No.

IN THE

Supreme Court of the United States

TIMOTHY J. DOLBIN,

Petitioner,

V.

DENIS R. 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

This Court held in *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980) that a plaintiff who brings a class action presents two separate issues for judicial resolution, one is the claim on the merits and the other is the claim that he is entitled to represent a class. Plaintiffs whose claims are satisfied through entry of judgment over their objections *after* the denial of a class certification ruling still retain a "personal stake" in obtaining class certification and may nevertheless appeal the denial of a request for class certification and class action (RCA) because an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim.

When Air Force veteran Timothy J. Dolbin challenged the U.S. Department of Veterans Affairs (VA)'s disparate docketing practices and egregious delays on behalf of himself and others through an RCA the Court of Appeals for Veterans Claims (Veterans Court) denied his request by interpreting and relying on a portion of the Veterans Appeals Improvement and Modernization Act (VAIMA) that the parties agreed is inapplicable to his claim and his RCA. Nearly a year after the Veterans Court's decision Mr. Dolbin's individual claim became moot. The Federal Circuit held that the RCA was also moot because the Veterans Court did not reach the merits of the RCA so the relation back doctrine and the exception to mootness set forth in *Geraghty* did not apply.

The question presented is: If an RCA under Rule 23 of the Federal Rules of Civil Procedure is dismissed based on an erroneous interpretation of law, but not on the merits, does the named plaintiff seeking to

represent the class retain a personal interest to appeal the dismissal if his/her individual claim became moot after the dismissal of the RCA?

RELATED PROCEEDINGS

Timothy J. Dolbin v. Denis McDonough, Secretary of Veterans Affairs, No. 21-2373 (Fed. Cir. judgment entered Apr. 18, 2023)

Timothy J. Dolbin v. Denis McDonough, Secretary of Veterans Affairs, No. 21-2890 (Vet. App. judgment entered Sept. 17, 2021)

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INTRODUCTION

When the VAIMA was made law in 2017, it contained provisions allowing the VA to, *inter alia*, (1) develop pilot programs to test adjudication of appeals and gather data prior the law's full implementation and (2) to carry out a separate, alternative appeal process for "fully developed appeals." The VA elected not to pursue the "fully developed appeals" process but did exercise its ability to create a pilot program and created the Rapid Appeals Modernization Program (RAMP).

The VA's campaign launching the RAMP was aggressive. All veterans with active appeals in the VA's pre-VAIMA system were sent correspondence inviting them to "opt-in" to the pilot program.

However, the VA neglected to inform the claimants who were enticed to opt-in that the RAMP did not address critical components of claim processing with respect to docketing procedures at the Board of Veterans' Appeals (Board). Specifically, the RAMP was silent on where on the docket an appeal is placed after it is subject to prior remand and what constitutes "sufficient" cause to advance a case on the Board's docket or otherwise obtain expeditious treatment of an appeal.[1]

This caused thousands of veterans who opted their claims into the RAMP to experience even greater confusion and delays in the processing of their claims than existed in the pre-VAIMA system. To compound

[1] The VA did not promulgate any regulations or guidance addressing these short comings until after the VAIMA's full implementation in 2019.

the matter, the VA constructed RAMP as a freeway with no exit: there was no mechanism for a claimant to return to the pre-VAIMA system or exit the pilot program once the opt-in was done.

When Mr. Dolbin sought relief on behalf of himself and others similarly situated through a writ of mandamus and RCA the Veterans Court denied his requests by interpreting and applying section 4(b) of the VAIMA governing "fully developed appeals"—a section of the VAIMA that was never implemented by the VA and is wholly inapplicable to Mr. Dolbin's claim and his RCA. On appeal, the Federal Circuit dismissed Mr. Dolbin's mandamus petition as moot because, while his appeal was pending, the Board issued a decision on his underlying claim. The Federal Circuit also held that the RCA was equally moot because the Veterans Court did not reach its merits so the relation back doctrine and the narrow exception to mootness set forth in *Geraghty* did not apply.

At first blush it may seem that the question in this case has already been addressed by this Court. Indeed, in *Geraghty*, this Court held that plaintiffs whose claims are satisfied through entry of judgment over their objections after the denial of a class certification ruling still retain a "personal stake" in obtaining class certification and may nevertheless appeal the denial of an RCA because an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim. However, in this case, the Federal Circuit hyper focused on *Geraghty*'s use of the word "denial" and read into that single word a meaning that RCAs must be denied on the merits in order for exceptions to the

mootness doctrine to apply. Thus, the Federal Circuit fundamentally changed *Geraghty*'s holding and application to RCAs presented to the Veterans Court.

The Federal Circuit's erroneous reading of misapprehends *Geraghty* and forecloses proper consideration of erroneously denied RCAs filed in the mandamus petition context. But even more troublesome is the fact that the Federal Circuit's decision in Mr. Dolbin's case is in direct conflict with its precedent in *Monk v. Shulkin*, 855 F.3d 1312, 1322 (Fed. Cir. 2017), in which the Court held that the mootness exception in *Geraghty* applied to cases, like Mr. Dolbin's, where the named plaintiff's claim became moot after the RCA was denied. In fact, in *Monk* the Federal Circuit held that *Geraghty*'s exception to mootness applied, despite the fact that the Veterans Court did not reach the merits of Mr. Monk's RCA because it erroneously determined that it did not have the authority to hear RCAs at all.

There is no doubt about the importance and reoccurring nature of this issue. Given that it was only recently in 2017 when the Federal Circuit recognized the Veterans Court had the authority to hear RCAs in the first instance, the caselaw guiding RCAs is still in its infancy. And given that the Federal Circuit has allowed RCAs to be heard by the Veterans Court in only two contexts—the mandamus petition and on direct appeal—it is critical for the Federal Circuit to properly apply exceptions to the mootness doctrine for RCAs. As such this Court should grant certiorari to ensure that *Geraghty* is followed, the Federal Circuit's jurisprudence remains uniform, and that its incorrect and overly narrow reading of *Geraghty* does not

foreclose one of the primary vehicles to have RCAs heard by the Veterans Court.

OPINIONS AND ORDERS BELOW

The Order of the Federal Circuit denying Petitioner's petition for panel rehearing is reproduced at Pet. App. 16a-17a. The unpublished decision of the Federal Circuit is available at *Dolbin v. McDonough*, 2023 U.S. App. LEXIS 9139, 2023 WL 2981495 and reproduced at Pet. App. 1a-8a. The decision of the Court of Appeals for Veterans Claims is reported at *Dolbin v. McDonough*, 34 Vet. App. 334 (2021) and reproduced at Pet. App. 9a-15a.

JURISDICTION

The Federal Circuit entered judgment on April 18, 2023. Pet. App. 18a-19a. After being granted an extension of time, Mr. Dolbin petitioned for panel rehearing on July 17, 2023, which the Federal Circuit denied on August 1, 2023. Pet. App. 16a-17a. The Federal Circuit's mandate was entered on August 8, 2023. Pet. App. 17a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Pub L. 115-55, 101 Stat. 1105 (Aug. 23, 2017) are reproduced at Pet. App. 20a-27a.

STATEMENT OF THE CASE

1. Congress created the VAIMA but left claims processing gaps that were not filled by the VA prior to establishing and adjudicating claims in its pilot program.

On August 23, 2017, the President signed the VAIMA into law to reform the veterans' disability benefits systems that by all accounts was "broken" and marked by lengthy delays that veterans and their dependents experienced in applying for and receiving what are often life-saving funds. *Military-Veterans Advocacy v. Sec'y of Veterans Affairs*, 7 F.4th 1110, 1118 (Fed. Cir. 2021); *Martin v. O'Rourke*, 891 F.3d 1338, 1351-52 (Fed. Cir. 2018) (Moore, J. concurring). Substantively, the VAIMA did not change the requirements claimants must show in order to establish entitlement to the benefits sought. Rather, it changed the claim procedures to reflect Congress's goal of streamlining the administrative appeals system to help ensure that claimants receive timely decisions while still protecting their due process rights. *Military-Veterans Advocacy*, 7 F.4th at 1119 (citing H.R. Rep. No. 115-135, at 5).

The VAIMA created two categories of claims: Legacy claims,[2] which would continue to be adjudicated under the pre-VAIMA law and VAIMA claims,[3] which would be adjudicated under the

[2] Claims pending prior to February 19, 2019, the effective date of the VAIMA. 38 C.F.R. § 3.2400.

[3] Claims filed after February 19, 2019.

modernized system created by Congress. *Mattox v. McDonough*, 34 Vet. App. 61, 68, (2021).

Legacy claims on initial appeal to the Board are docketed in order by which they are received but claims that are returned to the Board after having been previously remanded assume their original place on the docket. 38 C.F.R. § 20.902(a). Any Legacy cases may be advanced on the docket if good cause is shown. 38 C.F.R. § 20.902(b). Additionally, Legacy cases that have been remanded by the Veterans Court are treated "expeditiously" by the Board without regard to their place on the Board's docket. 38 C.F.R. § 20.902(d).

By contrast, the VAIMA does not address docketing of appeals at the Board, i.e. where a case is placed on the docket. It only states that a case "may be advanced on the docket" for earlier consideration by filing a motion showing good cause. Pub. L. No. 115-55 § 2(t), 131 Stat. 1112-13 (Aug. 23, 2017). This was the case until January 2019, when the Secretary promulgated 38 C.F.R. § 20.800, requiring VAIMA appeals to be docketed in the order in which they are received. *See* 38 C.F.R. § 20.800(d) (2019); *see also* Pet. App. 10a. Section 20.800 did not provide for previously remanded appeals to be returned to their original place on the docket. However, it did maintain that appeals remanded by the Veterans Court were to be treated expeditiously without regard to their place on the docket. 38 C.F.R. § 20.800(d) (2019).

The VAIMA also allowed the VA to develop pilot programs to test adjudication of appeals concurrently under the Legacy system and what would become the VAIMA prior to its full implementation. *Id.*; Pub. L. No. 115-55 § 4(a)(1), 131 Stat. at 1119; H. Rep. 115-135 at

pg. 2 (May 19, 2017). Pursuant to section 4(a) of the VAIMA, the VA created the RAMP to gather data to implement the VAIMA and then invited claimants to participate by opting their current Legacy appeals into the pilot program. Pet. App. 2a; 38 C.F.R. § 19.2 (2019); 38 C.F.R. § 3.2400(c)(2019); 84 Fed. Reg. 138 (January 18, 2019); *see also* Pub. L. No. 115-55, § 2, 131 Stat. 1105 (Aug. 23, 2017).

However, because the VAIMA explicitly empowered the Secretary to operate the RAMP before the effective date of the entire modernized system, RAMP claims/appeals operated independently from Legacy claims/appeals. Pet. App. 10a. As such, RAMP appeals are not governed by VAIMA regulations such as 38 C.F.R. § 20.800 because none of the VAIMA regulations existed at the time. *Id.* The only law that existed at the time of the RAMP was the pre-VAIMA law that addressed docketing for previously remanded claims and the VAIMA, which did not address docketing at the Board. *Id.*

In addition to creating pilot programs, Congress also provided the VA with the authority to carry out a separate, alternative appeal process for "fully developed appeals." Pub. L. No. 115-55 § 4(b)(1), 131 Stat. at 1119-23; H. Rep. 115-135 at pg. 7, 11-14 (May 19, 2017). Section 4(b) of the VAIMA specifically outlines what must be included in a fully developed appeal, the time period for filing a fully developed appeal, the action the VA must take to assess whether the appeal satisfied all the requirements of a fully developed appeal, and how the appeal can or must be

reverted back to the standard appeals process. Pub. L. No. 115-55 § 4(b)(2)(A)-(D), 131 Stat. at 1120-21.

Perhaps most importantly in this appeal, the VAIMA expressly states that section 4(b) only applies to fully developed appeals and that fully developed appeals are only appeals that are filed in accordance with section 4(b)(2)(A). Pub. L. No. 115-55 § 4(b)(4) and (5), 131 Stat. at 1123. For reasons unknown, the VA elected not to implement section 4(b) of the VAIMA.

2. Mr. Dolbin Petitions the Veterans Court for a Writ of Mandamus and Requests Class Certification and Class Action for Similarly Situated Claimants, and the Veterans Court Denies It.

Mr. Dolbin filed his original claims for disability compensation benefits on June 13, 2008 and May 20, 2011 in the Legacy system. Pet. App. 2a. His claims were denied by a VA Regional Office and he appealed to the Board, which remanded his claims on multiple occasions. Pet. App. 2a, 11a. After each remand his claims were returned to their original place on the Board's docket and afforded expeditious treatment, but when Mr. Dolbin opted his claims into the RAMP, the Board docketed his claims by the date of his RAMP appeal. Pet. App. 2a-3a, 9a-10a. So Mr. Dolbin requested that the Board advance his case on the docket and expedite his case under 38 U.S.C. § 5109B, because his case had been remanded by both the Board and the Veterans Court previously. Pet. App. 3a. The Board denied his request, holding that VAIMA appeals must be considered in docket number order. *Id.*

Mr. Dolbin then filed a petition for extraordinary relief requesting that the Veterans Court issue a writ of mandamus to compel the Board to advance his

appeal on its docket and afford it expeditious treatment. *Id.* He also filed an RCA requesting that the Veterans Court certify a class action of similarly situated claimants and address the Board's docketing practices under the VAIMA and extend the relief requested in his petition to the class. *Id.*

On August 26, 2021, the Veterans Court issued an Order denying Mr. Dolbin's mandamus petition and dismissing his RCA as moot. Pet. App. 4a, 9a-15a. Regarding Mr. Dolbin's mandamus petition, the Veterans Court held that Congress provided the rule governing the Board's docketing system under VAIMA and that the Act clearly sets out a first-come, first-served docketing system for RAMP appeals. Pet. App. 10a-11a. In support of this holding, the Court cited section 4(b)(3)(B), the portion of the VAIMA that addresses "fully developed appeals" that the VA elected not to implement, and which the VAIMA itself expressly stated only applied to "fully developed appeals." *Id.*; *see also* Pub. L. No. 115-55 § 4(b)(4) and (5), 131 Stat. at 1123. The Veterans Court further noted that section 4(b) "requires the Board to 'maintain fully developed appeals on a separate docket than standard appeals' and to 'decide fully developed appeals in the order that the fully developed appeals are received on the fully developed appeal docket.'" Pet. App. 11a. But neither Mr. Dolbin's appeal nor any other putative class members' appeals were filed as, or ever alleged to be, "fully developed appeals" under section 4(b).

The Veterans Court also noted that 38 U.S.C. § 5109B requires the Secretary to ensure that previously remanded claims are processed expeditiously, but held that the statute does not

require the Board to allow a claimant to "jump the line." Pet. App. 13a-14a. The Veterans Court rationalized that Congress has already expressed an unequivocal intention for VAIMA appeals to be processed in the order received. *Id.* The Veterans Court reiterated its interpretation of section 4(b) of the VAIMA when denying Mr. Dolbin's RCA, stating "VAIMA clearly established the Board's first-come first-served docketing system for RAMP appeals, which applies to every member of the putative class" and because "the Board's docketing procedure for RAMP appeals was prescribed by Congress," Mr. Dolbin's argument fails as a matter of law. Pet. App. 11a-12a, 14a-15a.

3. The Federal Circuit Finds Mr. Dolbin's Individual Claim and RCA are Moot.

Mr. Dolbin appealed the adverse decision to the United States Court of Appeals for the Federal Circuit. Pet. App. 4a. While the appeal was pending, the Board issued a decision on Mr. Dolbin's underly claim for disability compensation benefits. Pet. App. 4a-5a.

The Federal Circuit found Mr. Dolbin's individual claim was moot and that the capable of repetition yet evading judicial review exception to mootness does not apply. Pet. App. 5a. Next, the Federal Circuit relied on *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013) for the proposition that a class action is usually moot if the named plaintiff's claim becomes moot before the class certification and held that because the proposed class was uncertified at the time that Mr. Dolbin's claim became moot the July 2022 Board decision mooted both Mr. Dolbin's individual action for mandamus and the uncertified class action because he

no longer had a personal interest to represent others. Pet. App. 6a-7a. The Federal Circuit also found that the relation back doctrine was not applicable and that the narrow exception set forth in *Geraghty* only applies to denials on the merits. Pet. App. 7a-8a. The Court concluded that because the Veterans Court dismissed Mr. Dolbin's RCA as moot based on his individual claim, it did not reach the merits of the RCA. Pet. App. 8a.

REASONS FOR GRANTING THE PETITION

I. The Federal Circuit's conclusion that the July 2022 Board decision mooted the uncertified class action because Mr. Dolbin no longer had a personal interest to represent others was directly rejected by this Court in *Geraghty*.

The Federal Circuit held that the July 2022 Board decision mooted the uncertified class action because Mr. Dolbin no longer had a personal interest to represent others. Pet. App. 7a-8a. However, this Court expressly rejected this position in *Geraghty*.

In *Geraghty*, the respondent sought certification of a class of all federal prisoners who are or who will become eligible for release on parole but his request was denied by the District Court as neither necessary or appropriate *Geraghty*, 445 U.S. at 393. Respondent appealed to the United States Court of Appeals for the Third Circuit but while his appeal was pending, he was released from prison. *Id.* at 394. On appeal, the Third Circuit reversed and remanded the District Court's judgment finding that if a class had been certified mootness of respondent's personal claim could not have rendered the controversy moot and that

certification of a "certifiable" class that erroneously had been denied, relates back to the original denial and thus preserved jurisdiction. *Id.* This Court granted certiorari to address the question of "whether a trial court's denial of a motion for certification of a class may be reviewed on appeal after the named plaintiff's personal claim has become 'moot.'" *Id.* at 390. The petitioners argued that in a situation where no class has been certified and a proposed class representative's claim becomes moot, there is no party before the court with a live claim so the court does not have jurisdiction to consider whether a class should have been certified. *Id.* at 401.

This Court rejected that argument and held that a plaintiff who brings a class action presents two separate issues for judicial resolution: a claim on the merits and a separate claim for entitlement to represent a class. *Id.* at 402.

Importantly, this Court further held that a "personal stake" in the case can still exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired and that "the question of whether class certification is appropriate remains as a concrete, sharply presented issue." *Id.* at 403. This Court continued that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied" and that the proposed representative retains a "personal stake" in obtaining class certification sufficient to assure that Article III values are not undermined. *Id.* at 404. Thus, this

Court's holding in *Geraghty* directly contradicts the Federal Circuit's conclusion that Mr. Dolbin no longer had a personal interest to represent others in his RCA because his individual claim was moot.

This Court should grant certiorari because its decision in *Geraghty* conflicts with the conclusion reached by the Federal Circuit as to whether Mr. Dolbin has a continued personal interest in his request for class certification.

II. The Federal Circuit's decision is incorrect because it misinterpreted this Court's holding in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013) as limiting exceptions to mootness of a request for class certification as only applying to denials of class actions on the merits.

The Federal Circuit relied on *Genesis* to conclude that the *Geraghty* exception to mootness only applies when an RCA is denied on the merits. Pet. App. 7a-8a. This is incorrect because nothing in *Geraghty* or *Genesis* requires a denial of a class certification motion be on the merits. In fact, *Genesis* itself distinguished its holding from *Geraghty*'s holding by noting that *Geraghty* applies to cases, like Mr. Dolbin's, in which the named plaintiff's claim remains alive at the time the district court denies class certification. *Genesis*, 569 U.S. at 75.

In *Genesis*, the respondent, on behalf of herself and others similarly situated, brought a collective action under the Fair Labor Standards Act (FSLA) of 1938. *Genesis*, 569 U.S. at 69. She received an offer of judgment and the District Court determined her

individual claim was moot and dismissed her suit for lack of subject matter jurisdiction. *Id.* at 69-70. On appeal the United States Court of Appeals for the Third Circuit reversed and held that while respondent's individual claim was moot her collective action was not because allowing defendants to "pick-off" named plaintiffs before certification would frustrate the goals of collective actions. *Id.* at 70.

This Court granted certiorari and held that the respondent's case was moot and that the District Court properly dismissed her collective action under the FSLA. *Id.* at 73. This Court first noted that cases involving class actions filed pursuant to Rule 23 of the FRCP are readily distinguishable and inapposite because Rule 23 actions are fundamentally different from collective actions under the FSLA and because cases involving Rule 23 actions are inapplicable to the facts of the respondent's case. *Id.* at 74. This Court specifically determined that *Geraghty* (a Rule 23 case) was inapposite because it explicitly limited its holding to cases in which the named plaintiff's claim remains live at the time the District Court denies class certification, whereas the respondent had not yet moved for conditional certification under the FSLA when her claim became moot. *Id.* at 75. As such, this Court held that there is no certification decision to which respondent's claim could have related back. *Id.* This Court further noted that Rule 23 cases like the one at issue in *Geraghty* acquire an independent legal status once it is certified under Rule 23 but there is no independent legal status for "conditional certification" under the FSLA. *Id.* This Court reiterated that

"[w]hatever significance 'condition certification' may have in § 216(b) proceedings, it is not tantamount to class certification under Rule 23." *Id* at 78.

As this Court held, *Genesis* is readily distinguishable from cases like Mr. Dolbin's not only because Mr. Dolbin's individual claim remained alive at the time the Veterans Court denied his RCA but also because his RCA was filed under Rule 23 of the FRCP whereas Genesis involved an individual claim was mooted before any ruling on the collective action brought under the FSLA. *Id.* at 66, 78. Yet, the Federal Circuit found *Genesis* to be applicable to Mr. Dobin's case and relied on it to conclude that the Veterans Court must have denied his RCA on the merits in order for any exception to mootness to apply.

Further illustrating the fundamental difference between Rule 23 class actions and FSLA collective actions and the Federal Circuit's complete misunderstanding of *Genesis*, is the Federal Circuit's reliance on *Genesis* for the proposition that "In the absence of any claimant's *opting in*, respondents suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action." Pet. App. 6a (emphasis added). Unlike FSLA classes, Mr. Dolbin requested class certification under Rule 23(b) of the FRCP which is an *opt-out* class. This Court has held that classes certified under FRCP 23(b)(2) are mandatory classes—that is—all the putative class members are part of the class and are not required to take the affirmative step to "opt-in." *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 361-62 (2011); *see also*

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) ("We reject [the] contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively 'opt in' to the class, rather than be deemed members of the class if they do not 'opt out.'"). Additionally, classes certified under FRCP 23(b)(3) have also been deemed "opt-out" classes in which the class members are automatically part of the class but are entitled to withdraw from the class at their option. *Id.*

Because Mr. Dolbin's RCA was made pursuant to Rule 23 (requiring classes certified under that rule to be opt-out classes) it was plainly incorrect for the Federal Circuit to require other putative class members to have opted-in after Mr. Dolbin's individual claim became moot as required by *Genesis* for FLSA classes.

Notwithstanding the inapplicability of, and the Federal Circuit's misunderstanding of, *Genesis*, Mr. Dolbin also asserts that the Federal Circuit incorrectly reads the single sentence in *Genesis* that "*Geraghty* narrowly extended this principle to *denials* of class certification motions" as only including denials on the merits and excluding other reasons for denials, such as in this case, when the denial was the result of the Veterans Court's clear misinterpretation of law. Pet. App. 7a-8a. However, nothing in *Genesis* limits the exception to mootness provided in *Geraghty* to denials of class motions on the merits. It merely reiterated its holding in *Geraghty* that where an action would have acquired the independent legal status described in

Sosna[4] but for the district court's erroneous denial of class certification, a corrected ruling on appeal "relates back" to the time of the erroneous denial of the certification motion. *Genesis*, 569 U.S. 66, 74-75. Neither *Genesis* nor *Geraghty* limit the phrase "erroneous denial of class certification" to a merits decision.

In sum, erroneous denial of an RCA, whether it is on the merits or not is still a legal error that resulted in the termination of the RCA. The only limit on *Geraghty* that was discussed in *Genesis* is that "*Geraghty*'s holding was explicitly limited to cases in which the named plaintiff's claim remains live at the time the district court denies class certification." *Id.* at 67. This Court should grant certiorari to clarify the application of *Geraghty* and *Genesis* to RCAs filed at the Veterans Court.

III. The doctrine of stare decisis bound the Federal Circuit's panel to follow its own precedent, which already determined that *Genesis* is not applicable to RCA's like Mr. Dolbin's.

Stare decisis—the idea that today's Court should stand by yesterday's decisions—is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014). It applies even when a decision has announced a "judicially created doctrine" because it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the

[4] *Sosna v. Iowa*, 419 U.S. 393 (1973).

judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827-828 (1991); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014).

In *Monk*, the Federal Circuit already determined that *Genesis* is easily distinguishable from situations, like Mr. Dolbin's, in which the named plaintiff's individual claim became moot after the RCA was denied, because "the *Genesis* plaintiff's claim was mooted *before* any decision on class certification was rendered." 855 F.3d at 1317-18 (emphasis in original). The Veterans Court noted that Mr. Dolbin's claim remained alive at the time of its decision. Pet. App. 11a (noting that Mr. Dolbin's case is currently awaiting adjudication by the Board). Likewise, the Federal Circuit also acknowledged that Mr. Dolbin's claim remained live at the time the Veterans Court denied his request for class certification and class action. Pet. App. 4a (noting that the 2022 Board decision that mooted Mr. Dolbin's individual claim was issued "nearly a year after the Veterans Court decision").

There is no question that the Federal Circuit is bound by the decisions of this Court. *See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1373-1374 (Fed. Cir. 2001) ("stare decisis is a doctrine that binds courts to follow their own earlier decisions or the decisions of a superior tribunal"). There is also no question that because the Federal Circuit was not sitting en banc when adjudicating Mr. Dolbin's case it was bound by its earlier decision in *Monk*. *Id.*

For this Court's decisions to have any legal effect, the doctrine of stare decisis must be followed. This Court should grant certiorari to ensure its words in *Geraghty* are not forsaken by the Federal Circuit and to ensure uniformity is maintained among the Federal Circuit's jurisprudence.

IV. The question presented in this case is important and recurring.

Unlike other appellate courts, when Congress created the Veterans Court it gave it the unique ability/responsibility to hear RCAs in the first instance. *Monk*, 855 F.3d at 1322. However, this responsibility was not recognized until 2017. *Id.* Since then, the Federal Circuit determined that the Veterans Court had jurisdiction to certify class actions in two contexts. One in which the Veterans Court already possesses jurisdiction on direct appeal from an adverse Board decision, i.e. when the Court has jurisdiction over each class member under 38 U.S.C. § 7252. *See Skaar v. McDonough*, 48 F.4th 1323, 1332 (Fed. Cir. 2022). The other is in the mandamus petition context pursuant to its authority to issue writs of mandamus in aid of its prospective jurisdiction under 38 U.S.C. § 1651. *Monk*, 855 F.3d at 1318-20.

Despite the VA's known strategy of evading judicial review by mooting pending mandamus petitions, the latter vehicle has been the most utilized for RCAs presented to the Veterans Court. *Id.* at 1321 (noting that "a great majority of the time" the VA responds to mandamus petitions by quickly correcting the problem within the short time allotted for

response). A review of the Veterans Court's class action jurisprudence shows that since 2017, there have been 21 requests for class certification and class action presented to the Veterans Court and 71 percent of those were filed in the mandamus petition context under 38 U.S.C. § 1651.

By holding that the exception to mootness in *Geraghty* only applies to denials of RCAs on the merits, the Federal Circuit empowers the VA to foreclose appellate consideration for RCAs filed in the mandamus petition context that are denied for any reason other than on the merits. This thwarts Congress's intent for the Veterans Court to hear RCAs and for the Federal Circuit to properly maintain judicial oversight over the Veterans Court. As a result, the Federal Circuit's erroneous decision erodes its own ability to adjudicate appeals of improperly denied RCAs filed at the Veterans Court. This is because Congress has limited the Federal Circuit's review of Veterans Court decisions largely "to issues of statutory or regulatory interpretation." *Carpenter v. Gober*, 228 F.3d 1379, 1381 (Fed. Cir. 2000); *see* 38 U.S.C. § 7292. Yet, in a case, like Mr. Dolbin's, in which the Veterans Court not only relied on a misinterpretation of law but relied on a portion of the law that was never implemented by the VA and expressly stated was not applicable to any appeal other than "fully developed appeals", appellate review by the Federal Circuit falls squarely in line with Congress's intent.

Beyond this, the Federal Circuit's decision has already been relied upon by the Veterans Court to deem other RCAs moot. For example, in just a few

short months after the Federal Circuit's judgment in Mr. Dolbin's case, the en banc Veterans Court relied on the decision to deny an RCA as moot stating "it is possible to read *Dolbin* as indicating that, even if a request for class certification is pending when the individual claim becomes moot, there is no exception to mootness so long as the class request has not yet been acted on." *Kernz v. McDonough*, 2023 U.S. App. Vet. Claims LEXIS 1575, *36, __ Vet.App. __ (Oct. 4. 2023).

The Veterans Court's en banc decision is *Kernz* highlights the confusion created by the Federal Circuit's erroneous reading of *Genesis*, especially against the backdrop of *Geraghty* and its own precedent in *Monk*. Thus, this Court's intervention is warranted.

V. This case is an ideal vehicle to clarify this Court's caselaw and the application of the relation back doctrine in the class action context at the Veterans Court.

This case provides an ideal opportunity for the Court to correct the Federal Circuit's erroneous reading of *Genesis* and to bring the harmony back to the Federal Circuit's jurisprudence.

The Federal Circuit readily acknowledged that a valid Rule 23 RCA that is erroneously denied on the merits can proceed on appeal despite the named plaintiff's individual claim becoming moot. Pet. App. 7a-8a. Indeed, this has been the case since Geraghty was decided over 40 years ago. *Geraghty*, 445 U.S. at 403-04. But it makes little sense to deny appellate

review of an erroneously dismissed RCA merely because that that dismissal was the product of a complete and utter misinterpretation of law rather than for any other reason on the merits.

Moreover, this Court commonly grants certiorari where the court of appeals would need to address distinct issues on remand. *See, e.g., McFadden v. United States*, 576 U.S. 186, 197 (2015); *Bailey v. United States*, 568 U.S. 186, 202 (2013). Because the section 4(b) of the VAIMA expressly stated that it only applied to "fully developed appeals" and the Veterans relied solely on the interpretation of section 4(b) to deny Mr. Dolbin's mandamus petition and RCA, the Federal Circuit should have remanded the matter to the Veterans Court for readjudication under the proper section of the law. It was well within the Federal Circuit's purview to ensure that this distinct legal error was corrected—just as Congress intended.

The facts of this case also favor granting certiorari because they are simple, straightforward, and undisputed. Mr. Dolbin presented a Rule 23 RCA to the Veterans Court. Pet. App. 3a-4a, 11a. The Veterans Court dismissed his RCA based on an erroneous interpretation of an inapplicable law—section 4(b) of the VAIMA. Pet. App. 4a, 12a-13a, 14a-15a. Mr. Dolbin's individual claim remained pending at the time of the Veterans Court's erroneous decision and for nearly another year thereafter. Pet. App. 4a, 11a.

The only dispute in this case is whether the Veterans Court's erroneous dismissal fell within the

exception to mootness created by *Geraghty*. This Court should grant certiorari and hold that it does.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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