested relief as to this claim, Mr. Skaar would not benefit from the regulation's presumption. Mr. Skaar attempts to sidestep this by arguing Palomares' recognition as a radiation-risk activity would entitle him to enroll in VA's Ionizing Radiation Registry (IRR). This program provides certain health screening benefits for veterans exposed to ionizing radiation. *See* VHA Directive 1301 (Apr. 6, 2017).

We hold Mr. Skaar lacks standing to challenge § 3.309 because he would not benefit from the relief requested as his condition, leukopenia, is not a listed radiogenic condition under that regulation. Thus, the inclusion of Palomares as a radiation-risk activity, while it may assist many unnamed class members, would not entitle him to § 3.309's presumption of service connection. Further, any harm Mr. Skaar has suffered from not having access to the IRR is distinct

from the alleged harm suffered by veterans with qualifying radiogenic diseases. The unavailability of IRR enrollment also fails to meet the proposed class definition. Mr. Skaar seeks to represent "all U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain[,] and whose application for service-connected disability compensation based on exposure to ionizing radiation the VA has denied or will deny." Mot. for Class Certification at 1. But IRR enrollment, to the extent Mr. Skaar has been denied it and to the extent it represents a "benefit," is not an "application for service-connected disability compensation" and, thus, cannot serve as the basis for Mr. Skaar's standing to represent the proposed class as to the § 3.309 claim.

"It is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) (emphasis in original). *But see Gratz v. Bollinger*, 539 U.S. 244, 262-63 (2003) (declining to answer whether respondent, who was an undergraduate transfer student, had standing to represent a class that included both undergraduate transfer students and freshmen or whether the issue was more properly analyzed under Rule 23's typicality analysis). Mr. Skaar may very well be correct he has suffered some type of harm from not having access to the IRR, but his proper remedy for that particular injury is to pursue relief from VA, not this Court. Thus, we dismiss Mr. Skaar's challenge to VA's omission of Palomares from § 3.309's list of

radiation-risk activities as he lacks standing to bring the claim. *See Rosinski v. Shulkin*, 29 Vet.App. 183, 190-92 (2018); *Prado-Steiman ex rel. Prado*, 221 F.3d at 1279.

2. Mr. Skaar has standing to pursue the § 3.311 claim on behalf of the class.

However, we hold Mr. Skaar does have standing to challenge VA's reliance on the Air Force's dose estimate methodology in deciding claims under § 3.311. First, he has suffered an injury-in-fact. Certain qualifying radiogenic conditions not listed in § 3.309 are analyzed under § 3.311, which requires evidence of radiation exposure and dosages for the award of service connection. *See* 38 C.F.R. § 3.311(a)(1); *see also Hilkert*, 12 Vet.App. at 145-49. Leukopenia is not listed as a qualifying radiogenic condition. *See* § 3.311(b)(2). But § 3.311, unlike § 3.309, provides that, for conditions other than those specifically listed by VA as qualifying radiogenic diseases, "VA shall nevertheless consider the claim under the provisions of this section provided the claimant has cited or submitted competent scientific or medical evidence that the claimed condition is a radiogenic condition." § 3.311(b)(4). And the Board favorably found Mr. Skaar's private medical opinions linked his leukopenia to radioactive exposure. *See* R. at 6. Thus, Mr. Skaar's leukopenia qualifies for the dose estimate procedures of § 3.311.

VA regulations require dose estimates be supported by "sound scientific and medical evidence." 38 C.F.R. § 3.311(c)(1)(i). Mr. Skaar, both individually and on behalf of the class, argues the Air Force's dose methodology, which VA relies on in adjudicating service connection claims by Palomares veterans, fails to meet that standard. Unlike the class claim under § 3.309, in

his class claim under § 3.311 Mr. Skaar was subject to the challenged conduct.

For claims under § 3.311, "an assessment will be made as to the size and nature of the radiation dose or doses." § 3.311(a). For claims based on exposure other than from atmospheric nuclear weapons testing or the military occupations of Hiroshima or Nagasaki, VA must request "any available records concerning the veteran's exposure to radiation," such as service medical records and "other records which may contain information pertaining to the veteran's radiation dose in service." § 3.311(a)(2)(iii).

Mr. Skaar filed a service connection claim for leukopenia in March 2011. VA then requested a dose estimate from the Air Force. That estimate stated Mr. Skaar's maximum total effective dose was 4.2 rem. In May 2012, the VA Environmental Health Program found that, because Mr. Skaar's effective dose was less than 5 rem, "it is unlikely that his leukopenia . . . can be attributed to radiation exposure." R. at 1877. VA then denied his claim in June 2012. However, in December 2013, the Air Force increased its assigned dose values for Palomares veterans after determining its previous methods led to inconsistent dose estimates. VA then again denied Mr. Skaar's leukopenia claim in March 2014, choosing not to apply the revised dose methodology to his claim. The Air Force then *again* revised its assigned dose value for Mr. Skaar to 17.9 rem, a more than quadruple increase from its previous assigned dose value. The Board then reopened Mr. Skaar's leukopenia claim in May 2015 because of the new dose estimate and remanded the claim to the RO, which again denied the claim. Mr. Skaar perfected an appeal to the Board, which then yet again denied service connection. R. at 2-12. The proposed class here

challenges VA's reliance on both the Air Force's pre- and post-2013 dose estimate methodologies. *See* Appellant's Apr. 8, 2019, Resp. at 3.

The parties spill a great deal of ink discussing Mr. Skaar's standing to represent the class challenge. The Secretary argues there is a crucial distinction between the pre-2013 and post-2013 methodologies.[3] *See* Secretary's Apr. 18, 2019, Resp. at 1-3. He contends Mr. Skaar lacks standing to challenge the pre-2013 methodology because that method was derived from air sampling, while his dose estimates came from urine sampling. *Id.* at 2. Mr. Skaar counters that "[t]he pre-2013 and post-2013 distinction is meaningless because [he] challenges the VA's reliance on the LA Report as a whole." Appellant's Apr. 23, 2019, Resp. at 4. In his view, "the LA Report's original sin is that it excluded the urine samples with the highest plutonium measurements." *Id.* Mr. Skaar alleges this exclusion of the highest dose estimates applies equally to both the pre-2013 and post-2013 methodologies.

Whether one considers the question of differences in the pre- and post-2013 methodologies as one of constitutional standing or under Rule 23's typicality analysis is largely one of semantics here, involving significant overlap. Thus, we analyze the pre- and post-2013 distinction in the context of both standing and typicality.

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[3] As stated above, the Air Force adopted the LA Report in 2001. *See* R. at 1580-81; 3508-511. Thus, and because Mr. Skaar challenges only VA's reliance on dose estimates prepared using the Report's methodology, he does not have standing to challenge denials of claims due to ionizing radiation exposure from the Palomares cleanup that were based on dose estimates pre-dating 2001.

First, Mr. Skaar has standing to challenge the post-2013 methodology because the Air Force's post-2013 methodology excluded the highest measurements recorded. In a December 2013 document, the Air Force stated it was revising Palomares dose estimates by setting the estimated dose intake for the High 26 group as "their established intake estimates," and by using, for all other Palomares veterans, the lowest dose intake from the High 26. R. at 1580-81. But Mr. Skaar contends the established plutonium intakes for the High 26 are artificially deflated by the earlier decision to exclude "unrealistically high" measurements taken on-site. Thus, the Air Force's revised methodology does nothing to correct the exclusion of the urine samples with the highest plutonium measurements as to Mr. Skaar, and he has sufficiently shown an injury-in-fact as to the post-2013 methodology. Appellant's Apr. 23, 2019, Resp. at 4.

Second, debating whether Mr. Skaar has standing to represent those class members solely challenging VA's reliance on pre-2013 Air Force dose estimates is almost certainly an academic exercise. As discussed in the balance of this order, we will certify a modified class of claimants that excludes those whose claims related to ionizing radiation exposure from the Palomares cleanup have been denied by VA or this Court and those whose appeals windows for those denials have expired. Put differently, our decision affects only claimants who will file claims after the date of this order or those whose claims are currently before the Court or pending before VA. That means it's exceedingly unlikely there are any remaining class members who will *only* have a dose estimate based solely on the pre-2013 methodology.

But, even if there are class members whose claims were denied solely on the basis of the Air Force's pre-2013 methodology, Mr. Skaar has sufficient standing to represent them. He has shown injury-in-fact from the pre-2013 methodology, which was derived from the LA Report. *See* R. at 1580-81. This methodology was applied to Mr. Skaar in the form of the May 2012 advisory opinion implementing the LA Report's dose estimate methodology, which specifically "excluded data from the on-site [urine] samples and attributed more significance to samples collected at later dates for the High 26 Group," of which Mr. Skaar was a member. R. at 2795. The Secretary argues, however, the exclusion of the urine samples from the pre-2013 methodology is irrelevant here because, in the decision on appeal, the Board expressly discounted the findings of the May 2012 advisory opinion as they were "based on an inaccurate dose estimate." R. at 10. But it is unclear how this makes any difference. It is undisputed that the dose estimate methodology under § 3.311, whether it be from pre- or post-2013, excluded certain urine dose samples. If Mr. Skaar is successful in showing this exclusion is not based on "sound scientific evidence" as required by VA's own regulations, then he will have suffered an injury-in-fact.

Mr. Skaar's injury is also "fairly traceable to the challenged conduct of the defendant." *Spokeo*, 136 S. Ct. at 1547. VA's own regulations require it to use "sound scientific evidence" in adjudicating radiation exposure claims, s*ee* 38 C.F.R. § 3.311, and VA is free to request dose estimates from private entities or to establish its own dose estimates procedures. Finally, Mr. Skaar's injury is "likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. An order from us holding the Secretary is in non-compliance with § 3.311 and directing him to comply

with the law would immediately give Mr. Skaar relief because he could not again be subject to the same allegedly unlawful process. Thus, Mr. Skaar has standing to bring the § 3.311 claim.

Having concluded Mr. Skaar has standing to challenge § 3.311 but not § 3.309, we have occasion to modify Mr. Skaar's proposed class definition to reflect our legal conclusions. *See Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757 (7th Cir. 2014) (courts should modify proposed class definitions that are slightly overbroad rather than deny certification outright); *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 750 (7th Cir. 2005) ("Litigants and judges regularly modify class definitions . . . ."); *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004); *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993) ("A court is not bound by the class definition proposed in the complaint and should not dismiss the action simply because the complaint seeks to define the class too broadly."). But first, we must consider whether, as a matter of law, we have the power to certify class actions in the appeal context at all. We conclude we do.

B. The Power To Certify Class Actions in the Appeal Context

Before the passage of the Veterans' Judicial Review Act (VJRA), Pub. L. 100-687, 102 Stat. 4105 (1988), veterans were free to aggregate challenges to VA regulations in the limited context in which judicial review was available. *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361 (1974); *Wayne State Univ. v. Cleland*, 590 F.2d 627 (6th Cir. 1978); *Giusti-Bravo v. U.S. Veterans Admin.*, 853 F. Supp. 34 (D.P.R. 1993); *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113 (N.D. Cal. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980). Yet, until recently this Court did not

recognize its authority to entertain class actions. *See Monk II*, 855 F.3d at 1320-21; *Harrison*, 1 Vet.App. at 439. In *Monk II*, the Federal Circuit disagreed, reasoning there was "no persuasive indication that Congress intended to *remove* class action protection for veterans when it enacted the VJRA." 855 F.3d at 1320 (emphasis in original). "Rather, Congress gave the Veterans Court express authority to prescribe rules of practice and procedure for its proceedings." *Id.* Thus, "[o]n the basis of th[is] express statutory authority . . . , the Veterans Court may prescribe procedures for class actions or other methods of aggregation." *Id.*

Although *Monk II* concerned a petition and this is an appeal, nothing in that decision indicates our authority to certify classes is limited to the petition context. Indeed, when describing the bases on which we had the power to certify classes, the Federal Circuit stated: "We hold that the Veterans Court has such authority [to certify and adjudicate class action cases] under the All Writs Act, other statutory authority, and the Veterans Court's inherent powers." *Monk II,* 855 F.3d at 1318. Although the reference to the All Writs Act arguably could be confined to the context of a petition (although that is not necessarily the case), the other two sources of authority to certify classes are not so limited. Moreover, the Federal Circuit specifically discussed our authority in the context of an appeal. *See id.* at 1320. To be sure, that court had no occasion to rule on the question of class actions in the appeal context because *Monk II* concerned a petition. Nevertheless, its analysis is instructive. At a minimum, our inherent authority supports the use of the class action device as does our ability to craft rules of practice and procedure. *See* 38 U.S.C. § 7264(a). There is no principled distinction between the authority the Federal Circuit recognized for petitions from appeals.

Thus, faithfully applying the Federal Circuit's logic in *Monk II*, we hold we possess the authority to certify class actions in the appeal context.

Having concluded we possess the power to aggregate claims and certify class actions in the appeal context, we now address whether we will exercise that power. We hold that, in appropriate circumstances, we will.

C. The Utility of Class Actions in the Appeal Context

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). They are "a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment." *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004). And they have a long history, originating with English "bills of peace," which allowed courts to consolidate numerous persons with the same claim against the same defendant. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 376 (1967). They have been an established part of Federal practice since the original version of Rule 23 was promulgated in 1937 and established three types of class actions plaintiffs could bring. *See* FED. R. CIV. P. 23(b) advisory committee's note to 1937 adoption. The Rule was revised to its current form in a landmark 1966 amendment laying out the procedural "measures which can be taken to assure the fair conduct of [class] actions." FED. R. CIV. P. 23(b) advisory committee's note to 1966 amendment; *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995).

"Class relief is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Yamasaki*, 442 U.S. at 700-01). "[T]he class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every" class member "to be litigated in an economical fashion under Rule 23." *Yamasaki*, 442 U.S. at 701.

Class actions can also be an effective force for institutional change. As one court has observed, "[u]nless we can use the class action and devices built on the class action, our judicial system is not going to be able to cope with the challenges of [] mass repetitive wrongdoing." *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 652 (E.D. Tex. 1990), *aff'd in part, vacated in part on other grounds by* 151 F.3d 297 (5th Cir. 1998). The Federal Circuit has observed that "[c]lass actions can help [this Court] . . . by promoting efficiency, consistency, and fairness, and improving access to legal and expert assistance by parties with limited resources." *Monk II*, 855 F.3d at 1320. Further, "[c]lass actions may help [this Court] consistently adjudicate cases by increasing its prospects for precedential opinions," help "prevent the VA from mooting claims scheduled for precedential review," and "could be used to compel correction of systemic error and to ensure that like veterans are treated alike." *Id.* at 1320-21.

We agree with the Federal Circuit's views on the utility of the class action device. Although that court made its comments in the petition context, the concepts of "efficiency, consistency, and fairness" apply

equally to appeals. It is true this Court has the power to issue precedential decisions that, in some measure, mimic the effect of a class action. However, that power does not mean there is no use for the class action device. We conclude although our ability to issue binding precedent is a factor we should consider when deciding whether to certify a class (a matter we return to below), that ability does not counsel in favor of categorically rejecting the use of this procedural device.

Thus, as we have the power to certify class actions and will exercise our discretion to do so in appropriate cases, we now consider whether this matter is appropriate for certification. To do so requires precisely defining the proposed class. *See* FED. R. CIV. P. 23(c)(1)(B) (class action orders "must define the class and the class claims, issues, or defenses"). To do so we must have "a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified" that "provid[es] the parties with clarity and assist[s] class members in understanding their rights and making informed opt-out decisions." *Marcus v. BMW of N.A., LLC*, 687 F.3d 583, 591 (3d Cir. 2012).

D. The Proposed Class Composition

Mr. Skaar asks us to certify a class of "all U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain[,] and whose application for service-connected disability compensation based on exposure to ionizing radiation the VA has denied or will deny." Mot. for Class Certification at 1. Combined with his later clarification of the class

definition, the proposed class contains five subgroups.[4] They are the following:

- Past Claimants: those Palomares veterans whose claims based on ionizing radiation exposure were denied before reaching the Board but who did not perfect an appeal of that denial;
- Expired Claimants: those Palomares veterans whose claims based on ionizing radiation exposure the Board has denied but whose appeal windows to this Court have expired without the filing of a Notice of Appeal;
- Present Claimants: those Palomares veterans whose claims based on ionizing radiation exposure the Board has denied and whose appeal windows to this Court have not yet expired or who have already appealed an adverse decision to this Court;
- Present-Future Claimants: those Palomares veterans who have filed claims based on ionizing radiation exposure that remain pending before VA at any level and that VA will deny; and
- Future-Future Claimants: those Palomares veterans who have developed a radiogenic condition but have not yet filed claims based on ionizing radiation exposure.

The proposed class composition depends on whether we have jurisdiction over each subgroup. First, we clearly have jurisdiction over the Present Claimants

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[4] We separate the class into subgroups merely for purposes of analyzing our jurisdiction as to each subgroup and do not divide the class into formal subclasses. *See* FED. R. CIV. P. 23(c)(5) (permitting district courts to divide a class into subclasses).

because they possess final Board decisions and either their 120-day windows to appeal those decisions to this Court have not yet expired or these claimants have already appealed within the 120-day time period. *See* 38 U.S.C. §§ 7252(a), 7266(a). We consider the remaining subgroups in turn.

1. The Present-Future and Future-Future Claimants

The Present-Future and Future-Future Claimants pose a unique jurisdictional issue. Neither subgroup has had final Board decisions dispose of its claims. Indeed, the Future-Future Claimants have not yet even filed disability compensation claims. We must decide whether our jurisdictional statute prohibits the inclusion of class members without a final Board decision as we have "an independent obligation to ensure that [we] do not exceed the scope of [our] jurisdiction." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Relying on the Supreme Court's holding in *Bowen v. City of New York*, 476 U.S. 467 (1986), we conclude our jurisdictional statute does not prohibit their inclusion.

i. There is no indication Congress intended veterans to receive fewer procedural protections under the VJRA than they enjoyed before its enactment.

"Courts created by statute," like ours, "can have no jurisdiction but such as the statute confers." *Christianson v. Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). Subject-matter jurisdiction "can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). "A statute affecting federal jurisdiction must be construed both with precision and with fidelity to

the terms by which Congress has expressed its wishes." *Kucana v. Holder*, 558 U.S. 233, 252 (2010). Guided by the Federal Circuit, we hold that, pursuant to our statutory authority under 38 U.S.C. §§ 7252 and 7261, we have the authority to certify class actions that include veterans who have not yet received a final Board decision and those who have not yet filed a claim. *See Monk II*, 855 F.3d at 1318.

We have only one source of jurisdiction: 38 U.S.C. § 7252. *See Henderson*, 562 U.S. at 434. It gives us "exclusive jurisdiction to review [Board] decisions," allowing us to "affirm, modify, or reverse" Board decisions and "remand the matter, as appropriate." 38 U.S.C. § 7252(a). Essentially, a final Board decision operates as the jurisdictional "trigger" that gives us the authority to hear a particular appeal. *See Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) (our Court's "jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed"); *Wick v. Brown (In re Wick)*, 40 F.3d 367, 373 (Fed. Cir. 1994) (a Board decision is a "statutory prerequisite for [this Court's] jurisdiction"). 38 U.S.C. § 7261 then lays out our scope of review in cases in which we already possess jurisdiction under section 7252 and "does not provide an independent basis for jurisdiction." *Wick*, 40 F.3d at 371; *see also Dixon v. McDonald*, 815 F.3d 799, 803 (Fed. Cir. 2016). Instead, this provision delineates what types of relief we may provide. *See* 38 U.S.C. §§ 7252(b) ("The extent of [this Court's judicial] review shall be limited to the scope provided in section 7261 . . . ."), 7261(a)(1)-(4) (laying out the various actions this Court can take when deciding appeals). Both statutes play important, but differing roles. First, for jurisdiction to be proper in a given matter, it must lie under section 7252. Then, once jurisdiction is

proper, section 7261 informs us what, if any, actions we may take.

In *Harrison*, we decided we lacked the authority to hear class actions because, among other reasons, section 7252 limited our jurisdiction to review of Board decisions. 1 Vet.App. at 439. But in *Monk II*, the Federal Circuit addressed that, stating *Harrison* "reflect[ed] a concern that the Veterans Court would exceed its jurisdiction if, for example, it certified a class that included veterans that had not yet received a Board decision or had not yet filed a notice appealing a Board decision." 855 F.3d at 1320. The Federal Circuit "disagree[d] that [our] authority is so limited," explaining that 38 U.S.C. § 7264(a), which authorizes us to create the procedures necessary to exercise our jurisdiction, allows us to "prescribe procedures for class actions or other methods of aggregation." *Monk II*, 855 F.3d at 1320. The Federal Circuit also noted that "[b]efore the VJRA, veterans seeking to enforce veterans benefit statutes were able to file class actions in some circumstances." *Id.* at 1319. In essence, the Federal Circuit's holding was supported by the notion that veterans should be afforded more procedural protections after the VJRA's enactment, not less.

Thus, absent any express indication from either Congress or the Federal Circuit that veterans in the context of an appeal should be afforded *less* procedural protections than were available to them before the VJRA's enactment, rather than more, we will not place such a restriction on this most favored class of citizens and their ability to pursue their disability benefits claims in the manner and fashion of their choosing. *See Henderson*, 562 U.S. at 441 ("We have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the

beneficiaries' favor.'" (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n.9 (1991))).

The dissent asserts that section 7252(a) "contains the nonwaivable, jurisdictional elements that a veteran must have both filed a claim and received a Board decision." *Post* at 49, 50. The dissent goes on to reason that "[t]he majority's focus on determining whether to waive the requirement of a Board decision is at best premature because it did not explain why it determined that our jurisdictional statute has waivable components." *Id.* But, the dissent misreads our decision. We do not today hold that the requirement of a final Board decision is waivable. Rather, we hold that because Mr. Skaar, as class representative, has obtained a final Board decision pursuant to section 7252, the jurisdictional door has been opened, and we may use our other authorities, as explained in *Monk II*, to aggregate Mr. Skaar's claims with those of the remaining class members.

Our reasoning can be analogized to a magistrate judge's exercise of jurisdiction over a class action. 28 U.S.C. § 636 is jurisdictional in nature, and, in sum, provides that a magistrate judge can exercise jurisdiction over proceedings in civil matters with the consent of the parties. *Roell v. Withrow*, 538 U.S. 580, 585-86 (2003). Yet, even though section 636 is jurisdictional in nature, a magistrate can enter judgment in a class action without each class member giving consent. *Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1078-79 (9th Cir. 2017); *Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1324-25 (11th Cir. 2013); *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 180-81 (3d Cir. 2012); *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 268-69 (7th Cir. 1998). Thus, the jurisdictional mandates of section 636(c) are

satisfied when only the named plaintiff in a class action has consented to proceed before a magistrate.

The courts to have considered the issue of consent in a class action have not "waived" the jurisdictional requirement of consent. Rather, they have held that the jurisdictional requirement is satisfied for all class members through the named plaintiff providing consent. *Williams*, 159 F.3d at 269 ("[T]he named representative . . . is the 'party' to the lawsuit who acts on behalf of the entire class, including with regard to the decision to proceed before a magistrate judge. This is an inherent part of representational litigation."). We find that Mr. Skaar's satisfaction of our jurisdictional requirement of a final Board decision, *see* 38 U.S.C. § 7252(a), is sufficient to vest this Court with subject matter jurisdiction, much in the same way a named plaintiff's consent to proceed before a magistrate is sufficient to grant the magistrate jurisdiction to enter final judgment as to all class members.

ii. We may certify classes that include claimants without final Board decisions.

The Secretary argues we lack jurisdiction to certify a class of veterans that includes those without a final Board decision "[b]ecause a Board decision is a jurisdictional prerequisite to review in this Court[.]" Secretary's Resp. to Mot. for Class Certification at 5. Thus, in his view, we could never certify a class of veterans without first ensuring there is a final Board decision as to each veteran in the class. In support, he relies on three Social Security cases: *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Yamasaki*, 442 U.S. at 682; and *City of New York*, 476 U.S. at 467. We examine each in turn.

In *Salfi*, the District Court certified a class of claimants challenging a Social Security regulation that required a marriage to have existed at least 9 months before the death of a wage earner for a surviving spouse to receive benefits. The District Court held jurisdiction was proper under 28 U.S.C. § 1331 (the general Federal question jurisdictional statute), certified the class, and held the regulation unconstitutional. On direct appeal, the Supreme Court reversed, finding jurisdiction lay under 42 U.S.C. § 405 instead. That statute requires a final decision after a hearing by the Secretary of Health and Human Services before claimants can appeal adverse Social Security decisions to a district court. The Court concluded the District Court erred by certifying a class that included claimants who had *not yet filed an application for benefits* because "the [class] complaint was deficient in that it contain[ed] no allegations that [claimants] ha[d] even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise." But, the Court went on to also hold that the District Court did not err in certifying a class of claimants who *had filed a benefits application but had not yet been afforded a hearing*—a nonjurisdictional requirement of § 405(g). The Court reasoned that the exhaustion requirement was not necessary when the issue was one that would be futile to bring before an agency. When read in isolation, *Salfi* is clearly disadvantageous to the proposed class members who do not have final Board decisions. However, as we will see, the lack of a final agency decision for each of a proposed class's members was not a concern for the Court 11 years later in *City of New York*.

Although the Secretary argues *Yamasaki* weighs against our having jurisdiction over the proposed class, we find it inapposite. There, the Supreme Court

was confronted with a nationwide class of Social Security claimants whom the Government had overpaid. The Government sought to recoup those overpayments by withholding the respondents' future benefits. The respondents requested reconsideration or waiver of the recoupment. Two district courts then certified a nationwide class of claimants and granted injunctive relief requiring the Agency to provide every class member with a pre-recoupment oral hearing. On appeal, the Court of Appeals for the Ninth Circuit affirmed. The Supreme Court needed to determine, among other things, whether section 405(g) "permits a federal district court to certify a nationwide class and grant injunctive relief." The Court concluded it did, reasoning Congress would have explicitly proscribed class actions in the Social Security context if it had intended to do so. *Yamasaki* is relevant here only to the extent the Court discusses the *relief* granted, not the lower courts' jurisdiction. The Court held "[w]ith respect to that relief, the classes certified were plainly too broad" as both classes "included persons who had not filed requests for reconsideration or waiver in the past and would not do so in the future." But that discussion was not key to the Court's holding, as it explained: "The Secretary's objection to the class definition is well taken, but it provides no basis for altering the relief actually granted in this case." 442 U.S. at 682. Thus, *Yamasaki* sheds no light on the question before us.

City of New York, however, bears a striking similarity to the matter before us. There, the Supreme Court considered a class of claimants challenging an internal policy of the Social Security Administration that operated to deny otherwise deserving claimants benefits to which they were entitled. "The gravamen of respondents' complaint was that petitioners had

adopted an unlawful, unpublished policy under which countless deserving claimants were denied benefits." The District Court found the Government's internal policy invalid and certified a class that included both (i) claimants who had not appealed Social Security's decision within the required 60-day timeframe, thus requiring equitable tolling, and (ii) claimants who had not received a final agency decision. The Court of Appeals for the Second Circuit affirmed. 476 U.S. at 467.

The Supreme Court grappled with two issues in *City of New York*. The first, which we discuss elsewhere in this order, concerned whether the District Court erred by equitably tolling the statute of limitations for class members who had not timely appealed the Government's decision. The second issue, however, concerned whether the District Court lacked jurisdiction to certify a class that included claimants who had not received a final agency decision, as required by section 405(g). In *Salfi*, the Court called this requirement "central to the requisite grant of subject-matter jurisdiction" and, thus, claimants without a final decision could not be certified as part of a class. 422 U.S. at 764. But this time, in *City of New York*, the Court concluded section 405(g) was *not* a bar to class certification, even for claimants who had not received a final decision. This was so because (i) the class claims were "collateral to the claims for benefits that class members had presented administratively;" (ii) "the claimants . . . would be irreparably injured were the exhaustion requirement now enforced against them;" and (iii) "[t]he purposes of exhaustion would not be served by requiring these class members to exhaust administrative remedies." The Court further explained the class

> stand[s] on a different footing from one arguing merely that an agency incorrectly applied its regulation. Rather, the District Court found a systemwide, unrevealed policy that was inconsistent in critically important ways with established regulations. Nor did this policy depend on the particular facts of the case before it; rather, the policy was illegal precisely because it ignored those facts. . . . Under these unique circumstances, there was nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise.
>
> In addition, the relief afforded by the District Court is fully consistent with the policies underlying exhaustion. The court did not order that class members be paid benefits. Nor does its decision in any way interfere with the agency's role as the ultimate determiner of eligibility under the relevant statutes and regulations. Indeed, by ordering simply that the claims be reopened at the administrative level, the District Court showed proper respect for the administrative process. It did no more than the agency would have been called upon to do had it, instead of the District Court, been alerted to the charge that an undisclosed procedure was illegal and had improperly resolved innumerable claims.

476 U.S. at 485.

The Court also found its decision in *Mathews v. Eldridge* dispositive. There, the Court held "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." 424 U.S.

319, 330 (1976). The Court in *City of New York* explained that "[t]wo factors influenced the Court's judgment that *Eldridge* was a case in which deference to the [A]gency's determination of finality was not necessary. First, the constitutional challenge brought there was 'entirely collateral to [a] substantive claim of entitlement.' Second, the claim rested 'on the proposition that full relief cannot be obtained' [as a result of the district court's decision]." 476 U.S. at 483 (citation omitted) (quoting *Eldridge*, 424 U.S. at 330-31). The *City of New York* Court was "especially sensitive to this kind of harm where the Government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place." *Id.* at 484. The purposes of exhaustion include (i) permitting evidentiary development; (ii) allowing the agency to bring its expertise to bear on an issue before judicial review; and (iii) giving due respect to the agency's established procedures. *City of New York*, 476 U.S. at 486.

City of New York tells us an administrative exhaustion-of-remedies requirement can be waived where (i) the challenged conduct is collateral to a claim for benefits; (ii) enforcing the exhaustion requirement would irreparably harm the claimant; and (iii) the purposes of exhaustion would not be served by its enforcement. Turning to the instant appeal, we hold we have jurisdiction to certify a class action that includes members who do not have a final Board decision provided (i) the challenged conduct is collateral to the class representative's administratively exhausted claim for benefits—i.e., the class representative has obtained a final Board decision; (ii) enforcing the exhaustion requirement would

irreparably harm the class; and (iii) the purposes of exhaustion would not be served by its enforcement.

Applying this test here, we have jurisdiction over the proposed class and will not require exhaustion of administrative remedies by each and every class member. First, jurisdiction over Mr. Skaar's appeal is proper under section 7252(a), for he has exhausted his administrative remedies, and the challenged conduct is collateral to both his and the unnamed class members' benefits claims because granting the requested relief would not be an "order that class members be paid benefits." *City of New York*, 476 U.S. at 486. "[A] claim is collateral when the 'plaintiffs' claims are essentially to the policy itself, not its application to them, nor to the ultimate substantive determination of their benefits.'" *Stengel v. Callahan*, 983 F. Supp. 1154, 1159 (N.D. Ill. 1997) (quoting *Johnson v. Sullivan*, 922 F.2d 346, 353 (7th Cir. 1990)). Second, the alleged harm here, if shown to be true, is precisely the type of "harm where the Government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place" the Supreme Court was concerned with in *City of New York*. 476 U.S. at 484. And, finally, the purposes of exhaustion would not be served by enforcement of section 7252(a)'s exhaustion requirement on the unnamed class members. The parties have compiled and agreed on a detailed factual record containing the Board's findings and conclusions. VA, through the Board, has brought its agency expertise to bear by providing a supplemental statement of reasons or bases addressing Mr. Skaar's challenge to § 3.311. *See generally* Secretary's Mar. 29, 2019, Resp. And, if the requested relief is granted, our order would not "in any way interfere with the [A]gency's role as the ultimate determiner of eligibility under the

relevant statutes and regulations." *See City of New York*, 476 U.S. at 486. Thus, we waive the exhaustion requirement for the Present-Future and Future-Future Claimants, permitting them to be included in the proposed class.

Our reading of this caselaw is consistent with class action adjudication in the veterans' benefits context before the VJRA's enactment. For example, the lack of final Board decisions was not an impediment to pre-VJRA class certification in *Nehmer*. There, a district court certified a class of veterans challenging VA's implementation of 38 U.S.C. § 354, the Dioxin and Radiation Exposure Compensation Act, even though "[n]one of the named plaintiffs presented the claims raised in this lawsuit to the VA, either during their individual claim adjudications or in a petition for rulemaking[.]" The court reasoned the class members did not need to exhaust administrative remedies because (i) although VA may have had expertise in creating its procedures, "it does not possess particular expertise in determining what procedures adhere to the statutory mandate of the Dioxin Act and the Administrative Procedure Act;" (ii) a full record would be available through discovery; (iii) "the Court's hearing of the plaintiff's claims will not engender disrespect for the [A]gency's procedures;" (iv) the likelihood of the plaintiff's success by exhausting their administrative remedies was "low" because "the VA itself has adopted a system-wide policy; any errors committed in adopting the policy were made by the VA itself, not an individual fact-finder;" (v) "the class attack on the VA's procedural irregularities is distinct from any individual's attack on their denial of benefits;" and (vi) requiring exhaustion of remedies would place a "substantial burden" on the class members. *Nehmer*, 118 F.R.D. at 113. *Nehmer*, which predated the VJRA, thus fits with

our holding today and, again, there is "no persuasive indication that Congress intended to *remove* class action protection for veterans when it enacted the VJRA." *Monk II*, 855 F.3d at 1320 (emphasis in original).

iii. This Court is the appropriate forum to hear challenges that are collateral to a benefits claim.

The remaining class claim here is collateral to Mr. Skaar's claim for benefits. Veterans cannot preemptively bring such collateral claims to VA seeking only to invalidate a specific procedure or practice. Instead, their only avenue would be to proceed to exhaust their administrative remedies by asking the Board to provide relief it is powerless to give. *See* 38 U.S.C. § 7104(c) (Board decisions are "bound by the regulations of the Department"). Congress cannot have intended such a result. Requiring every class member to have a final Board decision when the Board is powerless to provide the relief sought does not comport with the principle that, when interpreting statutory finality requirements, "[t]he prevailing rule of construction is that crucial collateral claims should not be lost and that irreparable harm should be avoided." *Mental Health Ass'n of Minn. v. Heckler*, 720 F.2d 965, 969 (8th Cir. 1983). If veterans cannot aggregate actions to collaterally challenge alleged systemic wrongdoing before us, where should they seek such review? It is not enough to say Palomares veterans instead should have petitioned for rulemaking when the regulations at issue were drafted. *See* 38 U.S.C. § 553(e). If the class claim is proven, veterans could not have known and should not be required to have known their benefits claims would be subject to a legally invalid process. Thus, this Court

is the appropriate forum to hear their collateral challenges to benefits claims.

Having concluded the Present, Present-Future, and Future-Future Claimants are members of the proposed class, we next consider the Expired Claimants.

2. The Expired Claimants

The Expired Claimants require a different analysis because they received final Board decisions but did not appeal them to this Court. Mr. Skaar asks us to exercise our discretion and waive section 7266(a)'s 120-day Notice of Appeal filing requirement, allowing their expired benefits claims to be revived before us, aggregated as part of the proposed class, and then, if the class prevails on the merits, returned to the Agency for readjudication. *See* Appellant's Mar. 21, 2018, Resp. at 3-4; s*ee also Bove v. Shinseki*, 25 Vet.App. 136, 140 (2011) (per curiam order), *overruled on other grounds by Dixon v. McDonald*, 815 F.3d 799 (Fed. Cir. 2016). We decline to do so.

As the Supreme Court explained in *Henderson*, section 7266(a)'s 120-day appeal window for obtaining review before this Court "does not have jurisdictional attributes" but nonetheless was "an important procedural rule," leaving it to us to determine whether and when waiver applied. 562 U.S. at 441. In *Bove*, we explained waiver is warranted "when circumstances precluded a timely filing despite the exercise of due diligence." 25 Vet.App. at 140. Those circumstances include (1) mental illness that renders one incapable of handling one's own affairs or other extraordinary circumstances beyond one's control; (2) reliance on incorrect statements by VA officials; or (3) misfilings at the regional offices or the Board. *See, e.g.*, *Brandenburg v. Principi*, 371 F.3d 1362, 1364 (Fed.

Cir. 2004) (misfiling); *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004) (mental illness); *Bailey v. West*, 160 F.3d 1360, 1365-68 (Fed. Cir. 1998) (en banc) (incorrect statement by VA official); *McCreary v. Nicholson*, 19 Vet.App. 324 (2005) (extraordinary circumstances). But this is not an exhaustive list because there are no bright line rules in the equitable tolling context. As the Federal Circuit recently reminded us, "the extraordinary circumstances element [of equitable tolling] necessarily requires a case-by-case analysis and not a categorical determination." *James v. White*, 917 F.3d 1368, 1373 (Fed. Cir. 2019).[5]

The Supreme Court dealt with a similar issue in *City of New York*. Recall there the Court upheld certification of a class of Social Security claimants that included those who had not appealed adverse benefits determinations within the relevant appeal window. 476 U.S. at 486. The Court concluded equitable tolling was warranted. *Id.* at 482. This was so, the Court reasoned, because equitable tolling "served the purpose of the [Social Security] Act where . . . 'the Government's secretive conduct prevents plaintiffs from knowing of a violation of rights.'" *Id.* at 481 (quoting *City of New York v. Heckler*, 742 F.2d 729, 738 (1984)). *But see Pittson Coal Grp. v. Sebben*, 488 U.S. 104, 123 (1988) (finding equitable tolling was not warranted where "[t]he agency action was not taken pursuant to a secret, internal policy, but under a

[5] Given the case-by-case analysis equitable tolling requires and the prohibiting of the use of categorical rules under *James*, it is difficult to see how equitable tolling matters could be resolved through aggregate action. We leave for another day whether such a class would be appropriate, but the uncertainty on that question is an additional reason to exclude the Expired Claimants from the class here.

regulation that was published for all to see"). To the Court, the Government's conduct in *City of New York* represented one of the "cases [that] may arise where the equities in favor of tolling . . . are 'so great that deference to the agency's judgment [of finality] is inappropriate.'" 476 U.S. at 480 (quoting *Eldridge*, 424 U.S. at 330). Mr. Skaar essentially asks us to equate VA's adjudication of Palomares veterans' claims with the secretive conduct the Supreme Court found so reprehensible in *City of New York*, to extend *Bove* to such situations, and to allow equitable tolling here. We will not.

Including the Expired Claimants in the class offends the very notion of finality. Each of them received Board decisions and could have challenged VA's treatment of Palomares veterans just like Mr. Skaar, yet each chose not to. Mr. Skaar has presented no reason for us to depart from *Bove*'s principle that the 120-day Notice of Appeal window to this Court will only be waived "when circumstances precluded a timely filing despite the exercise of due diligence." 25 Vet.App. at 140. Indeed, he has never alleged the Expired Claimants were precluded from timely filing appeals to this Court for any reason other than VA's historical practice in adjudicating claims from Palomares veterans. But before a claimant succeeds in changing the law, VA will always (presumably) adjudicate claims in accord with its own interpretation of that law and our legal pronouncements. Thus, there is no principled way to distinguish the Expired Claimants here and *any* other claimants who have been denied benefits, failed to appeal to this Court, and later discovered their benefits denial was based on an incorrect reading of the law. The proper course for such claimants is to file supplemental claims based on new and relevant evidence with VA, *see* 38 C.F.R. § 3.2501, not to

attempt to skirt finality and existing precedent merely because of the novel procedural nature of this case.

The unfair substantive legal advantage the Expired Claimants would enjoy if we permitted them to join the class is illustrated by a recent Court decision, *Ray v. Wilkie*, 31 Vet.App. 58 (2019). There, a panel of the Court held VA's historical practice of refusing to define a key regulatory phrase in 38 C.F.R. § 4.16(b) frustrated judicial review, warranting remand in cases where the phrase is undefined. *Id.* at 73-74. The *Ray* decision surely benefited the named appellant. And it also benefited any claims involving that regulation currently pending before the Court or VA. But it certainly provided no retrospective relief for claimants who had been denied benefits previously but whose appeal windows had expired.

Or consider this matter. Had Mr. Skaar filed the instant appeal, *not* sought class certification, and succeeded on the merits, his appeal would be decided through precedential decision. That decision would bind Mr. Skaar and any and all claimants with claims currently pending before VA and the Court (the Present, Present-Future Claimaints) as well as any claimants with claims filed in the future (Future-Future Claimants). But there would be no authority to support that precedential decision reviving expired claims, as Mr. Skaar asks us to do here.

At first glance, our exclusion of the Expired Claimants may seem unduly harsh. But claimants in the veterans benefits system do not face the same consequences of finality as litigants in traditional civil litigation. Instead, under 38 U.S.C. § 5108(a) and 38 C.F.R. § 20.1105(a), if the class succeeds on the merits, then the Expired Claimants can file supplemental claims based on new and relevant evidence. The

Expired Claimants may not enjoy the same effective date protections as the other subgroups within the class, but they would still have an avenue to service connection available to them.

In sum, that this is a class action does not and should not change this analysis as the class action device is a *procedural* rule that, if we are to employ it, should not yield *substantive* legal benefits. We will not now excuse the Expired Claimants' lack of diligence in pursuing their claims, depart from precedent, and grant retrospective relief merely because this is a class action. Thus, we decline to equitably toll the Expired Claimants' claims and modify the proposed class to exclude them. *See* FED. R. CIV. P. 23(c)(5); *Suchanek*, 764 F.3d at 757; *Schorsch*, 417 F.3d at 750; *Robidoux*, 987 F.2d at 937.

3. The Past Claimants

The Past Claimants were denied by VA but never reached the Board because they did not perfect an administrative appeal. For our purposes, they are akin to the Expired Claimants in that they have no final Board decisions. But unlike the Expired Claimants, that is not because they failed to appeal their denials to this Court. Instead, these claimants were denied by some part of VA other than the Board. Thus, if they are to be included in the class, they require equitable tolling of their appellate review windows before VA. *See Jaquay v. Principi*, 304 F.3d 1276, 1286 (Fed. Cir. 2002), *overruled on other grounds by Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009); *Hunt v. Nicholson*, 20 Vet.App. 519, 522 (2006) ("[T]he same principles that guided the Federal Circuit in allowing equitable tolling of the deadline for filing appeals to this Court apply with equal force to tolling the deadline for filing Substantive Appeals."). For the

same reasons we decline to equitably toll the appeal windows for the Expired Claimants, we decline to do so for the Past Claimants as well and modify the proposed class to exclude them. There is simply no principled distinction between the proposed class here and any other individual challenge to VA action that warrants excusing the Past Claimants' lack of diligence in preserving their claims.

Considering Mr. Skaar lacks standing to bring the § 3.309 claim but possesses standing to pursue the § 3.311 claim and considering our exclusion of the Expired and Past Claimants from class certification, we must modify the proposed class definition. *See* FED. R. CIV. P. 23(c)(5); *see also Suchanek*, 764 F.3d at 757. Thus, we modify the proposed class definition as follows: *All U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, and whose application for service-connected disability compensation based on exposure to ionizing radiation VA has denied or will deny by relying, at least in part, on the findings of dose estimates requested under 38 C.F.R. § 3.311, except those whose claims have been denied and relevant appeal windows of those denials have expired, or those whose claims have been denied solely based on dose estimates obtained before 2001.* With this modified definition in mind, we now turn to the class certification analysis.

E. Class Certification Analysis

At this time, our Court has no rule of procedure governing class actions. Indeed, as far as we are aware, we are the only appellate court in the Nation with the authority to aggregate actions in the first instance. But while we are unique in that regard, we are not starting with a blank slate. As alluded to before, the Federal Rules of Civil Procedure provide for

class actions in Rule 23. As we did in the petition context, *see Monk III*, 30 Vet.App. at 174, we adopt Rule 23 as a guide for class certification in the appeal context. Also, as with petitions, *see id.*, we have at least some limited factfinding ability in the context of determining whether a class should be certified.

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his [or her] compliance with the Rule[.]" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). A party seeking class certification must demonstrate by a preponderance of the evidence the four requirements of Rule 23(a), and at least one of the requirements of Rule 23(b).[6] *See N.J. Carpenters Health Fund v. Rali Series 2006-Q01 Tr.*, 477 F. App'x 809, 812 (2d Cir. 2012); *see also Wal-Mart Stores, Inc.*, 564 U.S. 338 at 351 ("A party seeking class certification . . . must be prepared to prove that there are *in*

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[6] Although not explicitly listed under Rule 23, many courts have required that class membership be "ascertainable." *See, e.g.*, *Ward v. EZCorp, Inc.*, 679 F. App'x. 987 (11th Cir. 2017); *Leyse v. Lifetime Entm't Servs., LLC*, 679 F. App'x 44, 47 (2d Cir. 2017); *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016); *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 659 (7th Cir. 2015); *see also McKeage v. TMBC, LLC*, 847 F.3d 992, 998 (8th Cir. 2017) ("A class may be ascertainable when its members may be identified by reference to objective criteria."); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015). We need not weigh in on this debate here because it is clear ascertainability is not required for Rule 23(b)(2) classes such as the one at issue here. *See Shook v. El Paso City*, 386 F.3d 963, 972 (10th Cir. 2004) ("while the lack of identifiability is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2)"); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972); *Shelton v. Bledsoe*, 775 F.3d 554, 561 (3d Cir. 2015); *Cole v. City of Memphis*, 839 F.3d 530, 541-42 (6th Cir. 2016).

fact sufficiently numerous parties, common questions of law or fact, etc.") (emphasis in original).

Rule 23(a) requires (1) the class be "so numerous that joinder of all members is impracticable;" (2) there be common questions of law or fact; (3) the claims or defenses of the named representative be typical of the class; and (4) the class representatives "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a). These requirements "effectively 'limit[] the class claims to those fairly encompassed by the named plaintiff's claims.'" *Falcon*, 457 U.S. at 156 (quoting *Gen. Tel. Co. of Sw. v. EEOC*, 446 U.S. 318, 330 (1980)). Rule 23(b)(2), the relevant subsection here, states class actions are appropriate when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or corresponding declaratory relief is appropriate respecting the class as a whole." Taken together, the Rule 23 analysis tells us "whether the named plaintiff's claim and the class are so interrelated that the interests of the class members will be fairly and adequately protected in their absence," while protecting defendants' rights. *Falcon*, 457 U.S. at 157.

We must conduct "a rigorous analysis" of the proposed class, *Falcon*, 457 U.S. at 160-61, that may "entail some overlap with the merits of the plaintiff's underlying claim" as the "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). But, crucially, "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the

requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). Instead, "[m]erits questions may be considered to the extent—and only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* As we explain below, the proposed class meets the requirements for class certification for the remaining class claim.

1. The proposed class is so numerous that joinder would be impracticable.

To warrant certification under the Federal Rules of Civil Procedure, the proposed class must be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). This requirement is a bit of a square peg in a round hole at this Court. In Federal district court, parties have numerous devices they may use to "join" additional parties. *See, e.g.*, FED. R. CIV. P. 19 (mandating joinder of certain parties), 20 (allowing joinder of certain other parties), 22 (interpleader), 24 (intervention). The rules thus make the class action a more exceptional device with stringent requirements because there are alternative means for parties to join others in a proceeding that do not require the binding of absent parties. We have no comparable joinder devices.[7] Thus, asking if joinder in an appeal is

[7] Indeed, our rules do not even expressly *allow* for joinder, much less describe how parties are to seek it. Thus, in so far as the numerosity requirement asks whether "joinder of all members is impracticable," it would appear to always be answered in the affirmative in proposed class actions before us until we craft such a rule.

"impracticable" does not make the same sense here as doing so in a district court. If anything, given the difficulty in terms of "joinder" before our Court, the numerosity standard would likely be met on a lesser showing than in a district court. In any event, it is met here under any standard.

Numerosity need not be proven exactly. *See, e.g.*, *Hinman v. M&M Rental Ctr., Inc.*, 545 F. Supp. 2d 802, 806 (N.D. Ill. 2008). "[C]ourts generally find that the numerosity factor is satisfied if the class comprises 40 or more members and will find that it has not been satisfied when the class comprises 21 or fewer." *Celano v. Marriott Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007); *see Lightfoot v. District of Columbia*, 246 F.R.D. 326, 335 (D.D.C. 2007) ("Courts in this District have generally found that the numerosity requirement is satisfied and that joinder is impracticable where a proposed class has at least forty members."). But "[t]here is no minimum number of members needed for a suit to proceed as a class action." *Marcus v. BMW of N. Amer., LLC*, 687 F.3d 583, 595 (3d Cir. 2012). "[I]t is permissible for a plaintiff to make reasonable inferences drawn from available facts" and "an 'information monopoly [by the party opposing the class] will not stand in the way of persons seeking relief.'" *Violette v. P.A. Days, Inc.*, 214 F.R.D. 207, 213 (S.D. Ohio 2003) (quoting *Jackson v. Foley*, 156 F.R.D. 538, 542 (E.D.N.Y. 1994)). Additionally, the numerosity requirement is relaxed for classes seeking injunctive relief. *Sueoka v. United States*, 101 F. App'x. 649, 653 (9th Cir. 2004) ("Because plaintiffs seek injunctive and declaratory relief, the numerosity requirement is relaxed and plaintiffs may rely on the reasonable inference arising from plaintiffs' other evidence that the number of unknown and future members . . . is sufficient to make joinder impracticable."). And

although "[n]umerosity is more than a numbers game," *Howard's Rexall Stores, Inc. v. Aetna U.S. Healthcare, Inc.*, No. CIV. oo-CV-31B, 2001 WL 501055, at *6 (D. Me. May 8, 2001), "[w]hen class size reaches substantial portions, . . . the impracticability requirement is usually satisfied by numbers alone." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996).

In response to a Court order requesting more information, the Secretary stated that, per the Department of Defense, 1,388 U.S. military personnel participated in the Palomares nuclear cleanup. *See* Secretary's Dec. 13, 2018, Resp. The order also asked him to provide information relating to certain categories of veterans in the proposed class. But instead, the Secretary explained VA's "internal databases are not equipped to furnish the Court with the number of veterans falling within the" class's various subcategories. *Id.* In reply, Mr. Skaar questioned the Secretary's compliance with our order and noted the record reflects there are "at least nineteen veterans who had filed claims for Palomares-related disabilities with the VA, 'including three appeals for reassessment for a total of 22 claims.'" Appellant's Jan. 4, 2019, Resp. at 3 (quoting R. at 1580). Given the overall number of veterans present at Palomares, the relaxed numerosity standard for classes seeking injunctive relief, *see Sueoka*, 101 F. App'x. at 653, and Mr. Skaar's additional information concerning the claims made, we may reasonably infer the proposed class contains potentially up to 1,388 veterans and at least 22, a number sufficient to satisfy the numerosity requirement. *See, e.g.*, *Lightfoot*, 246 F.R.D. at 335. Thus, we hold the class satisfies the numerosity requirement.

2. The proposed class presents a common issue capable of classwide resolution.

The second Rule 23 requirement for class certification, commonality, "requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law." *Wal-Mart*, 564 U.S. at 350. Rather, "[t]heir claims must depend upon a common contention." *Id.* "That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "[F]or purposes of Rule 23(a)(2) [e]ven a single [common] question will do." *Id.* "What matters to class certification . . . [is] the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* "The critical point is 'the need for *conduct* common to members of the class.'" *Suchanek*, 764 F.3d at 756 (quoting *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 602 (7th Cir. 2014)) (emphasis in original). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Suchanek*, 764 F.3d 750, 756 (7th Cir. 2014); *see In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016).

The Secretary concedes the proposed class would satisfy the commonality requirement if the class is limited "to include only those veterans whose applications [for service-connected disabilities] were denied based on § 3.311[.]" *See* Secretary's Feb, 20, 2018, Resp. at 17. Considering our dismissal of the class challenge to § 3.309 and corresponding modification of

the class definition, this is an effective concession of commonality as to the class challenge under § 3.311 as only "those veterans whose applications were denied based on § 3.311" would qualify as class members. Further, we agree commonality is met for this claim. The class members' claims "depend upon a common contention"—that VA's dose estimate procedures do not rely on "sound scientific and medical evidence" in contravention to § 3.311(c)(1)(i)—that "is capable of classwide resolution"—in the form of an order enjoining the Secretary from denying claims under § 3.311 until VA's procedures comply with the regulation. *Wal-Mart*, 564 U.S. at 350.

3. Mr. Skaar's claim is typical of that of the proposed class.

Class certification also requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). This inquiry focuses on whether "in pursuing his own claims, the named plaintiff will also advance the interests of the class members." *In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996). Or, put differently, "as goes the claim of the named plaintiff, so go the claims of the class." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998). Although distinct, the typicality requirement overlaps with certain other requirements of Rule 23(a). In particular, "[t]he commonality and typicality requirements . . . tend to merge." *Falcon*, 457 U.S. at 157 n.13.

Courts will deny class certification "when the variation in claims" between a class representative and absent class members "strikes at the heart of the respective causes of actions." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67 (4th Cir. 2006). The class representative's claims need not be identical, but must

"share the same essential characteristics as the claims of the class at large." *Haggart v. United States*, 89 Fed. Cl. 523, 534 (2009); *Arreola v. Godinez*, 546 F.3d 788, 798 (7th Cir. 2008). "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct.'" *Wolin v. Jaguar Land Rover N.A., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). "[T] he typicality prong of Rule 23(a) sets a relatively low threshold." *Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 82 (E.D.N.Y. 2007); *see, e.g.*, *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002); *Lightbourn v. Cnty. of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997). Typicality is also easier to satisfy where classes seek injunctive relief. *See Baby Neal ex. Rel. Kanter v. Casey*, 43 F.3d 48 (3d Cir. 1994).

The Secretary argues Mr. Skaar's claim is not typical enough to permit him to serve as class representative because the reason for any denials of Palomares veterans' claims related to ionizing radiation exposure may not turn on the results of dose estimates requested under § 3.311. *See* Secretary's Feb. 20, 2018, Resp. at 17-19; Secretary's July 27, 2018, Resp. at 8-11. Much like any concerns regarding commonality and standing, this concern is alleviated by our restructuring of the class. As explained above, because we are dismissing the class challenge to § 3.309 for lack of standing, the only issue before us concerns those claims that have either been denied or will be denied under § 3.311.

And as discussed above regarding Mr. Skaar's standing to represent the class, the Secretary's

argument that Mr. Skaar lacks standing to represent class members whose claims had been denied under the Air Force's pre-2013 methodology also presents potential typicality concerns. But, as we explained, the pre- and post-2013 distinction is largely theoretical. Put simply, Mr. Skaar shares the same injury from VA's reliance on Air Force's dose estimates as any conceivable claimant falling within the modified class. Thus, his claim "share[s] the same essential characteristics as the claims of the class at large," and his claim is typical enough to permit him to serve as class representative. *Haggart*, 89 Fed. Cl. at 534.

4. Mr. Skaar will fairly and adequately protect the interests of the class.

The final Rule 23(a) inquiry asks whether "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). "A decision with respect to the class is conclusive only if the absent members were adequately represented by the named litigants and class counsel." *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 768 (7th Cir. 2003), *abrogated on other grounds by Smith v. Bayer Corp.*, 564 U.S. 299 (2011).[8] "Adequacy is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011). Thus, "[t]he adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997). Class

[8] We consider the adequacy of class counsel below.

representatives serve as fiduciaries for certified classes. *See London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1254 (11th Cir. 2003).

To be adequate, class representatives must possess the claim asserted on behalf of the class, have interests otherwise aligned with and not antagonistic to those of the class, and be able to advocate vigorously and competently for the interests of the class. *See Kirkpatrick v. J.C. Bardford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987). For much of the same reasons typicality and commonality are present here, we hold Mr. Skaar is adequate to serve as class representative. He possesses the same claim as the unnamed class members, his interest in VA complying with § 3.311(c)(1)(i) is aligned with the class, and there is no indication he is unable to vigorously and competently advocate for the interests of the class. *Id.* Moreover, we see no conflict of interest that would prevent Mr. Skaar from advancing the interests of the class.

5. The requested injunctive relief is appropriate respecting the class as a whole.

Federal Rule of Civil Procedure 23(b)(2) permits aggregation when all Rule 23(a)'s perquisites have been met, and "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The Supreme Court has instructed that "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360 (quoting Richard A. Nagareda, *Class Certification in*

the Age of Aggregate Proof, 84 N.Y.U. L. REV. 97, 132 (2009)). Rule 23(b)(2) requires that "a single injunction or declaratory judgment . . . provide relief to each member of the class." *Id.* Thus, if there are class members who would not benefit from a class-wide injunction (or declaration), certification under Rule 23(b)(2) would not be appropriate. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (commenting in action concerning claims by detained aliens that, because some members of the class may not be entitled to the requested relief, certification under Rule 23(b)(2) might be inappropriate).

We hold the proposed class meets Rule 23(b)(2)'s requirements for certification. The class seeks a single class-wide injunction ordering VA to comply with the provisions of § 3.311. And with the dismissal of the class challenge to § 3.309 and the restriction of the class to those claimants who have been or will be subject to § 3.311, there is no question that, if the class succeeds on the merits, "injunctive relief or corresponding declaratory relief"—in the form of an order from this Court to the Secretary that he comply with the provisions of § 3.311—"is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2).

6. The class action device is a superior method of litigating the class claim.

Having concluded Rule 23(a) and Rule 23(b)(2) are satisfied, we could stop our certification analysis were we sitting as a district court. However, we are not. We have used Rule 23 as a "guide" for class certification. But we are not bound by it. *See Int'l Union, UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (the "Federal Rules of Civil Procedure . . . apply only in the federal district courts"); FED. R. CIV. P. 1 ("These rules govern the procedure in the United States

district courts."). As we mentioned earlier in our discussion, to our knowledge, we are the only appellate body in the Nation with the authority to aggregate actions in the first instance. Our appellate nature and national jurisdiction make us stand apart from the ordinary course of aggregate litigation in Federal district courts, which are empowered to find facts and conduct discovery while we are not, absent some limited circumstances. *See* 38 U.S.C. § 7261(c) ("In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court."); § 7252(b) ("Review in the Court shall be on the record of proceedings before the Secretary and the Board."); *but see Monk III*, 30 Vet.App. at 171 (holding this Court "has authority to conduct limited factfinding to determine whether class certification is warranted"); *Bove*, 25 Vet.App. at 143 ("[T]his Court . . . may seek facts outside the record before the Board and independently weigh the facts to determine if equitable tolling is appropriate."); *Erspamer v. Derwinski*, 1 Vet.App. 3, 10 (1990) (Court may consider facts not before the Board when considering the merits of a petition for extraordinary relief). Moreover, we are different than district courts because we can issue precedential decisions that bind those not before the Court. In other words, unlike district courts, our decisions can have something like the effect of a class action judgment without receiving class treatment.

As we explain below, class actions before us will serve as a special procedural device for certain types of claims that lend themselves to aggregate adjudication. This is because class actions "conserve judicial resources by allowing courts to treat common claims together, obviating the need for repeated adjudications of the same issues." *Cochran v. Volvo Grp. N.A., LLC*, No. 1:11-CV-927, 2013 WL 1729103, at *1

(M.D.N.C. Apr. 22, 2013). They also relieve absent class members from having to bring and litigate complex claims individually. "[A]n absent class-action plaintiff is not required to do anything. He [or she] may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his [or her] protection." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985). Especially in an adjudicatory system involving large numbers of unrepresented claimants, class actions may allow claimants, such as Mr. Skaar, who have the resources, knowledge, and desire to challenge VA conduct and regulations to step forward and represent similarly situated claimants and, through notice of certification, educate other class members about the existence of a legal claim against the VA. *See Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 404 (6th Cir. 1980).

But our unique nature requires considerations beyond those applicable to district courts under Rule 23. Just as there are reasons in favor of exercising our discretion to certify a class in a particular matter, so, too, are there reasons counseling against certification. In *Harrison*, we declined to adopt class action procedures because (i) we believed we lacked the power to adopt such procedures; (ii) the potential difficulties in managing class actions in the first instance at the appellate level; and (iii) the availability of precedential decision-making as a superior form of litigation. 1 Vet.App. at 439. As we stated in *Monk III*, the Federal Circuit has expressly overruled *Harrison*'s first factor, lack of authority. 30 Vet.App. at 171 n.5. In *Monk III*, we declined to decide whether the remaining two *Harrison* factors were appropriate considerations for class certification. *Id.* We now explain that the remaining two *Harrison* factors—manageability and the availability of precedential decisions—stem from

the unique nature of this Court and are relevant considerations in the class certification analysis before this Court, even if they are not *categorical* reasons to decline to certify class actions.

While we recognize for traditional Rule 23(b)(2) class actions, "superiority [is] self-evident," *Wal-Mart*, 564 U.S. at 363, our national jurisdiction makes the inquiry different here. Requiring claimants to justify the use of the class action device considering the available alternatives, such as single-party precedential decisions, consolidation, petitions for rulemaking, and the ability to issue writs of mandamus, is necessary to justify the expenditure of judicial time and energy required to adjudicate class actions as an appellate court in the first instance and assume the risk of prejudicing the rights of absent veterans. *See Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield*, 654 F.3d 618, 630-31 (6th Cir. 2011). Thus, considering our appellate nature and limited factfinding abilities and guided by Rule 23, class actions before this Court are the exception, not the rule. In other words, we will presume classes should not be certified because our ability to render binding precedential decisions ordinarily will be adequate. Claimants seeking class certification can rebut this presumption by showing by a preponderance of the evidence that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy" before we will exercise our discretion in certifying a class. FED. R. CIV. P. 23(b)(3). This is a "fact-specific analysis" that "will vary depending on the circumstances of any given case." *Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 555 (5th Cir. 2011).

Rule 23(b)(3) lists several factors for determining the superiority of a class action. This is at least a

useful starting point. Of these, only 23(b)(3)(D) is relevant here.[9] That factor addresses "the likely difficulties in managing a class action," a highly relevant concern given our previously discussed limitations. FED. R. CIV. P. 23(b)(3)(D). Manageability "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen*, 417 U.S. at 164. Courts have declined to certify classes because of manageability concerns where individual class members brought claims in different states under different state laws, *see Riordan v. Smith Barney*, 113 F.R.D. 60, 66 (N.D. Ill. 1986); communication with some class members would be unduly difficult, *see Mateo v. The M/S Kiso*, 805 F. Supp. 761, 774 (N.D. Cal. 1991); individual damages calculations would be too complex, *see Abrams v. Interco, Inc.*, 719 F.2d 23, 31 (2d Cir. 1983); the class required too many individualized determinations, *see Danvers Motor Co., Inc. v. Ford Motor Co.*, 543 F.3d 141, 149 (3d Cir. 2008); and the sheer size of the class

[9] Subsection (A) looks at "the class members' interests in individually controlling the prosecution or defense of separate actions. FED. R. CIV. P. 23(b)(3)(A). But absent claimants are already bound by our precedential decisions, *see* 38 U.S.C. § 7269, and thus we need not require this factor. Subsection (B) considers "the extent and nature of any litigation concerning the controversy already begun by or against class members." FED. R. CIV. P. 23(b)(3)(B). Our national jurisdiction addresses this factor. *See* 38 U.S.C. § 7269. Duplicative legal issues can already be brought in this Court and we have adequate means to address them. *See* U.S. VET. APP. R. 5(a)(3) (allowing us to stay matters pending before the Court "in the interest of judicial efficiency"). Finally, subsection (C) is not relevant here as we are the appropriate forum for claimants to challenge VA's denial of benefits. *See* FED. R. CIV. P. 23(b)(3)(C) (listing "the desirability or undesirability of concentrating the litigation of claims in the particular forum" as a 23(b)(3) factor); *see also* 38 U.S.C. §§ 7252, 7261.

made effecting notice and providing opt out rights unmanageable, *see Gaffney v. United States*, 834 F. Supp. 1, 6 (D.D.C. 1993). Importantly, the "focus is not on the convenience or burden of a class action suit *per se*, but the relative advantages of a class action suit over whatever other forms of litigation might be realistically available" to claimants. *Klay v. v. Humana, Inc.*, 382 F.3d 1241, 1269 (11th Cir. 2004); *see also Johnston v. HBO Film Mgmt.*, 265 F.3d 178, 194 (3d Cir. 2001) (class action must represent the best available method for fair and efficient adjudication to warrant certification). But again, we only use Rule 23 as a guide. It is imperfectly crafted for our appellate setting and Rule 23(b)(3)(D)'s baseline is only the starting point of our analysis. In the balance of this section, we provide a non-exhaustive set of factors we will consider when deciding if a claimant has rebutted the presumption against aggregate action.

After canvassing federal class action jurisprudence and considering our unique appellate nature, we hold that, when considering whether the presumption against aggregate action has been rebutted, the Court will consider, as appropriate, whether (i) the challenge is collateral to a claim for benefits; (ii) litigation of the challenge involves compiling a complex factual record; (iii) the appellate record is sufficiently developed to permit judicial review of the challenged conduct; and (iv) the putative class has alleged sufficient facts suggesting a need for remedial enforcement. No one of these factors is more or less important than the others, rather the Court must engage in a case-by-case balancing to determine whether class certification is appropriate.

The first factor, whether the challenge is collateral to a claim for benefits, focuses on whether "the

'plaintiffs' claims are essentially to the policy itself, not its application to them, nor to the ultimate substantive determination of their benefits.'" *Stengel*, 983 F. Supp. at 1159 (quoting *Johnson*, 922 F.2d at 346). Such claims are "not essentially a claim for benefits" because they do "not merely challeng[e] the merits of the" agency's ultimate benefits determination. *Id.* In appeals involving clear regulatory or constitutional attacks on VA's application of a regulation such as this one, determining whether a matter is collateral will likely involve a simpler analysis than those instances where the regulatory or constitutional challenge is necessarily intertwined with VA's merits determination. Thus, the proper focus is whether the class challenge "is bound up with the merits so closely that our decision would constitute 'interference with agency process.'" *Johnson*, 922 F.2d at 353 (quoting *Salfi*, 422 U.S. at 765).

The second factor, whether litigation of the challenge involves compiling a complex factual record, is meant to reserve the class device for challenges that will likely require extensive record development at the Agency beyond the class representative's individual benefits claim. Without such factual development, many claimants could find it extraordinarily difficult to litigate such challenges as they would lack the ability to obtain the information necessary to substantiate the class claims. Additionally, class certification centralizes litigation in a single appellate record, obviating the need for unnamed class members to collect evidence or request information from VA and for VA to adjudicate duplicative information requests.

The third factor requires considering whether the record is sufficiently complete for adjudication. This reflects the fact that "the focal point for judicial review

[of agency conduct] should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Further, the putative class representatives have control over this factor as ordinarily the completeness of the record is strongly influenced by claimants expressly raising arguments before the Board and entering relevant evidence into the record. As stated above, we do, just as in the petition context, have some limited factfinding ability when deciding motions for class certifications in the appeal context. *See Monk III*, 30 Vet.App. at 174. But factfinding is "typically unnecessary to judicial review of agency decisionmaking." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). This is doubly so for our court, which, as discussed, has unique limitations on its factfinding ability above and beyond those of a federal district court. *See* 38 U.S.C. §§ 7261(c), 7252(b). *But see Monk III*, 30 Vet.App. at 171; *Bove*, 25 Vet.App. at 143; *Erspamer*, 1 Vet.App. at 10. Thus, the extent to which a proposed class will require additional factfinding is an important consideration in determining whether the presumption against aggregate action is rebutted.

The final factor deals with enforcement. When this Court issues a favorable precedential decision, it certainly binds VA in all pending and future claims. *See* 38 U.S.C. § 502. But claimants not party to that decision who may be subject to errors affecting their rights, whether due to VA's non-compliance with our decision at a later date or otherwise, do not have any right to prompt remedial enforcement. Their only recourse is bringing the allegedly invalid agency action before us by fully exhausting agency review before filing a notice of appeal. And in some cases, this will be an ordinary feature of litigation. But where the facts suggest a need for prompt remedial enforcement,

claimants may instead seek class certification. This is a fact-specific analysis that will vary based on the unique facts of each individual appeal. So, for example, one need not find that the Agency is likely to disobey—we find such willful noncompliance unlikely in all but the most extreme case. Instead, a special need for remedial enforcement might be the result of the class members' age or some similar factor suggesting the need for especially timely relief.

Applying these factors here, class certification is the superior method for litigating the remaining class claim. The class claim is collateral to Mr. Skaar's claim for benefits because it challenges VA's adherence to a generally applicable regulation and is not "bound up with the merits [of Mr. Skaar's claim for disability benefits] so closely that our decision would constitute 'interference with agency process,'" *Johnson*, 922 F.2d at 353 (quoting *Salfi*, 422 U.S. at 765), as a favorable decision on the merits would not be an "order that class members be paid benefits" nor would it "in any way interfere with the agency's role as the ultimate determiner of eligibility" for benefits. *City of New York*, 476 U.S. at 485. In fact, a merits decision in the class's favor would do "no more than the agency would have been called upon to do had it, instead of [us], been alerted to the" alleged deficiencies in the Air Force's dose estimate methodologies. *Id.* Thus, this factor weighs in favor of certification.

So, too, does the second. The record in this case is complex and voluminous, containing numerous documents related to technical and scientific matters, *e.g.*, R. at 2635-50, 2682-3501, and decades old records, *e.g.*, R. at 3558-4148. Centralizing the class challenge in one litigation strikes us as a far better use of our limited judicial resources and avoids the specter of

both unnamed class members and VA engaging in duplicative record development.[10]

The third factor also weighs in favor of certification. Mr. Skaar and the proposed class have submitted scientific evidence challenging the validity of the Air Force's dose estimates. *See* R. at 2635-50. We are also equipped with the Board's supplemental statement addressing Mr. Skaar's challenge to VA's adherence to § 3.311. *See generally* Secretary's Mar. 29, 2019, Resp. We require no additional information to decide the class challenge on the merits. Importantly, if the class sought not only to challenge VA's compliance with § 3.311 but *also* proffered an alternative dose methodology, we would likely require significant amounts of additional information such that class certification could prove impractical. However, here, the record is complete.

Finally, the class has alleged sufficient facts suggesting a need for timely remedial enforcement, and thus the final factor also weighs in favor of certification. The Palomares nuclear cleanup occurred on January 17, 1966, nearly 54 years ago. The advanced age of the class members, especially considering they all must suffer from a radiogenic disability to qualify, suggests a need for the availability of prompt remedial enforcement. VA already considers claimants' ages when determining whether to expedite appeals. *See* 38 U.S.C. § 7107. Thus, we think it an apt consideration

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[10] As an example of the type of duplicative recordmaking we hope to discourage, Mr. Skaar indicated that several other putative class members with claims at the Board would "shortly submit in their own cases the same records" he has already submitted to the Court. Appellant's June 20, 2018, Resp. at 14, n.4. Such duplicative recordmaking cannot be in the interest of systemic efficiency.

in the class certification context as well. Additionally, the requested relief is identical across the class—a Court order to VA that it comply with § 3.311. It is more efficient and prudent to administer the requested class relief here collectively through an orderly and consistent process amenable to judicial supervision, rather than through piecemeal litigation.

All four factors weigh in favor of certification. Thus, we hold class certification is a superior method of litigating the remaining class claim.

7. Proposed counsel is adequate.

Having now concluded a class action is appropriate in this appeal as to the § 3.311 claim, we turn to the appointment of class counsel who is adequate to protect the interests of absent class members. Although Rule 23(a)(4) historically included an analysis of the adequacy of class counsel, that inquiry is now codified in 23(g). *See Sheinberg v. Sorensen*, 606 F.3d 130, 132-35 (3d Cir. 2010). Despite the rule change, the analysis is largely the same. *See Kalish v. Karp & Kalamotousakis, LLP*, 246 F.R.D. 461, 463 (S.D.N.Y. 2007). The Rule provides a set of factors courts must consider when judging class counsel's adequacy: (i) the work already done investigating and developing the claims; (ii) counsel's class action and substantive legal experience; (iii) counsel's relevant legal knowledge; and (iv) counsel's willingness to litigate the claim. FED. R. CIV. P. 23(g)(1)(A)(i)-(iv). Courts are not limited to these factors and "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." FED. R. CIV. P. 23(g)(1)(B). We adopt these Rule 23(g) factors as guides for our assessment of the adequacy of class counsel.

Proposed class counsel in this action is Michael Wishnie, Esq., of the Veterans Legal Services Clinic of Yale Law School's Jerome N. Franks Legal Services Organization. He is adequate. Counsel has done extensive work developing the claims at issue in this matter, demonstrated both "relevant legal knowledge" of and experience in both class action litigation and veterans law through prior aggregate actions before us, *see, e.g.*, *Monk III*, 30 Vet.App. at 174, and shown a willingness to commit the necessary resources to lead this action through counsel's extensive work on this matter. Thus, and because there are no "other matter[s] pertinent to counsel's ability to fairly and adequately represent the interests of the class," counsel is adequate and will be appointed to represent the class. *See* FED. R. CIV. P. 23(g)(1)(B).

8. Generalized notice of class certification is required but opt out rights are not.

We have two final matters to consider, although they are related. We must first determine whether to afford class members the opportunity to opt out of the class we have certified. Next, we must determine what type of notice, if any, to provide to the class about this certification. The issues are related because if opt out rights are available, ensuring actual notice of the pendency of the class action takes on greater importance.

Classes certified under Rule 23(b)(2) generally do not require opt-out rights for absent class members. *See Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990). This is so because the indivisible nature of injunctive relief means it applies to every member of the class no matter what. *See In re Allstate Ins. Co.*, 400 F.3d 505, 506 (7th Cir. 2005) (commenting that "[t]he thinking behind this distinction [concerning opt out rights] is that declaratory and injunctive relief will

usually have the same effect on all members of the class as individual suits would"). This same indivisible nature of the injunctive relief requested here combined with this Court's national jurisdiction counsel against allowing opt-out opportunities for members of the class we have certified. *See* 38 U.S.C. § 7269.

Federal Rule 23(c) states "[f]or any class certified under Rule 23(b)(1) or (2), the court *may* direct appropriate notice to the class" while for those certified under (b)(3) "the court *must* direct to class members the best notice practicable under the circumstances." (emphasis added). Because we have determined the class members do not have the right to opt out of the class we have certified, notice at this stage of the proceedings is less critical than if class members could remove themselves from the class. Nonetheless, we believe it is the best practice to take reasonable steps to inform class members of the pendency of this action. Such notice need not be individualized for each member of the class but, rather, may be a generalized notice. As directed at the conclusion of this order, the parties are to jointly submit a proposed class notice and plan for effecting notice, both of which we must approve. If the parties are unable to agree, they should submit separate sections and include them in the joint submission.

III. CONCLUSION

We are, as we have observed before, "in uncharted waters." *Monk v. Shulkin*, No. 15-1280, 2018 WL 507445, at *2 (Jan. 23, 2018). We recently recognized our authority to aggregate actions in the petition context, *see Monk II*, 30 Vet.App. at 170-71, and we will now do so in the appeal context as well. Our decision today heralds the beginning of an era in which we will entertain, but by no means always certify,

class actions in the first instance, making us the only Federal appellate court in the Nation to do so. Grappling with the complexities of the law of aggregate action while also maintaining fidelity to the VJRA and congressional intent to benefit those who have served the Nation has been—and no doubt will continue to be—a challenge we must face. But if class action procedures can lead to more consistent, efficient, and effective adjudication, then our Nation's veterans deserve no less.

Upon consideration of the foregoing, it is

ORDERED that the motion for class certification is GRANTED IN PART and DENIED IN PART. It is further

ORDERED that the proposed class definition is modified as explained herein and the following class is certified in this matter: *All U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, and whose application for service-connected disability compensation based on exposure to ionizing radiation VA has denied or will deny by relying, at least in part, on the findings of dose estimates requested under 38 C.F.R. § 3.311, except those whose claims have been denied and relevant appeal windows of those denials have expired, or those whose claims have been denied solely based on dose estimates obtained before 2001.* It is further

ORDERED that Michael J. Wishnie, Esq., is appointed as class counsel. It is further

ORDERED that, within 30 days, the parties jointly submit a proposed class notice and plan for effecting notice. If the parties are unable to agree, they are to submit separate sections and include them in the joint submission. It is further

ORDERED that this matter is returned to the original panel appointed to this appeal for management of the class action and a decision on the merits.

DATED: December 6, 2019

SCHOELEN, *Senior Judge*, concurring in part and dissenting in part:

I agree with my colleagues in the majority generally as to the usefulness of the class action mechanism in the context of appeals before this Court. I particularly agree that class certification could be a useful device for dealing with broad, ancillary issues such as the potentially flawed dose estimate methodology challenged in the case before us. That issue exists outside the boundaries of traditional veterans law litigation, and having a system in place to address a discrete legal issue divorced from class members' underlying benefits claims will increase judicial efficiency and agency adjudication rates. Nonetheless, I respectfully disagree with the majority's ill-explained finding that our jurisdictional statute permits us to include Future-Future Claimants as class members. I also disagree with their unwillingness to include Past Claimants and Expired Claimants in the class. In my view, the majority's interpretation and application of *Bowen v. City of New York*, 476 U.S. 467 (1986), is flawed, and their flawed view systematically precludes vulnerable veterans from receiving full and fair hearings. Additionally, I am very concerned about reconciling our role as an appellate court that can issue precedential decisions with the necessity and superiority of class actions. To that end, I propose additional factors for the balancing test analyzing whether class actions are superior to precedential decisions.

I. THE FUTURE-FUTURE CLAIMANTS SHOULD BE EXCLUDED FROM THE CLASS

The majority states that *City of New York* "bears a striking similarity to the matter before us." Majority at 19. I strongly agree, and find our jurisdictional statute, 38 U.S.C. § 7252, to be properly analogous to the Social Security jurisdictional statute, 42 U.S.C. § 405(g), at issue in *City of New York*, which is why I find the majority's inclusion of the Future-Future Claimants in the class troubling.

At the outset, I agree with my dissenting colleagues insofar as they find that section 7252 includes the nonwaivable, jurisdictional requirement that a veteran's claim be presented preliminarily to VA, just as the Supreme Court in *Mathews v. Eldridge* held that presentment was a nonwaivable, jurisdictional requirement for Social Security claimants to obtain judicial review under section 405(g). Dissent at 46-48; 424 U.S. 319, 328 (1976) ("The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary."). This is so because, intuitively, there can be no decision under either statute absent a claim.

The majority glosses over this requirement and instead summarily concludes that we have jurisdiction over the Future-Future Claimants. It is unclear to me whether the majority finds that we have jurisdiction over nonpresenting Palomares veterans because we have jurisdiction over Mr. Skaar or because they should be treated in like manner to the Present-Future Claimants under the administrative exhaustion analysis. If it is the former, the Social Security cases we rely upon throughout this opinion counsel that the

jurisdictional requirement that someone file a claim is an individual requirement that cannot be waived; if it is the latter, the majority improperly conflates the concepts of presentment and exhaustion. Nothing in our caselaw or the analogous Social Security cases leads me to believe that either of these theories is a faithful interpretation of our jurisdictional statute. To the contrary, section 7252 is, on its face, sufficiently comparable to section 405(g) and this Court should find that presentment is a jurisdictional requirement. Simply put, it cannot possibly be true that our jurisdictional statute is waivable in its entirety for potential class members who have never filed a claim.

Further, I find no Social Security caselaw that allows a District Court to assert jurisdiction over nonpresenting individuals pursuant to section 405(g). In fact, when nonpresenting individuals have been consolidated with other Social Security class members, courts have invoked creative mechanisms such as mandamus jurisdiction under 28 U.S.C. § 1361. *See Clark v. Astrue*, 274 F.R.D. 462, 467 (S.D.N.Y. 2011) ("[I]ndividuals failing to present their claims can still be part of the class because the Court may exercise mandamus jurisdiction over their claims pursuant to 28 U.S.C. § 1361."); *see also City of New York v. Heckler*, 742 F.2d 729, 739 & n.7 (2d Cir. 1984); *Ellis v. Blum*, 643 F.2d 68, 77-82 & n.10 (2d Cir. 1981). Our closest analogue is the All Writs Act, which does not provide an independent source of jurisdiction, but rather allows us to protect our future jurisdiction. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002) (affirming that the All Writs Act does not confer jurisdiction on the federal courts); *see also Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999) (noting that the express terms of the All Writs Act confine a court "to issuing process 'in aid of' its existing statutory

jurisdiction; the Act does not enlarge that jurisdiction"). Because other federal courts have found the need to invoke an independent source of jurisdiction for nonpresenting class members, and because we have no other statutory grant of jurisdiction outside section 7252, it follows that our Future-Future Claimants cannot be consolidated as part of the class.

Despite the fact that I believe the Future-Future Claimants should not be part of the class, it is worth noting that this group of veterans is unlikely to be harmed by exclusion. In some ways, the exclusion of the Future-Future Claimants presents a legal fiction unique to this Article I appellate court – the precedential effect of our decision will bind them regardless of their nonpresenting status, and as soon as they file, they will be subject to whatever rule VA has been judicially mandated to follow. Although the Future-Future Claimants are necessarily implicated in this litigation, our authority to issue precedential decisions means they will not suffer any injustice during these proceedings, and our jurisdictional statute should not be skirted to establish a false equivalent with the Present-Future Claimants.

II. THE PAST AND EXPIRED CLAIMANTS SHOULD BE INCLUDED IN THE CERTIFIED CLASS

I also take exception with the majority's exclusion of the Past and Expired Claimants from the class. *City of New York* addressed the same legal issues we now face in deciding class composition – exhaustion of administrative remedies and equitable tolling – but, here, the majority has only adopted the Supreme Court's holding insofar as it pertains to the exhaustion of remedies issue. I do not believe the majority's application of that case is uniform or consistent.

In *City of New York*, the Supreme Court, in affirming the rulings of both the District Court and the Court of Appeals, notes that the District Court included claimants in the class who had not exhausted their administrative remedies. *City of New York*, 476 U.S. at 475-76 (citing *Eldridge*, 424 U.S. at 319). The Supreme Court then recounts the District Court's analysis as to why the class properly included those who had not complied with the 60-day statute of limitations:

> The [District] [C]ourt noted that the 60-day requirement is not jurisdictional . . . [and] found that "the same reasons which justify implying waiver of the exhaustion requirement *are stronger for the sixty*[-]*day requirement* because the statute of limitations is not, as is the exhaustion requirement, 'central to the requisite grant of subject-matter jurisdiction.'"

Id. at 476 (emphasis added) (citations omitted).

Effectively, the majority properly applies *City of New York*'s analysis as to the jurisdictional question (at least insofar as it pertains to the Present-Future Claimants), but chooses to impose a higher burden on the claimants in the nonjurisdictional portion of the case. This should not be so. Here, as in *City of New York*, the same rationales for waiver of the administrative exhaustion requirement are applicable to, and indeed stronger for, the equitable tolling issue. Succinctly stated, this Court should not waive the jurisdictional requirements for one class of veterans and then exclude other classes of veterans who present no jurisdictional impediments.[11]

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[11] I note that, although I agree with the dissent's point regarding the nonwaivability of section 7252's presentment

Moreover, it is unclear to me whether the majority purports to adopt *City of New York*'s equitable tolling framework and chooses to find that the nonsecretive nature of VA's dose estimate methodology distinguishes the matter, or whether they do not believe that framework applies at all to the Past and Expired Claimants simply because the specter of equitable tolling "offends the very notion of finality." Majority at 23. Regardless, I respectfully find their interpretation far too narrow.

A. Proper Application of Equitable Tolling Framework

This Court should endorse a wholesale import of *City of New York*'s framework. That means that, when analyzing whether equitable tolling is warranted for Past and Expired Claimants in a class context, two questions are presented: (1) "[W]hether equitable tolling is consistent with Congress' intent," and (2) "whether tolling is appropriate on these facts." *City of New York*, 476 U.S. at 480.

The first question should be answered now and applied to all future class certification analyses: Yes, equitable tolling in the context of the Expired Claimants and Past Claimants is consistent with congressional intent. Just like 42 U.S.C. § 405(g) at issue in *City of New York*, Congress designed the applicable veterans benefits statutes to be "unusually protective" of claimants. *Id.*; *see Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 437 (2011) ("The Social Security disability benefits program, like the

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requirement, I diverge from their thinking as to exhaustion. I agree with the majority's finding that our jurisdictional statute is sufficiently analogous to section 405(g) to warrant the same exhaustion analysis conducted in *City of New York*.

veterans benefits program, is 'unusually protective' of claimants.") (quoting *Heckler v. Day*, 467 U.S. 104, 106-07 (1984)). As the U.S. Court of Appeals for the Federal Circuit has stated, "Congress' intent in crafting the veterans benefits system is to award 'entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign.'" *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (quoting *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (en banc) (Michel, J., concurring)); *see also Jaquay v. Principi*, 304 F.3d 1276, 1286 (Fed. Cir. 2002) (en banc); *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000). That "special beneficence" is noted time and again in caselaw, and "in the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight." *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998).

Keeping in mind this rationale as to why equitable tolling is appropriate in veterans law cases generally, we must assess whether tolling is appropriate on the facts of this case. That must be done by comparing this case to *City of New York* and determining whether the conduct at issue here warrants our tolling of the filing deadline.

The majority tersely states that they will not equate VA's adjudication of Palomares veterans' claims with the secretive conduct at issue in *City of New York*, then asserts that "there is no principled way to distinguish the Expired Claimants here and any other claimants who have been denied benefits, failed to appeal to this Court, and later discovered that their benefits denial was based on an incorrect reading of the law." Majority

at 23. In context, this means that the majority has (1) implicitly held that "secretive conduct" *must* be at issue to trigger equitable tolling, and (2) placed this case on equal footing with conventional challenges to denials of veterans' disability compensation claims.

Other courts have not applied *City of New York* so strictly. For instance, the U.S. Court of Appeals for the Eighth Circuit analyzed whether secretive conduct is "an absolute prerequisite" for equitable tolling to be appropriate and held that "although a secret, internal policy is probably not a prerequisite to equitable tolling, some type of misconduct on the part of the agency or gross, but good-faith, error on the part of the claimant should justify this extraordinary remedy." *Medellin v. Shalala*, 23 F.3d 199, 204 (8th Cir. 1994), *rehearing denied* (June 2, 1994). Similarly, the Southern District of Ohio has previously held that equitable tolling was appropriate for a class of plaintiffs challenging the former practice of the Secretary of Health and Human Services in calculating the amount of supplemental security income (SSI) benefits. Though the policy at issue was not secret or clandestine, the District Court found equitable tolling was warranted because the calculation of SSI benefits was not made pursuant to an established regulation and claimants "might well be unaware of the specific factors taken into account by the Secretary." *Gould v. Sullivan*, 131 F.R.D. 108, 112 (S.D. Ohio 1989). Additionally, when certifying a class of claimants, the Southern District of New York in *Hill v. Sullivan* stated that it did "not believe it necessary to determine whether . . . behavior amounts to a 'clandestine policy' to 'prevent[ ] plaintiffs from knowing of a violation of [their] rights.'" 125 F.R.D. 86, 95 (S.D.N.Y. 1989) (citations omitted). Rather, the court agreed with the plaintiffs that the Secretary's failure to publish challenged rulings "had

the same practical effect on claimants as the defendant's secretive conduct in [*City of New York*]." *Id.* (citations omitted).[12]

I do not attempt here to explicitly import another court's test or draw a bright line that can be applied in future cases. Rather, when taken together, these cases demonstrate that equitable tolling can be appropriate in instances where the conduct complained of falls short of "secretive," and I believe that, on the facts of this specific case, tolling is warranted. *See Toomer v. McDonald*, 783 F.3d 1229, 1239 (Fed. Cir. 2015) (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010)) (stating that equitable tolling is a matter assessed by the Court on a case-by-case basis with an acknowledgment of the "need for flexibility" and "for avoiding mechanical rules"). The U.S. Air Force originally worked with consultants who developed a methodology for deriving dose estimates for Palomares veterans, which was detailed in the LA Report; the inputs for this methodology included vast amounts of scientific data not easily understood by laypersons, including dosimetry readings, bioassay data, environmental testing, and multiple complex computer models; over 12 years after the LA Report was published, the Air Force – *not VA* – determined that inconsistencies existed in dose estimates; thereafter, the Air Force began using a revised

[12] Additionally, although not arising in the equitable tolling context, the District Court in *Nehmer v. U.S. Veterans' Admin.* did not require secretive conduct by VA to include the "Expired Claimants" – i.e., the pre-1985 claimants – in the class. 118 F.R.D. 113 (N.D. Cal. 1987). Nevertheless, they were allowed to participate in the class because they shared a threat of "future harm" with other class members. *Id.* at 117. This harkens to the analysis by the majority that surely Congress did not expect veterans to have fewer rights after the Veterans' Judicial Review Act than they did before its enactment.

methodology when providing VA with dose estimates for Palomares veterans; and the revised methodology also contained highly complex measurements and datasets (which may or may not be flawed). There is no doubt in my mind that this development-and-assignment exercise, conducted outside VA's purview and essentially devoid of oversight, prevented veterans from continuing administrative appeals and pursuing benefits they may have been entitled to, and thus is sufficient under *City of New York*'s framework that the equities in this case favor tolling.

B. The Majority's Other Contentions

Further, the majority should not equate a flawed dose estimate methodology with a misapplication of law. *City of New York* itself states that claimants who were subject to the systemwide, unrevealed policy "stand on a different footing from one arguing merely that an agency incorrectly applied its regulation."[13] 476 U.S. at 485. The dose estimates produced by that methodology function as scientific facts ancillary to administrative proceedings, not as a legal interpretation subject to future revision. And the development of this methodology behind a veil at the Department of Defense (DoD) "prevented [the claimants] from realizing that they had valid grounds for seeking administrative review." *McDonald v. Sec'y of Health &*

[13] The Supreme Court made this statement when discussing claimants who had not exhausted their administrative remedies as opposed to those who argued equitable tolling was warranted. Nevertheless, the phrase is easily extended to the claimants seeking equitable tolling, as its purpose is merely to distinguish the policy challenge from an illegal application of a regulation. In other words, regardless of which group within the proposed class we are discussing, a claimant's challenge to the underlying obscured policy differs from a claimant's challenge to a regulation.

Human Servs., 834 F.2d 1085, 1090 (1st Cir. 1987). The flawed dose estimates did not function like a new legal interpretation that was disadvantageous to veterans, but rather provided a flawed factual basis that prevented claimants from even *accessing* the veterans benefits system.

Additionally, the majority says there is no principled way to distinguish the Past and Expired Claimants from any other claimants who have been denied benefits, failed to appeal to this Court, and later discover their benefits denial was based on an incorrect reading of the law. Majority at 23. But I would assert that the same rationales for inclusion of the Present-Future Claimants apply with equal – if not greater – force to the Past and Expired Claimants. The majority views it a "substantive advantage" that veterans' claims will be relitigated maintaining their effective dates, but to frame this advantage as more substantive than the inclusion of those claimants over whom we do not typically have jurisdiction is incorrect. Equitable tolling is a procedural tool the Court can use just like waiver of administrative exhaustion. The fact that veterans can file supplemental claims under 38 U.S.C. § 5108(a) and 38 C.F.R. § 20.1105(a) is of no consequence. Moreover, they may very well lose their original effective date, and thus it is not a similar remedy. Veterans who are effectively barred from an entire administrative system via a factual error developed by an agency we have no direct authority over would not be "substantively advantaged" in any way by including them in the class; instead, they would only be given what they were improperly denied initially under the law.

Further, for the sake of argument, even if I agreed with the majority's premise that utilizing the class

device here renders substantive benefits for the Past and Expired Claimants, it is unclear to me why that precludes this Court from including them in the class. *City of New York* clearly endorsed certification of just such a group of Social Security claimants. Those claimants arguably were privy to the same types of "substantive benefits" that our Past and Expired Claimants would be, but were still included in the class. I believe it error to first invoke a categorical rule that class certification should never be used for a substantive advantage, then label inclusion in the class a substantive advantage, all while overlooking that *City of New York* did the very thing the majority prohibits.

At the end of the day, Article III caselaw is not controlling, but this Court has chosen of its own volition to import the narrowest interpretation possible of *City of New York* to justify certifying an unjustly narrow class.[14] Our failure to equitably toll in this case does not show reverence for existing interpretations of law or respect for the administrative process, but rather provides tacit endorsement of DoD-developed policies and facts to be used later by VA, no matter the consequences within VA's regulatory scheme.[15] It is a

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[14] *See Henderson*, 562 U.S. at 437-38 ("[N]one of the precedents cited by the parties controls our decision here. All of those cases involved review by Article III courts. This case, by contrast, involves review by an Article I tribunal as part of a unique administrative scheme.").

[15] That is not to say that I necessarily agree with Mr. Skaar as to the merits underlying this case. But I believe the majority to be saying that no matter how far removed from the veterans benefits process or the agency which oversees it, and no matter how scientifically dense or ill-conceived the policy, we lack the power as an institution to equitably toll veterans' cases if the alleged misconduct is not clandestine.

statement that a group of vulnerable veterans should not have full and fair hearings because they were not legally savvy enough to challenge a complicated and convoluted dose reconstruction methodology developed by consultants at an agency wholly separate from VA. As the U.S. Court of Appeals for the Second Circuit stated in *City of New York v. Heckler*, "[a]ll of the class members who permitted their administrative or judicial remedies to expire were entitled to believe that their Government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States." 742 F.2d at 738. The Past and Expired Claimants should be allowed their (legitimate) day in court, just like the Present-Future Claimants over whom we would not traditionally have jurisdiction.

III. SUPERIORITY TEST

Another significant issue involves the determination of when we will grant class certification versus when we will issue a precedential decision – a question unique to this appellate court engaging in an activity typically committed to District Courts. Because we possess the authority to issue precedential decisions that bind all future VA decisions, class actions would likely be more appropriate in rare and unique circumstances. When assessing whether the class action device is superior to a precedential decision, I agree with the majority that a balancing test is appropriate; however, it must be a sufficiently robust test. To that effort, I would add two factors to their analysis. The first additional factor addresses whether litigation of the challenge involves complex technical or scientific matters. The second addresses whether the alleged conduct is "systemic" – that is, whether a significant number of VA claims involve this issue.

A. Technical or Scientific Complexity

This first additional factor is meant to reserve the class device for challenges that will likely require sophisticated knowledge beyond the normal level of savvy needed by claimants or their attorneys to litigate veterans' individual benefits claims. Many claimants could find it extraordinarily difficult to litigate challenges involving technical data or complex scientific concepts, as they would lack the ability to obtain or understand the information necessary to substantiate their claims. Class certification centralizes litigation, obviating the need for unnamed class members to independently construct theories based on data not readily available or understandable.

This factor is related to, but separate from, the majority's second prong, which contemplates whether "litigation of the challenge involves compiling a complex factual record." One of these considers whether the underlying concepts that will be contemplated in merits litigation are complicated to a litigant and one considers whether development before the agency is extensive and onerous (essentially making it complicated for the Court). Future cases can and should contemplate both factors when asking whether class certification is superior.

Here, the additional factor is clearly met. Understanding how DoD constructed dose estimates for Palomares veterans, and understanding whether or how those dose estimates were miscalculated, is a highly complex exercise that requires skills far beyond those of individual litigants. This lends extra weight to the majority's findings as to superiority.

B. Systemic Complaint

The second factor I propose adding – whether the issue in the appeal is a systemic complaint – is a distinct inquiry from the numerosity prong of the class certification test set out under Rule 23(b), where the concerns are more related to whether the class is so numerous as to make individual adjudication of claims at the Court impractical. The systemic-complaint factor looks at the question from VA's perspective – are there so many claims at VA involving this issue that this decision will have a significant effect on the agency and will the agency likely benefit from a single-stroke class action decision rather than one-by-one appeals?

I would find that this factor weighs against a class action and favors a precedential decision. Although 1,600 veterans is a significant number of parties affected (and sufficient to satisfy Rule 23's numerosity requirement), it is not sufficient to be deemed a systemic complaint when VA handles over a million claims per year.[16] Nevertheless, as the superiority test is a balancing test, failing one factor does not foreclose class certification. When taken as a whole, I concur with the majority that class certification is superior in this case to a precedential decision.

FALVEY, *Judge*, with whom PIETSCH and MEREDITH, *Judges*, join, dissenting:

The majority boasts that "we are the only appellate court in the Nation with the authority to aggregate actions in the first instance." *Ante* at 25. There are

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[16] *See* VA, CONGRESSIONAL SUBMISSION, FY 2020, VOL. III: BENEFITS AND BURIAL PROGRAMS AND DEPARTMENTAL ADMINISTRATION 146 (2019), https://www.va.gov/budget/docs/summary/fy2020VAbudgetvolumeIIIBenefitsBurialProgramsAndDeptmentalAdministration.pdf.

sound reasons why no other appellate court has undertaken this innovation. Given the limited nature of our jurisdiction and scope of review, we question the efficacy of the majority's action, and, considering our ability to issue precedential decisions that direct VA practices nationwide, we also question its necessity. We believe that the majority has created a class that exceeds our jurisdiction and offers a comparable outcome to members of that class that a precedential decision could provide without the manageability and preclusion problems inherent in class litigation. Because we disagree with the substance of the majority's order, the rationale underlying it, and the way the majority has developed this case, we respectfully dissent.

I. ANALYSIS

Although there is much in the majority's order with which we disagree, we will focus here on those matters related to our jurisdiction to conduct class actions in the appellate context and the utility of doing so even if we have such jurisdiction, and how that applies to Mr. Skaar's proposed class.

A. The Power to Certify Class Actions in the Appeal Context

1. Our authority to certify a class is derived from our procedural statutes.

Under our jurisdictional statute—38 U.S.C. § 7252—the Court's review is limited to Board decisions and the record of proceedings before the Secretary and the Board. We agree that, if a proposed class satisfies the jurisdictional requirements of section 7252, then the Court has the authority to certify that class. Under such circumstances, if the Court chooses to exercise that authority, it may certainly utilize procedural statutes, such as 38 U.S.C. § 7264(a), to aggregate a

class. In our view, our jurisdictional statute restricts classes that we may certify in the appeal context under our procedural statutes to those containing only class members who have obtained a final Board decision. And, our review of those members' cases is limited to the record of proceedings.

The majority goes much further. It finds the authority to conduct class actions in an esoteric "inherent authority." Citing the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Monk v. Shulkin* (*Monk II*), 855 F.3d 1312 (Fed. Cir. 2017), the majority contends that our "inherent authority" supports our use of class actions. *Ante* at 13-14. The majority fails to explain the source and scope of the term "inherent authority." More importantly, it does not explain how "inherent authority" expands our jurisdiction beyond that provided by our jurisdictional statute, aside from a conclusory statement that it does. It is equally unclear why vague references to "inherent authority" are necessary to justify class actions where section 7264(a)—which provides that proceedings of the Court "shall be conducted in accordance with such rules of practice and procedure as the Court prescribes"—allows for such aggregation, so long as the jurisdictional requirements under section 7252 are first met.

The Federal Circuit in *Monk II* cited the All Writs Act (AWA) as the basis for this Court's authority to certify class actions in the petition context. The majority itself questions whether the AWA grants us authority to certify classes in the appeal context. It does not. Neither the AWA nor *Monk II* can stand as the legal basis for aggregating appeals because, unlike the wide authority the AWA gives us to protect our

prospective jurisdiction, our authority to review appeals has been tightly circumscribed by Congress.

Thus, we would find that, although the Court has authority to certify a class in the appeal context when jurisdictional requirements are satisfied, such authority is derived from the procedural discretion granted to us by Congress, not the AWA or any purported "inherent authority."

2. But our procedural statutes do not create jurisdiction.

The majority, relying on *Monk II*, conflates the procedural statutes, which provide us with the methods to manage cases over which we have jurisdiction, with the statute authorizing our jurisdiction. The Federal Circuit in *Monk II* noted that *Harrison v. Derwinski*, 1 Vet.App. 438 (1991) (en banc) (per curiam order), in which the Court found that it lacked power to adopt a class action rule because, inter alia, section 7252 limited our review to Board decisions, reflected a concern that we would "exceed [our] jurisdiction" if we certified a class that included veterans without a Board decision. *Monk II*, 855 F.3d at 1320. The Federal Circuit then stated that it disagreed that our "authority is so limited," indicating that Congress expressly gave us "the authority to 'compel action of the Secretary unlawfully withheld or unreasonably delayed.'" *Id.* (quoting 38 U.S.C. § 7261(a)(2)).

The authority to compel action of the Secretary, coupled with our power under the AWA, allows us to aggregate cases in the petition context. It does not help us determine how to handle direct appeals. Anything the Federal Circuit said about direct appeals is dicta. That tribunal has yet to discuss our authority to conduct class actions on direct appeal when that issue

was directly presented, properly briefed, and accompanied by an appropriate record. We, therefore, have no precedential guidance concerning that matter and do not rely on any unnecessary statements the Federal Circuit may have made.

After noting that the Federal Circuit disagreed with the Court's finding in *Harrison*, the majority references section 7264(a). A procedural statute, which authorizes us to create mechanisms necessary to exercise our jurisdiction (i.e., we may utilize such tools once we have jurisdiction), cannot be used to overcome the jurisdictional barrier that the Court identified in *Harrison*. *See Henderson v. Shinseki*, 562 U.S. 428, 434 (2013); *In re Wick*, 40 F.3d 367, 373 (Fed. Cir. 1994) ("If Congress had intended the court's jurisdiction to be broader than that conferred by § 7252, Congress would have expressed that intention legislatively.").

3. Based on section 7252(a) and Supreme Court precedent, we are prohibited from waiving any administrative exhaustion requirements and assuming jurisdiction over class members who have not filed a claim and do not have a Board decision.

The majority acknowledges the Secretary's argument that the Court lacks jurisdiction to include veterans without a Board decision in the certified class because such a decision is a jurisdictional prerequisite for Court review. *Ante* at 18; *see* 38 U.S.C. § 7252(a). Of those without a Board decision, the majority indicates that such veterans fall into one of two subgroups within the proposed class: (1) Present-Future claimants—those who have filed claims that remain pending before VA; and (2) Future-Future claimants—those who have not yet filed claims. *Ante*

at 15-16. The majority then states that it waives the exhaustion requirement—which, presumably, is that each class member have a Board decision—for these claimants and finds that the Court has jurisdiction over them. *Id.* at 20-21.

The Supreme Court's Social Security Administration (SSA) cases the Secretary and the majority reference to support their positions regarding jurisdiction are not directly on point as to our judicial review statutes. Although these cases provide helpful guidance as to how jurisdictional requirements should be analyzed, this precedent does not undermine the jurisdictional requirements of section 7252(a) or show that those requirements are waivable by the Court.

a. A statute may contain nonwaivable jurisdictional requirements and waivable administrative exhaustion requirements.

In *Mathews v. Eldridge*, the Supreme Court explained that its decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975), identified three conditions[17] that must be satisfied to obtain judicial review under 42 U.S.C. § 405(g). 424 U.S. at 328. Of these, the requirement that there be "a final decision of the Secretary made after a hearing" was central to the requisite grant of subject-matter jurisdiction. *Id.* (citing *Salfi*, 422 U.S. at 764). The Supreme Court stated that, implicit in *Salfi*, was the principle that

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[17] The Supreme Court noted that two of these conditions—that civil action be commenced within 60 days after the mailing of notice of such decision and that the action be filed in an appropriate district court—specified a statute of limitations and appropriate venue, and are waivable by the parties. *Mathews v. Eldridge*, 424 U.S. 319, 328 n.9 (1976).

> this condition consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

Id. Recently, the Supreme Court in *Smith v. Berryhill* reiterated the *Eldridge* holding that section 405(g) contains both a nonwaivable jurisdictional requirement and a waivable requirement regarding the exhaustion of administrative requirements. 139 S. Ct. 1765, 1773 (2019).

b. There is a difference between a requirement being waivable and determining whether to waive that requirement.

Although the majority notes the axiom that "[s]ubject-matter jurisdiction 'can never be waived or forfeited,'" *ante* at 16 (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012)), it then proceeds to do just that. It does so by applying a test for determining whether to waive a statutory requirement without first ascertaining whether the statutory requirements in question are in fact waivable.

Lest there be any residual doubt after 30 years of caselaw, section 7252(a) is jurisdictional. Indeed, it's hard to imagine that the English language could produce a more clearly jurisdictional provision. *See*

Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1849 (2019) (courts should deem a requirement jurisdictional when Congress clearly states that it is). The statute is labeled "[j]urisdiction" and the phrase in question says that this Court "shall have exclusive jurisdiction to review decisions of the Board." The majority here investigates whether it may expand the Court's traditional view of its authority by reaching back into the agency's adjudicatory process and laying hold of claims that have not yet been subject to a Board decision. As we will explain, its actions contravene the intentions of Congress.

In *Bowen v. City of New York*, 476 U.S. 467 (1986), and *Eldridge*, the Supreme Court found that the waivable element of section 405(g) was the requirement that the administrative remedies prescribed by the Secretary be exhausted. The Supreme Court then utilized the test referenced by the majority (whether the challenged conduct is collateral to a claim for benefits; exhaustion would cause irreparable harm; and the purpose of exhaustion is not served by its enforcement) when assessing whether deference to the agency's determination of finality was necessary. *City of New York*, 476 U.S. at 483 (noting that, "[o]rdinarily, the Secretary has discretion to decide when to waive the exhaustion requirement," but that in certain cases deference to the agency's judgment is inappropriate), 484 ("The ultimate decision of whether to waive exhaustion . . . should also be guided by the policies underlying the exhaustion requirement."); *Eldridge*, 424 U.S. at 328, 330.

In other words, the Supreme Court first determined whether the statutory element was waivable and only then assessed whether those steps created by the Secretary to reach a final decision warranted any

deference, a process that the majority did not follow. As discussed below, no portion of section 7252(a) is waivable.

c. Section 7252(a) contains the nonwaivable requirement that a class member must have filed a claim with VA.

Once again, under section 7252(a), our Court "shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals," and, by way of comparison, under section 405(g), an individual may obtain review by a court of "any final decision of the Commissioner of Social Security made after a hearing."[18] Section 7252(a) includes the nonwaivable, jurisdictional requirement identified in *Eldridge*—that a claim for benefits shall have been presented to the agency—given that, under both statutes, there could be no decision absent a claim. 424 U.S. at 328 (noting that a decision was "clearly required by the statute"); *see Berryhill*, 139 S. Ct. at 1773. Therefore, if a veteran has not filed a claim with VA, our Court would not have jurisdiction over that individual. Since this requirement is jurisdictional, we cannot waive it. Thus, as discussed further below, the notion that the majority's so-called "Future-Future" claimants can be part of a class over which we have jurisdiction does not make it past the starting line.

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[18] At the time of *Eldridge*, the title of the agency head was Secretary of Health, Education, and Welfare and thus this portion of section 405(g) read "any final decision of the Secretary made after a hearing." 424 U.S. at 327. Currently, the title is Commissioner. Aside from this title change, the language of section 405(g) has remained the same.

d. Section 7252(a) does not contain the waivable requirement that administrative remedies prescribed by the Secretary be exhausted.

Our jurisdictional statute contains nothing like the waivable element identified in *Eldridge*—that the administrative remedies prescribed by the Secretary be exhausted. Section 405(g) allows for judicial review of "any final decision" of the Secretary/Commissioner, whereas section 7252(a) requires a decision of the Board. Congress specifically identified the type of VA decision that a claimant must obtain before jurisdiction in this Court is established, while section 405(g) does not specify which component of SSA must have provided the decision.

The Supreme Court relied on the fact that section 405(g) did not identify a particular component of SSA from which a decision need be issued when determining that the exhaustion of administrative remedies could be waived. For context, the SSA administrative review process generally requires that, if an SSA claimant disagrees with the state agency's initial denial of benefits, the claimant may seek (1) reconsideration by the original state agency; (2) if reconsideration is adverse, a hearing by an administrative law judge (ALJ); and (3) if the ALJ's decision is adverse, review by the Appeals Council. *See City of New York*, 476 U.S. at 471-72. In *Salfi*, the Supreme Court found that, because the Secretary in that case did not raise an exhaustion of administrative remedies argument, the reconsideration determination was "final." 422 U.S. at 767; *see id*. at 766 (stating that the term "final decision" was left undefined by the Act and its meaning left to the Secretary to flesh out by regulation).

In *Eldridge*, the claimant, rather than request reconsideration of the state agency's determination, commenced judicial action challenging the constitutional validity of SSA's administrative procedures and the Supreme Court held that the denial of the claimant's request for continued benefits was a final decision for the purpose of section 405(g) jurisdiction over his constitutional claim. 424 U.S. at 324-25, 332 (noting that *Salfi* required only that there be a "final decision" with respect to the claim for entitlement to benefits and that denying Mr. Eldridge's substantive claim would not answer his constitutional challenge).

In contrast, section 7252(a) requires a Board decision, rather than any VA decision. The statute, therefore, precludes the Court from using the waivable element identified in *Eldridge* to find that an agency decision other than a Board decision meets the requirements for section 7252(a) jurisdiction.

Moreover, the Supreme Court in *Salfi* and *Eldridge* focused on the fact that the Secretary/Commissioner was responsible for establishing the steps in SSA's administrative process, given that the waivable element was the requirement that the administrative remedies *prescribed by the Secretary* be exhausted. *See City of New York*, 476 U.S. at 471-72 (noting that reconsideration of the state agency determination and review by the Appeals Council were prescribed by regulations, not statutes). Those factors are fully inapposite here.

Although the Secretary may establish administrative procedures through regulations, our jurisdictional statute inherently includes the administrative step of appealing an adverse regional office (RO) decision to the Board because the statute itself requires a Board decision. *See Am. Legion v. Nicholson*, 21 Vet.App. 1,

4-5 (2007) (citing Senate Bill 11); *see also* 134 Cong. Rec. S9184 (daily ed. July 11, 1988) (Senator Cranston, in outlining the procedure for judicial review under the Veterans Judicial Review Act (VJRA), stated that such review "would be available only after a veteran's claim has been turned down by a VA regional office and, on appeal, by the Board"). Because the administrative steps the majority here is seeking to waive are prescribed by Congress in a statement of jurisdiction, rather than the Secretary (who must also comply with the statute), *Eldridge* cannot be used as a tool to make a requirement that is plainly jurisdictional and unwaivable into something that is not.

We note also that section 405(g) contains the language "after a hearing." But, in waiving the administrative remedies requirement, the Supreme Court in its SSA cases focused on the fact that this statute did not specify the type of decision required before judicial review, rather than whether the hearing component in the statute could be waived. In *Salfi*, however, the Supreme Court briefly addressed this requirement and it found that a hearing would be futile once the Secretary determined that the only issue to be resolved was a matter of constitutional law beyond his competence to decide and that the Secretary may award benefits without a hearing. *Salfi*, 422 U.S. at 767. Our jurisdictional statute does not require a hearing before judicial review. Moreover, although the SSA Secretary may make a benefits determination without a hearing, VA cannot make a benefits determination without issuing a decision. Further, according to the Supreme Court's guidance in *Eldridge*, 424 U.S. at 328, "some decision . . . is clearly required" by our statute and, as noted, specifies it must be a *Board* decision.

e. We conclude that section 7252(a) includes no waivable elements.

As the Court and Federal Circuit have assumed for 30 years, section 7252(a) contains the nonwaivable, jurisdictional elements that a veteran must have both filed a claim and received a Board decision. Under the Supreme Court's framework, the Court and the Secretary are unable to waive any requirement of our jurisdictional statute. The majority's focus on determining whether to waive the requirement of a Board decision is at best premature because it did not explain why it determined that our jurisdictional statute has waivable components.

Further, the test that the majority utilizes to determine waivability was used by the Supreme Court to assess whether deference should be given to the administrative steps prescribed by the Secretary to reach a final decision. Because administrative remedies inherent in section 7252(a) are prescribed by Congress rather than the Secretary, the test that the majority cites does not apply.[19] Because the requirement of a

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[19] The majority's analogy of Mr. Skaar's case to magistrate judges exercising jurisdiction over proceedings in civil matters with the consent of parties, *ante* at 17-18, is unpersuasive. First, our analysis for finding that our jurisdictional statute contains no waivable requirements is based on Supreme Court precedent regarding SSA benefits, where at least two of those cases pertained to class actions. *See generally City of New York*, 476 U.S. at 467; *Salfi*, 422 U.S. at 749. Those Supreme Court cases discussing disability benefits are more analogous to our VA disability benefits cases and provide more guidance than do circuit court cases pertaining to magistrate judges. Second, as we will discuss, there are significant distinctions between trial courts—i.e., where magistrate judges practice—and our Court—i.e., an appellate body, where class certifications generally are not initiated. Third, even though all members of a class need not

Board decision under section 7252(a) cannot be waived, we do not have jurisdiction over individuals who have yet to obtain one. We will now address the two subgroups contained within this category.

f. We do not have jurisdiction over the Future-Future claimants.

As we explained above, the Court cannot take jurisdiction over the majority's so-called Future-Future claimants—i.e., those veterans who have not yet filed a claim. In *Salfi*, *Eldridge*, *City of New York*, and *Berryhill*, the Supreme Court noted that the requirement that a claim for benefits shall have been presented to the agency was a nonwaivable, jurisdictional statutory element. Accordingly, in *Salfi*, the Supreme Court found that, as to the unnamed plaintiffs, "the complaint is deficient in that it contains no allegations that [those class members] have even filed an application with the Secretary, much less that he has rendered any decision . . . . The class thus cannot satisfy the requirements for jurisdiction under 42 U.S.C. § 405(g)." *Salfi*, 422 U.S. at 764; *see Califano v. Yamasaki*, 442 U.S. 682, 704 (1979) (stating that the certified classes were too broad, but indicating that, at least in this instance, the relief offered by the injunction would not be afforded to individuals until they filed a written waiver request to the Secretary—i.e., met the statutory jurisdictional prerequisites).

Our statute contains the nonwaivable, jurisdictional requirement that a claimant have filed a claim with

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consent to proceed before a magistrate if the named plaintiff has done so, other jurisdictional requirements must still be met. *See* 28 U.S.C. § 636(c)(1) (a "magistrate judge . . . may conduct any or all proceedings . . . when specially designated to exercise such jurisdiction by the district court or courts he serves").

VA. The majority's conclusion that we have jurisdiction over individuals who have not filed a claim cannot be correct.

g. We also do not have jurisdiction over the Present-Future claimants.

As to the Present-Future claimants—those veterans who have filed claims that remain pending before VA at any level—we would also find that the Court does not have jurisdiction over these individuals. As stated, no element of section 7252(a) is waivable, given that Congress prescribed the administrative remedy necessary to obtain judicial review in our Court and specified that a veteran must have a Board decision before we assume jurisdiction. Therefore, we disagree that the majority has the authority to waive this requirement.

The Present-Future claimant subgroup can be further subdivided: (1) veterans who have filed a claim that remains pending before the RO (i.e., veterans who do not have a VA decision at all); and (2) veterans who have a claim pending before the Board (i.e., veterans who have appealed an RO decision, but have not obtained a Board decision).

The first group is in the same boat as the Future-Future claimants. *See Eldridge*, 424 U.S. at 328 ("[S]ome decision by the Secretary is clearly required by the statute."). Regarding the second group, once more, Congress, not the Secretary, prescribed the administrative steps necessary to obtain review in our Court and insisted that claimants obtain a Board decision before appealing here. The cases discussed by the majority are inapposite, and we have neither jurisdiction over that group nor authority to accrue more power than Congress explicitly intended.

4. Under section 7252(b), we are prevented from reviewing class members' records that were not first reviewed by VA as well as the evidence Mr. Skaar submitted following the Court's limited remand.

Under section 7252(a), we would find that we do not have jurisdiction over a large portion of Mr. Skaar's proposed class because they do not have a Board decision.[20] But our jurisdictional statute contains another section, which provides that our review is limited to the record before the Board or the Secretary. 38 U.S.C. § 7252(b). This statutory requirement raises issues not only for the other class members, but for Mr. Skaar as well.

a. We do not have jurisdiction to review other class members' records.

In the appellant's June 20, 2018, response to the Court's May 21, 2018, order, Mr. Skaar explained that three other veterans intended to submit the exhibits he had attached to his merits brief to a decision review officer (DRO) and the Board. The Secretary had moved to strike those documents because they were not in Mr. Skaar's record before the Board. Mr. Skaar asserted that, "[a]s a result, should this Court certify the proposed class, so much of the Secretary's motion to strike as addresses Mr. Skaar's exhibits would likely become moot, because the contested exhibits would indisputably be before the Secretary in the individual records of other class members." Appellant's June 2018 Response (Resp.) at 14, n.4. Yet, the Court could not review these documents, or any other such evidence, and make determinations based on them

[20] And some do not even have a claim filed with VA that would lead to such a decision.

where the Secretary or the Board had not first reviewed those veterans' records and made findings, in a decision, as to that evidence. *See* 38 U.S.C. §§ 7252, 7261(c); *see also Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that the Board is responsible for assessing the credibility and weight of evidence).

b. We do not have jurisdiction to review Mr. Skaar's supplemental record.

Mr. Skaar and the majority faced a significant impediment in reaching class certification. Mr. Skaar's arguments could not result in class certification unless he and the majority found a way to force many hundreds of pages of documents that he did not present to the Board before us. They were not part of his record of proceedings, cannot plausibly be said to have been constructively before the Board, and are not of the kind subject to judicial notice. Mr. Skaar is the only named veteran. We are not aware of any potential class member that has obtained a final decision after submitting the documents in question to the Board.

The Secretary asked us to strike those documents. In a typical case, we certainly would have granted the motion. In this instance, however, members of the majority issued an order on February 1, 2019, which we will refer to as the limited remand order. For reasons we need not repeat here, that order was not in accordance with law. *See Skaar v. Wilkie*, 31 Vet.App. 16, 22 (2019) (Pietsch, J., dissenting). We cannot condone the Court's decision to use a record created by judicial artifice to certify a class. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) ("[T]he focal point for judicial review [of agency conduct] should be the administrative record already in existence, not some new record made initially in the reviewing court.").

c. Mr. Skaar should not have been permitted to submit additional evidence to the Board and we do not have jurisdiction to review those documents.

The Court should not have permitted Mr. Skaar to submit additional evidence after the limited remand. The Court, in *Kutscherousky v. West*, explained that providing an appellant with 90 days to submit additional evidence and argument to the Board after a Court remand was "consistent with the shift of the claim upon remand by the Court from the Court's adversarial process back to the nonadversarial, ex parte adjudication process carried out on behalf of the Secretary." 12 Vet.App. 369, 372 (1999) (per curiam order); *see Williams v. Wilkie*, ___Vet.App. ___, No. 16-3988, 2019 WL 4365058, *6 (Sept. 13, 2019). This case never left the adversarial process. The Court explicitly stated in its limited remand order that it retained jurisdiction over the matter. Unlike in *Kutscherousky*, where the Court stated, as justification for allowing the submission of additional evidence and argument, that the "nonadversarial process should begin anew with a full de novo adjudication," 12 Vet.App. at 372, the majority in Mr. Skaar's case indicated that "what we require from the Board is not a new decision," *Skaar*, 31 Vet.App. at 19. Rather, the Court required only a supplemental statement of reasons or bases from the Board addressing in the first instance a challenge to the dose methodology that Mr. Skaar made prior to the April 2017 Board decision.

As the word "supplemental" reveals, the April 2017 Board decision remains the jurisdiction-conferring decision on appeal. Mr. Skaar's submissions plainly run afoul of our caselaw stating that we may not review documents postdating the Board decision on

appeal. *See Obert v. Brown*, 5 Vet.App. 30, 32 (1993) ("This Court is a Court of review that may consider only evidence that was in the record and before the Board in its adjudication."); *Rogozinski v. Derwinski*, 1 Vet.App. 19, 20 (1990). The majority ignored the matter in its decision. It should have explained why what it has done here is not artificial record-building that assisted Mr. Skaar in overcoming the obvious deficiencies in his class certification motion.

Second, in the limited remand order, the majority, by stating that Mr. Skaar could submit additional materials "including the evidence submitted to this Court," 31 Vet.App. at 19, highlighted a method for circumventing procedures that the Court itself and Congress had put in place—i.e., it offered Mr. Skaar and other veterans a way to defeat motions to strike and possibly obtain review of documents that would not otherwise be afforded. *See id.* at 31 (Pietsch, J., dissenting). It is difficult to read that passage and not conclude that the Court has put a thumb on the scales in this case.

Third and most importantly, we do not have jurisdiction to review the documents Mr. Skaar submitted to the Board following the limited remand order. As we noted in our dissent, *id.* at 31, the Federal Circuit, in *Kyhn v. Shinseki*, held that the Court's review of affidavits requested by the Court and generated after the Board decision on appeal "was in contravention of the jurisdictional requirement that '[r]eview . . . shall be on the record of proceedings before the Secretary and the Board,'" 716 F.3d 572, 576-77 (Fed. Cir. 2013) (quoting 38 U.S.C. § 7252(b)). The documents Mr. Skaar submitted following the limited remand, which discuss dose methodology, are evidentiary in nature and were not in the record prior to the Board decision

on appeal. *See id*. (the affidavits were evidentiary in nature and could not be considered by the Court in the first instance).

Further, the Board did not make factual findings in the first instance about much of the later-submitted evidence. *See* Board Mar. 26, 2019, Supplemental Statement at 2-5 (discussing evidence it had previously considered in the April 2017 Board decision, such as the April 2012 and December 2013 Air Force Memorandums and the June 2014 Air Force revised radiation dose estimate). To the extent that it made such findings, the Board addressed only one of the later-submitted documents—a December 2017 publication—and noted that it was published after the April 2017 Board decision and that the author's disagreement with the methodology used by the Air Force "does not necessarily render the June 2014 opinion 'unsound.'" *Id*. at 4-5. Rather than faithfully undertake the factfinding the limited remand intended, the Board correctly noted that it is limited to reviewing the evidence available at the time it renders its decision. *Id*. at 5. Ultimately, the Board determined that in April 2017 it had no evidentiary basis to reject the dose estimate offered by the Air Force. *Id*.

These correct findings mean that the limited remand order did not solve the record problems that the Court faces in this case. The Court is not permitted to review evidence submitted to the Board following the February 1, 2019, limited remand or, even if it were, to make findings of fact as to most of that evidence because the Board has not done so in the first instance. *See Kyhn*, 716 F.3d at 576-77. The answer remains the same as the one we proffered in our dissent to the limited remand order. The class motion should be denied and this case remanded. Then, the Board, with

full jurisdiction, may consider any evidence that Mr. Skaar wishes to submit, and Mr. Skaar, should the Board deny his claim again, will be better positioned to support a class motion.

As we have noted before, "[b]ecause the [Notice of Appeal (NOA)] triggering our jurisdiction relates only to the April 2017 Board decision, the date of the Board's decision governs what materials are considered part of the record of proceedings under section 7252(b)," *Skaar*, 31 Vet.App. at 30 (Pietsch, J., dissenting) (citing U.S. VET. APP. R. 10(a)(1) (providing that the record before the agency consists of all evidence before the Board "on the date the Board issued *the decision from which the appeal was taken*" (emphasis added))). The majority, in neither the limited remand nor this order certifying the class, cites any authority indicating that a "supplement" to the Board decision on appeal is legally sufficient for it to deem the date of the supplement to be the decision date and to then augment the record accordingly. *See* Secretary's Apr. 23, 2019, Resp. at 1 n.1 (arguing that the Board's supplemental statement is not a decision because it does not grant or deny relief as required by 38 U.S.C. § 7104(d)(2)).

Therefore, Mr. Skaar has not met the jurisdictional requirement under section 7252(b) such that he may adequately represent other class members in challenging the dose methodology, where (1) that challenge is based on documents not previously reviewed by the Board, and (2) we are not permitted to review or make findings as to most, if any, of the evidence submitted following the limited remand.

5. In addition to our jurisdictional restrictions, our procedural statutes limit our scope of review.

Section 7261(c) provides that "[i]n no event shall findings of fact made by the Secretary or the Board . . . be subject to trial de novo by the Court." 38 U.S.C. § 7261(c). The majority acknowledges this, stating that "[o]ur appellate nature and national jurisdiction make us stand apart from the ordinary course of aggregate litigation in federal district courts, which are empowered to find facts and conduct discovery while we are not." *Ante* at 30 (citing 38 U.S.C. §§ 7252(b), 7261(c)). Our procedural limitations make it near impossible to develop a motion for class certification as well as adjudicate the merits of the appeal without dubious mechanisms like the limited remand order.

The majority cites to three cases apparently to demonstrate that we are perhaps not so unlike district courts. *Ante* at 30, 33. The majority first cites *Erspamer v. Derwinski*, 1 Vet.App. 3, 10 (1990), noting that the Court may consider facts not before the Board when addressing the merits of a petition. But, in considering whether to grant a petition, the Court necessarily requires information not included in the record before the Board, such as evidence of actions taken by VA to process a veteran's claim where delay is alleged. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004) (an appellate court must determine whether mandamus is appropriate under the circumstances); *Cox v. West*, 149 F.3d 1360, 1363 (Fed. Cir. 1998) (this Court's jurisdiction is "irrelevant to the question of the [C]ourt's power under the AWA," which provides authority for the Court to grant petitions). That evidence is not used, as the evidence collected here is intended to be used, to address the merits of

the underlying claim. It is used only for the purpose of determining whether our prospective jurisdiction has been blocked.

We are restricted by law (*but see Wolfe v. Wilkie*, __ Vet.App. __, No. 18-6091, 2019 WL 4254039, at *23-24 (Sept. 9, 2019) (granting the petition and invalidating a regulation despite the availability of agency remedies because obtaining a final agency determination would be "'a useless act'")) from using the facts we gather in the petition context for any purposes other than ensuring that our potential jurisdiction is protected. *See Lamb v. Principi*, 284 F.3d 1378, 1384 (Fed. Cir. 2002) ("'[E]xtraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial.'" (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953))). Thus, the Court's ability to review evidence not before the Board in addressing a petition does not provide support for that same type of review of appeals, where section 7252(b) firmly restricts us from conducting discovery. For these same reasons, the majority's citation to *Monk v. Wilkie* (*Monk III*), 30 Vet.App. 167, 171 (2018) (en banc order), for the proposition that the Court has authority to conduct limited factfinding to determine whether class certification in the petition context is warranted, *ante* at 30, is unpersuasive in the context of adjudicating class action appeals on the merits.

Finally, the majority cites *Bove v. Shinseki*, stating that the Court "'may seek facts outside the record before the Board and independently weigh the facts to determine if equitable tolling is appropriate,'" *ante* at 30 (quoting 25 Vet.App. 136, 143 (2011) (per curiam order)). As with a petition, however, determining whether to equitably toll a late filing necessarily

requires information not in the record before the Board, because the Court must assess whether events that happened after the Board issued the decision on appeal were extraordinary and prevented the claimant from timely filing the document in question despite due diligence. *See Toomer v. McDonald*, 783 F.3d 1229, 1238 (Fed. Cir. 2015). The merits of the underlying claim are not considered at that stage and section 7252(b) does not apply. If equitable tolling is granted, the merits decision that the Court ultimately issues will be based on the record before the Board at the time of the decision on appeal, as required by law, and not on evidence gathered to determine whether equitable tolling is warranted. If it postdates the Board decision, that evidence will not appear in the record of proceedings.

Thus, the process for determining whether to equitably toll a filing deadline is not analogous to reviewing class action appeals on the merits. The distinction between our Court and district courts remains, as does the issue of how our jurisdictional and procedural statutes impact our ability to adjudicate aggregated appeals.

6. There are distinctions between an appellate court and trial courts.

The Federal Circuit in *Monk II* and the majority here determined that veterans should be afforded more, not less, procedural protections after the VJRA's enactment and thus, because veterans were previously allowed to aggregate appeals, they should be able to do so now. *See Monk II*, 855 F.3d at 1319-20; *ante* at 13, 16-17. The Federal Circuit found "no persuasive indication that Congress intended to *remove* class action protection for veterans when it enacted the VJRA." *Monk II*, 855 F.3d at 1320, n.4 (referencing a

Congressional Budget Office cost estimate from 1988 that discussed potential litigation challenges, stating that, according to SSA, most challenges to regulations are class actions). Congress, however, created an appellate tribunal with distinct features that separate it from district courts and even other appellate courts. We must account for those differences. *See Henderson*, 562 U.S. at 441 ("[T]he review opportunities available to veterans before the VJRA was enacted are of little help in interpreting [a statute within the VJRA].").

The VJRA provided a new framework for veterans to pursue their disability benefits and with it a new procedure to ensure that this Court's findings applied to many veterans—i.e., a precedential decision. *See* 38 U.S.C. §§ 7254, 7267; *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). A precedential decision ensures that judicial determinations are broadly and consistently applied across VA and afford similar, if not greater, protections for veterans than did the rare instances of class actions in district courts prior to the VJRA. To the extent that our jurisdictional requirements inhibit our ability to certify a class in the appeal context, we assume that Congress was aware of any such limitations when it enacted the VJRA. If Congress wishes to expand our class action authority in the appeal context, then it should legislate the change to our jurisdictional statute. It is not for us to enhance our own authority by rewriting statutes to suit our preferences.

Three of the five cases cited by the majority (and the Federal Circuit in *Monk II*) to demonstrate that veterans were previously able to aggregate cases are district court cases. *Ante* at 13 (citing *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113 (N.D. Cal. 1987); *Giusti-Bravo v. U.S. Veterans Admin.*, 853 F. Supp. 34

(D.P.R. 1993); *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980)). *Nehmer* demonstrates a key distinction between an appellate court and a trial court. There, the U.S. District Court for the Northern District of California reasoned that class members did not need to exhaust administrative remedies because, inter alia, a full record would be available through discovery. *Nehmer*, 118 F.R.D. at 122. All agree that our Court is precluded by statute from relying on discovery to complete the record.

The other two cases the majority and the Federal Circuit reference are from appellate courts. In both, the trial courts determined whether the classes should be certified prior to the cases being appealed. *See Johnson v. Robison*, 415 U.S. 361, 364 n.3 (1974) (noting that class action was commenced in the U.S. District Court for the District of Massachusetts and that the district court defined the class); *Wayne State Univ. v. Cleland*, 590 F.2d 627, 628, n.1 (6th Cir. 1978) (indicating that the district court certified the class and remanding in part for the district court to decide a matter in the first instance). The appellate courts reviewed the propriety of decisions regarding class actions but did not, as the majority is trying to do, make certification decisions in the first instance.

The primary tension in this case is that we are an appellate court doing what appellate courts normally should not do. Trial courts are equipped to certify classes and adjudicate aggregated cases because they are not statutorily prohibited from supplementing the record through discovery and making factual findings in the first instance. Our inability to conduct those basic functions vital to certifying a class means that, unless Congress restructures our authority, adjudicating class certification cases that come to us through an

appeal will likely present the jurisdictional hurdles that we have seen in this case.

B. The Utility of Class Actions in the Appeal Context

In *Harrison*, our Court declined to establish class action procedures, in part, because they would be "highly unmanageable" and because class actions are "unnecessary," given the binding effect of the Court's precedential decisions in pending and future cases. 1 Vet.App. at 438-39. Although the Federal Circuit disagreed with our finding in *Harrison* that we lack authority to certify a class, it did not disturb our determination that class actions are unnecessary and highly unmanageable. *See Monk II*, 855 F.3d at 1320. That conclusion was correct when *Harrison* issued and remains so today.

1. Class actions are unnecessary because we can issue precedential decisions, which may be used to attain institutional change and efficiency.

The majority, referencing *Monk II*, states that class actions will stop VA from preventing judicial review of meritorious arguments by mooting the cases in which they arise. *Ante* at 14-15. The Federal Circuit authority on which the majority relies applies to petitions, not appeals. The Federal Circuit noted that in *Young v. Shinseki*, 25 Vet.App. 201, 215 (2012) (en banc per curiam order) (Lance, J., dissenting), the dissent explained that VA's delay in adjudicating appeals evades review at times because VA usually acts promptly to resolve petitions. *Monk II*, 855 F.3d at 1320 21. The Federal Circuit noted that, after we order VA to respond to a petition, "the 'great majority of the time' the VA 'responds by correcting the problem

within the short time allotted for a response, and the petition is dismissed as moot.'" *Id*. (quoting *Young*, 25 Vet.App. at 215 (Lance, J., dissenting)).

The Secretary cannot "moot" an appeal in the same manner that he can "moot" a petition. The Secretary may offer to settle an appeal, but that offer must be accepted by an appellant. A motivated appellant who has decided to place his or her own outcome second to the greater cause of veterans rights—in other words, an appellant like Mr. Skaar—can always decline even the most generous settlement offer if a greater victory remains to be won. The Secretary also may concede error before a judge, but the Court is free to ignore or accept his concession and find additional errors. Unlike with petitions, the Secretary cannot unilaterally stop an appeal from proceeding to judicial review or control the outcome once it reaches a judge or panel.

Second, the majority states that class actions "can . . . be an effective force for institutional change" and may be used to correct systemic error and ensure that veterans are treated alike. *Ante* at 14-15. Leaving aside for a moment the problem of judicial overreach inherent in that declaration, a precedential decision may be used to achieve the same objective. *See Harrison*, 1 Vet.App. at 438 (finding that class actions were unnecessary due to the binding effect of precedential decisions). If we had an adequate record, a panel might have, months ago, found that the dose methodology VA used in Mr. Skaar's case was flawed and counter to 38 C.F.R. § 3.311. Its decision, a nationwide precedent, would have fixed any such systemic dose estimate problem and VA would have been required to apply the Court's holding consistently to all veterans' cases.

The majority responds that claimants not party to a panel decision and potentially subject to errors affecting their rights, whether due to VA's non-compliance with our decision or otherwise, "do not have any right to prompt remedial enforcement." *Ante* at 33. The assumption that VA will not comply with our precedential decisions, like the assumption that it will moot every potential embarrassment, is needlessly cynical and suggests that we are acting at least in part with punitive intent. Moreover, all so-called Future-Future claimants' claims will be governed by the precedent, Present-Future claimants can point out the new precedent to VA and ask for it to be considered, claimants on appeal at the Court can ask for a remand based on the new precedent, and claimants who have already received a final decision may seek to reopen or file a supplemental claim.

Furthermore, if we found against an appellant in a precedential decision, other claimants impacted by that decision will have a full and fair opportunity to attempt to distinguish their cases. Bound class members will presumably have no such leverage. Given the difficulty in conveying the meaning of a class litigation, they may be surprised by the fact that their individual cases are subsumed and decided through arguments made by another.

Third, the majority and the Federal Circuit in *Monk II* tout class actions as an efficient method for correcting VA error. This case is not good support for that position, as we are now, more than 800 days after Mr. Skaar filed his NOA, issuing our third substantive en banc order and have not begun to address the merits.

We see no indication that class certification appeals are going to move as quickly as the average panel

decision, particularly where the class appeals would require the additional step of certifying the class. We also are not moved by the novelty of this case. Had the Court waited to develop rules for aggregate litigation rather than issue a string of contested ad hoc decisions, it might have significantly reduced the time and resources it has expended on this case.

Finally, the procedural history of Mr. Skaar's case demonstrates that aggregated appeals at our Court may not be as efficient as expected. As we noted above, given our inability to conduct discovery, limited remand decisions or other suspect mechanisms may routinely be necessary to grant future class motions. That can only lead to delay.

2. Class actions are more unmanageable for our appellate Court than they are for trial courts.

The majority states that the *Harrison* manageability factor stems from the unique nature of the Court and, although it is not a categorical reason to decline class certification, it is a relevant consideration. *Ante* at 31. The majority indicates that class actions will only be allowed if the appellant demonstrates the superiority of the class action to a precedential decision. It then sets forth a several factor balancing test, cut from whole cloth, for making this determination. *Id*. at 32. One factor is whether the record is sufficiently complete for adjudication, including whether additional factfinding is needed. *Id.* at 33 (acknowledging Supreme Court precedent that the record may not be created by a reviewing court and that we have unique limitations on factfinding). That factor is no factor at all if limited remands are to become the norm in class cases. We also believe that there are additional related considerations.

First, when assessing whether the named appellant meets the section 7252(b) requirement—such that we have jurisdiction not only over his or her record but also over class members who themselves do not meet our jurisdictional prerequisites—the Court should not rely on circuitous methods (e.g., limited remands) to find this requirement satisfied, which presumably would become unmanageable over time. Rather, the record of the named appellant should be itself complete before appeal to this Court. By using the limited remand here, the Court has provided a poor and probably misleading example of how these cases should be handled in the future. Its actions do not square with its *Harrison* analysis.

Relatedly, class actions are more unmanageable for our Court because, for class members who do not meet section 7252 jurisdictional requirements and there is no record of proceedings, we cannot make necessary factual findings in the first instance. Therefore, although some potential class members here purportedly submitted the same scientific evidence to VA that was the subject of the Secretary's motion to strike, we are not persuaded by Mr. Skaar's argument that any problem in reviewing this evidence was resolved. In other words, records not reviewed by VA cannot be used to supplement the named appellant's incomplete record. We do not have jurisdictional authority to review those records even if they contained more favorable evidence than that found in the named appellant's record. The evidence must come before us in the form of a record of proceedings from a properly appealed Board decision.

Second, we once more reiterate that this Court does not have the same discovery and factfinding abilities as trial courts. *See Nehmer*, 118 F.R.D. at 122 (highlighting a key distinction between those courts

and our appellate body when the Northern District of California determined that class members did not need to exhaust administrative remedies because, inter alia, a full record would be available through discovery). Further, the Court also does not have the same ability as a trial court to hear from an expert about complex scientific matters.

As indicated throughout our dissent, we would find that the third factor of the majority's balancing test, the completeness of the record, heavily weighs against certifying the class in Mr. Skaar's case, particularly where the Court is not permitted to review the evidence submitted to the Board following the February 1, 2019, limited remand or, even if it were, to make findings of fact as to most of that evidence. *See Kyhn*, 716 F.3d at 576-77.

C. Class Certification in Mr. Skaar's Case

For the most part, we will not address the majority's class certification analysis. As to numerosity, however, based on our view that we do not have jurisdiction over those veterans without a final Board decision, we would find that Mr. Skaar's proposed class does not satisfy this factor.

The Secretary stated that he knew of only six Palomares veterans who had received a Board decision (adverse or not) from 2001 to the present addressing any claim dealing with claimed ionizing radiation exposure concerning the Palomares cleanup. *See* Secretary's Dec. 13, 2018, Resp. at 3. Mr. Skaar responded that the record reflects that there are "at least [19] veterans who had filed claims for Palomares-related disabilities with the VA, 'including [3] appeals for reassessment for a total of 22 claims,'" Appellant's Jan. 4, 2019, Resp. at 3 (quoting R. at 1580), but he

does not indicate how many of those claims resulted in a Board decision. Even if the six Board decisions referenced by the Secretary pertain to 38 C.F.R. § 3.311 and applied the post-2013 methodology (given that Mr. Skaar does not have standing to challenge 38 C.F.R. § 3.309 or the pre-2013 methodology)[21] and that those decisions were adverse,[22] six or seven potential class members is not sufficient to fulfill the numerosity requirement.

Although such an adverse finding on numerosity would be dispositive when assessing whether to certify a class, we will also briefly address the adequacy of the

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[21] Although we recognize that it is unlikely that there are individuals who have a dose estimate based solely on the pre-2013 methodology, we would find that Mr. Skaar lacks standing to challenge the pre-2013 methodology and only has standing to challenge the post-December 2013 methodology. He suffered no injury-in-fact in his current appeal based on the pre-2013 methodology. The Board expressly discounted the findings of the May 2012 advisory opinion, which were based on the pre-2013 methodology. R. at 10. Although there is some overlap between standing and typicality, the majority appears to have conflated these issues when explaining how Mr. Skaar has established standing. The majority states that, if he is successful in showing that the exclusion of urine samples was not based on sound scientific evidence, he will have suffered an injury-in-fact. *Ante* at 12-13. But that only indicates that he may satisfy the typicality requirement—his issue regarding the urine sample exclusion is typical of class members with dose estimates based on both pre- and post-2013 methodologies. However, this does not show that Mr. Skaar in his current appeal was harmed by the pre-2013 methodology.

[22] Although this is unlikely because the Secretary also stated that he knew of three Palomares veterans who had received an adverse Board decision from 2001 to the present addressing any claim dealing with claimed ionizing radiation exposure concerning the Palomares cleanup. *See* Secretary's Dec. 13, 2018, Resp. at 3.

class representative. Mr. Skaar cannot adequately protect the interests of the class because we do not have jurisdiction to review the evidence he submitted to the Board following its April 2017 decision (i.e., the documents that form the basis of his challenge to the VA methodology) or to make any determinations regarding that evidence.

Finally, related to our concern that class actions, if unfavorable to the class, may preclude members from raising different arguments as to the dose methodology, we question whether Mr. Skaar has presented the best argument to challenge this methodology. *See McDowell v. Brown*, 5 Vet.App. 401, 408 (1993) (noting that "courts will more carefully scrutinize the adequacy of representation afforded to absent [class] members [who are not afforded notice and opt-out protections] . . . before determining that they are bound, by res judicata, by the final judgment or settlement in the prior class action."). Mr. Skaar's argument focuses on the 2001 Labat-Anderson (LA) Report. Although the April 2012 Air Force dose estimate relied, in part, on the LA Report, R. at 1888 (citing seven other references), it is unclear whether the Air Force's post-December 2013 methodology relied on that report. We note that, at least on its face, the June 2014 Air Force memorandum regarding revised radiation dose information does not appear to rely on the LA Report because it does not mention it and instead states that the new dose estimates were based on International Committee on Radiological Protection (ICRP) reports. R. at 1301-02. It may be that Mr. Skaar has presented the best challenge to the VA methodology, but we believe that the majority should "more carefully scrutinize" this matter where preclusion is an issue. *See McDowell*, 5 Vet.App. at 408.

II. CONCLUSION

This case highlights some of the jurisdictional and practical challenges inherent in entertaining class actions in an appeal context, given the statutory framework that governs our review of Board decisions and the record before the Board or Secretary. *See Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) ("[T]he court's jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed."). The majority has created a mechanism that exceeds our jurisdiction and offers no more benefits than a precedential decision, but with significant manageability and preclusion problems. Although we are sympathetic to the veterans who served in Palomares and who may have suffered injuries as a result, and we applaud Mr. Skaar's efforts to remedy this matter for all veterans, a class action in the appeal context is no answer. A simple precedential decision on this issue, when properly before the Court, would more efficiently provide them and Mr. Skaar with the answers they deserve.

Finally, we are concerned with the manner that this case has been handled. The Court has seized more power than Congress allotted to it with unsound legal innovations.

For these reasons, we respectfully dissent.

APPENDIX F

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS

C 23 361 522
Docket No. 13-31 368A
Advanced on the Docket

IN THE APPEAL OF
VICTOR B. SKAAR
REPRESENTED BY
MICHAEL J WISHNIE, Attorney

DATE: March 26, 2019

SUPPLEMENTAL STATEMENT OF
REASONS OR BASES

In April 2017, the Board denied entitlement to service connection for leukopenia, to include as due to radiation exposure. The Veteran appealed this decision to the United States Court of Appeals for Veterans Claims (Court).

In a February 2019 Order, the Court determined that the appellant had expressly challenged the methodology used by VA to measure radiation exposure under 38 C.F.R. § 3.311, but that the Board failed to address this argument. Accordingly, the Court ordered a limited remand for the Board to provide a supplemental statement of reasons or bases addressing the appellant's argument in the first instance.

The Veteran's letters challenging VA's process as referenced in the Order are dated October 30, 2014 and September 9, 2016. In the October 2014 letter the Veteran challenged the conclusion offered by the United States Air Force that it did not find external or internal radiation exposure data for him. The appellant indicated he did not have a personal recording

device at the time of exposure, but that he submitted urinalyses and this data should be available. The Veteran argued that considering the exposure conditions at Palomares (working in a heavily contaminated area), it was difficult for him to understand how the Air Force Safety Center only provided an estimated dose of approximately 4.2 rem. He further argued that the level of exposure that was attributed to his situation was arbitrary and capricious and formed without sufficient consideration of the facts. He noted that the Air Force had employed a consulting firm (Labat-Anderson, Inc.) in 1999 to seek answers.

In the September 2016 letter, the Veteran argued that the conclusion denying service connection was also unfounded, arbitrary, capricious, and not supported by previous records regarding his claim. As supporting evidence, he cited to the June 2014 revised radiation dose showing a much higher committed effective dose of 17.9 rem.

As set forth, the purpose of the Court's limited remand was to address the Veteran's challenge to the methodology used by VA to measure radiation exposure under 38 C.F.R. § 3.311. Thus, this discussion will focus on the dose estimates of record and will not address the ultimate opinions concerning the relationship between in-service radiation exposure and leukopenia as provided by the Under Secretary for Health.

Pursuant to regulation, for claims based on radiation exposure other than atmospheric nuclear weapons test participation or occupation of Hiroshima or Nagasaki, a request will be made for any available records concerning a veteran's exposure to radiation. These records normally include but may not be limited to a veteran's Record of Occupational Exposure to Ionizing Radiation (DD Form 1141), if maintained, service

medical records, and other records, which may contain information pertaining to a veteran's radiation dose in service. All such records will be forwarded to the Under Secretary for Health, who will be responsible for preparation of a dose estimate, to the extent feasible, based on available methodologies. 38 C.F.R. § 3.311(a)(2)(iii).

Requests to the service department were negative for a DD Form 1141. Extensive information, however, was obtained from the Air Force regarding the Veteran's participation in cleanup following the Palomares incident. The Veteran is considered to be among a group of individuals who, as a result of urine samples, had the greatest plutonium body burden out of all personnel who submitted samples (i.e. "High 26").

An April 2012 memorandum from the Department of the Air Force indicates that based on the results of urine samples, as well as scientific publications, the Air Force Safety Center provided an estimated maximum total effective dose equivalent, or sum of external and internal dose for the Veteran, of approximately 4.2 rem, and a separate red bone marrow 50-year committed equivalent dose of 1.18 rem.

In December 2013, the United States Air Force Medical Support Agency completed a memorandum to the VA Regional Office in Jackson, Mississippi, which addressed radiation exposure estimates for the Air Force nuclear weapons accident responders in Palomares. The memorandum notes that the Air Force's Office of the Surgeon General had recently evaluated internal processes for completing ionizing radiation dose assessments for veterans involved in the Palomares response. The review was initiated to ensure a conservative and consistent approach was applied to

the dose reconstructions and their office continued to strive toward timely, scientifically-based responses.

As the review indicated inconsistencies in dose assignment over the past 12 years and following a comprehensive review of all data generated from 1966, the Air Force decided to formally standardize response methodology for radiation dose inquiries involving Palomares participants. This included: (a) establishing the Veteran's presence at the incident site; (b) performing a review of duties based on historical records and statements provided by the Veteran; (c) reviewing available bioassay data for the Veteran and assigning an intake value; (d) estimating committed doses for the organ(s) of concern; and (e) if the member does not have valid urine sample, reconstructing the dose based on similar exposures using their specific duties if possible. Regarding (c), if the Veteran was a member of the cohort with the highest exposure potential (designated as the "High 26"), their established intake estimates were to be used.

In June 2014, the Air Force Medical Support Agency provided a revised radiation dose estimate for the Veteran. The memorandum indicates that the appellant was determined to be one of the highest exposed individuals that responded to the incident. Following a review of his previously reported intake values, he was assigned a conservative (i.e., worst case) committed effective dose of 17.9 rem based on the application of contemporary models to his bioassay data from the 1960's. The corresponding critical organ doses were now 175.7 rem for the bone surface, 69.3 rem for the lungs, and 8.4 rem for the liver.

In February 2019, i.e., after the Board's decision was issued, an attorney argued that since 2001, VA has relied on radiation dose estimates derived from a

scientifically unsound report produced by Labat-Anderson, Inc. (LA Report). In support, he cites to a December 2017 publication, i.e., a publication issued after the Board's decision, wherein a nuclear physicist, Dr. F.V.H., explains that the LA Report provides two dose estimate ranges for Palomares veterans and that neither of these ranges are based in "sound scientific evidence." Dr. F.V.H. further suggested that "sound scientific evidence" for Palomares veterans' dose estimates could take two forms. First, VA could offer new radiation exposure testing for these claimants using current technology. Second, VA could require the Air Force to use a methodology that uses all bioassay data collected, including the highest doses measured, and building scientific uncertainty into the model and dose ranges.

The attorney also submitted extensive exhibits and argues that this evidence requires the Board to find that VA's reliance on dose estimates derived from the LA Report do not meet the standard for "sound scientific evidence."

The attorney specifically cites to 38 C.F.R. § 3.311(c)(3) which provides as follows:

> For purposes of paragraph (c)(1) of this section, "sound scientific evidence" means observations, findings, or conclusions which are statistically and epidemiologically valid, are statistically significant, are capable of replication, and withstand peer review, ...

As noted, the April 2012 dose estimate was subsequently revised and arguments as to its validity appear moot. Indeed, the Board's April 2017 decision specifically did not rely on May 2012 findings issued by the Director of the Compensation and Pension

Service since those findings were based on the April 2012 report. In an effort to comply with the Order, however, the Board notes that the December 2013 memorandum from the Air Force indicates that there were inconsistencies in prior dose estimates and thus, the methodology on which the April 2012 estimate was based for this particular Veteran appears inaccurate.

Regarding the dose estimate provided in June 2014, the Board finds that on its face it is based on sound scientific evidence. The dose estimate was provided by the Air Force Medical Support Agency and was based on then recently re-evaluated internal processes which were initiated to ensure a comprehensive and consistent approach to dose estimates. The dose estimate considered the Veteran's previously reported intake values based on the application of contemporary models to his bioassay data collected in the 1960's. To the extent Dr. F.V.H. post decision statement disagrees with the methodology used by the Air Force does not necessarily render the June 2014 opinion "unsound".

The Board acknowledges the appellant's concerns with the LA Report but notes that report was not specifically referenced in the June 2014 revised dose estimate from the Air Force Medical Support Agency. To the extent that the LA Report formed the basis for the re-evaluated internal processes referenced therein, the Board finds that just as it is prohibited from exercising its own independent judgment to resolve medical questions, the Board is not in a position to exercise such independent judgment on matters involving scientific expertise. *Cf. Colvin v. Derwinski,* 1 Vet. App. 171, 175 (1991).

It is further notable that at no time *prior to* the Board's April 2017 decision did the appellant offer his own independent dose estimate. Such a report would have

been considered by the Board, and the Board would have been required to determine its probative value in making a decision. Without an independent dose estimate, and without a rational basis to reject the competent findings of the Air Force which were relied upon by various VA personnel, the Board could not find that the lay opinions offered by the appellant prior to the April 2017 decision outweigh the opinions offered by experts in the field. That is, while the appellant has since raised numerous challenges to the methodology used, in evaluating the evidence the Board is limited to the evidence that is available to it at the time a decision is rendered. While the appellant's October 2014 and September 2016 letters raised challenges to the dose estimate there was no evidence that the claimant has any expertise in the field of preparing dose estimates, or that he had access to the evidence considered by the United States Air Force when they offered their revised opinion in June 2014. As such, in April 2017 the Board had no evidentiary basis to reject the opinion offered by the Air Force.

In summary, the regulations provide specific instructions for obtaining dose estimates. 38 C.F.R. § 3.311(a)(2)(iii). The Board is bound by regulations of the Department. 38 U.S.C. § 7104(c); 38 C.F.R. § 19.5, 20.101(a). To the extent the Veteran disagrees with the dose estimate derived from military records, the Board observes that he may submit his own dose estimate from a credible source and pursuant to regulation, referral to an independent expert may then be warranted. 38 C.F.R. § 3.311(a)(3).

/s/ Derek R. Brown
DEREK R. BROWN
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD M. Carsten, Counsel

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. Your local VA office will implement the Board's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

How long do I have to start my appeal to the court? You have 120 days from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the Board decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time.* Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service

terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal with the Court, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the Board to reconsider any part of this decision by writing a letter to the Board clearly explaining why you believe that the Board committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that your letter be as specific as possible. A general statement of dissatisfaction with the Board decision or some other aspect of the VA claims adjudication process will not suffice. If the Board has decided more than one issue, be sure to tell us which issue(s) you want reconsidered.

Issues not clearly identified will not be considered. Send your letter to:

Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this 'decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the Board to vacate any part of this decision by writing a letter to the Board stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and

unmistakable error" (CUE). Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400-20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the Board, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso/. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on

how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

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The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. See 38 C.F.R. 14.636(i); 14.637(d).

APPENDIX G

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

DOCKET NO. 13-31 368A

C 23 361 522

IN THE APPEAL OF VICTOR B. SKAAR

DATE April 14, 2017

On appeal from the
Department of Veterans Affairs Regional Office
in St. Louis, Missouri

THE ISSUE

Entitlement to service connection for leukopenia, to include as due to radiation exposure.

REPRESENTATION

Appellant represented by: Missouri Veterans Commission

ATTORNEY FOR THE BOARD

M. Carsten, Counsel

INTRODUCTION

The Veteran served on active duty from November 1954 to July 1981.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a June 2012 rating decision by the Department of Veterans Affairs (VA) Regional Office (RO) in Jackson, Mississippi. The appeal was certified to the Board by the RO in St. Louis, Missouri.

In May 2015, the Board determined that new and material evidence had been submitted to reopen a

claim of entitlement to service connection for leukopenia and remanded the matter for additional development.

The Board acknowledges that additional evidence has been added to the record since the August 2016 supplemental statement of the case. To the extent this evidence was submitted by the Veteran, automatic waiver applies. 38 U.S.C. § 7105(e)(1) (West 2014).

The Board also notes that clarifying opinions were obtained from the Director, Compensation Service in August and September 2016. These were negative opinions and a remand solely to issue another supplemental statement of the case would serve no useful purpose. *Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994) (remands which would only result in unnecessarily imposing additional burdens on VA with no benefit flowing to the veteran are to be avoided). The Board further notes that the Veteran submitted a copy of the September 2016 clarification (which was identical to the August 2016 clarification as concerns the issue in question) as an exhibit to his February 2017 argument.

In January 2017, the Veteran indicated that he was withdrawing his hearing request. See 38 C.F.R. § 20.704(e) (2016).

This is a paperless appeal and the Veterans Benefits Management System (VBMS) and Virtual VA folders have been reviewed.

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (2016). 38 U.S.C.A. § 7107(a)(2) (West 2014).

FINDING OF FACT

The preponderance of the probative evidence is against finding that leukopenia was demonstrated during service or is related to events in service, to

include exposure to ionizing radiation in Palomares, Spain in 1966.

CONCLUSION OF LAW

Leukopenia was neither incurred nor aggravated during service, nor may it be presumed to have been so incurred therein. 38 U.S.C.A. §§ 1110, 1131(West 2014); 38 C.F.R. §§ 3.303, 3.307, 3.309, 3.311 (2016).

REASONS AND BASES FOR
FINDING AND CONCLUSION

Veterans Claims Assistance Act of 2000 (VCAA)

With respect to the Veteran's claim herein, VA has met all statutory and regulatory notice and duty to assist provisions. *See* 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326 (2016); *see also Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015).

Analysis

In June 2012, VA denied entitlement to service connection for leukopenia with chronic low blood counts (also claimed as thrombocytopenia and pancytopenia). The Veteran disagreed with the decision and perfected this appeal.

The Veteran asserts that he developed leukopenia as the result of his participation in the cleanup of radioactive debris at Palomares, Spain in 1966. Service records and associated documents confirm his presence and exposure.

Certain diseases are service-connected on a presumptive basis if they become manifest in a radiation-exposed veteran. *See* 38 C.F.R. § 3.309(d). Leukopenia is not listed as a disease specific to radiation-exposed

veterans and presumptive service connection is not for consideration.

In general, service connection will be granted for disability resulting from injury or disease incurred in or aggravated by active military service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303. Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disability was incurred in service. 38 C.F.R. § 3.303(d).

Service treatment records do not show that either leukopenia or any other blood disorder had its onset during active service and the Veteran does not contend as such. Rather, he argues that his currently diagnosed leukopenia is related to in-service radiation exposure. The specific requirements for adjudicating claims for service connection based on exposure to ionizing radiation are found at 38 C.F.R. § 3.311.

In all claims in which it is established that a radiogenic disease first became manifest after service and was not manifest to a compensable degree within any applicable presumptive period, and it is contended the disease is a result of ionizing radiation exposure during service, an assessment will be made as to the size and nature of the radiation dose or doses. 38 C.F.R. § 3.311(a)(1).

For claims based on radiation exposure other than atmospheric nuclear weapons test participation or occupation of Hiroshima or Nagasaki, a request will be made for any available records concerning a veteran's exposure to radiation. These records normally include but may not be limited to a veteran's Record of Occupational Exposure to Ionizing Radiation (DD Form 1141), if maintained, service medical records,

and other records, which may contain information pertaining to a veteran's radiation dose in service. All such records will be forwarded to the Under Secretary for Health, who will be responsible for preparation of a dose estimate, to the extent feasible, based on available methodologies. 38 C.F.R. § 3.311(a)(2)(iii).

When it is determined that a veteran was exposed to ionizing radiation, subsequently developed a radiogenic disease, and such disease first became manifest during any applicable period, the claim will be referred to the Under Secretary for Benefits for further consideration. 38 C.F.R. § 3.311(b)(1).

Leukopenia is not listed as a radiogenic disease under 38 C.F.R. § 3.311(b)(2). Notwithstanding, the Veteran submitted private opinions linking leukopenia to his exposure to radioactive material, and as such, VA will consider the claim under the provisions of this section. *See* 38 C.F.R. § 3.311(b)(4).

An April 2012 memorandum from the Department of the Air Force responded to the request for a radiation dose inquiry. The Air Force Safety Center determined that the Veteran arrived at the scene of a nuclear weapons accident in Palomares in January 1966 and stayed until late March 1966. He was among a group of individuals who, as a result of urine samples, had the greatest plutonium body burden out of all personnel who submitted samples. Based on the results of urine samples, as well as scientific publications, the Air Force Safety Center provided an estimated maximum total effective dose equivalent, or sum of external and internal dose for the Veteran, of approximately 4.2 rem, and a separate red bone marrow 50-year committed equivalent dose of 1.18 rem.

On May 4, 2012, the Director, Compensation Service submitted a request to the Under Secretary for Health for a radiation review under 38 C.F.R. § 3.311. A May 14, 2012 response from the Director, Post 9-11 Era, Environmental Health Program states that since the Veteran's radiation dose did not exceed 5 rem in one year or 10 rem in a lifetime, it was unlikely that his leukopenia, thrombocytopenia and/or pancytopenia could be attributed to radiation exposure during service. The Director of the Post 9-11 Era, Environmental Health Program specifically noted that at exposures below 5-10 rem, the risks of health effects were either too small to be observed or were nonexistent.

On May 15, 2012, the Director, Compensation service reviewed the above memorandum, and following consideration of the entire record, opined that there was no reasonable possibility that the Veteran's leukopenia, thrombocytopenia, and pancytopenia resulted from his exposure to ionizing radiation in service.

A December 2013 Memorandum from the Air Force Medical Support Agency indicates that the dose assessments for veterans involved in the Palomares incident were being reevaluated. In June 2014, the Air Force Medical Support Agency provided a revised response pertaining to the Veteran. This report stated that the appellant was determined to be one of the highest exposed individuals that responded to the incident. He was assigned a conservative committed (i.e., worst case) effective dose of 17.9 rem based on the application of contemporary models to his bioassay data from the 1960s. The corresponding critical organ doses were now 175.7 rem for the bone surface, 69.3 rem for the lungs, and 8.4 rem for the liver.

Pursuant to the May 2015 remand, in October 2015, the RO requested additional opinion based on the

revised dose estimate. In March 2016, the Director, Compensation Service, submitted a request to the Under Secretary for Health.

On August 4, 2016, the Director, Post 9/11-Era Environmental Health Program responded to the request. The memorandum notes that there were two separate methodologies used by the Air Force to determine radiation dose to the red (bone) marrow, which was the organ of interest for the Veteran's leukopenia. For purposes of the opinion, the higher calculated radiation dose of 14.2 rem would be used. The opinion quotes the reference Medical Effects of Ionizing Radiation which includes a discussion of the kinetic effects of a post radiation event in hematopoietic tissue and notes that "[s]uch changes are not seen with acute marrow doses of less than 10 to 20 Gy [1000 to 2000 rads] in a relatively acute regimen." The memorandum further states:

> The radiation dose to the Veterans bone marrow was 14.2 rem. This is far below the doses [1000 to 2000 rads] mentioned [above]. Also, the fact that leukopenia did not manifest until 32 years after exposure is not supportive of the claim. Leukopenic blood changes would be seen within days (or even hours).

Considering the above, it was opined that it was not likely that the Veteran's leukopenia was caused by exposure to ionizing radiation during service.

On August 5, 2016, the Director, Compensation Service provided an advisory opinion. Based on a review of the August 4th memorandum, as well as the claims folder, it was their opinion that there was no reasonable possibility that the Veteran's leukopenia

could be attributed to ionizing radiation exposure while in service.

Thereafter, a clarification was requested as to why the dose estimate of 17.9 rem was not used in formulating the August 2016 advisory opinion. The response from the Director, Compensation Service dated August 16, 2016 indicates that they requested clarification from the Veterans Health Administration and received the following response:

> Since Plutonium (Pu) is a bone-seeker the dose to the surface of the bone would be the highest we would expect to see in the body. If high enough of a dose we might see changes to the bone, such as osteosarcoma, etc.
>
> All of the other doses mentioned (that result in the 50 year committed effective dose to the whole body) are a result of the retained [plutonium] in the skeleton; as it decays and ever so slowly leaves the body; so slowly that one would die of natural causes before it is all gone. The committed effective dose is not the dose to the bone marrow. Even if we call the 17.9 rem the dose to the marrow, it makes no difference. He does not have cancer, so there is no calculation in IREP (Interactive Radio Epidemiological Program of the National Institute of Occupational Safety and Health). If he had a bone marrow cancer of some type (leukemia) we could run the numbers in IREP. By the way, I did this [ran the potential scenario through IREP]. PC (probability of cancer) is less than 20% at the 99% CL [confidence level].

Based on this assessment, the August 2016 advisory opinion remained the same and there was no reasonable possibility that the Veteran's leukopenia was the result of exposure to ionizing radiation. It was noted, however, that there was a reasonable possibility that the skin cancer was the result of exposure to ionizing radiation.

In September 2016, another clarification was received from the Director, Compensation Service. This is identical to the August 16th clarification as concerns the leukopenia.

Throughout the appeal period, the Veteran has submitted extensive argument. Most recently, in February 2017, he challenged the validity of the August 4, 2016 memorandum. Specifically, the finding that leukopenia did not manifest until 32 years after service. He contends that initial laboratory analysis in August 1983 had already begun to cause concern, which was 17 years post-exposure, not 32. Whether leukopenia was diagnosed 17 or 32 years after service is, however, irrelevant as the memorandum indicates that leukopenic blood changes would be seen within days or even hours.

The Veteran also argues that the opinions of his private physicians, who have treated him since 1983, should be considered more probative than those referenced above. The Veteran refers to three specific opinions.

A July 1998 record from the Nevada Cancer Center indicates the Veteran was seen for follow up of leukopenia. It was noted that about 31 years ago he was exposed to plutonium and had been seen for leukopenia. Further evaluation, to include bone marrow aspiration, biopsy, and chromosome analysis,

was negative. The physician stated that the Veteran had leukopenia and historically, plutonium exposure appeared to be the positive agent; however, they had been unable to prove this.

An August 2011 record from Dr. L.T. refers to office notes from 2009 and indicates that the principal diagnosis in those notes mentioned that the patient had mild pancytopenia and the etiology was likely related to exposure to heavy radioactive material in January 1996. That was an error and should have been January 1966. The record further stated that the pancytopenia was thought to be related to his exposure to radioactive material while cleaning up two of the four thermonuclear bombs that exploded in Spain. Per the patient, he was exposed to radioactive uranium, plutonium, cesium and yttrium.

A September 2016 statement from the Veteran's primary care physician, Dr. J.F., indicated that the Veteran had chronic leukopenia, anemia, and intermittent thrombocytopenia as a result of exposure to ionizing radiation/plutonium.

The evidence clearly shows that the Veteran was exposed to radiation during service. Further, he has been diagnosed with leukopenia. Hence, the only question remaining is whether leukopenia was caused by or is related to the in-service radiation exposure.

As set forth, the record contains various opinions addressing nexus. The Board is free to favor one medical opinion over another, provided it offers an adequate basis for doing so. *See Evans v. West*, 12 Vet. App. 22, 30 (1998); *Owens v. Brown*, 7 Vet. App. 429, 433 (1995). Whether a physician provides a basis for his or her medical opinion goes to the weight or credibility of the evidence in the adjudication of the

merits. *Hernandez-Toyens v. West*, 11 Vet. App. 379, 382 (1998). Other factors for assessing the probative value of a medical opinion are the physician's access to the claims folder and the thoroughness and detail of the opinion. *Prejean v. West*, 13 Vet. App. 444, 448-9 (2000).

On review, the May 2012 advisory opinion is not considered probative as it was based on an inaccurate dose estimate.

The Board finds, however, that the August 2016 advisory opinion from the Director, Compensation Service and the September 2016 clarification to be highly probative. The opinion was based on a review of the entire record, to include the radiation review conducted by Dr. M.M., MD, MPH, which discussed the Veteran's history and radiation exposure and considered relevant literature. The memorandum provided by Dr. M.M. was well reasoned and supported by adequate rationale, to include scientific research regarding the effects of radiation exposure. The September 2016 clarification addressed the discrepancy in dose estimates and considered the one most favorable to the Veteran.

The Board does not find the private statements to be as probative. While these physicians all arguably provided positive opinions, none offered any rationale for their statements. There is no indication they reviewed the records or considered applicable dose estimates or scientific research. The Board further notes that "[t]he Court has expressly declined to adopt a 'treating physician rule' which would afford greater weight to the opinion of a Veteran's treating physician over the opinion of a VA or other physician." *Winsett v. West*, 11 Vet. App. 420, 424-25 (1998) (*citing Guerrieri v. Brow*n, 4 Vet. App. 467, 470-71 (1993)).

The Board acknowledges the Veteran's contentions and his sincere belief that leukopenia is related to his in-service radiation exposure. He has provided substantial argument in support of his claim, but as a lay person, he is not competent to provide an opinion addressing the etiology of a complex disability such as leukopenia. *See Woehlaert v. Nicholson*, 21 Vet. App. 456 (2007). His assertions simply do not outweigh the probative opinions of record offered by professionals who have considered both the appellant's medical record and the radiation dose to which he was exposed.

The claim is denied.

In reaching this decision the Board considered the doctrine of reasonable doubt, however, as the preponderance of the evidence is against the appellant's claim, the doctrine is not for application. *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990).

ORDER

Entitlement to service connection for leukopenia, to include as due to radiation exposure, is denied.

DEREK R. BROWN
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. Your local VA office will implement the Board's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

How long do I have to start my appeal to the court? You have 120 days from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the Board decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal with the Court, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the Board to reconsider any part of this decision by writing a letter to the Board clearly explaining why you believe that the Board committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that your letter be as specific as possible. A general statement of dissatisfaction with the Board decision or some other aspect of the VA claims adjudication process will not suffice. If the Board has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the Board to vacate any part of this decision by writing a letter to the Board stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. You should be careful

when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400-20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

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If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice

before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: If you hire an attorney or agent to represent you, a copy of any fee agreement must be sent to VA. The fee agreement must clearly specify if VA is to pay the attorney or agent directly

out of past-due benefits. See 38 C.F.R. 14.636(g)(2). If the fee agreement provides for the direct payment of fees out of past-due benefits, a copy of the direct-pay fee agreement must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. See 38 C.F.R. 14.636(g)(3).

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. See 38 C.F.R. 14.636(i); 14.637(d).

APPENDIX H

STATUTORY AND REGULATORY PROVISIONS INVOLVED

28 U.S.C. § 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

38 U.S.C. § 7252

(a) The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

38 C.F.R. § 3.311

(a) Determinations of exposure and dose -

(1) Dose assessment. In all claims in which it is established that a radiogenic disease first became manifest after service and was not manifest to a compensable degree within any applicable presumptive period as specified in § 3.307 or § 3.309, and it is contended the disease is a result of exposure to ionizing radiation in service, an assessment will be made as to the size and nature of the radiation dose or doses. When dose estimates provided pursuant to paragraph (a)(2) of this section are reported as a range of doses to which a veteran may have been exposed, exposure at the highest level of the dose range reported will be presumed.

(b) [omitted]

(c) Review by Under Secretary for Benefits.

(1) When a claim is forwarded for review pursuant to paragraph (b)(1) of this section, the Under Secretary for Benefits shall consider the claim with reference to the factors specified in paragraph (e) of this section and may request an advisory medical opinion from the Under Secretary for Health.

(i) If after such consideration the Under Secretary for Benefits is convinced sound scientific and medical evidence supports the conclusion it is at least as likely as not the veteran's disease resulted from exposure to radiation in service, the Under Secretary for Benefits shall so inform the regional office of jurisdiction in writing. The Under Secretary for Benefits shall set forth the rationale for this conclusion, including an evaluation of the claim under the applicable factors specified in paragraph (e) of this section.

(ii) If the Under Secretary for Benefits determines there is no reasonable possibility that the veteran's disease resulted from radiation exposure in service, the Under Secretary for Benefits shall so inform the regional office of jurisdiction in writing, setting forth the rationale for this conclusion.

(2) If the Under Secretary for Benefits, after considering any opinion of the Under Secretary for Health, is unable to conclude whether it is at least as likely as not, or that there is no reasonable possibility, the veteran's disease resulted from radiation exposure in service, the Under Secretary for Benefits shall refer the matter to an outside consultant in accordance with paragraph (d) of this section.

(3) For purposes of paragraph (c)(1) of this section, "sound scientific evidence" means observations, findings, or conclusions which are statistically and epidemiologically valid, are statistically significant, are capable of replication, and withstand peer review, and "sound medical evidence" means observations, findings, or conclusions which are consistent with current medical knowledge and are so reasonable and logical as to serve as the basis of management of a medical condition.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Nos. 2021-1757 and 2021-1812

VICTOR B. SKAAR,

Claimant-Cross-Appellant,

v.

DENIS MCDONOUGH,

Secretary of Veterans Affairs,

Respondent-Appellant.

Appeal from the United States Court of Appeals for
Veterans Claims in Case No. 17-2574

BRIEF OF RESPONDENT-APPELLANT

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* * *

Accordingly, in the AWA petition context, the Veterans Court certainly has the authority to certify a class of claimants who have not received a board decision. Indeed, the lack of timely-issued board decisions was the very premise of the petition alleging unreasonable delay in *Monk*. But the ability to certify classes including veterans who have not received a board decision in the context of an AWA petition does not lead to the conclusion that, in a chapter 72 appeal reviewing the merits of one individual's board decision, the Veterans Court can certify a class of hundreds more

who do not meet the jurisdictional requirement of that chapter—a board decision.[17]

* * *

[17] We do not argue that the Veterans Court can never use its Congressionally-conferred authorities to certify class actions in the chapter 72 appeal context. *See Monk*, 855 F.3d at 1318 (alluding to the government's concession that the court can aggregate cases properly before it). For instance, if numerous individuals have received a board decision on a particular issue and meet the necessary requirements for class certification, the court could certainly certify those individuals as a class in the interest of promoting the efficiency of appellate review. But it cannot implement a class action procedure in violation of its own jurisdictional statute—and *Monk* does not suggest otherwise.