

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

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|--------------------------------------|---|--------------------|
| JAMES M. KERNZ, |) | |
| Individually and on behalf of others |) | |
| similarly situated, |) | |
| |) | |
| Appellants, |) | |
| |) | |
| v. |) | Docket No. 20-2365 |
| |) | |
| DENIS MCDONOUGH, |) | |
| Secretary of Veterans Affairs, |) | |
| Appellee. |) | |

NOTICE OF CLARIFICATION

During oral argument, Mr. Kernz was asked how he could recharacterize the proposed class so that it does not require the Court or the VA to make any factual findings regarding the timeliness of the appeals of the class members. *See* Oral Argument at 1:10:24-1:12:50; <https://www.youtube.com/watch?v=dqBHabRI3Uw>.

Given that the Court’s question at oral argument was central to the class certification and class action issues in this case, Mr. Kernz wishes to clarify his response at oral argument. Mr. Kernz would recharacterize the proposed class as:

All VA benefits claimants who have received or will receive letters from the Board denying appellate eligibility/jurisdiction under the Appeals Modernization Act (AMA) or Legacy (non-modernized) review system and were not provided appellate rights.

Mr. Kernz asserts that this definition captures all the claimants adversely affected by the Board’s current policy of making and issuing initial adverse eligibility/jurisdictional determinations without affording the adversely affected claimants the opportunity to appeal those determinations. This definition also removes any fact finding by the Court or VA in

that is distills the class member inquiry to a single binary question of whether the claimant received one of the Board's notice letters denying appellate eligibility or jurisdiction. If answered in the affirmative, the claimant is a member of the class. If answered in the negative, the claimant is not.

The Secretary has acknowledged that copies of all the Board's letters sent to claimants are stored in their files in the VA's Veterans Benefits Management System (VBMS). *See* Sec. Resp. to Request for Class Action at Exhibit J ¶¶ 11-12. Thus, the recharacterized definition of the class allows the Secretary to locate and notify the class members without performing additional fact finding regarding timeliness.

WHEREFORE, Mr. Kernz respectfully submits this Notice of Clarification on the 5th day of April 2022 by:

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