IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

BURTON R. RIPLEY, and **LEA-ANN BUTLER,** individually and on behalf of others similarly situated, **Petitioners,** v. **DENIS MCDONOUGH,** in his capacity as Secretary of Veterans Affairs, **Respondent.**	)))))))))))))	Vet. App. No. 21-947

PETITIONERS' OPPOSITION TO MOTION
TO DISMISS AMENDED PETITION FOR LACK OF STANDING

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INTRODUCTION

The Secretary's attack on the standing of Petitioners Lea-Ann Butler and Burton Ripley boils down to asserting that unless a petitioner has failed to apply within one year of the intent to file, there has been—at best—a "procedural" violation without concrete harm. Not so. Petitioners (and the class) suffer Article III injury when the Secretary fails to furnish benefits applications he is required by statute and regulation to provide. By instead requiring Petitioners to assume a burden not contemplated by statute to affirmatively seek out the application, he has caused concrete harm. Petitioners need not show that they will lose their effective date to have Article III standing.

The Secretary's attempt to moot Petitioners' claims by mailing them application forms after they filed suit also fails. Petitioners had standing to challenge the Secretary's practices when they filed the request for class certification, and they maintain a continuing legal interest in representing the class. The well-established "picking off" and "inherently transitory" exceptions to mootness also allow the case to proceed so that Petitioners can represent the class. Accordingly, the Secretary's motion to dismiss should be denied.

I. Petitioners Have Standing To Pursue Their Claims.

The Secretary contends that Ms. Butler and Mr. Ripley lack standing because they assert "nothing more than a purely legal or procedural violation 'divorced from any concrete harm.'" Mot. to Dismiss Am. Pet. for Lack of Standing ("Mot.") at 9, *Murray v. McDonough*, No. 21-947 (Vet. App. Dec. 21, 2021). Not so. Petitioners have standing to challenge the Secretary's past failure to furnish them and other class members with forms as required by statute, which harmed them by requiring them to take further action to seek

out their forms. They also have standing to pursue a forward-looking injunction to remove the hurdle that the Secretary unlawfully has imposed to their ability to access benefits.

A. The Secretary Injured Petitioners By Failing To Provide Them Forms.

Contrary to the Secretary's arguments, his failure to provide forms to Petitioners and other class members causes a concrete injury, not just a bare procedural harm. A harm is concrete if it is real or "actually exist[s]." *Spokeo, Inc. v Robins*, 578 U.S. 330, 340 (2016). While an injury is not concrete where it causes no specific harm beyond a bare procedural statutory violation, this does not mean that procedural injuries can never be concrete. *See id.* at 341–42. Nor does it mean that a petitioner must suffer the type of harm that the Secretary contends must occur; namely, missing the one-year deadline. Instead, where a defendant's removal of a statutorily required mechanism for accessing a benefit forces a claimant to take action she would not need to otherwise take, concrete injury results.

Animal Legal Defense Fund v. United States Department of Agriculture, 935 F.3d 858 (9th Cir. 2019) ("*ALDF*"), is illustrative. There, the agency failed to comply with the Freedom of Information Act ("FOIA") requirement to post certain documents in "virtual reading rooms." *See id.* at 866–67. The documents also could be obtained by a written FOIA request, but plaintiffs wished to view the documents via the reading room without going through the FOIA request process. *Id.* at 864–65. The court held that the plaintiffs had standing to force the agency to comply with the requirement because the agency had deprived plaintiffs of a specific mechanism for accessing information. *See id.* at 866–67.

Just as the plaintiffs in *ALDF* had standing to challenge the agency's withdrawal of

a statutorily required mechanism for accessing documents, Petitioners have standing to challenge the Secretary's refusal to furnish them forms. Instead of furnishing Petitioners and class members with the forms he is statutorily required to provide, the Secretary mailed a template letter describing the location of electronic forms on VA's website. This amounts to concrete injury sufficient to support Article III standing because it forced Petitioners to engage in affirmative action to obtain the forms—actions that would not be necessary if the Secretary had complied with his statutory duties. *See id.*[1]

Rosinski v. Wilkie (*Rosinski II*), 31 Vet. App. 1 (2019), lends further support. There, an attorney in private practice challenged a VA policy that allowed veterans service organizations to review ratings decisions "prior to promulgation," but did not allow private attorneys to do the same. *Id.* at 4–5. Although the private attorney had access to "other, post-promulgation methods for error correction," the Court held that he had standing to seek mandamus relief because these alternatives did "not negate the fact that he is denied *this* avenue to do so or excuse the extra burdens imposed by those alternate methods." *Id.* at 8–9 (emphasis in original). So too here. Congress promised Petitioners a particular process for receiving an application form so that they can submit a claim for benefits; the Secretary does not honor that process, instead forcing Petitioners to pursue an alternate

[1] That the Secretary sent Petitioners paper forms after they joined the lawsuit is irrelevant to whether Petitioners have standing. The proper point in time for analyzing Petitioners' standing is at the time they joined the lawsuit. *Cf. Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed."); *see also Sealant Sys. Int'l, Inc. v. TEK Global, S.R.L.*, 616 F. App'x 987, 989 (Fed. Cir. 2015) (standing is evaluated as of the time a claim is asserted).

path (and bear its attendant extra burdens) to obtain the benefits application. That suffices to show standing.

B. The Secretary's Practice Creates A Procedural Hurdle To Claimants' Ability To Access Benefits.

Petitioners also have standing to seek prospective injunctive relief for the independent reason that the Secretary's conduct creates an imminent risk to claimants' ability to access benefits. Contrary to the Secretary's assertions, Mot. at 10-11, Petitioners need not show that they would ultimately be deprived of benefits to establish standing for prospective injunctive relief. *See MedImmune, Inc. v. Genentech*, 549 U.S. 118, 134 (2007) (a rule that parties must wait to be injured to pursue forward-looking relief regarding "actively contested legal rights finds no support in Article III"). For this type of claim, parties need only show that an invasion of their concrete right is "sufficiently imminent." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021). In the context of a procedural right, imminence can be shown through a "causal relationship." *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014). The plaintiff "need not demonstrate that but for the procedural violation the agency action would have been different." *Id.*; *see also Env't Def. Fund v. Fed. Energy Regulatory Comm'n*, 2 F.4th 953, 968 (D.C. Cir. 2021) (when considering a procedural right, "'courts relax the normal standards of redressability and imminence'").[2]

[2] To the extent the Secretary challenges the ripeness of Petitioners' claims, *see* Mot. at 8 n.17, his arguments should be evaluated under a standing analysis, *see MedImmune*, 549 U.S. at 128 n.8 (ripeness and standing "boil[ed] down to the same question" in a case involving future harm). The Secretary's argument that Petitioners' claims are unripe because there is still time for him to mail them paper forms before their one-year window

The Secretary's practice creates a procedural hurdle to claimants' ability to access benefits. As Congress recognized in enacting the furnishing requirement, claimants cannot submit applications without access to application forms. 38 U.S.C. § 5102(a) (the Secretary shall furnish forms with "all instructions and forms necessary to apply for" benefits). Moreover, electronic forms exacerbate the concrete harm imposed on the roughly 27% of Americans 65 years and older who do not use the Internet in any location and over 26% who do not have anyone in the household who uses the Internet. *See Digital Nation Data Explorer*, Nat'l Telecomms. & Info. Admin. (May 11, 2022), https://tinyurl.com/yahezrd2 (results from a survey last conducted in November 2021).

The Secretary himself recognized that modernization efforts should not come at the expense of claimants who lacked access to or the ability to use electronic forms. Originally, the Secretary proposed amendments to § 3.155 that would have given more favorable treatment to benefits applications submitted electronically. After receiving public comment, the Secretary retreated from that position, acknowledging the large population of claimants who were not able or prepared to use the Internet to submit benefits applications and recognizing the need to protect their rights too. 79 Fed. Reg. 57660, 57664 (Sept. 25, 2014); *see* Am. Pet. 6–7 & n.4. The Secretary's practice imposes the greatest

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to submit a benefits application expires is incorrect. Here, the Secretary had already failed to furnish forms to Petitioners when they joined the lawsuit, thus imposing a burden on them to take affirmative action to obtain their forms and creating a concrete injury. The Secretary further acknowledges that his policy of sending a letter with instructions to access application forms online instead of properly furnishing application forms is a current "practice." *E.g.*, Mot. at 12 n.22, 15–16; Resp. to Am. Pet. & Am. Request for Class Certification at 17–18, *Murray v. McDonough*, No. 21-947 (Vet. App. Feb. 25, 2022). Petitioners thus face the risk of imminent harm.

imminent harm to the very people that he has stated he must protect. As a result, Petitioners have standing, and the Secretary's motion should be denied.

II. The Case Is Not Moot.

The Secretary also argues that this case should be dismissed as moot because the Secretary mailed Petitioners paper application forms on December 16, 2021—long after receipt of their intent to file forms but just six days after Petitioners joined this lawsuit. *See* Mot. 13–16. But the law is well established: Petitioners can serve as class representatives—and pursue claims on behalf of the class—even if their individual claims become moot. First, Petitioners maintain a personal interest in representing the class, and that issue remains a live controversy. Second, the "picking off" exception to mootness protects against a defendant's attempt to avoid litigation by mooting named plaintiffs' claims. Third, the "inherently transitory" exception to mootness allows for the adjudication of claims that are likely to expire before a court can rule.

A. Petitioners Retain An Interest In Serving As Class Representatives.

The Secretary contends that Petitioners no longer have a personal stake in this case because he mailed them paper applications after this lawsuit was filed. Mot. at 14. But as the Third Circuit has recognized, "[s]o long as a class representative has a live claim at the time he moves for class certification, neither a pending motion nor a certified class action need be dismissed." *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135 (3d Cir. 2000). "A plaintiff who brings a class action presents two separate issues for judicial resolution": (1) the individual's claim on the merits, and (2) "the claim that he is entitled to represent a class." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980).

Even if the first interest becomes moot, the plaintiff "has a continuing legal right to represent a class," which gives him "a surviving personal stake in the determination of whether he can act as a class representative." *Rosetti v. Shalala*, 12 F.3d 1216, 1226 (3d Cir. 1993).

Petitioners had a live claim both at the time they sought to join the class certification motion filed on November 18, 2021, and when the Court granted that request on December 10, 2021. *See* Part I, *supra*. That renders the ongoing class dispute a live controversy suitable for judicial resolution. *See Geraghty*, 445 U.S. at 403 (recognizing that a plaintiff's claim that he should represent the class can "remain[] as a concrete, sharply presented issue" even if the plaintiff's individual claims expire).

B. The "Picking Off" Exception To Mootness Applies.

The "picking off" exception to mootness also precludes dismissal of the case. That exception "prevent[s] defendants from strategically avoiding litigation by settling or buying off individual named plaintiffs in a way that 'would be contrary to sound judicial administration.'" *Unan v. Lyon*, 853 F.3d 279, 285 (6th Cir. 2017) (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980)); *see also Richardson v. Bledsoe*, 829 F.3d 273, 279–86 (3d Cir. 2016) (reaffirming validity of "picking off" exception); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (tactic of "picking off" plaintiffs rendered their claims "acutely susceptible to mootness" and justified applying exception to mootness); *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546–47 (7th Cir. 2003) (satisfaction of the named plaintiff's claim does not moot the claim where a motion for class certification has been filed).

As this Court has recognized, the Secretary has a "history of mooting petitions before judicial resolution," which makes claims against him "particularly susceptible to mootness." *Godsey v. Wilkie*, 31 Vet. App. 207, 219–20 (2019). The Secretary's actions here—sending paper applications to Ms. Butler and Mr. Ripley just days after they joined the suit and then arguing that their claims are moot—underscores that individual claims are likely to end before the Court adjudicates class certification and the merits of the case.

The Secretary asserts that mailing Petitioners Butler and Ripley their forms days after they joined this suit was not a "tactic . . . to avoid judicial scrutiny of [VA's] practices." Mot. at 15. According to the Secretary, this mailing was "consistent with [VA's] practices" of mailing paper applications after receiving a communication (in this case, this lawsuit) that "expressed a need or desire for a paper application." *Id.* But the record in this case refutes the alleged existence of this practice. The late Mrs. Murray, like Ms. Butler and Mr. Ripley, submitted an intent to file form, received in response a template letter without a paper application, and then filed this lawsuit. Mot. at 2, 7, 11 n.20. The Secretary did not mail a paper application form to her, forcing Mrs. Murray to take affirmative action to obtain an application after filing suit and shortly before her one-year deadline. *See id.*

Thus, the "picking off" exception to mootness applies here. In *Unan*, for example, the defendant swiftly resolved plaintiffs' individual claims soon after suit was filed, without any accompanying systemic solution. The Sixth Circuit held that the timing of the defendant's actions "supports a finding that defendant was strategically seeking to avoid litigation by selectively resolving the claims of any potential representatives as soon as

they became known to defendant." 853 F.3d at 286. The same is true here. The Secretary cannot avoid systemic changes that would benefit the class by mailing applications to individual class representatives when they file suit.

C. The Inherently Transitory Exception to Mootness Applies.

This case also should not be dismissed as moot because it falls within the well-established exception for "inherently transitory" claims. *See Geraghty*, 445 U.S. at 399; *see also Godsey*, 31 Vet. App. at 218–20. Under this exception to mootness, extinguishment of a plaintiff's individual claim will not moot the case if (1) "some class members will retain a live claim at every stage of litigation," and (2) "the individual claim might end before the district court has a reasonable amount of time to decide class certification." *J.D. v. Azar*, 925 F.3d 1291, 1311 (D.C. Cir. 2019); *accord Monk v. Shulkin* (*Monk II*), 855 F.3d 1312, 1317 (Fed. Cir. 2017). Both criteria are met here.

Until the Secretary changes his practice, class members will retain live claims. A claimant who submits an intent to file orally or by mail but receives only a form letter in response will have an active claim, and their claims persist even if the Secretary mails paper forms to other class members.

Class members' claims also will not "persist long enough for [the Court] to adjudicate class certification." *J.D.*, 925 F.3d at 1310. Courts routinely hold that claims expiring in less than a year are inherently transitory. *See, e.g.*, *Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021) ("The challenged action . . . is capped at a period of one year, which is too short for the judicial review to 'run its course.'"); *McNeil v. Cmty. Prob. Servs., LLC*, 2021 WL 366776, at *9 (M.D. Tenn. Feb.

3, 2021) (applying inherently transitory exception to probation periods of a year or less).

Petitioners have one year from submitting an intent to file to complete an application for benefits before they lose their effective date. There is little certainty that the Court would adjudicate class certification issues in a case like this by the time this one-year deadline passed—indeed, this case has been pending for more than one year. *See, e.g.*, *Monk v. Wilkie* (*Monk III*), 30 Vet. App. 167 (2018) (class certification not resolved until approximately 13 months after remand from Federal Circuit); *Skaar v. Wilkie*, 32 Vet. App. 156 (2019) (class certification not resolved until approximately two years after filing).

As the Second Circuit has explained, the inherently transitory exception protects against a plaintiff needing "to forgo remedies to which she is entitled in order to seek broader remedies for the [agency's] alleged derelictions." *Salazar v. King*, 822 F.3d 61, 75 (2d Cir. 2016). Otherwise, the Court would be expected to "acquiesce in conduct by which the [agency] disregards [its] congressional command." *Id.* This case presents "precisely the sort of situation the inherently transitory exception is designed to correct," *id.*, and the Secretary should not be allowed to escape judgment for ignoring a statutory and regulatory requirement to furnish the forms required for claimants to apply for benefits.

CONCLUSION

Petitioners respectfully ask the Court to deny the Secretary's motion to dismiss.

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Respectfully submitted,

Kathryn E. Cahoy

Barton F. Stichman
NATIONAL VETERANS LEGAL SERVICES PROGRAM
1600 K Street N.W., Suite 500
Washington, D.C. 20006-2833
(202) 621-5677

Kathryn E. Cahoy
COVINGTON & BURLING LLP
3000 El Camino Real, 10th Floor
5 Palo Alto Square
Palo Alto, CA 94306-2112
(650) 632-4700

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2022, the foregoing Opposition was filed with the Court by submitting the document through the Court's electronic filing system ("CM/ECF") consistent with the Court's E-Rule 2(c). The resulting notice of docket activity "constitutes service of the filed document on all CM/ECF Users in [the] case," including the Secretary, pursuant to the Court's E-Rule 6. No party to this case is CM/ECF-exempt.

Kathryn E. Cahoy
Counsel for Petitioners