IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

J. RONI FREUND & **MARY S. MATHEWSON,** *Petitioners,* v. **DENIS McDONOUGH,** in his capacity as Secretary of Veterans Affairs, *Respondent.*	)	Vet. App. No. 21-4168

PETITIONERS' MOTION FOR LEAVE TO FILE RESPONSE TO SECRETARY'S APRIL 11, 2022, SUPPLEMENTAL MEMORANDUM

The Petitioners, J. Roni Freund and Mary S. Mathewson, on behalf of themselves and this case's proposed Class, respectfully move for leave to file a response to the supplemental memorandum that the Secretary of Veterans Affairs ("Secretary"), through counsel, filed in this case on April 11, 2022 ("Supplemental Memorandum"). The Petitioners are submitting, together with this Motion for Leave, the response that they seek leave to file (the "Response").

The Petitioners request leave to file the Response pursuant to U.S. Vet. App. Rule ("Rule") 2, Rule 27, and this Court's inherent authority. They do so for the reasons that follow.

PERTINENT FACTS

The Court will be familiar with this case's underlying facts, the Petition, and the Request for Class Action ("RCA"). The Petitioners here wish to highlight that this case's principal briefing completed months ago. That briefing includes the supplemental briefing that the Court ordered from the Secretary in November 2021, which provided the Secretary with an opportunity to address deficiencies in his initial responses to the Petition and RCA.

What is more, this case's oral argument also has completed. During the oral argument, the Secretary received a further opportunity when answering the Court's questions to address deficiencies in the Secretary's briefing in this case.

The responses that the Secretary chose to prepare (or not) and to provide (or not) in this case's briefing and at oral argument left this Court with questions. And so, on March 10, 2022, the Court issued a five-page order ("Order"). It outlined the Petitioners' individual and class contentions in this case; the responses that the Secretary had provided to the contentions (or not) as of March 10, 2022; and at least some of the Court's outstanding questions for the Secretary. The Court ordered the Secretary to file a high-ranking Department of Veterans Affairs ("VA") official's "affidavit or affidavits" to address the Order's enumerated questions.

Some questions that the Order identifies pertain to legal positions that the Secretary had chosen to advance as to the RCA presenting a live case or controversy. *See* Order at 4–5 (Question 3; "Has VA sent a notice letter to either or both groups identified in response to Questions 1 and 2 above? If not, why is the Secretary contending that the [RCA] is moot …?"); *id.* at 5 (third sentence in Question 6; "If the Secretary has undertaken no actions to identify such appeals [specified in the Question 6's first sentence], explain why he is contending that the [RCA] is moot."). Others pertain to characteristics of a subset of the proposed Class's members—in particular, those whose "appeals, as of January 31, 2022, … remained closed in VACOLS and … had been closed since May 15, 2017." *Id.* at 4–5 (Matter Nos. 2 & 3). Others pertain to additional matters. *See id.* at 4–5.

On April 11, 2022, the Secretary filed not just the "affidavit or affidavits" that the Court ordered but, additionally, what the Secretary described as a "supplemental memorandum"

accompanying the affidavit. Sec'y's Resp. to Court's Mar. 10, 2022, Order, at 1 (Apr. 11, 2022). The affidavit addresses at least to some extent the questions that the Order specifies. *See id.* Ex. 1. The Supplemental Memorandum, which is signed not by the VA affiant but instead by the Secretary's counsel, glosses the affidavit and presents new assertions as to why, in the Secretary's view, the Court should dismiss the RCA as moot. *See id.* at 3–8. In particular, the Secretary asserts in the Supplemental Memorandum that VA has performed certain actions since March 10, 2022, in connection with the Order; and that those new actions have mooted the RCA.[1]

When the Court issued its Order for the Secretary to file "an affidavit or affidavits," the Court neither ordered nor invited the Petitioners to file a response. The Court did not, however, address whether it would accept a response from the Petitioners as to any filing that the Secretary made beyond the Order's scope. Petitioners submit that the Supplemental Memorandum exceeds the Order's scope, and for the reasons that follow they respectfully request that the Court grant the Petitioners leave to file their Response.

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[1] *See* Sec'y's Supp. Mem. at 4 ("While VA does not provide notice to claimants when an appeal is closed due to a failure to file a Substantive Appeal beyond the notice provided in the SOC notice letter, the Court should still find the RCA is moot because VBA has undertaken a review of the 253,913 closed appeals identified in response to Question 1 using multiple databases, identified those appeals for which a timely Substantive Appeal was filed but not acknowledged, and has a specific plan to reactivate those appeals over the course of this fiscal year."); *id.* ("[I]n response to Question 6, the RCA is moot because VA has undertaken actions to address and resolve the harm identified by Petitioners, i.e., that legacy appeals have been erroneously closed in VACOLS and remain closed despite a timely filed Substantive Appeal."); *id.* at 6 ("The RCA is moot because VA has reviewed all appeals closed between May 15, 2017, and January 31, 2022, for failure to file a Substantive Appeal, identified those appeals that were improperly closed in VACOLS, established plans to reactivate those appeals during this fiscal year, and established plans to conduct monthly, special reviews to ensure the accuracy of legacy appeals records closed in VACOLS for failure to file a timely Substantive Appeal.").

ARGUMENT

Absolutely nothing about the Order suggests that the Court intended to provide the Secretary with yet another opportunity—now post-briefing and after even oral argument—to introduce new issues or argument into this case. Absolutely nothing about the Order suggests, moreover, that the Court intended to permit the Secretary to do so without the Petitioners being able to respond on behalf of themselves and the thousands of similarly situated claimants with a timely perfected legacy appeal that the Secretary erroneously closed and then withheld all action. The Supplemental Memorandum—including its new assertions of mootness—, meanwhile, is plainly beyond the scope of the "affidavit or affidavits" that the Court ordered the Secretary to file to address the Order's enumerated questions.

The issue becomes what to do about the Secretary exceeding the Order's scope. The Petitioners have considered asking this Court to strike the Supplemental Memorandum. No Rule, after all, permits the Secretary to file such a Supplemental Memorandum—much less to present new legal argument in it. What the Rules contemplate instead is a motion. *See* U.S. Vet. App. R. 27(a)(1). The difference between the Secretary presenting new argument in a Supplemental Memorandum versus a motion matters because the Rules permit a party opposing a motion to file a response or opposition within 14 days as a matter of course. *See* U.S. Vet. App. R. 27(b)(1). The Rules do not articulate any such protection, however, when the Secretary presents new argument in an unsolicited "Supplemental Memorandum."

The Petitioners do not consider striking the Supplemental Memorandum to be wholly satisfactory relief. They are proceeding on behalf of a proposed Class that contains thousands of claimants whose timely perfected legacy appeals the Secretary erroneously has closed,

without notice, and as to which the Secretary has been withholding all action on ever since. For some, the Secretary's new response to counsel's December 2020 Freedom of Information Act request suggests, that withholding has been ongoing for more than a decade. *See Solze* Notice, at 3 (Mar. 24, 2022) (breaking down, by year in which the Statement of the Case was issued going back to 2011, the number of appeals that VACOLS indicates have been closed for VACOLS not reporting a timely substantive appeal, and that remain closed); Reply in Support of RCA, Ex. C-14, at AppxC247 & n.3 (describing how a substantial percentage of appeal closures, for VACOLS not reporting a timely substantive appeal, have been erroneous).

What is more, many of the appeals' original claimants have died. Others are dying. Still others are in danger of dying before VA, at long last, reactivates and adjudicates the appeals. The Petitioners believe that striking the Supplemental Memorandum would encourage only new filings from the Secretary, with in turn more responses from them, when for the proposed Class members' sake they desire that this case progress to decision now. As a result, what the Petitioners request is not that the Court strike the Supplemental Memorandum. They instead have prepared a Response and request simply that the Court grant them leave to file it.

The Petitioners respectfully submit that Fair Process and Due Process require that, when as here the Secretary presents late, unsolicited, new argument that, if accepted, would be dispositive of a claimant's prior filing, the Court permit the filing's proponent a meaningful opportunity to respond. They also respectfully submit that this is particularly strongly the case in the context of a putative class action, where the Secretary is seeking an RCA's dismissal; and all the more so in a putative class action advocating for U.S. military veterans or survivors, a group whom Congress specially favors and for whose benefit it built this claim system.

Fair Process. Claimants "have a right to fair process in the development and adjudication of their claims and appeals before VA." *Bryant v. Wilkie*, 33 Vet. App. 43, 46 (2020) (citing *Smith v. Wilkie*, 32 Vet. App. 332, 337 (2020); *Austin v. Brown*, 6 Vet. App. 547, 551–52 (1994); *Thurber v. Brown*, 5 Vet. App. 119, 122–26 (1993)). "This non-constitutional right stems, in part, from the nature of the nonadversarial VA benefits adjudication system, which 'is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process.'" *Id.* (quoting *Thurber*, 5 Vet. App. at 123; citing *Prickett v. Nicholson*, 20 Vet. App. 370, 382 (2006)).

Fair Process also protects claimants before this Court—including when the Court is contemplating dismissal. *See Winters v. Gober*, 219 F.3d 1375, 1376–80 (Fed. Cir. 2000). In *Winters*, the en banc Court had ordered an appeal dismissed, for failure to state a well-grounded claim, due to a change in law during the appeal's pendency. *See id.* at 1376–78. The U.S. Court of Appeals for the Federal Circuit vacated this Court's decision and remanded partly due to "fundamental principles of fairness." *Id.* at 1379. This Court's dismissal, the Federal Circuit explained, had "deprived [the claimant] of the opportunity to present evidence on the well grounded claim issue before the original triers of fact" and also deprived the claimant of VA notice and an opportunity to respond. *Id.* at 1379–80. It held the dismissal to be "inconsistent with general principles of fairness, and … particularly unwarranted in view of the fact that 'the character of the veterans' benefits statutes is strongly and uniquely pro-claimant.'" *Id.* at 1380 (quoting *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998)).

Winters not only controls of its own accord, *see, e.g.*, *Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992), this Court has incorporated it into its Fair Process precedent. *See Holliday v. Principi*,

14 Vet. App. 280, 290 (2001), *overruled in part on other grounds*, *Kuzma v. Principi*, 341 F.3d 1327, 1329 (Fed. Cir. 2003).

Here, Fair Process requires permitting the Petitioners an opportunity to respond to the Supplemental Memorandum's new RCA mootness assertions. The Secretary is pursuing the RCA's dismissal—a dispositive action as to it. The Secretary now is doing so on the basis of new facts. The Petitioners view the Secretary's new assertions to be without merit. They seek leave to file the Response to explain why. They further submit that leave is appropriate because the burden to persuade this Court that it has jurisdiction, even through the Secretary's shifting or new assertions, remains the Petitioners'. *See, e.g.*, *Lawrence v. Wilkie*, 33 Vet. App. 158, 161 (2020). Basic notions of fair play and substantial justice require that they receive an opportunity to respond to the Supplemental Memorandum's new RCA mootness assertions.

Additionally, the Petitioners respectfully submit, these circumstances are analogous to VA developing new, assertedly adverse facts after a Statement of the Case or Supplemental Statement of the Case. Fair Process requires the claimant a pre-decisional opportunity to respond to such development. *See Thurber*, 5 Vet. App. at 123–26. They also are analogous to the Board raising a jurisdictional question *sua sponte*. In such circumstances, the claimant also must receive an opportunity to respond. *See Marsh v. West*, 11 Vet. App. 468, 470–71 (1998). Again, an opportunity to respond is all that, through this Motion, the Petitioners seek here.

Due Process. The Constitution's guarantee of Due Process further safeguards the Petitioners and all proposed Class members. *See, e.g.*, *Cushman v. Shinseki*, 576 F.3d 1290, 1296–1300 (Fed. Cir. 2009). In considering Due Process, "courts weigh 'the private interest that will be affected by the official action'; 'the risk of an erroneous deprivation of such interest through

the procedures used[;] … the probable value, if any, of additional or substitute procedural safeguards'; and the Government's interest." *Martinez v. Wilkie*, 31 Vet. App. 170, 179 (2019) (quoting *Mathews v. Eldridge*, 412 U.S. 319, 335 (1976)). As even a brief examination of these factors reveals, Due Process requires permitting the Petitioners to respond regarding the Supplemental Memorandum's approach to mootness.

Substantial Private Interest. The Petitioners' interest, on behalf of the proposed Class's thousands of members, in defending against the RCA's dismissal is substantial. The issue, to repeat, is dispositive. What is more, given the Secretary's continuing refusal to notify the proposed Class members when it closes (or that it has closed) their appeals through an automated system, many proposed Class members do not know that VA affirmatively has closed their timely perfected legacy appeals and is withholding all action on them instead of the claimant still being in a position of simply awaiting the Board's decision. Meanwhile, the Secretary's approach to identify and cure these errors has been (and remains, as the Petitioners would argue in the Response) at best haphazard and directed to only a subset of the proposed Class. The Secretary's attempt to dismiss the RCA for mootness, if successful, thus as a practical matter likely would bar many claimants with a timely perfected legacy appeal from—due to the Secretary's administrative error in closing the appeals, as well as what the Petitioners argue is an unlawful deprivation of notice—any relief at all for quite some time, if not forever.

Substantial Risk of Error. To repeat, the Petitioners consider the Secretary's assertions of the RCA's supposed mootness to be without merit. For mootness as of March 10, 2022, this is so for the reasons that the Petitioners have addressed in their prior filings and at oral argument. For mootness in the light of the Secretary's actions since March 10, 2022, this is so

for reasons that the Petitioners desire to address in the Response. The Petitioners hope that, even if the Court denies leave to file the Response, the Court would reject the Secretary's meritless arguments. Even so, the Petitioners respectfully submit that Due Process requires providing them an opportunity to file the Response to help aid the Court in avoiding the RCA mootness errors that the Secretary, through the Supplemental Memorandum, is now inviting.

The Filing's Value Proposition. The Petitioners' request here is modest. In the unsolicited Supplemental Memorandum, the Secretary has made a new assertion of RCA mootness. The Petitioners merely ask leave to file a Response addressing why the Court should reject that new assertion—that is, to be heard on this issue that the Secretary newly has raised.

This right is of tremendous importance to the proposed Class's members. To repeat, the Secretary seeks the RCA's dismissal. The issue is both dispositive and opposed. If the Court were to dismiss the RCA as moot—notwithstanding that many of the proposed Class members remain with no relief whatsoever and that the remainder now have only what the Secretary describes as a "plan" (which characterization the Petitioners would dispute in the Response), with no notice that would address the Petitioners' notice-related complaints on behalf of the proposed Class—, such a dismissal likely as a practical matter would bar many proposed Class members from receiving any relief at all for quite some time, if not forever.

The Government's Interest. The government's interest "is not that it shall win, but rather that justice shall be done." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). Here, that means permitting the Petitioners an opportunity to respond to the new assertions of mootness that the Secretary placed in the Supplemental Memorandum beyond the Order's scope.

Finally, irrespective of whether Fair Process or Due Process *requires* that the Petitioners receive leave to file the Response, the Petitioners respectfully request that the Court through Rule 2 or its inherent authority suspend its Rules' silence as to permitting a response to a Supplemental Memorandum and, whether through the mechanism of suspending the Rules' silence or through its inherent authority, grant leave for the Petitioners to file the Response. If the Court were to do so, the Petitioners respectfully submit that it would not need to reach the Fair Process or Due Process issues that the Petitioners cautiously have addressed above.

The Secretary has notified the Petitioners, all through counsel, that the Secretary takes no position on this Motion for Leave and reserves the right to file a written response.

CONCLUSION

On March 10, 2022, the Court required the Secretary to file "an affidavit or affidavits" addressing certain enumerated matters. The Secretary filed a Supplemental Memorandum in which the Secretary newly asserts, based on actions that VA took the liberty of performing since March 10, 2022, with respect to a subset of proposed Class, that the RCA is now moot.

The Petitioners respectfully submit, for all of the above reasons, that the Court should grant leave to file the Response, which they are submitting simultaneously with this Motion for Leave and which addresses the Supplemental Memorandum's new assertions as to the RCA presenting a live case or controversy. They cautiously add that they also stand by all of the arguments that they have presented in this case.

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Respectfully submitted,

/s/ John D. Niles
John D. Niles
Kenneth H. Dojaquez
Carpenter Chartered
P.O. Box 2099
Topeka, KS 66601
785-357-5251
john@carpenterchartered.com
kenny@carpenterchartered.com

Counsel for Petitioners