IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

VICTOR B. SKAAR,	)	
	)	
Appellant,	)	
	)	Vet. App. No. 17-2574
v.	)	
	)	
PETER O'ROURKE,	)	
Acting Secretary of Veterans Affairs,	)	June 20, 2018
	)	
Appellee.	)	

APPELLANT'S RESPONSE TO COURT'S MAY 21, 2018 ORDER

Appellant Victor Skaar respectfully submits this response to the Court's order directing supplemental briefing on issues of class certification.

Introduction

This brief responds to three questions posed by the Court. The first two ask whether the requirements of Federal Rule of Civil Procedure 23(a)(2)–(4) and the Due Process Clause of the Fifth Amendment to the United States Constitution are satisfied with respect to each of two categories of claims within the proposed class definition: (1) already "denied" claims, and (2) those claims that the Secretary of Veterans Affairs ("Secretary" or "VA") "will deny." The third question directs the parties to address the applicability, if any, of *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), with respect to both the "denied" and "will deny" claims.

Appellant's proposed class meets the requirements of Rule 23(a)(2)–(4) and ensures that the due process rights of proposed class members are protected. Although *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) rejected money damages class actions under Fed. R. Civ. P. 23(b)(1) and 23(b)(3), the Supreme Court has long recognized that injunctive relief actions, like this one, are "prime examples" of what the modern class actions rules

were designed to capture, and that Rule 23 "builds on experience, mainly, but not exclusively, in the civil rights field." *Amchem Prod., Inc. v. Windsor*, 521 U.S. at 614 (citations omitted); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011). In such cases, "the intertwined nature of the individual litigants' situations . . . is precisely the reason *to* certify" because "certification alone will ensure the due process protections embedded." William B. Rubenstein, *Newberg on Class Actions* § 4:35 (5th ed. 2018). To the extent that *Amchem* and *Ortiz* address the purpose and nature of class actions, the cases support certification of Appellant's proposed class.

On behalf of himself and members of the proposed class, Appellant respectfully asks this Court to order that: (1) the VA's refusal to recognize Palomares as a radiation-risk activity in 38 C.F.R. § 3.309 violates the Administrative Procedure Act (APA) and the Fifth Amendment; (2) the VA cease using its current dose estimate methodology for Palomares veterans in 38 C.F.R. § 3.311 adjudications; (3) the VA create dose estimate and adjudication procedures that comply with its own regulations, the applicable statutes, and the constitutional guarantees of equal protection and procedural due process, and apply them to all existing and future claims; and (4) the VA review previously denied claims under the revised procedures.

The class relief sought is entirely injunctive in nature; Appellant does not seek monetary damages. Even if the Court grants Appellant's requested injunctions, the Secretary will assess each veteran's eligibility for disability benefits individually according to his condition and service. *See Nehmer v. U.S. Vet. Admin.*, 118 F.R.D. 113, 117–18 (N.D. Cal 1987) (noting that an injunctive class is appropriate where "the class attack on the VA's procedural irregularities is distinct from any individual's attack on their denial of benefits"). If this case were proceeding under the Federal Rules of Civil Procedure, Appellant's proposed class would be certified under 23(b)(2) and would not face the type of intra-class conflicts at issue in *Amchem* and *Ortiz*.

This brief addresses the Court's third question first because of the limited applicability of *Amchem* and *Ortiz* to Appellant's proposed class. Then, Parts II and III demonstrate that Appellant's proposed class meets the requirements of Rule 23(a)(2)–(4) and the Due Process Clause. If Appellant's arguments prevail, class treatment will promote adjudicatory efficiency at this Court, at the Board of Veterans Appeals, and in the Regional Offices, by ensuring that all Palomares disability benefits claims are adjudicated using uniform, scientific procedures. *See* Br. of Pet'rs. at 45–48, *Monk v. Shulkin*, U.S. Vet. App. No. 15-1280 (Feb. 8, 2018) (citing, *inter alia*, Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1649 (2017)). Certification of an injunctive class here is permissible under Fed. R. Civ. P. 23(b)(2) and vindicates Palomares veterans' due process rights by fulfilling Congress's intent that this Court "provid[e] an opportunity for those aggrieved by VA decisions to have such decisions reviewed by a court . . . in order to provide such claimants with fundamental justice." S. REP. NO. 100-418, at 50 (1988).

I. *Amchem* and *Ortiz* support certification of injunctive relief class actions.

The Appellants have moved to certify an injunctive relief class action much like those available under Rule 23(b)(2). Unlike "damages" class actions, injunctive relief class actions do not require the predominance of "common questions of law or fact" affecting the class, or the superiority of the class action vehicle to "fairly and efficiently adjudicat[e] the controversy." Fed. R. Civ. P. 23(b)(3).

Distinguishing money and injunctive relief class actions is critical. Class actions that seek monetary relief require "predominance" and "superiority" analyses, as well as notice and an opportunity to opt out of the class to protect the due process interests of individual class members. In Rule 23(b)(2) injunctive classes, on the other hand, the plaintiffs often seek to enjoin a system-wide policy or practice such that "the relief sought must perforce affect the entire class at once," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. at 361–62. Appellant's requested relief would not vindicate some class members'

rights at the expense of others', unlike in some money damages class actions.

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), which attempted to globally resolve the pending "elephantine mass of asbestos cases" in the federal courts, *Ortiz*, 527 at 815, have limited applicability to Appellant's proposed (b)(2) class. *See, e.g.*, *Professional Firefighters Association of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 646-48 (8th Cir. 2012) (cabining the applicability of *Amchem* and *Ortiz*'s concerns regarding intra-class conflicts to damages, not injunctive, class actions); *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64, 84 (M.D. Tenn. 2004) (limiting the applicability of *Ortiz*'s concern for the due process rights of absent class members to Rule 23(b)(1), which concerned class settlement of monetary damages, not class-wide injunctive relief); *see generally* 1 William B. Rubenstein, *Newberg on Class Actions* § 1:3 (5th ed. 2018) (distinguishing the problems that class types under Rule 23 are designed to address).

In *Amchem*, the plaintiffs sought a class-wide global monetary settlement that would compensate current and future claimants with asbestos-linked illnesses formulaically. Concerned that the compensation scheme proposed by the current group of lead plaintiffs and their steering committee of attorneys could not properly take into account the range of individual circumstances present in each asbestos exposure case, the Court held that class questions did not predominate, and that a legislative solution was necessary. *Amchem*, 521 U.S. at 624-25.

By contrast, the class-wide injunction that Appellant seeks would not infringe upon the VA's individualized adjudicatory procedures. Appellant asks only that this Court order that the methodology applied to the procedures not be arbitrary and capricious. The *Amchem* Court was also concerned that the lead plaintiffs' and steering committees' financial interests conflicted with future claimants' because the proposed settlement included compensation caps and the preclusion of state claims. As a result, the Court held that the proposed class did not meet Rule 23(a)(4)'s adequacy requirement.

Id. at 597. No such concerns are present in this case.

Similarly, in *Ortiz*, a plaintiffs' steering committee sought class-wide global settlement of asbestos-related claims under Rule 23(b)(1)(B)'s limited fund mechanism. The *Ortiz* Court held that the class could not be certified under (b)(1)(B) because the fund at issue was constrained only by the parties' agreement, and the conflicting intra-class financial interests were also not properly addressed. *Ortiz*, 527 U.S. at 821. Central to the *Ortiz* Court's holding was that the class definition at issue was not sufficiently inclusive. In a mandatory limited fund class, class counsel agreed to "exclude what could turn out to be as much as a third of the claimants that negotiators thought might eventually be involved." *Id.* at 854.

Appellant's proposed class extends to all Palomares veterans and thus is sufficiently inclusive. The concerns at issue in *Ortiz* do not apply here. Indeed, *Amchem* expressly embraced injunctive relief class actions against government entities, distinguishing them from the sprawling national damage class action in that case. Recounting the history of the class action rule, the Court in *Wal-Mart* clarified that "the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single class[-]wide order." 564 U.S. at 361. In so doing, it recognized that "civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what (b)(2) is meant to capture." *Id.*

Class-wide injunctions against unlawful policies are different from damage class actions because when a statute or regulation is found invalid—in whole or in part—it is equally invalid with respect to all class members. *See, e.g.*, *Cruz v. Zucker*, 195 F. Supp. 3d 554, 565–66 (S.D.N.Y. 2016) (holding that a facial challenge to a regulation "is the 'glue' holding together plaintiffs' claims as required by *Dukes*: if the ban violates the federal law, each of the claims brought by members of the

[class] will be resolved 'in one stroke.'"). Accordingly, after *Amchem* and *Ortiz*, courts have appropriately continued to certify class actions alleging that the government's policy violated plaintiffs' rights.[1]

Appellant's proposed injunctive relief respects the adjudicatory structure and procedures established by Congress and the VA. Appellant asks only that the procedures operate as required by statute, regulation, and due process. As is shown below, classes certified for such injunctive relief are internally consistent, eliminating the need for the predominance inquiry conducted in *Amchem* and avoiding the intra-class financial conflicts that often arise in mass tort claims settlements, like *Ortiz*.

II. The requirements of Rule 23(a)(2)–(4) and the Due Process Clause are satisfied with regard to the category of class members with "denied" claims.

Appellant's proposed class satisfies the requirements of commonality, typicality, adequacy, and due process with regard to those with "denied" claims as described in the Class Clarification.

A. Rule 23(a)(2): Commonality

The proposed class—including all those members whose claims have been "denied," *see* Class Clarification—satisfies the commonality requirement under Rule 23(a)(2). Courts have construed this requirement permissively. *See Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1019 (9th Cir. 1998) (noting that "the existence of shared legal issues with divergent factual predicates" is sufficient for commonality under Rule 23(a)(2)). Members whose claims the VA has denied at each level suffer the same

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[1] *See, e.g.*, *Murphy v. Piper*, No. CV 16-2623, 2017 WL 4355970, at *10 (D. Minn. Sept. 29, 2017) ("Plaintiffs' due process claims are capable of [c]lass[-]wide resolution because the Court can determine with respect to the class as a whole whether Defendant is fulfilling her statutory obligation to ensure . . . adequate notice and opportunity for a hearing"); *Sourovelis v. City of Philadelphia*, 320 F.R.D. 12, 22 (E.D. Pa. 2017) (certifying class challenging Philadelphia civil forfeiture rules that deprived parties of procedural due process); *K.W. ex rel. D.W. v. Armstrong*, 298 F.R.D. 479, 486 (D. Idaho 2014), *aff'd* 789 F.3d 962 (9th Cir. 2015) (certifying class of Medicaid recipients alleging procedural due process claims); *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1203 (N.D. Cal. 2017) ("The procedural due process claim for which A.H. seeks class-wide preliminary injunctive relief is amenable to common answers.").

injuries under the definition of commonality established in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), because they are subject to the same set of unlawful policies.

The VA has arbitrarily and capriciously denied disability benefits resulting from exposure to ionizing radiation at Palomares to members of the proposed class in two ways. First, Palomares' exclusion from 38 C.F.R. § 3.309 denies these class members a presumption of service connection between their injuries and their exposure to radiation. Second, the VA has subjected those whose claims were adjudicated under § 3.311 to an arbitrary and scientifically invalid dose estimate methodology. In so doing, the VA has violated class members' statutory right to be free from arbitrary and capricious agency action under the APA and their constitutional rights to due process and equal protection under the Fifth Amendment. Appellant's Mot. For Class Cert. at ¶ 30.

Commonality is satisfied when the parties challenge a common agency policy or practice. *See, e.g.*, *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014) (finding that "what all members of a putative class [of incarcerated people] have in common is their alleged exposure, as a result of specified statewide [Arizona Department of Corrections'] policies and practices . . . to a substantial risk of serious future harm"); *see also Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015) (holding that a proposed class of incarcerated people subject to either existing skin infections or the threat of future skin infections satisfied commonality in challenging the prison's practice of "deliberate indifference"). All proposed class members are harmed by the arbitrary methodology used to estimate radiation exposure and by the arbitrary exclusion of Palomares from § 3.309, regardless of the reasons given for their individual denials. As of December 2013, at least nineteen veterans' claims for Palomares-related disabilities have been appealed to the Board of Veterans Appeals. Appellee used the scientifically inaccurate methodologies under § 3.311 to adjudicate four of these claims, and denied two claims that

would have been granted were Palomares listed under § 3.309, assuming there were no other disqualifying circumstances. Appellant's Reply Br. in Support of Mot. for Class Cert. at 7, ¶ 2. Further, those whose claims have been denied are not precluded from class certification, as they still share a threat of future harm with all other class members and seek to challenge the procedures used in adjudicating Palomares claims, rather than their individual denials. *See Nehmer*, 118 F.R.D. at 117–18 (recognizing that although "some of the named plaintiffs were denied benefits prior to promulgation of the Dioxin Regulation" they "share the threat of future harm with all other class plaintiffs").

Even if the Court were to find that it does not have jurisdiction over a subsection of denied claims, injunctive relief need only reach a significant number of the proposed class, not every member. *See James v. City of Dallas, Tex.*, 254 F.3d 551, 570 (5th Cir. 2001) ("[T]he commonality test is met when there is at least one issue whose resolution will affect all or a significant number of the putative class members."). Class certification is available even where members of the proposed class are ultimately ineligible to receive the relief sought. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982); Fed. R. Civ. P. 23(b)(2) advisory committee's notes to 1966 amendments (courts may certify injunctive relief classes even when the defendant's actions threaten only "one or a few members of the class, provided it is based on grounds which have general application to the class"). If the Secretary ultimately determines on an individualized basis that veterans are not entitled to the benefits associated with a service connection, such class members are still entitled to have their claims reviewed using a scientifically accurate methodology.

Ultimately, "what matters most to class certification . . . is not the raising of common 'questions'—even in droves—but, rather, the capacity of a class[-]wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (emphasis added); *see*

also 7AA Charles A. Wright et al., *Fed. Prac. & Proc. Civ.* § 1778 (3d ed. 2018) ("When common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis."). Those "requirements are almost automatically satisfied in actions primarily seeking injunctive relief." *Braggs v. Dunn*, 317 F.R.D. 634, 667 (M.D. Ala. 2016) (internal quotations omitted). Richard Nagareda, whom the Supreme Court cited in *Wal-Mart*, agreed. *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)).[2]

Here, the Court can resolve each question of law presented at once for all members of the proposed class by granting or denying injunctive relief. *See Nehmer*, 118 F.R.D. at 122 (holding that the court had the power to resolve class issues before it and that "a remand to the agency is not necessary for developing an adequate record").

B. Rule 23(a)(3): Typicality

Appellant's claims meet the typicality requirement of Rule 23(a)(3) with respect to those with "denied" claims. Typicality is met where "the named representative's claims share the same essential characteristics as the claims of the class at large," 1 William B. Rubenstein, *Newberg on Class Actions* § 3:29 (5th ed., 2018), even where the claims of other class members are not identical to that of the named representative, *see, e.g.*, *Hanlon*, 150 F. 3d at 1019 (noting that "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members").

[2] Nagareda, a reporter for the American Law Institute's *Principles of the Law of Aggregate Litigation*, wrote: "[I]n litigation against governmental entities . . . the generally applicable nature of the policy or practice typically means that the defendant government will be in a position, as a practical matter, either to maintain or discontinue the disputed policy or practice as a whole, not to afford relief therefrom only to the named plaintiff." *Principles of the Law of Aggregate Litig.* § 2.04 cmt. a.

Appellant is typical of the proposed class for two reasons. First, because access to benefits such as the VA's Ionizing Radiation Registry ("IRR") (providing certain health screening benefits to those who participated in radiation-risk activities) and medical expenses are dependent on the inclusion of Palomares as a radiation-risk activity under § 3.309. Palomares' exclusion renders Appellant, like all other class members, unable to access such benefits. Appellant's Reply Br. in Supp. of Mot. for Class Cert. at 9, ¶ 3; *see also Wal-Mart*, 564 U.S. at 348–49. Second, all members of the proposed class, like Appellant, have had or may develop conditions that might be found to be radiogenic under § 3.311(b)(2), but whose service connection is not presumptive under § 3.309. The claims of all class members are subject to the same flawed methodologies under § 3.311(b), meeting the requirement of typicality under Rule 23(a)(3).

Appellant is also typical of the proposed class because his interests align with the proposed class members'. As noted above, Appellant shares the same injury as those class members with "denied" claims and the injunctive relief sought by Appellant provides the same relief to all class members. The injuries caused by (1) the Secretary's exclusion of Palomares from § 3.309, prohibiting a presumptive service connection, and (2) the Secretary's arbitrary and scientifically invalid dose estimate methodologies under § 3.311 are typical of all class members because all Palomares veterans' claims are subjected to the same invalid methodology. Because Appellant has been denied disability benefits as a result of the VA's flawed regulations and methodology, he has no conflict of interest with the class and meets the typicality requirement of Rule 23(a)(3).

C. Rule 23(a)(4): Adequacy

Appellant fairly and adequately represents the proposed class members with "denied" claims for reasons similar to those why his claims are typical of the proposed class; as the Supreme Court has noted, the inquiries for commonality, typicality, and adequate representation all "tend to merge."

Wal-Mart, 564 U.S. at 349 n.5; *see also Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 (1982). Appellant seeks injunctive relief that benefits a discrete class of Palomares veterans who share a common interest. Representation is adequate when the interests of the representative party and the substantive interests of members of the proposed class do not conflict. *See Sosna v. Iowa*, 419 U.S. 393, 393 (1975) (holding that the Rule 23(a)(4) requirement of adequate representation was met because it was "unlikely that segments of the class represented would have interests conflicting with appellant's"); Am. Law Inst., *Principles of the Law of Aggregate Litig.* § 2.07(a)(1) (2010) (providing structural definition of adequacy of representation); Wright & Miller § 1768 ("[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status."). Class members' interests in their benefits determinations do not conflict with Appellant's, and the Secretary has not identified any such conflict.

Moreover, the number of members in the proposed class does not exceed 1,600, all of whom are veterans who were exposed to ionizing radiation at Palomares. By contrast, the Court in *Amchem* denied class certification because a single plaintiff sought "to act on behalf of a single giant class" with intra-class conflicts. *Amchem*, 521 U.S. at 595. Thus, the concerns about class members' divergent financial interests that motivated the Supreme Court's holdings in *Amchem* and *Ortiz* are not applicable here because Appellant's proposed class seeks only injunctive relief that benefits the class as a whole. *See* 521 U.S. at 591; 527 U.S. at 815.

The injunctive remedy sought would allow class members whose claims the Secretary has denied to receive the benefit of an adjudication under lawful and scientifically valid procedures. Appellant meets the requirements of adequate representation under Rule 23(a)(4) with respect to the

proposed class of those with "denied" claims.[3]

D. Due Process

In class action litigation, due process concerns typically focus on three issues regarding the rights of absent class members: 1) adequacy of representation; 2) sufficient notice; and 3) the opportunity to opt out of the class. Indeed, when an aggregate action is dispositive of the legal claims of those not present, it is the court's responsibility to ensure that absent class members' interests are fairly represented. *See Hansberry v. Lee*, 311 U.S. 32 (1940) (recognizing the need for adequate representation in aggregate litigation). In cases "wholly or predominately for money judgments," the Supreme Court has held that due process *requires* all three of the above elements to permit the use of the class action mechanism. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). However, where the plaintiff seeks only declaratory or injunctive relief on behalf of the class, such as in this case, notice and opt-out are discretionary tools of the court and not required elements of class certification. 2 William B. Rubenstein, *Newberg on Class Actions* § 4:36 (5th ed. 2018). The injunctive relief Appellant seeks will affect absent class members regardless of their participation, and certifying the proposed class protects class members' due process rights because the class action vehicle guarantees that absent class members' interests will be adequately represented. *See Hansberry*, 311 U.S. at

[3] Appellant's counsel are adequate legal representatives for the proposed class. Appellant's counsel are qualified and experienced in litigating class actions, both in this Court and in federal district court. Mot. For Class Cert. at ¶ 36–37; *see also* Br. of Pet'r. at 30–33, *Monk v. Shulkin*, U.S. Vet. App. No. 15-1280 (Jan. 24, 2018) (detailing qualifications). Moreover, unlike in *Amchem* and *Ortiz*, Appellant's counsel in this case do not stand to profit financially if Appellant prevails in his class claims. The Veterans Legal Services Clinic is part of Yale University, a not-for-profit organization, and receives no compensation from its clients. *See* Retainer Agreement, filed Aug. 29, 2017. Therefore, Appellant's counsel's interests are not misaligned with those of Appellant or members of the proposed class.

40; *Laumann v. Nat'l Hockey League*, 105 F. Supp. 3d 384, 408 (S.D.N.Y. 2015) ("[I]n [23](b)(2) situations, an individual litigant's case is likely to have an impact on similarly situated parties, which means that certification [likely] helps the absent parties, because it guarantee[s] that their interests will be adequately represented.") (internal quotation marks omitted).

Similarly, injunctive class actions make notice and opt-out rights optional because the injunctive remedy is mandatory and benefits all class members, thus meeting the requirements of the Due Process Clause of the Fifth Amendment. *Wal-Mart*, 564 U.S. at 363. Notice at certification, although permitted in (b)(2) classes by court order, generally "has no purpose when the class is mandatory." *Id.*; *see also* Fed. R. Civ. P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (2), the court *may* direct appropriate notice to the class.") (emphasis added). However, if a settlement is imminent, Rule 23(e) *requires* that (b)(2) class members be notified of the proposed settlement. Fed. R. Civ. P. 23(e)(1). At the settlement stage, notice is mandatory even in 23(b)(2) class actions to ensure that absent class members have an opportunity to voice any concerns before the final judgment is rendered.

These procedural mechanisms confirm the propriety of class certification in the instant case. Without class certification, the rights of absent (non)class members would be effectively disposed of *without* any opportunity to participate. Appellant's motion for class certification increases the representation of absent class members through notice and participation upon settlement. Rubenstein, *Newberg on Class Actions* § 4:35 ("the intertwined nature of the individual litigants' situations—is precisely the reason *to* certify" because "certification alone will ensure the due process protections embedded in Rule 23").

Finally, opting out of a Rule 23(b)(2) class is often impracticable because of the all-or-nothing nature of the injunction sought. 2 William B. Rubenstein, *Newberg on Class Actions* § 4:36 (5th ed.

2018). However, proposed class members who might secure an opportunity for reconsideration of their "denied" claims through this proposed class action should be notified of that opportunity, but should not be required to seize it. These claimants would necessarily be affected by the injunction remedying the procedural deficiencies in 38 C.F.R. §§ 3.309 and 3.311 but the option to pursue their individual claim would remain within each claimant's control. Members of the proposed class are readily identifiable, and will voluntarily identify themselves by choosing to have their claims re-adjudicated. *See Nehmer*, 118 F.R.D. at 125. Because the Appellant adequately represents the interests of absent class members for whom this Court can order appropriate notice and opt-out rights pursuant to the Rule 23 model, due process is both satisfied *and* bolstered by certifying Appellant's requested class.

III. The requirements of Fed. R. Civ. P. 23(a)(2)-(4) and the Due Process Clause are satisfied with regard to members of the proposed class whose claims will be denied.

Appellant's proposed class satisfies the requirements of commonality, typicality, adequacy, and due process with regard to Palomares veterans who may file disability benefits claims in the future, or those whose pending claims or appeals the Secretary has not yet denied.[4]

[4] Undersigned counsel are aware of at least three Palomares veterans—members of the proposed "will deny" category—whose claims are pending at the RO or BVA, but have not yet received a final BVA decision. The claims of one Palomares veteran, John R. Fabregas (VA File No. 24172844), were denied by the San Diego RO in May 2018. Mr. Fabregas requested review by a Decision Review Officer and intends to appeal to the BVA if necessary. He has submitted or imminently will submit the exhibits attached to Mr. Skaar's merits brief and which are the subject of the Secretary's motion to strike in this case. *See* Appellee's Opposed Mot. to Strike Appellant's Br. at 9. The claims of the second and third Palomares veterans, Anthony D. Maloni (VA File No. 24268878) and John H. Garman (VA File No. 206322037), were denied by the Boston RO and Reno RO, respectively, and are now on appeal to the BVA. Both Mr. Maloni and Mr. Garman have advised counsel that they will shortly submit in their own cases the same records annexed to Mr. Skaar's merits brief and at issue in the Secretary's motion to strike. As 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.

A. Rule 23(a)(2): Commonality

Palomares veterans whose pending or future claims will be denied satisfy the commonality requirement of Rule 23(a)(2). The questions of law that Appellant raises are common to all Palomares veterans and so satisfy Rule 23(a)(2)'s requirement that class members face the same injuries. *See Wal-Mart*, 564 U.S. at 350. This holds true for claimants with previously denied claims and those whose claims will be denied. Palomares veterans with pending or future claims will face the same injuries unless this Court grants injunctive relief. Commonality exists under a theory of shared threats of future harm where some members of the proposed class have pending claims or have not yet applied for benefits. *See Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) (in proposed (b)(2) class that included those with future claims, noting that "[i]t is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate.").

Just a year before the creation of this Court, the Northern District of California certified a class of veterans after finding they met the commonality requirement because the veterans' future claims would be evaluated using a flawed "Dioxin Regulation" in a way that denied the class members' benefits. *Nehmer v. U.S. Vet. Admin.*, 118 F.R.D. 113, 123 (1987). The court took care to distinguish the common injury the class suffered from the merits of individual claimants: "[t]hough the class claims and individual claims overlap to the extent that both the class and the individuals are asserting that their diseases were caused by exposure to dioxin, the class attack on the VA's procedural irregularities is distinct from any individual's attack on their denial of benefits." *Id.* at 124. The Appellant's proposed class addresses substantively similar procedural issues to the class in *Nehmer*.

The court in *Nehmer* noted that "[c]ourts have frequently certified classes whose members

share a common threat of future harm." *Id.* at 117; *see also Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1074-75 (1983) (upholding certification of class of "all female employees who are enrolled in the [deferred compensation] plan *or will enroll* in the plan in the future" under Rules 23(a) and (b)(2)) (emphasis added); *Vietnam Veterans of America v. C.I.A.*, 2012 WL 4715308, *17 (N.D. Cal. 2012) ("[W]hen a plaintiff pursues injunctive relief to prevent future harm based on a policy or practice generally applicable to the class, it is not required that all of the class members have already been injured by the unlawful policy or practice."); *Thomas City Branch of N.A.A.C.P. v. City of Thomasville School District*, 187 F.R.D. 690, 695 (M.D. Ga. 1999) (approving a "class consisting of all present *and future* parents or guardians of African American children enrolled or eligible to be enrolled within the Thomasville City School District" under Rules 23(a) and 23(b)(2)) (emphasis added); *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 788 (E.D.N.Y. 1980) (granting class certification to a class of "all persons who claim injury from exposure to Agent Orange and their spouses, children, and parents who claim direct or derivative injury therefrom"); *cf.* 7AA Charles A. Wright et al., *Fed. Prac. & Proc. Civ.* § 1775 (3d ed. 2018) ("All the class members need not be aggrieved by or desire to challenge the defendant's conduct in order for some of them to seek relief under Rule 23(b)(2).").

Appellant's proposed class of future claimants face shared threats of adjudication of their application: (1) without the benefit of presumptive exposure and without the benefit of presumptive service connection for listed disabilities because Palomares is not recognized by regulation as a radiation-risk activity, *see* 38 C.F.R. § 3.309; and (2) based on inaccurate methodologies, *see id.* § 3.311. These future claimants face the same threat of injury regardless of the VA's final determination concerning individual benefits. *James*, 254 F. 3d at 570. This shared threat satisfies the commonality requirement of Rule 23(a)(2) with respect to the "will deny" category of Palomares veterans.

B. Rule 23(a)(3): Typicality

As with the "denied" claims, Appellant's claim is typical of the claims of proposed class members in the "will deny" category. Typicality is met when "class representative[s] . . . possess the same interest and suffer the same injury as the class members." *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). Appellant has suffered injury resulting from the exclusion of Palomares from § 3.309 because he is not able to access the IRR and related benefits of a service connection. Members of the class whose claims will be denied in the future will suffer the same injuries without a service connection to Palomares. Therefore, Appellant's claims for relief "share the same essential characteristics" as those of the "will deny" class members. *Newberg* § 3:29. Appellant's claim of injury as a result of inaccurate dose methodology is also typical of all those Palomares veterans who will apply for benefits in the future because the Secretary will calculate their radiation exposure levels based on a flawed methodology. Appellant's interests in adding Palomares to the radiation-risk activity list and changing the methodologies used to calculate radiation exposure levels of Palomares veterans are therefore identical to those of the proposed class.

C. Rule 23(a)(4): Adequacy

Appellant serves as a fair and adequate representative of the class of Palomares veterans whose future claims will be denied. The inquiry into adequacy is twofold: "[t]he 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." *Denney v. Deutsche Bank AG*, 442 F.3d 253, 268 (2d Cir. 2006). In addition, conflicts among subgroups in a class must be "fundamental" to preclude certification due to inadequacy of representation. *See In re Flag Telecom Holdings, Ltd.*, 574 F.3d 29, 35 (2d Cir. 2009). Appellant and those within the proposed class seek the same relief, namely: (1) the

inclusion of Palomares as a radiation-risk activity in § 3.309 and (2) the use of science-based methodologies to calculate the individual levels of exposure by Palomares veterans. To the extent that any conflicts between those with previously denied claims and those with future claims exist, they cannot be deemed "fundamental" because the injuries in each subclass are identical, and the class as a whole would receive the same benefit from injunctive relief. Both parties to this action agree that there are no conflicts of interests between Appellant and the proposed class or within the proposed class itself. Appellee's Resp. to Appellant's Motion for Class Cert. 19–20.

The injunctive relief sought by the Appellant on behalf of the class as a whole is a broad order requiring the VA to adjudicate Palomares-related claims in a procedurally and scientifically valid manner. Appellant seeks only an order that requires the VA to allow class members to re-adjudicate previously denied claims and to adjudicate future claims in a fair way.

D. Due Process

The due process analysis in Part I.D. above applies equally with respect to Palomares veterans with denied claims as to those with future claims. This is because all claims would be entitled to equal procedural rights *whenever* those claims are adjudicated. Unlike the classes at issue in *Amchem* and *Ortiz*, the relief available to future claimants will not be prejudiced by those who receive relief now. *See Ortiz*, 527 U.S. 815; *Amchem*, 521 U.S. 591. Similarly, the optional notice and opt-out right apply equally to both past and future claimants.

Class action suits alleging discrimination provide a useful analogy to Appellant's claims. Indeed, "courts have long relied on [injunctive] class actions to resolve constitutional challenges against government agencies," Maureen Carrol et al., *Government Class Actions After* Jennings v. Rodriguez, HARV. L. REV. BLOG (May 8, 2018), https://blog.harvardlawreview.org/government-class-actions-after-jennings-v-rodriguez. The adoption of Rule 23(b)(2)'s current language was intimately

related to the desegregation efforts after *Brown v. Board of Education*, when "individualized remedial processes . . . succeeded in derailing desegregation class actions." Carrol et al., *Government Class Actions After* Jennings v. Rodriguez; *see also Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954). Due process challenges, in particular, are suited to resolution through the class action because "they often raise generic questions about how system-wide hearing procedures impact a group of people who depend on the government for relief." Carrol et al., *Government Class Actions After* Jennings v. Rodriguez; *see also Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (stating that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions").

Much like the victims of discrimination, members of Appellant's class seek to remedy a generic system-wide procedural error that prevents them from acquiring a benefit to which they are entitled. Instead, the VA has consistently used flawed individualized procedures to incorrectly adjudicate these veterans' claims and deny them due process. Just as in *Brown* and constitutional challenges to agency action generally, Appellant's injunctive relief sought on behalf of the proposed class is particularly well-suited to resolution through the class action mechanism.

The Court's option to require notice and an opt-out right apply equally to both "denied" and "will deny" class members. Because the Palomares veterans are a discrete group of no more than 1,600 members, any potential notice requirement, whether upon court approval of a settlement, entry of a remedial order, or otherwise, is entirely feasible. Just as with veterans whose claims have been denied, future claimants would still retain control of the individual suits and would not be required to seek or re-adjudicate disability benefits. However, should they choose to do so, all Palomares veterans would receive the same procedural treatment under the revised and corrected rules and methods sought by Appellant.

Because Appellant adequately represents the interests of absent class members for whom this Court can order appropriate notice and opt-out rights pursuant to the Rule 23 model, due process is both satisfied and bolstered with respect class members whose claims will be denied by certifying Appellant's requested class.

Conclusion

Appellant Victor Skaar seeks class-wide resolution of both the scientific and legal questions facing all Palomares veterans. Class adjudication will permit this Court to ensure that all Palomares veterans' disability benefits claims are adjudicated according to statute and regulation as quickly and uniformly as possible, in accordance with Congress's purpose in establishing the veterans' benefits system and the U.S. Court of Appeals for Veterans Claims itself. Appellant's proposed class meets the requirements of Rule 23(a)(2)–(4) and the Due Process Clause of the Fifth Amendment, as to both "denied" and "will deny" categories of claims.

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* This brief does not purport to represent the views of Yale Law School, if any.