[ORAL ARGUMENT NOT SCHEDULED]

No. 16-5125

---

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

TINA HEARD, Individually and on behalf of all others similarly situated; PEARLINE SNOW, Individually and on behalf of all others similarly situated; CAROLYN GRAHAM, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

SOCIAL SECURITY ADMINISTRATION; UNITED STATES DEPARTMENT OF THE TREASURY; DISTRICT OF COLUMBIA,

Defendants-Appellees.

---

On Appeal from the United States District Court for the District of Columbia
No. 1:15-cv-00230 (Hon. Reggie B. Walton)

---

# APPELLANTS' INITIAL BRIEF

Jonathan H. Levy
Chinh Q. Le
Jennifer Mezey
Nina Wu
Legal Aid Society of the District of Columbia
1331 H Street, NW, Suite 350
Washington, DC 20005
(202) 628-1161
jlevy@legalaiddc.org

## CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

A. Parties and *Amici*. Plaintiffs-Appellants are Tina Heard, Pearline Snow, and Carolyn Graham, each of whom acts both individually and on behalf of all others similarly situated. Defendants-Appellees are the Social Security Administration, the United States Department of the Treasury, and the District of Columbia. No intervenors or *amici* appeared below or have yet appeared before this Court.

B. Ruling Under Review. The ruling under review is the Order dismissing the Complaint and denying the motion for class certification as moot, entered by the Honorable Reggie B. Walton on March 15, 2016. Deferred Appendix []-[]. The accompanying Memorandum Opinion filed that same date is available at 170 F. Supp. 3d 124 (D.D.C. 2016). Deferred Appendix []-[].

C. Related Cases. This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases currently pending in this Court or in any other court.

# TABLE OF CONTENTS

**Page(s)**

# TABLE OF AUTHORITIES

**Page(s)**

**Cases:**



* Authorities upon which we chiefly rely are marked with asterisks.

**Statutes, Regulations, and Rules:**

**Miscellaneous:**

# GLOSSARY

| | |
|---|---|
| DA | Deferred Appendix |
| POMS | Social Security Administration Program Operations Manual |
| SSA | Social Security Administration |

## INTRODUCTION

The Social Security Administration (SSA), asserting that it had overpaid each Plaintiff decades ago, confiscated their tax refunds through a process known as offset.[1] When Plaintiffs challenged these offsets, SSA did not respond. Plaintiffs then filed a class-action complaint in District Court, asserting that SSA's use of tax refund offsets was unlawful in numerous respects and seeking to represent a large class of individuals whose tax refunds SSA had similarly offset. Less than two weeks later, Plaintiffs filed a motion for class certification. Less than two weeks after that, SSA began refunding the amounts offset from each Plaintiff and purported to waive some or all of each Plaintiff's alleged overpayment. However, SSA did not terminate or disavow any of the offset procedures that the Complaint sought to enjoin. This appeal addresses whether SSA's post-Complaint refunds and waivers – provided solely to the three named plaintiffs and not to the over 50,000 other class members – rendered the class claims moot.

As described in greater detail below, SSA's actions did not moot the Complaint both because those actions did not fully redress the wrongs each Plaintiff alleged individually, and because those actions had no effect on the class claims even if SSA

[1] The offsets at issue here were accomplished through the coordinated actions of the three Defendants but were driven by SSA. For simplicity, this brief often refers to the Defendants collectively as SSA.

succeeded in "picking off" the three Plaintiffs' individual claims. Ultimately, this appeal addresses whether a class-action defendant can avoid its legal duties to a class of thousands by providing relief to just three individuals.

## JURISDICTIONAL STATEMENT

The District Court had jurisdiction under the federal question jurisdiction statute, 28 U.S.C. § 1331. Final judgment was entered on March 15, 2016. A timely notice of appeal was filed on May 11, 2016. *See* Fed. R. App. P. 4(a)(1)(B)(ii). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF ISSUES

1. Whether Plaintiffs' individual claims of unlawful seizure of their tax refunds were mooted when the seized funds were returned even though the Social Security Administration maintained that Plaintiffs still owed overpayment debts that could be collected in the same disputed manner?

2. Whether the alleged mooting of Plaintiffs' individual claims before a ruling on their motion for class certification also mooted the class claims, even though Defendants' actions deprived Plaintiffs of the fair opportunity to show that class certification was warranted?[2]

[2] As ordered by a motions panel of this Court, this brief also addresses the issue raised in Defendants' motions to dismiss: Whether this appeal has become moot because the Social Security Administration temporarily changed the challenged

# STATEMENT OF THE CASE

## I. STATUTORY AND REGULATORY BACKGROUND

### A. Title II of the Social Security Act: Benefits and Overpayments

Title II of the Social Security Act provides old-age, survivor, and disability benefits for workers who cannot work due to age and/or disability as well as specified dependents and survivors of such workers. *See* 20 C.F.R. §§ 404.301-404.374. If a child receives such benefits, SSA pays these benefits to a representative payee. *See id.* § 404.2010.

An "overpayment" occurs when a beneficiary receives a payment in excess of the amount to which the beneficiary was entitled. *Id.* § 404.501(a). A beneficiary (and a representative payee, when there is one) is liable to repay the overpayment. *See id.* § 404.502; SSA Program Operations Manual (POMS) GN 02205.007.[3]

SSA initially determines the existence, amount, and beneficiary liability for any suspected overpayment. 20 C.F.R. § 404.902(j), (k). Immediately after such a determination, SSA mails an overpayment notice to the beneficiary's last known address, specifying how and when the overpayment occurred, its amount, and how

---

policies in a document that has already expired and provided refunds to fewer than 20% of the class members.

[3] All POMS provisions cited in this brief are available online through https://secure.ssa.gov/apps10/poms.nsf/subchapterlist!openview&restricttocategory=02022.

that amount was calculated. *Id.* § 404.904. The notice must also explain the beneficiary's procedural right to contest the claimed overpayment debt by asking SSA to reconsider its decision. *Id.* §§ 404.900(a), 404.904.

A beneficiary may request reconsideration of SSA's initial determination regarding the existence or amount of the overpayment. *Id.* §§ 404.907-404.908. Such a request is decided by an SSA official based upon all available evidence, including any additional evidence submitted by the beneficiary. *Id.* § 404.913(a).

Even when an overpayment exists and SSA has correctly determined its amount, SSA is statutorily barred from attempting to recover from "any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." 42 U.S.C. § 404(b)(1). SSA implements this statutory requirement by allowing beneficiaries to request a "waiver" of the overpayment. Unlike a request for reconsideration, a waiver request does not challenge the existence or amount of the overpayment; instead, it asserts that SSA is barred from recovering the overpayment for the reasons stated in the statute. *See* 20 C.F.R. §§ 404.507-404.509; POMS GN 02250.150. If a beneficiary requests a waiver without submitting SSA's form designed for this purpose (SSA-632), SSA "must follow-up by contacting the beneficiary to see if he or she still wishes to pursue waiver and obtain the necessary documentation for fault, income, expenses, etc." POMS GN 02201.021(C).

A beneficiary might seek both reconsideration and waiver and might even do so at the same time. Because reconsideration – which challenges the validity of the overpayment – logically comes before waiver – which assumes the validity of the overpayment and addresses the equity of recovery from the beneficiary – SSA specifically acknowledges that "[a] formal determination or dismissal of the reconsideration is always necessary prior to making a determination on the waiver request." POMS GN 02201.021(D); *accord* POMS GN 02201.025(B)(4) ("A formal determination on the reconsideration request is always necessary.").

### B. Collection of Alleged Overpayment Debt Through Offset of Income Tax Refunds

When SSA determines that a beneficiary has been overpaid and the overpayment has not been waived, SSA may refer the overpayment to the Treasury Department for collection through offset of an income tax refund due to the beneficiary. 20 C.F.R. § 404.520(b); *see also* 31 C.F.R. § 285.2. Before doing so, SSA must give the beneficiary another opportunity to contest the debt, distinct from, and in addition to, the opportunity to contest SSA's initial determination of the overpayment. 20 C.F.R. § 404.520(a). SSA must send a "written notice of intent" to the beneficiary, which must inform the beneficiary of (1) the amount of the alleged overpayment, (2) the procedures by which the beneficiary may contest the offset, (3) the right to request a waiver, and (4) the right to inspect and copy SSA records.

*Id*. § 404.521. If the beneficiary disputes the existence of the debt or requests a waiver, SSA must review the evidence or hold a hearing, and issue written findings before referring the alleged overpayment to Treasury for offset. *Id*. §§ 404.521(d), 404.522, 404.523(a). After these procedures have been followed, the Treasury Department can offset federal tax refunds and make a referral so that a state (or the District of Columbia) can offset state or local refunds. 31 U.S.C. § 3720A; D.C. Code § 47-143.

## II. FACTUAL BACKGROUND

### A. Plaintiffs' Receipt of Social Security Benefits in the 1970s and 1980s

Plaintiffs received Title II Social Security benefits decades ago. Tina Heard and Carolyn Graham received such benefits from the early 1970s through the early 1980s through representative payees. Deferred Appendix (DA) [], [] (Compl. ¶¶ 39-40, 68-69). Plaintiff Pearline Snow received such benefits on her own behalf and as the representative payee for her two sons in the 1980s. DA [] (Compl. ¶¶ 57-58).

### B. The Offset of Plaintiffs' Tax Refunds in 2014 Without Prior Notice

In February and March of 2014, all three Plaintiffs' tax refunds were offset without notice. When Ms. Heard's anticipated tax refunds totaling $3,144 were offset (and she received nothing), she was forced to borrow money to make payments for rent, her car loan, and her son's college tuition. DA [], [] (Compl. ¶¶ 42, 88); DA [], [] (Heard Decl. ¶¶ 11, 14, 22, 32). She eventually learned that the taxing authorities had appropriated the refunds based on an alleged debt to SSA of $5,294.30. DA []

(Compl. ¶ 42); DA [], [] (Heard Decl. ¶¶ 12, 22). Ms. Snow received notices that her federal and District tax refunds totaling $2,541 had been intercepted based on an alleged debt to SSA. DA [] (Compl. ¶¶ 60, 62). Ms. Graham similarly noticed that her tax refunds were unexpectedly low and later received notices indicating that $488 had been offset from her tax refunds based on an alleged debt to SSA. DA [] (Compl. ¶¶ 73-76).

### C. SSA's Inability to Provide Any Basis for Its Own Debt Claims

In response to Plaintiffs' inquiries, SSA could not provide any basis for its overpayment claims. Ms. Heard filed a formal Request for Reconsideration (Form SSA-561) on February 19, 2014, DA [], []-[] (Heard Decl. ¶ 28 & Exhs. 3-4); DA [] (Stricks Decl. ¶ 16), and tried to get more information from SSA. An SSA representative confirmed that Ms. Heard's tax refunds had been offset but was unable to give her any other information. DA [] (Compl. ¶ 43); DA [] (Heard Decl. ¶ 12). The representative advised Ms. Heard to file a request for reconsideration and a waiver request but warned that a waiver request would constitute an admission of liability. DA [] (Compl. ¶ 43); DA [] (Heard Decl. ¶ 12). When Ms. Heard later visited an SSA field office, she was told that the overpayment had accrued between 1978 and 1981 and totaled $5,583. DA [] (Compl. ¶¶ 49-50); DA [] (Heard Decl. ¶¶ 24-25). The SSA representative was unable to provide any additional information because SSA's system is unable to retrieve information from before 2005. DA [] (Compl. ¶ 51); DA

[] (Heard Decl. ¶ 26). The SSA representative informed Ms. Heard that she needed to file a request for reconsideration and a waiver request. DA [] (Compl. ¶ 52); DA [] (Heard Decl. ¶ 27).

Ms. Snow also called SSA and was informed that no records were available to explain the basis for SSA's debt claim. DA [] (Compl. ¶ 61).

Ms. Graham met with an SSA representative who told her that he was unable to provide any additional information about the basis for the offset and that she could file a request for a hearing. On March 28, 2014, she filed both a request for a hearing and a formal Request for Reconsideration on Form SSA-561. DA [] (Compl. ¶¶ 77-78); DA [] (Stricks Decl. ¶ 7).

### D. SSA's Failure to Respond to Plaintiffs' Requests and the Filing of the Class-Action Complaint

In May 2014, Ms. Heard (now acting through counsel) reiterated her request for reconsideration and asked for reimbursement of the offset amount because she had still not received proper notice regarding the offset. DA [] (Heard Decl. ¶ 32). Ms. Heard received no response from SSA until after this putative class action was filed.

In April 2014, Ms. Snow (also now acting through counsel) requested return of the $2,541 offset from her tax refunds and a cessation to all efforts to collect any alleged overpayment until proper notice was provided. DA [] (Compl. ¶ 64); DA [], [] (Snow Decl. ¶ 20 & Exh. 3). On April 24, 2014, an SSA representative confirmed

that the available records did not show that Ms. Snow was sent an overpayment notice (or any other notice) before her tax refunds were offset and said that he would refer Ms. Snow's case to SSA's Payment Center, which would make a decision on the matter. DA [] (Compl. ¶ 65). Ms. Snow heard nothing more from SSA until a year later, after this putative class action was filed.

In January 2015, Ms. Graham (also now acting through counsel) requested return of her offset tax refunds and a cessation of all efforts to collect any alleged overpayment until proper notice was provided. DA [] (Compl. ¶ 82). SSA responded by stating that it would reimburse Ms. Graham's tax refunds but that the alleged overpayment debt still existed and that "SSA would likely pursue collection of the alleged overpayment in the future." DA [] (Compl. ¶ 84). In fact, Ms. Graham received no reimbursement and heard nothing more from SSA until after this case was filed.

### E. The Complaint and SSA's Response of Refunds and Waivers

Plaintiffs filed the Complaint on February 18, 2015, almost one year after they began to seek the return of the offset funds. The Complaint was filed by the Plaintiffs individually and on behalf of the putative class of all similarly situated individuals against the Social Security Administration, United States Department of the Treasury, and the District of Columbia. DA []-[] (Compl. ¶¶ 4-10).

The Complaint alleged that SSA violated the Constitution and federal statutes

and regulations by referring Plaintiffs' (and other class members') alleged debts to the Treasury Department for tax refund offset (1) without providing them with proper pre-offset notice, DA [], [], [] (Compl. ¶¶ 94, 103, 117), (2) without statutory authority, DA [] (Compl. ¶¶ 128-29), and (3) with no or insufficient supporting rationale, DA [] (Compl. ¶ 138). In addition to asking the court to declare unlawful and set aside the offsets, the Complaint sought prospective injunctions against new tax offset referrals (or tax offsets themselves) and an order holding unlawful and setting aside 20 C.F.R. § 404.520(b) to the extent that it authorizes SSA to refer class members' overpayment debt for tax refund offset. DA [], [], [], [], [] (Compl. ¶¶ 95-97, 104-106, 119-121, 132-134, 139-141). Less than two weeks after filing the Complaint, Plaintiffs filed a motion for class certification, which the court stayed "pending discovery." DA [], [] (District Court Docket Entry 4 & Minute Order of March 13, 2015).

As noted above, for almost a year after Plaintiffs' first request for reimbursement, SSA took no action on their individual requests. But the filing of the class-action Complaint had a sudden and salutary effect. A month after the Complaint was filed, Ms. Heard received a check from the Treasury Department for $3,144. DA [] (Heard Decl. ¶ 34). Shortly after that, however, Ms. Heard received two letters from SSA stating that her debt to SSA totaled $5,583, followed by a letter stating that the agency was waiving only $3,144. DA [] (Heard Decl. ¶¶ 35-38). The letter from SSA contained no explanation for the granting of the waiver or for why the amount waived

was over $2,000 less than the amount of the alleged debt.

One year after requesting return of her offset funds, but just two months after the Complaint was filed, Ms. Snow received two letters from SSA. One (dated April 17, 2015) said that SSA was waiving her overpayment of $5,386.99 – an apparently random amount – while the other (dated three days *later*) said that she would receive a check for $2,541 but "[t]his refund does not eliminate your overpayment." DA [], []-[]-[], []-[] (Snow Decl. ¶¶ 23-25 & Exhs. 4-5). In June 2015, Ms. Snow received a check from the Treasury Department in the amount of $2,541. DA [] (Snow Decl. ¶ 27). The check was not accompanied by any further discussion of the alleged $5,386.99 overpayment debt, and SSA did not rescind or modify its assertion that the overpayment had not been eliminated. DA [] (Snow Decl. ¶ 27).

One month after the Complaint was filed, Ms. Graham received, without explanation, two checks from the Treasury Department totaling $976. DA [] (Graham Decl. ¶¶ 29-30). This refund was double the amount ($488) offset from Ms. Graham's tax refunds and quadruple the alleged overpayment debt ($244). DA []-[] (Stricks Decl. ¶¶ 5-6). The following month, Ms. Graham received a letter from SSA stating, without explanation, that the agency was waiving her $244 overpayment. DA [] (Graham Decl. ¶ 31). Because Ms. Graham had already cashed both checks, believing that one reimbursed her for the tax refund offset and that the other related to underpayments from SSA, SSA concluded that it had made a *new* $488 overpayment

to Ms. Graham (that was not waived) and indicated that the agency might refer that amount for collection – specifically including by tax refund offset – in the future. DA [] (Graham Decl. ¶¶ 29-31); DA [] (Stricks Supplemental Decl. ¶¶ 6-7).

In a declaration prepared for this litigation, SSA explained its post-Complaint actions towards Plaintiffs. It said that it had provided refunds to Ms. Heard and Ms. Graham – even before it waived any overpayments – because it had sent their pre-offset notices to the wrong addresses. DA [], [] (Stricks Decl. ¶¶ 8, 17). It said that it provided a refund to Ms. Snow because it had provided her a waiver. DA [] (Stricks Decl. ¶ 30). And SSA explained that it had provided all three Plaintiffs with waivers "due to a lack of documentation," DA [], [], [] (Stricks Decl. ¶¶ 9, 18, 26), which confirmed the SSA representative's earlier statement to Ms. Heard that SSA's system is unable to retrieve information from before 2005, DA [] (Compl. ¶ 51); DA [] (Heard Decl. ¶ 26).

SSA issued these waivers although none of the Plaintiffs had filed a Form SSA-632, which is SSA's approved form to file such a request. Instead, Ms. Heard and Ms. Graham filed formal Requests for Reconsideration (using Form SSA-561), which were consistent with the *different* remedy that all three Plaintiffs sought – *i.e.*, an SSA determination that they were not liable for the alleged overpayments to begin with because the overpayments did not actually exist or were inadequately documented.

### F. The Motion to Dismiss and the Judgment of Dismissal

On June 4, 2015, the Defendants moved to dismiss the putative class action, claiming that SSA's post-filing payments and waivers rendered the entire class action moot. DA [] (Docket No. 20). Plaintiffs responded that the Complaint was not moot both because Defendants' actions had not eliminated all of the effects of their unlawful conduct and because there remained a case or controversy regarding class certification and classwide relief. In the alternative, Plaintiffs requested discovery into the concededly murky facts regarding the alleged overpayments and the waivers. Plaintiffs cited a number of legal theories under which the class claims survived even if their individual claims had become moot, including the doctrine that defendants cannot moot a putative class action by "picking off" the individual claims of the named class representatives before the court has a chance to rule on class certification.

The District Court granted the motion to dismiss in its entirety (and, apparently as a result of that dismissal, denied the motion for class certification, along with all other pending motions, as moot). DA [] (Op. 2). The court first concluded that Plaintiffs' individual claims were moot. With respect to Ms. Heard, the District Court relied upon a declaration prepared only for litigation, which stated that "as a result of the agency's determination to waive Ms. Heard's overpayment, her current overpayment balance is $0.00." DA [] (Stricks Decl. ¶ 21). The court did so despite noting the "unfortunate" "discrepancies in the SSA's communications sent to [Ms.]

Heard," namely that "SSA identified a $5,294.30 overpayment . . . but only explicitly waived $3,144.00." DA [] (Op. 8-9). The Court applied the same analysis to Ms. Snow. DA [] (Op. 10). The Court acknowledged that Ms. Graham's situation was more complicated because SSA continued to allege that she had an outstanding overpayment balance that could be collected through the disputed tax offset practices. DA []-[] (Op. 10-11). Nonetheless, the court dismissed Ms. Graham's concerns regarding future unlawful tax offset as "purely speculative" and "not yet ripe." DA []-[] (Op. 11-12).

The District Court then addressed whether the putative class claims could continue to exist if the individual claims were moot. The Court acknowledged but did not address several of Plaintiffs' legal theories indicating that the class claims were not moot. DA []-[] (Op. 13-16). Instead, the Court addressed only Defendants' "pick off" of the named plaintiffs, concluding that this case does not "represent[] the kind of 'pick off' tactic that should insulate the case from mootness merely because of a pending motion for class certification," because "the SSA, albeit with some errors, engaged its internal procedures to address the plaintiffs' administrative complaints, corrected its errors with respect to the plaintiffs' tax refund offsets, and determined that a waiver of the plaintiffs' debts was appropriate," by processing their "request[s] for reconsideration of the offsets as . . . implied request[s] for waiver." DA []-[]; (Op. 15-16).

This timely appeal followed.

### G. Post-Judgment Efforts to Moot the Class Action

After this appeal was docketed, SSA alleged that it took further action to attempt to moot this appeal. SSA claimed that it sent notices to many of the members of the putative class, informing them that they "may" be eligible for repayment of the wrongfully confiscated tax refunds. SSA's untested evidence indicated that a majority of the class members to whom notices were sent may not have even received those notices and that fewer than 20% of the individuals to whom notices were sent have actually received reimbursement of their wrongfully offset tax refunds.

## SUMMARY OF ARGUMENT

1. SSA failed to show that Plaintiffs' individual claims were moot. Plaintiffs sought declaratory and injunctive relief from SSA's unlawful tax refund offset practices, and those claims were not moot because those practices were admittedly ongoing. The refunds and waivers SSA provided did not moot Plaintiffs' individual claims because they did not eliminate the possibility that SSA would continue to use the disputed tax refund offset practices against Plaintiffs. SSA admitted that one Plaintiff, Ms. Graham, still had an overpayment that could be collected through the disputed practices, and there was a real dispute regarding whether the other two Plaintiffs had such overpayments. The District Court's acceptance of SSA's litigation position that these overpayments did not exist was error in light of SSA's own contrary

statements. Moreover, given SSA's history of alleging overpayments without any supporting documentation, all three Plaintiffs were also at risk of further SSA claims of overpayments collectable through tax refund offset.

2. SSA also failed to show that the class claims were moot. As this Court recognized in *DL v. District of Columbia*, 860 F.3d 713, 722 (D.C. Cir. 2017), special rules apply to mootness in the class-action context in order to further the purposes of class actions, most notably to provide "a convenient and economical means for disposing of similar lawsuits." (Quoting *U.S. Parole Commission v. Geraghty*, 445 U.S. 338, 402-03 (1980)). Accordingly, as this Court held in *DL*, there are circumstances in which plaintiffs can pursue class claims even after their individual claims are moot. It logically follows that putative class-action plaintiffs must be given "a fair opportunity to show that [class] certification is warranted." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016).

Three class mootness doctrines apply here. These doctrines – like this Court's ruling in *DL* – are based on the observation that the purposes of class actions embodied in Rule 23 are met only when class-action plaintiffs have a fair opportunity to obtain class certification, and that such a fair opportunity sometimes cannot be obtained until after their individual claims have become moot. Under the diligent pursuit doctrine, class claims are not moot if plaintiffs diligently pursue class certification but are unable to obtain a ruling on that issue before their individual claims become moot.

Under the transitory harms doctrine, class claims are not moot if they are sufficiently transitory that the plaintiffs' individual claims can become moot before a court rules on class certification. And under the "pick-off" doctrine, adopted by at least nine other federal courts of appeals, class claims are not moot if the defendant can unilaterally act to moot plaintiffs' individual claims before the court rules on class certification.

This case falls under all three doctrines. Almost immediately upon the filing of the Complaint, Plaintiffs filed and diligently pursued a motion for class certification. But SSA, with almost equal speed, took extraordinary steps to moot Plaintiffs' individual claims. SSA then sought dismissal on the basis of individual mootness before Plaintiffs had even obtained discovery in support of their motion for class certification. Plaintiffs were thus deprived of a fair opportunity to obtain a ruling on class certification, and the class claims are therefore not moot.

3. SSA's post-judgment actions have not mooted this appeal. To moot the appeal, SSA would have had to provide complete retroactive and prospective relief by providing a full refund to all class members and permanently terminating its unlawful tax refund offset policies. Instead, for retrospective relief, SSA initiated a complex process that resulted in refunds to fewer than 20% of class members. And prospectively, SSA issued a temporary policy change that has already expired. The failure to provide complete relief to the class means that the appeal is not moot.

## ARGUMENT

This Court "review[s] *de novo* the District Court's dismissal for mootness." *Reid v. Inch*, 914 F.3d 670, 674 (D.C. Cir. 2019); *accord, e.g.*, *People for Ethical Treatment of Animals v. USDA*, 918 F.3d 151, 156 (D.C. Cir. 2019) (citing *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 321 (D.C. Cir. 2009)).

### I. THE PLAINTIFFS' INDIVIDUAL CLAIMS WERE NOT MOOT.

"The burden of demonstrating mootness 'is a heavy one.'" *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotation marks omitted). The "heavy burden of establishing mootness is not carried by proving that the case is nearly moot, or is moot as to a 'vast majority' of the parties." *True the Vote, Inc. v. IRS*, 831 F.3d 551, 561 (D.C. Cir. 2016). A claim is not moot so long as a single plaintiff has "a concrete interest, however small, in the outcome of the litigation." *Knox*, 567 U.S. at 307-08 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984)). Additionally, where, as here, the Defendants' claims of mootness are based on events occurring after a party seeks judicial intervention, the claims "must be viewed with a critical eye." *Id*. at 307.

### A. Plaintiffs' Claims for Declaratory and Injunctive Relief with Respect to SSA's Tax Refund Offset Policies Were Not Moot.

SSA's actions did not provide all of the relief Plaintiffs sought in the Complaint. Plaintiffs sought declaratory and injunctive relief against SSA's policies and regulations regarding tax refund offset. SSA's individual refunds and waivers did not provide such relief or otherwise correct the unlawful policies.

Plaintiffs specifically alleged that the Defendants had unlawful policies and procedures that resulted in their improper tax refund offsets. *See* DA [] (Compl. ¶ 16) (alleging that SSA had unlawful policies and practices related to tax refund offset, including that the "extension of the tax refund offset remedy to alleged debts previously exempt from the remedy was an unlawful retroactive rule," that SSA "had a practice of referring alleged debts to the Treasury Department for tax refund offset" in a way that violated the Constitution, statutes, and regulations, and that SSA arbitrarily and capriciously "referr[ed] alleged debts for tax refund offset without an adequate supporting rationale"). And the Complaint specifically requested declaratory and injunctive relief from those policies and practices. DA [], [], [], [], [] (Compl. ¶¶ 96, 97, 105, 106, 120, 121, 133, 134, 140 141, Prayer for Relief III, IV). Plaintiffs thus sought redress against SSA's tax refund offset policy through declaratory and injunctive relief. That policy remained ongoing and was not altered

by Plaintiffs' individual refunds and overpayment waivers.[4]

Accordingly, Plaintiffs' requests for declaratory and injunctive relief against the tax refund offset policy were not moot. "[A] plaintiff's challenge will not be moot where it seeks declaratory relief as to an ongoing policy." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 321 (D.C. 2009) (citing *Super Tire Engineering v. McCorkle*, 416 U.S. 115, 125 (1974) and *City of Houston, Texas v. HUD*, 24 F.3d 1421, 1429 (D.C. Cir. 1994)); *see, e.g.*, *Aref v. Lynch*, 833 F.3d 242, 251 (D.C. Cir. 2016) (although appellants were no longer housed in designated units, case was not moot because "appellants are challenging the *procedure* used for designation – so . . . they have not 'obtained all the relief' they seek in their complaint"); *Ukrainian-American Bar Association v. Baker*, 893 F.2d 1374, 1377 (D.C. Cir. 1990) (challenge to government policy was not moot, so long as the policy still exists, even when "the particular situation" that gave rise to the challenge is no longer "live"); *Geismann v. ZocDoc, Inc.*, 850 F.3d 507, 514 (2d Cir. 2017) (even if defendant "had satisfied [plaintiff]'s demand for monetary relief," doing so "does nothing to satisfy the demand for injunctive relief"). This is particularly true here because Plaintiffs allege that SSA acted unlawfully and "[a]n inference arises from illegal past conduct that future violations may occur. The fact that illegal conduct has ceased does not foreclose

[4] As described in Section III, below, SSA did eventually change its tax refund offset policies, but only temporarily and only after the dismissal under review here.

injunctive relief." *SEC v. Koracorp Industries, Inc.*, 575 F.2d 692, 698 (9th Cir. 1978). Accordingly, Plaintiffs' claims for declaratory and injunctive relief were not moot.

### B. SSA Failed to Prove that Plaintiffs No Longer Needed Protection from SSA's Tax Refund Offset Policies.

Independent of the fact that Plaintiffs' requests for declaratory and injunctive relief remained alive for the reasons noted above, Defendants failed to meet their heavy burden of proving that it is "absolutely clear that the [Plaintiffs] no longer had any need of the judicial protection that [they] sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000). Plaintiffs sought judicial protection from unlawful tax refund offsets, and SSA failed to demonstrate that its overpayment waivers provided equivalent (*i.e.*, complete) protection. To the contrary, SSA specifically alleged that Ms. Graham had an overpayment debt and presented equivocal evidence regarding Ms. Heard's and Ms. Snow's overpayment debts. And SSA's practices suggested that further overpayment findings were likely. Most importantly, SSA clearly stated that it continued to view the disputed tax refund offset process as an appropriate means to collect any such debts. Accordingly, Plaintiffs' individual claims are not moot.

#### 1. SSA Could Employ the Challenged Policies to Collect the Overpayments at Issue.

At the time of the dismissal, SSA expressly asserted not only that Ms. Graham

still had an outstanding overpayment balance, DA [], []-[] (Graham Decl. ¶¶ 14, 29-34), but also that, applying the policies and procedures challenged in this lawsuit, her alleged "overpayment may at some time in the future become eligible for referral to [tax refund offset]," DA [] (Stricks Supp. Decl. ¶ 7). Among the remedies that Ms. Graham sought in the Complaint was an injunction preventing the referral of an alleged overpayment for tax refund offset under SSA's unlawful policies. DA [], [], [], [], [] (Compl. ¶¶ 97, 106, 121, 134, 141). It thus seems plain that there was meaningful relief available for Ms. Graham and that her claims were therefore not moot. The District Court's statement that Ms. Graham's concern regarding future tax refund offsets "presents a purely speculative concern," DA [] (Op. 11), cannot be sustained in light of SSA's express statement that it viewed her overpayment as current and potentially subject to tax refund offset.

The evidence with respect to whether Ms. Heard and Ms. Snow had outstanding overpayment debts at the time of the dismissal is less clear. But given the heavy burden placed on a party urging mootness, that lack of clarity precluded dismissal.

With respect to Ms. Heard, as the District Court correctly found, "[t]he SSA identified a $5,294.30 overpayment of Social Security benefits" but "explicitly waived [only] $3,144.00." DA [] (Op. 8); *see* DA [] (Stricks Decl. Exh. H-3). And the court further noted that SSA presented no evidence regarding how a $3,144 waiver could eliminate a $5,294 debt. *See* DA [] (Op. 8) ("[I]t is not clear from the exhibits alone

whether the discrepancy between the overpayment amount ($5,294.30) and the amount waived ($3,114.00) has itself been waived, resulting in the claimed 'overpayment balance [of] $0.00.'"). But the District Court went on to ignore this evidence of a current overpayment balance, instead deferring to SSA's litigation declaration averring, without explanation, that the waiver had reduced Ms. Heard's overpayment balance to zero. DA [] (Op. 9).

The court did not attempt to reconcile the evidence but simply noted that the litigation declaration was "publicly-filed . . . under the penalties of perjury" and that agency representations are entitled to a presumption of good faith. DA [] (Op. 9). This was legal error for three reasons. First, it was internally inconsistent. The District Court found both that Ms. Heard's overpayment debt had been reduced to zero by the waiver and that the amount of the waiver was far less than the amount of the debt. Second, it was based on the presumption of governmental regularity, which, as a matter of law, "does not apply when [an agency's] statements are belied by the record, as they are here." *Sanchez v. Lynch*, 614 Fed. Appx. 866, 867 (9th Cir. 2015).

Third, the records here showing a remaining debt have greater indicia of reliability than the conclusory declaration asserting a zero overpayment balance. The records showing a remaining debt were issued in the normal course of SSA business, contemporaneously with the waiver they described, and included important details such as the (different) amounts of both the overpayment and the waiver. The litigation

declaration does not have similar indicia of reliability. It was issued later for the purposes of litigation, and does not include vital details such as the amount of debt the agency had waived. *See Tabor v. Joint Board for the Enrollment of Actuaries*, 566 F.2d 705, 711 (D.C. Cir. 1977) (referring to "the potential unreliability of litigation documents"). At best, the evidence with respect to the amount of Ms. Heard's remaining overpayment balance was contradictory and unclear, precluding a finding of mootness. *See, e.g.*, *Norsworthy v. Beard*, 802 F.3d 1090, 1092 n.1 (9th Cir. 2015) (evidence regarding mootness unclear despite government's representations); *Scott v. Westlake Services LLC*, 740 F.3d 1124, 1126-28 (7th Cir. 2014) (class claim was not moot where dispute existed over whether defendants offered complete relief); *Sizova v. National Institute of Standards & Technology*, 282 F.3d 1320, 1326 (10th Cir. 2002) (same); *Building & Construction Trades Council v. Downtown Development, Inc.*, 448 F.3d 138, 152 (2d Cir. 2006) (mootness not found where record is unclear); *United States v. Allen*, 24 F.3d 1180, 1187 n.6 (10th Cir. 1994) (same).

The issues with respect to Ms. Snow are similar. SSA sent her a letter stating that her overpayment of $5,386.99 had been waived, followed a few days later by a letter stating that her overpayment remained. DA [] (Snow Decl. ¶ 23). Later, as part of this litigation, SSA provided a declaration stating that Ms. Snow did not owe any overpayment. DA [] (Stricks Decl. ¶¶ 28-29). On this unclear record, it was error for the District Court to find her claims moot.

At a minimum, it was erroneous to dismiss the Complaint as moot because, in light of the conflicting evidence provided by SSA, Plaintiffs were entitled to the discovery they requested. *See*, *e.g.*, *GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1345 (D.C. Cir. 2000). The trial court erred by not granting Plaintiffs' request for discovery in this regard, and, indeed, by not addressing that request at all. *See Majd-Pour v. Georgiana Community Hospital, Inc.*, 724 F.2d 901, 903 (11th Cir. 1984).

2. SSA Could Employ the Challenged Policies to Collect Additional Alleged Overpayments.

Because it had not disavowed its tax offset practices, to demonstrate mootness, SSA had to show not only that Plaintiffs had no overpayment debts collectable through such practices, but also that it would not allege such overpayment debts in the future. SSA failed to meet this burden.

SSA concedes that there was insufficient (or no) documentation for each of the three overpayments SSA alleged against Plaintiffs, DA [], [], [] (Stricks Decl. ¶¶ 9, 18, 26), and the Complaint alleged that this was SSA's practice towards class members more generally. Taking these allegations as true, it was likely that SSA would continue to allege – without basis – that Plaintiffs had overpayment debts dating back decades and would use the disputed tax refund offset practices to collect such alleged debts. *See* DA [] (Snow Decl. ¶¶ 32-34) (Ms. Snow had "no way of knowing if SSA

will eventually determine that [she] owe[s] additional monies and authorize [tax refund offset]"). Accordingly, even if each Plaintiff's full overpayment had been waived, the likelihood of additional overpayments being collected through the challenged tax refund offset policies was sufficient to preclude mootness.

## II. THE CLASS CLAIMS WERE NOT MOOT.

### A. Mootness of Individual Claims Does Not Moot Class Claims Absent a Fair Opportunity to Show that Class Certification is Warranted.

"The class-action device was intended to establish a procedure for the adjudication of common questions of law or fact." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984). Class actions further "the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims." *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 402-03 (1980); *accord DL v. District of Columbia*, 860 F.3d 713, 722 (D.C. Cir. 2017). In particular, class actions are "intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate." Advisory Committee Notes to the 1966 Amendment to Fed. R. Civ. P. 23(b)(2). As the Supreme Court has recognized, class

relief "is peculiarly appropriate" in the situation presented here, namely a challenge to SSA's policies and actions to recoup overpayments from a class of thousands. *Califano v. Yamasaki*, 442 U.S. 682, 684, 701 (1979).

These purposes and attributes of class actions affect the concept of mootness as applied to such actions. "In order to achieve the primary benefits of class suits, the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified." *Geraghty*, 445 U.S. at 403. Of course, a representative can exercise this right only when the class certification issue is not moot: that is, where there is a "dispute capable of judicial resolution." *Id.* But, in the class-action context, the named plaintiff need not have the traditional personal stake in the dispute. Instead, "a dispute capable of judicial resolution" including "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions" can exist "with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Id.* at 403-04; *see id.* at 400 (collecting "cases found not to be moot, despite the loss of a 'personal stake' in the merits of the litigation by the proposed class representative").

Accordingly, a class representative must be given a "fair opportunity to show that [class] certification is warranted." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). Moreover, this fair opportunity must be provided regardless of when or how the motion for class certification is ruled upon. If the named plaintiff's claim

becomes moot *after* the motion for class certification is ruled upon, regardless of whether the motion is granted or denied, the plaintiff may continue to litigate the class claims. *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 400-01 (1975) (plaintiff can continue to represent class even though her individual claim expired after class was certified); *Geraghty*, 445 U.S. at 397-98, 404 (plaintiff can continue to represent class even though his individual claim became moot after class certification was denied); *Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997) ("[A] named plaintiff who has merely asked for class certification may appeal the denial of class certification even after his individual claim becomes moot."). Importantly, the same "fair opportunity" must be provided when a plaintiff's individual claims expire *before* a court rules on class certification because the "timing of class certification" in relation to when the plaintiff's individual claim becomes moot "is not crucial" to the mootness inquiry. *Geraghty*, 445 U.S. at 398. Accordingly, in *DL*, 860 F.3d at 721-22, this Court upheld an order granting class certification even though the plaintiffs' individual claims had become moot *before* the class had been properly certified.

Three separate (but partially overlapping) legal doctrines – described in detail below – provide for the survival of class claims when plaintiffs' individual claims become moot before a ruling on class certification and apply to the facts of this case: (1) the diligent pursuit doctrine, (2) the transitory harms doctrine, and (3) the pick-off doctrine. Under each of these doctrines, there remains the same constitutionally

cognizable case or controversy that existed in *Sosna*, *Geraghty*, and *DL*, namely, the controversy over whether a class should be certified.

### B. Class Claims Here Were Not Moot Because There was No Fair Opportunity to Show that Certification was Warranted.

#### 1. Diligent Pursuit Doctrine

In order to ensure a "fair opportunity to show that certification is warranted," a court has jurisdiction to decide a motion for class certification after plaintiffs' individual claims become moot, so long as they diligently pursue class certification. *E.g.*, *Richardson v. Director, Federal Bureau of Prisons*, 829 F.3d 273, 283 (3d Cir. 2016) ("[W]hen a would-be class representative is *not* given a 'fair opportunity' to show that certification is warranted (perhaps because her individual claim became moot before she could reasonably have been expected to file for class certification), she should be permitted to continue seeking class certification for some period of time after her claim has become moot."); *Stein v. Buccaneers Ltd.*, 772 F.3d 698, 707 (11th Cir. 2014) ("What matters is that the named plaintiff acts diligently to pursue the class claims."); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1045 (5th Cir. 1981); *see also* Jack Starcher, *Addressing What Isn't There: How District Courts Manage the Threat of Rule 68's Cost-Shifting Provision in the Context of Class Actions*, 114 Columbia Law Review 129, 140 (2014) ("Circuit courts seem to agree that a defendant cannot moot a putative representative's class claims where a timely class certification

motion has already been filed."); M. Andrew Campanelli, *Note, You Can Pick Your Friends, But You Cannot Pick Off the Named Plaintiff of a Class Action*, 4 Drexel Law Review 523, 537 (Spring 2012) (collecting cases holding that the existence of a "diligently and timely filed motion for certification" forestalls a finding of mootness).

There are at least three reasons for this rule. First, as noted above, it would be illogical (and unsound from a policy perspective) for mootness in these cases to turn on how quickly a court rules on a request for class certification because the relevant controversy over whether the class should be certified exists both before and after the court rules. *See Geraghty*, 445 U.S. at 398 (noting that "the timing of class certification . . . is not crucial" to the mootness inquiry). The case or controversy in such cases is independent of the plaintiffs' individual claims and is the same whether the court has ruled on the request for class certification or not. *See, e.g.*, *Sosna*, 419 U.S. at 402 ("controversy may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot"); *DL*, 860 F.3d at 721-22 (class action not moot although class was not certified until after all named plaintiffs' claims had become moot); *Stephens v. PBGC*, 755 F.3d 959, 964 (D.C. Cir. 2014) (ruling on appeal from denial of class certification, although named plaintiffs had settled their individual claims); *Basel v. Knebel*, 551 F.2d 395, 397 n.1 (D.C. Cir. 1977) (although named plaintiff's individual claims were moot, public assistance class action remained live because "it

is clear that a live controversy exists with regard to class members").

Second, named plaintiffs also have an individualized stake in class certification, which they must be given a "fair opportunity" to pursue. In *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 335, 336 (1980), the Supreme Court held that a putative class action was not moot even though class certification had been denied and judgment had been entered in favor of each individual plaintiff because the plaintiffs still "alleged a stake in the outcome" of the case, including "a continuing individual interest in the resolution of the class certification question in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails." This Court followed *Roper* in *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 528 (D.C. Cir. 2006), which recognized that a named plaintiff in a class action "has two legally cognizable interests: . . . 'the claim on the merits [and] the claim that he is entitled to represent a class.'" *Id.* (quoting *Geraghty*, 445 U.S. at 402). This Court held that the *Richards* plaintiff "retain[ed] a personal stake in the class claim," even though she "settled her personal claim." *Id.* at 528, 529. This individual interest is not limited to spreading costs and fees, but also includes the individual's interest in obtaining declaratory and injunctive relief for a larger class. Indeed, that interest is specifically recognized in the Advisory Committee Notes to the 1966 Amendment to Fed. R. Civ. P. 23(b)(2), which collected cases allowing plaintiffs to pursue such class claims. One of those cases, *Potts v. Flax*, 313

F.2d 284, 288-89 & n.4 (5th Cir. 1963), a class action alleging systemic racial discrimination in education, correctly and succinctly noted why it would be wrong for class claims to be moot under these circumstances; it would make no sense for a court, in response to such a class action, to "require a school system to admit the specific successful plaintiff . . . while others, having no such protection, were required to attend schools in a racially segregated system."

Third, a typical class action functions like "traditional joinder (of which it is a species)," in that it "enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). Accordingly a motion for class certification functions much like a traditional motion to intervene. And such a motion is not moot, even after the dispute among the existing parties becomes moot. *See, e.g.*, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977) (affirming grant of motion to intervene filed after final judgment on the individual plaintiff's claims had been entered); *In re Brewer*, 863 F.3d 861, 870 (D.C. Cir. 2017) (motion to intervene not moot when sole individual plaintiff had settled claim and dismissed the complaint). This Court correctly noted that such a motion to intervene, like a motion for class certification, presents "a Catch-22" in which granting the motion preserves the court's jurisdiction, but there is a claim that the court lacks jurisdiction to rule on the motion in the first place. *Id.* at 868. "The circle is broken,

however, because we have jurisdiction to determine our own jurisdiction, and we conclude we have jurisdiction to hear the motion." *Id.* (citation omitted); *see also United States v. $41,305.00 in Currency*, 802 F.2d 1339 (11th Cir. 1986). As with a motion to intervene, jurisdiction to decide a motion for class certification survives even after the dispute between the pre-existing parties (the plaintiff acting individually and the defendant) becomes moot.

This Court's reasoning in *DL* suggests that it agrees with the conclusions of other courts of appeals that diligently pursued class claims do not become moot when the plaintiffs' individual claims become moot. In *DL*, 860 F.3d at 721, the trial court incorrectly certified a class, and before that certification was reversed on appeal and a different class was correctly certified, the named plaintiffs' individual claims had become moot. This Court held that class claims remained live because the plaintiffs "had live claims when they sought certification, and but for the district court's error, could have obtained proper class certification before their individual claims became moot." *Id.* The same logic applies, not just to judicial error, but to any circumstance beyond the plaintiffs' control that delays a class certification decision until after the plaintiffs' individual claims become moot. This is the broader category of cases described in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), in which no "fair opportunity to show that certification is warranted" is provided.

This logic applies more broadly because it was expressly based on fulfilling

"Rule 23's purpose," including to provide "'a convenient and economical means for disposing of similar lawsuits.'" *DL*, 860 F.3d at 722. This purpose "would be disserved by a [class mootness] rule . . . requiring [class members] to find new named plaintiffs at every turn of inevitably protracted class litigation." *Id.* Although the particular "turn" in *DL* was a judicial error causing delay during which the individual plaintiff's claims became moot, such a delay could just as easily (arguably more easily) be caused by the need for protracted discovery or simply by a court's discretionary decision to take time to consider a motion for class certification. All of these situations fit under the reasoning of *DL* and *Campbell-Ewald* and should be treated the same.

Here, there is no question that Plaintiffs diligently pursued class certification. Plaintiffs filed a motion for class certification less than two weeks after the Complaint. DA []-[]. That motion was stayed "pending discovery." DA [] (Minute Order of March 13, 2015). During that stay, Defendants orchestrated their own delay, during which they took the actions they now claim mooted Plaintiffs' individual claims. Defendants: (1) asked the court to defer consideration of the motion for class certification on the basis that they should be allowed to respond to the Complaint first, *see* DA [] (Motion for Class Certification 2), (2) obtained two extensions of time for that response, *see* DA []-[], []-[] (Docket Entries 8, 17 & Minute Orders of March 13, 2015 and April 20, 2015), (3) used that additional time to take the steps they now

claim mooted the individual claims, and then (4) filed a motion to dismiss based on those steps. Even then, in opposing the motion to dismiss, Plaintiffs not only noted the pendency of their motion for class certification, but specifically asserted that the court needed a reasonable opportunity to rule on that motion before considering whether to dismiss the Complaint. Thus, despite Plaintiffs' diligent pursuit of class certification, they have not yet received a fair opportunity to show that a class should be certified, and the class claims are not moot.

2. Transitory Harms Doctrine

Another situation in which a fair opportunity to obtain class certification can elude plaintiffs is when they allege harm that is "transitory enough to elude review." *Nielsen v. Preap*, 139 S. Ct. 954, 963 (2019). "The critical question" for this doctrine "is whether the court will have time to rule on a motion for class certification brought by a plaintiff who has standing to bring a particular claim before the claim will become moot; the inquiry is not *why* the claim will become moot." *Salazar v. King*, 822 F.3d 61, 74 (2d Cir. 2016). Accordingly, a defendant's ability to moot named plaintiffs' individual claims makes those claims transitory in the relevant sense and means that class claims persist even after individual claims have become moot. *See*, *e.g.*, *Wilson v. Gordon*, 822 F.3d 934, 941-47 (6th Cir. 2016); *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010); *Thorpe v. District of Columbia*, 916 F. Supp. 2d 65, 67 (D.D.C. 2013).

*Nielsen* was a putative class action challenging the practice of detaining

immigrants without a bond hearing pending decisions on their removal. The Government asserted that this class action might be moot because "by the time of class certification the named plaintiffs had obtained either cancellation of removal or bond hearings." 139 S. Ct. at 963. The Supreme Court rejected that argument, holding that "the fact that a class 'was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction' when, as in these cases, the harms alleged are transitory enough to elude review." *Id.* The *Nielsen* Court applied the transitory harms doctrine even though the harm at issue lasted an average of one year and sometimes longer, *id.* at 976 (Thomas, J., concurring in part), and was terminated, not by the mere passage of time, but by the defendants taking affirmative action to provide relief (by providing the requested hearing or canceling the removal proceedings entirely), *id.* at 961, 963. *Nielsen* thus makes clear that a claim can be sufficiently transitory to preclude mootness even when the reason the individual claims ultimately become moot is the defendant's action. *See also Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (holding transitory certain conduct during pre-trial detention, although such detention could last years, because its duration "cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial" and, as a result, "[i]t is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the

class").

*Salazar v. King*, 822 F.3d 61 (2d Cir. 2016), a putative class action against the Secretary of Education alleging unlawful failure to suspend collection of class members' student loans, is also instructive. After the class complaint was filed, the defendant discharged the named plaintiffs' individual loans. *Id.* at 64. The court held that the case was not moot because of the transitory nature of the harm. *Id.* at 72. The court noted that the reason it was uncertain whether such claims would remain live long enough for a ruling on class certification was the defendant's ability (and inclination) to unilaterally discharge the loans. *Id.* at 73-74.

This rule also applies to public benefits. In *Garnett v. Zeilinger*, 323 F. Supp. 3d 58, 62 (D.D.C. 2018), plaintiffs asserted that food stamps benefit applications were being unlawfully delayed. The government mooted the named plaintiffs' individual claims by processing (and granting) *their* applications before the class was certified. *Id.* at 67. The court nonetheless found that the class claims were not moot; instead, they were transitory because the class would always exist but the government was capable of (and willing to) moot any named plaintiffs' individual claims by processing their applications without doing the same for the entire class. *Id.* at 68*; see also Robidoux v. Celani*, 987 F.2d 931, 939 (2d Cir. 1993) (class action against state welfare agency for unlawfully delayed action fits within transitory harms doctrine because defendant "will almost always be able to process a delayed application before

a plaintiff can obtain relief through litigation").

The harm here is transient in the same way as the harms in *Nielsen*, *Salazar*, and *Garnett*. The impact of the improper tax refund offsets persists until SSA eliminates them through refunds coupled with complete and permanent elimination of all debts collectable through such offsets. SSA's ability and willingness to remedy the offsets in this manner – at least with respect to Plaintiffs, if not other class members – renders those claims "transitory" in the relevant sense and means that the class claims here remained live even if Plaintiffs' individual claims became moot.

3. Pick-Off Doctrine

Finally, a defendant cannot moot a class action by "picking off" the named plaintiffs' individual claims – that is, by taking unilateral action to moot those individual claims before class certification.[5] As the Supreme Court explained in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980), holding a case moot in such circumstances "would be contrary to sound judicial administration" because "[r]equiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant[] . . . before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class

[5] Some judicial opinions also describe such cases as "acutely susceptible to mootness." *See, e.g.*, *Richardson v. Director, Federal Bureau of Prisons*, 829 F.3d 273, 276 (3d Cir. 2016); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011).

actions" and "invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." Picking off named plaintiffs is thus another specific example – similar to (and in cases like this one overlapping with) transitory harms – in which there is no "fair opportunity to show that certification is warranted."

Even before *Roper*, the Second Circuit applied the pick-off rule (without using those words) in a case that, like this one, challenged SSA actions. In *White v. Mathews*, 559 F.2d 852, 854 (2d Cir. 1977), the named plaintiff filed a putative class action challenging "the glacial pace at which [SSA] has adjudicated claims to disability payments." There, as here, SSA argued that the action was moot because SSA provided the named class representative with relief *after* the complaint was filed but "before the class was certified." *Id.* at 857. The court of appeals held that the district court's subsequent ruling on class certification related back at least to the date of the motion for class certification, and thus prevented the case from becoming moot, because a contrary ruling "would mean that the SSA could avoid judicial scrutiny of its procedures by the simple expedient of granting [relief] to plaintiffs who seek, but have not yet obtained, class certification." *Id.* The court also noted that "the key issue . . . is a live one still for members of the class," and that if the judge "had been concerned about mootness he obviously could have ruled on the class certification motion more quickly." *Id.*; *accord Blankenship v. Secretary of HEW*, 587 F.2d 329, 333 (6th Cir. 1978) (putative class action alleging delays in Social Security hearings

was not moot when government provided hearings to named plaintiffs "while continuing to allow long delays with respect to all other [putative class members]"); *Moore v. Matthews*, 69 F.R.D. 406, 407-09 (D. Mass. 1975) (rejecting SSA argument that class action was moot because SSA provided relief to named plaintiffs).

For numerous reasons including those expressed in *White* and *Blankenship*, the vast majority of federal courts of appeals have endorsed some form of the pick-off rule. As the Sixth Circuit explained, "[t]he 'picking off' exception," which applies "when a motion for class certification is still pending," "was developed to prevent 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 *Roper*, 445 U.S. at 339); *see also, e.g.*, *Bais Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 54 (1st Cir. 2015); *Gayle v. Warden*, 838 F.3d 297, 305-06 & n.11 (3d Cir. 2016); *Lusardi v. Xerox Corp.*, 975 F.2d 964, 981-83 (3d Cir. 1992) (tracing the history of the pick-off rule from *Sosna* and *Gerstein*); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1050 (5th Cir. 1981); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1018 (7th Cir. 2014); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1250 (10th Cir. 2011); *Stein v. Buccaneers Ltd. Partnership*, 772 F.3d 698, 706 (11th Cir. 2014). The United States Department of Justice has endorsed the pick-off rule as well. *See* Brief for the United

States as *Amicus Curiae* at 19, *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2015) (No. 14-857) ("'[R]equiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained,' would 'frustrate the objectives of class actions,' would be 'contrary to sound judicial administration,' and would 'invite waste of judicial resources by stimulating successive suits brought by others.'") (quoting *Roper*, 445 U.S. at 339), *available at* https://www.justice.gov/sites/default/files/osg/briefs/2015/09/11/14-857bsacunitedstates.pdf (last visited May 15, 2019).

This Court should adopt the pick-off rule, as at least nine other federal courts of appeals already have. As noted above, this Court has already held – in the context of judicial error – that a class can be certified after the named plaintiff's individual claim has become moot, *DL v. District of Columbia*, 860 F.3d 713, 721 (D.C. Cir. 2017), and the reasoning this Court employed in *DL* is equally applicable to cases involving a pick off. That reasoning includes the observation that "Rule 23's purpose" includes providing "'a convenient and economical means for disposing of similar lawsuits[]'" and that, "[b]y contrast, Rule 23's purpose would be disserved by a rule . . . requiring [class members] to find new named plaintiffs at every turn of inevitably protracted class litigation." *Id.* (quoting *Geraghty*, 445 U.S. at 402-03). The pick-off rule minimally extends the holding of *DL* in a manner fully consistent with *DL*'s

reasoning because it facilitates convenient and economical resolution of class claims and avoids the frequent need to file new lawsuits with new plaintiffs for the same purpose. *See, e.g.*, *Weiss v. Regal Collections*, 385 F.3d 337, 344 (3d Cir. 2004) ("As in *Roper*, allowing the defendants here to 'pick off' a representative plaintiff with an offer of judgment less than two months after the complaint is filed may undercut the viability of the class action procedure, and frustrate the objectives of this procedural mechanism for aggregating small claims."), *overruled in part on other grounds*, *Campbell-Ewald*, 136 S. Ct. at 669.

The facts here fall squarely within the pick-off rule, as the Tenth Circuit concluded on almost identical facts in *Reed v. Heckler*, 756 F.2d 779 (10th Cir. 1985). The complaint in *Reed* alleged that SSA unlawfully collected funds from a large class based on alleged overpayments. *Id.* at 781-82. SSA corrected or waived the overpayments to the named class representatives, while leaving in place the overpayments of the tens of thousands of remaining class members, and argued that "the merits of the case are moot as a result of the waivers." *Id.* at 782. The Tenth Circuit rejected that argument in *Reed*, as should this Court here, because the general rule that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim" has particular force in "class claims that have been rendered moot by purposeful action of the defendants." *Id*. at 786 (citing *Zeidman*, 651 F.2d at 1049-50); *see J.B. v. Valdez*, 186 F.3d 1280, 1289 n.6 (10th Cir.

1999) (characterizing *Reed* as "holding [that] purposeful action of defendants in giving plaintiffs what they seek may not make moot plaintiff[s'] claim in a class action"); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1247 & n.3 (10th Cir. 2011) (reaffirming *Reed*). Here, as in *Reed*, Plaintiffs' individual claims were purportedly rendered moot through the "purposeful action of defendants in giving plaintiffs what they seek." That alone demonstrates the existence of a pick off as the courts have defined it.

Although application of the pick-off doctrine does not turn on SSA's motives for issuing refunds and waivers, it is apparent that the goal of SSA's "purposeful action" was to strategically avoid class litigation by treating Plaintiffs differently from other class members. SSA ignored Plaintiffs' requests for refunds – including two formal Requests for Reconsideration – for up to one year after they were submitted. Only after (and very promptly after) the class-action Complaint was filed did the agency take action related to these requests. Indeed, although the three Plaintiffs' refund requests were filed at different times, they were all granted less than two months after the Complaint was filed and within 10 days of each other. DA [], [], [] (Stricks Decl. ¶¶ 9, 18, 26). That timing alone is highly suggestive of the agency's pick-off motive. *See Wilson v. Gordon*, 822 F.3d 934, 950 (6th Cir. 2016) (pick-off motive shown in part by fact that the State did not address named plaintiffs' claims "until after the lawsuit and contemporaneous motion for class certification were filed,

despite the fact that the Plaintiffs had brought four of these cases to the State's attention before the lawsuit was filed").

It is also telling that SSA "did not moot Plaintiffs' claims through an established, standard procedure." *Id.* SSA's standard procedure is *not* to treat a request for a refund as a request for a waiver – even when a claimant specifically asks for a waiver. *See, e.g.*, *Robert E. v. Berryhill*, No. 6:16-cv-00117, 2018 U.S. Dist. LEXIS 166636, at *11 (D. Or. Aug. 13, 2018) (Administrative Law Judge "could not grant a waiver because Plaintiff never filed a formal request for such relief," even though "Plaintiff 'respectfully request[ed] the overpayment be waived' in his request for reconsideration"). SSA adhered to this standard procedure with respect to the thousands of class members who were not named plaintiffs but who called SSA to request a refund, but did not adhere to this standard with respect to Plaintiffs. This is demonstrated by the fact that, while 100% of Plaintiffs' requests for refunds were treated as requests waivers, fewer than 6% of other class members' requests for refunds were treated the same way.

Moreover, once SSA inferred the existence of requests for waivers, it processed those inferred requests in violation of numerous of its own policies and in a manner that applied only to Plaintiffs. The hallmark of a pick off is such singling out of the named plaintiffs for special treatment that moots their individual claims. SSA's written established procedures require that, whenever SSA infers that a beneficiary is

requesting a waiver, it "*must* follow-up by contacting the beneficiary [by phone or mail] to see if he or she still wishes to pursue waiver." POMS GN 02201.021(C) (emphasis added). Yet SSA made no such follow-up contact with any Plaintiff here. Additionally, SSA cannot act on a waiver without obtaining information regarding the beneficiary's "ability to pay," including "income" and "expense." *Id.*; POMS GN 02250.002(B)(3). Yet SSA purported to waive all three Plaintiffs' alleged overpayments without possessing or obtaining that information.

SSA's violations of its own procedures are even more striking with respect to Ms. Heard and Ms. Graham, both of whom filed formal Requests for Reconsideration (using Form SSA-561) in early 2014. *See* DA [], [] (Heard Decl. ¶¶ 28, 37); DA []-[] (Heard Decl. Exhs. 3-4); DA [], [], [] (Stricks Decl. ¶¶ 7, 16 and Exhs. G-1, H-1). SSA claims that it "also processed [each] Request for Reconsideration as an implied request for waiver." DA [], [] (Stricks Decl. ¶¶ 7, 16). But doing so was improper because a request for reconsideration implements 42 U.S.C. § 404(a) (determining existence and amount of overpayment), while a waiver implements 42 U.S.C. § 404(b) (no recovery from "any person who is without fault"), and the two provisions are separate and distinguishable. *See Califano v. Yamasaki*, 442 U.S. 682, 695-96 (1979). Moreover, even if Ms. Heard and Ms. Graham had requested both reconsideration and waiver, SSA must make a decision on reconsideration before making any waiver determination. *Robert E.*, No. 6:16-cv-00117, 2018 US Dist. LEXIS 166636, at *11;

POMS GN 02201.021(D) & GN 02201.025(B)(4). SSA violated that clear policy with respect to Ms. Heard and Ms. Graham, rushing to issue waivers (which they never actually requested) in order to moot the Complaint, while never ruling on the formal Requests for Reconsideration, which have now been pending for over five years. All of these improprieties strongly suggest that SSA employed the quintessential pick-off tactic here of providing relief to named plaintiffs while withholding that same relief from all other class members. *See Lucero*, 639 F.3d at 1242 (reviewing "*de novo*" alleged pick-off attempt).

The District Court's explanation for declining to apply the pick-off rule here – that the agency simply made an "administrative decision to correct a mistake by returning the funds demanded by the plaintiffs," DA [] (Op. 16) – has no relationship to the question of whether SSA picked off Plaintiffs' individual claims. Indeed, the District Court failed to even evaluate the key questions of whether SSA purposely acted to moot Plaintiffs' claims, treated Plaintiffs differently from other class members, and violated its own guidelines in doing so. Ultimately, it is uncontested that SSA took action that allegedly mooted Plaintiffs' individual claims (but not class claims) before the trial court was able to rule on their motion for class certification, and that constitutes a pick off that leaves the class claims intact, even if it is successful in mooting Plaintiffs' individual claims.

## III. SSA'S POST-JUDGMENT EFFORTS TO MOOT THIS APPEAL HAVE FAILED.

SSA filed a motion to dismiss in this Court on the basis that post-judgment actions it had taken mooted this appeal. That motion was referred to the merits panel with instructions to the parties to address the issues in their briefs.

SSA's motion asserts that this class action is moot because (1) the agency issued an "Emergency Message" announcing a "policy change" with respect to its use of tax refund offsets and (2) it had initiated a notification/opt-in process that had resulted in refunds to fewer than 20% of the individuals SSA attempted to notify. These assertions do not meet the "heavy burden of establishing mootness" on appeal, most notably because that burden "is not carried by proving that the case is nearly moot, or is moot as to a 'vast majority' of the parties," *True the Vote, Inc. v. IRS*, 831 F.3d 551, 561 (D.C. Cir. 2016), but instead requires the provision of a complete remedy to every party, which means every class member, *Castillo v. Cameron County, Texas*, 238 F.3d 339, 343 n.1 (5th Cir. 2001). A complete remedy means, at a minimum, all of the relief sought in the Complaint. *E.g.*, *Schnitzler v. United States*, 761 F.3d 33, 35, 37 (D.C. Cir. 2014). Here, the Complaint sought both retrospective relief (refunds) and prospective relief (declarations that the conduct at issue was unlawful and injunctions barring such conduct going forward) for a defined class. Only a tiny fraction of that relief has been provided; the rest remains available for a court to award, meaning that

the case is not moot.

First, the Complaint seeks relief for *every* class member, defined as individuals with alleged Social Security benefit overpayments that *accrued* before November 21, 2001. *See* DA [] (Compl. ¶¶ 13, 15). SSA's unilateral actions, however, apply only to "debtors with a *delinquency date* of May 19, 2002 or earlier and a 10 or more year delinquent debt." Social Security Emergency Message EM-17014, https://secure.ssa.gov/apps10/reference.nsf/links/05122017101827AM (last visited May 15, 2019) (emphasis added). An overpayment "accrues" when an initial overpayment determination is made, and that can take place years before that overpayment becomes "delinquent" upon the exhaustion of administrative procedures. SSA has failed to prove that the Emergency Message provided relief to the entire class because the class (individuals whose overpayments accrued before November 21, 2001) may include individuals not covered by the Emergency Message (individuals with overpayment debts that became delinquent after May 19, 2002). Such individuals seek relief under the Complaint but have received none.

Second, the Complaint seeks recovery of all tax refund offsets made by SSA against all class members. SSA admits that it has provided refunds to fewer than 20% of the individuals it believes are eligible for such refunds. The appeal is not moot because a court could order SSA to provide refunds to all class members.

Third, SSA incorrectly suggests that it can moot the class claims by merely

offering refunds (with various conditions, including that class members understand a vague letter, call SSA, and affirmatively request a refund), regardless of whether those offers are accepted. That is *not* the remedy requested in the Complaint, which is an *unconditional* refund for every class member. More importantly, an unaccepted offer to satisfy a claim moots nothing. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 670 (2016) (claim not mooted by defendant's "unaccepted offer to satisfy [plaintiff's] individual claim").

Fourth, even if it were sufficient for SSA to merely offer refunds, remaining disputes regarding the circumstances and manner of that offer prevent this case from being moot. In *Knox v. Service Employees International Union*, 567 U.S. 298, 308 (2012), a complaint seeking refunds of union dues was not moot even after the union offered refunds; there remained disputes regarding the notice of the refund offer, what information would have to be provided in order to get a refund, and whether refunds could be requested by fax or email. These disputes prevented the case from being moot because a court still had the power to grant meaningful relief, such as an order "to send out a 'proper' notice giving employees an adequate opportunity to receive a full refund." *Id.* at 307-08. The same issues are present here; SSA's notices were inadequate and its refund process includes unnecessary barriers. The class is entitled to continue to litigate for adequate notice and the removal of those barriers.

Fifth, the class has not obtained the declaratory and injunctive relief that it

seeks. The Emergency Message is not the equivalent of that relief because it is a nonbinding internal SSA document communicating a "policy change" and includes no finding/confession of error like the requested relief would. *See Parra v. Astrue*, 481 F.3d 742, 749 (9th Cir. 2007) ("Emergency Teletype" – a precursor to today's "Emergency Message" – "do[es] not carry the force of law and [is] not binding upon the agency"). Moreover, unlike a judicial decision, Emergency Messages are temporary and can be terminated by SSA at will. The Emergency Message here, for example, expired on August 8, 2018 – before SSA filed its motion to dismiss. Although SSA has repeatedly attempted to retroactively extend the expiration date, the Emergency Message has expired and is no longer effective.[6]

Sixth, even if the Emergency Message were still operative, by nature, Emergency Messages are statements that can be modified or withdrawn at will. Ceasing offending conduct through such a statement is the paradigmatic example of a voluntary cessation that could be undone the moment the litigation prompting it is dismissed. And such "voluntary cessation of a challenged practice" does not moot

[6] The expiration date was apparently subsequently extended to April 8, 2019, but that date has now passed as well. *See* Social Security Emergency Message EM-17014, https://secure.ssa.gov/apps10/reference.nsf/links/05122017101827AM (last visited May 15, 2019). SSA also relied on a second Emergency Message that expired on March 27, 2019. *See* Social Security Emergency Message EM-18009, https://secure.ssa.gov/apps10/reference.nsf/links/03272018084847AM (last visited May 15, 2019).

this case because SSA cannot carry "the 'heavy burden' of making 'absolutely clear' that it could not revert to its policy," especially here where it has already reverted. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000)).

Seventh, the Emergency Message has had no effect (and can have no effect) on the agency's unlawful regulations. The Complaint specifically asks for a declaration not only that the offsets were unlawful but also that two regulations (20 C.F.R. § 404.520(b) and 31 C.F.R. § 285.2(d)(6)(i)) are unlawful in related respects. SSA has taken no action to correct the legal deficiencies in these regulations, and the trial court could therefore provide meaningful relief in that regard.

Accordingly, the District Court can still grant the Plaintiffs meaningful relief as requested in the Complaint, including an order:

1. Extending to the entire class the remedies SSA has already provided to Plaintiffs.

2 Requiring SSA to immediately and without preconditions refund all the appropriate tax refunds offset from class members and to properly notify class members of the refund and its basis, including assurance that SSA will attempt no similar unlawful offsets in the future.

3. Declaring that the appropriations of the tax refunds at issue were unlawful (which SSA has never admitted).

4. Setting aside for all purposes the offset of these tax refunds.

5. *Permanently* enjoining further similar unlawful offsets.

6. Declaring 20 C.F.R. § 404.520(b) and 31 C.F.R. § 285.2(d)(6)(i) unlawful as specified in the Complaint.

Because these (and other) meaningful remedies remain available, the appeal is not moot.

## CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

/s/ *Jonathan H. Levy*
Jonathan H. Levy
Chinh Q. Le
Jennifer Mezey
Nina Wu
Legal Aid Society of the District of Columbia
1331 H Street, NW, Suite 350
Washington, DC 20005
(202) 628-1161
jlevy@legalaiddc.org

*Counsel for Appellants*

## CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,869 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14.

/s/ *Jonathan H. Levy*
Jonathan H. Levy

*Counsel for Appellants*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of May, 2019, I electronically filed the foregoing Appellants' Initial Brief with the Clerk of the Court by using the CM/ECF system. I further certify that the participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Jonathan H. Levy*
Jonathan H. Levy