No. 12-_____

In The
Supreme Court of the United States

VETERANS FOR COMMON SENSE AND VETERANS UNITED FOR TRUTH, INC., ON BEHALF OF THEMSELVES AND THEIR MEMBERS, PETITIONERS,

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress has provided that the Secretary of Veterans Affairs' "decision" as to an individual veteran's entitlement to benefits is not subject to judicial review by federal district courts. Title 38 U.S.C. § 511 provides that the Secretary of Veterans Affairs "shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits." 38 U.S.C. § 511(a). Subject to certain exceptions that are not pertinent here, "the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." *Ibid.* In conflict with the D.C. Circuit, Second Circuit, and Federal Circuit, the en banc Ninth Circuit held that petitioners' systemic constitutional and Administrative Procedure Act challenges to the Secretary's policies and procedures in handling veteran medical benefits and death and disability claims were barred by Section 511, even though petitioners challenge no benefit "decision" made by the Secretary.

The question presented is:

Whether the Ninth Circuit erred in holding that 38 U.S.C. § 511 precludes the district court's jurisdiction over systemic challenges to the United States Department of Veterans Affairs' failures to provide timely medical benefits and to timely resolve claims for service-connected death and disability benefits.

PARTIES TO THE PROCEEDING

Petitioners are Veterans for Common Sense and Veterans United for Truth, Inc., on behalf of themselves and their members.

Respondents are Eric K. Shinseki, Secretary of Veterans Affairs; the United States Department of Veterans Affairs; Steven L. Keller, Acting Chairman, Board of Veterans Appeals; Allison A. Hickey, Under Secretary, Veterans Benefits Administration; Bradley G. Mayes, Director, Compensation and Pension Service; Robert A. Petzel, Under Secretary, Veterans Health Administration; Ulrike Willimon, Veterans Service Center Manager, Oakland Regional Office, Department of Veterans Affairs; and the United States of America.

CORPORATE DISCLOSURE STATEMENT

Veterans for Common Sense and Veterans United for Truth, Inc. have no parent corporations, and no publicly held company owns 10% or more of their respective stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Veterans for Common Sense and Veterans United for Truth, Inc., on behalf of themselves and their members, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The en banc decision of the Ninth Circuit (app., *infra*, 1a-67a) is reported at 678 F.3d 1013. The order of the Ninth Circuit granting rehearing en banc (app., *infra*, 343a-344a) is reported at 663 F.3d 1033. The panel decision of the Ninth Circuit (app., *infra*, 68a-204a) is reported at 644 F.3d 845. The district court's memorandum of decision, findings of fact, and conclusions of law (app., *infra*, 205a-295a) is reported at 563 F. Supp. 2d 1049. The district court's order granting in part and denying in part respondents' motion to dismiss (app., *infra*, 296a-342a) is unreported.

JURISDICTION

The Ninth Circuit issued its panel decision on May 10, 2011. The petition for rehearing en banc was granted on November 16, 2011. The Ninth Circuit issued its en banc decision on May 7, 2012.

On July 24, 2012, Justice Kennedy granted an extension of time within which to file a petition for a writ of certiorari to and including September 5, 2012.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 38 U.S.C. §§ 511, 7104, 7252, 7261, and 7292 are set forth in the appendix to the petition. App., *infra*, 345a-353a.

INTRODUCTION

Our Nation has made a solemn commitment to those who serve in the Armed Forces in combat: to provide medical care and mental-health treatment on their return home and to provide monetary support to soldiers disabled during service or to their families in the event of death. Congress charged the United States Department of Veterans Affairs (VA) with providing these benefits. Tragically for many veterans, the VA has fallen far short of meeting these commitments.

An unprecedented number of veterans returning from war in Iraq and Afghanistan are suffering from mental-health disorders such as post-traumatic stress disorder (PTSD). Without timely treatment, these disorders too often lead to severe depression and suicide. Yet the VA is putting off critically time-sensitive mental-health evaluations for weeks or even months, even though the VA knows there is an epidemic of suicides among the Nation's veterans. This has resulted in over 75,000 veterans waiting for mental-health treatment to which they are lawfully entitled. Congress has taken notice of this epidemic and has directed the VA to implement a comprehensive fix, but the VA has failed to implement procedures

necessary to ensure that our Nation's veterans receive the benefits to which they are entitled.

The VA's practices and policies are just as problematic with regard to the adjudication of claims for death and disability benefits. These benefits, which provide basic sustenance for many veterans and their families, often take *years* to be awarded. Many veterans with valid claims never actually receive their benefits, because they die before they are awarded.

Petitioners, nonprofit veterans organizations, brought statutory and constitutional challenges to the VA's practices and procedures, or lack thereof, that cause these delays. After a divided three-judge panel held that the district court had jurisdiction to resolve petitioners' challenges, the Ninth Circuit en banc concluded that jurisdiction was lacking under the Veterans Judicial Review Act (VJRA), 38 U.S.C. § 511(a). Section 511(a) provides that the Secretary of Veterans Affairs "shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. § 511(a). The VJRA also states that, subject to certain exceptions, "the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court." *Ibid.* Under one exception, the Court of Appeals for Veterans Claims can review certain "decisions" by the Secretary. *Id.* §§ 511(b)(4), 7252.

The Ninth Circuit's construction departs from the plain language of the statute by reading the word "decision" out of Section 511(a). Nowhere do petitioners challenge any "decision" by the Secretary in any particular veteran's case; petitioners challenge the VA's deficient procedures and unjustifiable delays before making the decision, rather than the decision itself. Indeed, three other circuits disagree with the Ninth Circuit's interpretation. Consistent with the text of Section 511(a), the D.C. Circuit, Second Circuit, and Federal Circuit have construed Section 511 to preclude judicial review only as to a *decision* actually made by the Secretary.

Moreover, the ruling below's reading of Section 511(a) ignores that this Court narrowly construes jurisdiction-stripping statutes, particularly where such an application would entirely preclude judicial review. This Court requires a clear and unambiguous statement from Congress to preclude constitutional challenges. No such statement exists in this case.

The Nation's veterans are suffering due to intolerable delays by the VA. Having served the Nation and sacrificed during war, veterans should not be forced to wait any longer. This Court should grant certiorari to resolve the conflict in the courts of appeals and make clear that the federal district courts are open to hear systemic challenges by veterans.

STATEMENT OF THE CASE

A. Statutory Framework

1. Congress has provided veterans with certain benefits for their service to the Nation. Veterans have a statutory right to medical care by the Veterans Health Administration (VHA), including mental-health treatment, for any service-related injuries. 38 U.S.C. § 1710 et seq. And in the event of disability or death while on active duty, or death from a service-connected disability, compensation is paid to the veteran or the veteran's survivors. 38 U.S.C. §§ 1110, 1310, 1312. Veterans and their families can seek disability and death benefits by filing a claim with the Veterans Benefits Administration (VBA). 38 U.S.C. § 5100 et seq.

When a veteran is denied death or disability benefits, a veteran can appeal the adverse "decision" within the VA to the Board of Veterans' Appeals. 38 U.S.C. §§ 7104, 7105. Medical decisions, such as the type and timing of care and treatment an individual veteran needs, are not subject to further review by the Board. 38 C.F.R. § 20.101(b) ("Medical determinations * * * are not adjudicative matters and are beyond the Board's jurisdiction.").

In the Veterans Judicial Review Act, Congress has provided veterans the right to appeal adverse benefits determinations from the Board to an Article I court. The VJRA further provides that that court—the Court of Appeals for Veterans Claims (Veterans Court)—"shall have exclusive jurisdiction to review

decisions of the Board of Veterans' Appeals." 38 U.S.C. § 7252. The Veterans Court "decide[s] all relevant questions of law" to the benefits decision and can only set aside administrative factual findings that are "clearly erroneous." 38 U.S.C. § 7261(a)(1), (a)(4).

The Federal Circuit has exclusive jurisdiction to review decisions from the Veterans Court. 38 U.S.C. § 7292.

2. The VJRA also makes certain benefits "decisions" by the Secretary of Veterans Affairs non-reviewable by any court.

Section 511(a) provides that "[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." 38 U.S.C. § 511(a). Subject to certain exceptions, those decisions "shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." *Ibid.* In particular, claims decisions are not subject to this judicial review prohibition to the extent they fall within the Veterans Court's exclusive jurisdiction. *Id.* § 511(b).

B. Factual Background

1. Delays and inadequate procedures in the provision of veterans' mental-health treatment

a. The consequences of war do not end when a soldier returns home. In addition to the over 6,000 dead and 40,000 wounded in the wars in Iraq and Afghanistan, hundreds of thousands of United States military personnel return home from combat with severe mental-health disorders, including major depression and PTSD.

These mental-health disorders are life altering and, if untreated, can be life ending. PTSD is a severe "psychological condition that occurs when people are exposed to extreme, life-threatening circumstances" or are placed in "immediate contact with death and/or gruesomeness, such as [what] occurs in combat." App., *infra*, 223a (alteration in original). Military personnel returning from the wars in Iraq and Afghanistan are experiencing PTSD at unprecedented rates due to unique circumstances in those wars. App., *infra*, 223a-224a. As of 2008, approximately 300,000 soldiers then deployed in Iraq or Afghanistan suffered from PTSD or depression. About a third of all soldiers returning home from these wars have PTSD, traumatic brain injury, or severe depression. App., *infra*, 224a. If not properly treated, PTSD is a leading risk factor for suicide. App., *infra*, 227a-228a.

b. Although Congress has required the Secretary to provide free health care for five years to honorably discharged veterans who have served in combat, 38 U.S.C. § 1710(a)(1), (e)(1)(D), (e)(3)(A), the VHA systematically has failed to provide essential timely mental-health care to veterans.

This is the case even though Congress has mandated that the "Secretary shall provide" a general mental and psychological assessment "as soon as practicable after receiving the request, but not later than 30 days after receiving the request." *Id.* § 1712A(a)(3). And while the VHA has mandated (consistent with Congress's directive) that any veteran who presents at a VHA facility with mental-health issues receive an evaluation within 24 hours and a follow-up appointment within 14 days, app., *infra*, 82a-83a, only slightly more than half of veterans returning from Iraq and Afghanistan with symptoms of PTSD receive "minimally adequate care." App., *infra*, 224a (citing 2008 study by the RAND Corporation). Funds are not the problem; the VA has acknowledged that it possesses more than enough resources to meet veterans' needs.[1]

[1] Before the district court, the VA conceded that it "has sufficient funding to carry out its mission of ensuring that veterans have the medical care they need." App., *infra*, 226a. The VHA's "current budget provides enough funding to cover a 'worst-case scenario' of an influx of veterans returning from Iraq and Afghanistan with mental illness." *Ibid.*

Rather than receiving an initial evaluation within 24 hours, veterans are often outright deprived of treatment for depression and PTSD—as the VA Office of the Inspector General (OIG) reported in May 2007. For patients who needed treatment for symptoms of depression with moderate severity, 24.5% had to wait two to four weeks for an evaluation, and 4.5% waited four to eight weeks. App., *infra*, 233a. For PTSD, 26% of patients had to wait two to four weeks just to be evaluated, and 5.5% had a four-to-eight week wait time. *Ibid.* All told, 85,000 veterans languish on waiting lists to receive mental-health care; rather than remedy this problem, the VHA instead simply increased the time before a veteran can be placed on a waiting list. App., *infra*, 235a.[2]

There is no redress that a veteran can seek from the Board or Veterans Court when mental-health treatment is systemically delayed, even though these

[2] If anything, the length of the delays is understated. A subsequent OIG audit found that appointment schedulers were entering incorrect information, which "resulted in some 'gaming' of the scheduling process." App., *infra*, 234a. Actually 25% of patients had wait times over 30 days. App., *infra*, 233a. And a more recent audit found that the situation had only deteriorated. As of April 2012, just 49% of referred patients were receiving an evaluation within 14 days, and the remaining 51% had to wait 50 days on average. VA OIG, *Review of Veterans' Access to Mental Health Care*, at ii (2012), available at http://www.va.gov/oig/pubs/VAOIG-12-00368-161.pdf.

delays often have catastrophic consequences.[3] Failure to treat PTSD timely can result in alcoholism, drug addiction, homelessness, and antisocial behavior. App., *infra*, 78a. And the longer PTSD goes untreated, the greater the risk of suicide. App., *infra*, 227a. Indeed, the confluence of the VA's delays and the sheer number of veterans returning from Iraq and Afghanistan suffering from PTSD has led to an epidemic of suicides. Each day, about 18 veterans take their own lives, including 4 to 5 suicides each day among veterans entitled to health care from the VHA. The suicide rate among veterans is 3.2 times higher than the general-population rate. App., *infra*, 224a-225a. Tragically, many veterans who commit suicide previously sought emergency mental-health treatment from VA hospitals and were simply turned away. Pet. 9th Cir. E.R. 2007; 2010-2011; 2020-2021; 2025; 2027-2028.

None of this has to happen. Congress is aware of the problem and has taken action, enacting the Joshua Omvig Veterans Suicide Prevention Act, Pub. L. No. 110-110, 121 Stat. 1031 (2007). Congress concluded that "suicide among veterans suffering from post-traumatic stress disorder * * * is a serious problem." *Id.* § 2. It directed that the VA "should

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[3] Government regulations provide that "[m]edical determinations, such as determinations of the need for and appropriateness of specific types of medical care and treatment for an individual, *are not adjudicative matters and are beyond the Board's jurisdiction*." 38 C.F.R. § 20.101(b) (emphasis added).

take into consideration the special needs of veterans suffering from PTSD * * * and [who] experience high rates of suicide in developing and implementing the comprehensive program under this Act." *Ibid.* Notwithstanding this directive, the VA has failed to implement emergency procedures that Congress and its own audits have deemed necessary.

Instead, the VA has tried to cover up the problem. The Deputy Chief of Patient Care Services in the VA's Office for Mental Health wrote in an internal e-mail: "Shh! Our suicide prevention coordinators are identifying about 1,000 suicide attempts per month among the veterans we see in our medical facilities. Is this something we should (carefully) address ourselves in some sort of release before someone stumbles on it?" App., *infra*, 225a-226a.

2. Delays in adjudication of claims for disability and death benefits

The VBA administers veterans' benefits programs, such as pension and disability benefits. Veterans with disabilities resulting from disease or injury sustained or aggravated during active military service are entitled to monetary benefits from the VBA, 38 U.S.C. § 1110, and their families are entitled to benefits in the event of death, *id.* §§ 1310, 1312. Many veterans, or their families, are entirely dependent on these disability or death benefits for financial support. App., *infra*, 241a.

But for too many veterans, the VBA's benefits system is broken. As of April 2008, over 400,000

claims were pending, app., *infra*, 250a, and over a million claims are pending now.[4] For any claim that involves an appeal, it takes an average of 4.4 years for benefits to be awarded. App., *infra*, 252a. The delay is so long that thousands of veterans die before their appeals are resolved. App., *infra*, 255a.

The claims process begins with the veteran's filing of an application with one of the 57 VA Regional Offices, which makes the initial decision as to a veteran's entitlement to benefits. On average, it takes a Regional Office over half a year to issue an initial decision, with PTSD claims taking longer. App., *infra*, 242a-243a.

Veterans whose claims are denied by a Regional Office may appeal the adverse determinations to the Board of Veterans' Appeals, the internal appellate body of the VA. But before an appeal even can be heard by the Board, the Regional Office must prepare two straightforward documents: a Statement of the Case and a two-page Certification of Appeal. App., *infra*, 248a-249a; 38 C.F.R. § 19.35; Certification of Appeal, available at http://www.va.gov/vaforms/va/pdf/VA8.pdf. Veterans must wait 261 days and 573 days, respectively, for the VBA to complete these simple tasks, app., *infra*, 250a, even though the VBA has acknowledged

[4] As of August 27, 2012, 824,274 compensation claims are pending in Regional Offices and 255,946 compensation claims are pending on appeal. Dep't of Veterans Affairs, 2012 Monday Morning Workload Reports (Aug. 27, 2012), available at http://www.vba.va.gov/REPORTS/mmwr/index.asp.

they take only 2.6 hours combined for someone to complete. Pls. Trial Ex. 1282. The VBA does not know why some veterans must wait 1000 days or more for certification. App., *infra*, 250a-251a.

The appeal itself to the Board of Veterans' Appeals is even slower. Although veterans have the right to request a hearing before the Board (which makes the veteran more likely to prevail), most veterans do not request such a hearing, despite the high likelihood of success, because it takes on average 455 days to receive one. App., *infra*, 252a. All told, it takes an average of 3.9 years for the VA to resolve an appeal. *Ibid.*

The appeals process effectively places many veterans in a perpetual holding pattern. This is the case even though veterans prevail in 72.7% of all cases (winning outright 28.5% of the time and getting a remand in 44.2% more cases).[5] And even though Congress has mandated that remands receive "expeditious treatment" by the Regional Offices, 38 U.S.C. § 5109B, it takes Regional Offices almost 500 days to resolve remanded claims (and 564 days for remanded PTSD claims). Approximately 75% of remanded claims return to the Board of Veterans Appeals. It then takes another 149 days on average for the Board to render a second decision. App., *infra*,

[5] *See* Board of Veterans' Appeals, Report of the Chairman at 21, (Feb. 1, 2012), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2011AR.pdf.

255a. Of these second appeals, 27% are remanded to the Regional Office yet again, resulting in a constant "churning" of claims between the Regional Offices and the Board of Veterans' Appeals.[6]

C. Proceedings Below

1. Petitioners brought suit alleging that the VA's practices and procedures resulting in severe, systemic delays in medical treatment and the adjudication of death and disability claims violated veterans' due process rights under the Constitution and the Administrative Procedure Act. Petitioners sought declaratory and injunctive relief, including an order compelling the VA to implement its own strategic plan for improving mental-health treatment and to afford veterans faced with administrative delays an opportunity to challenge them. Petitioners did not seek relief for the denial of any medical treatment or disability benefits on behalf of any particular veterans. App., *infra*, 95a-99a.

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[6] A May 2012 report of the VA OIG confirmed that the "VBA's management of appeals was ineffective in providing timely resolution of veterans' appeals" and that the situation is deteriorating. VA OIG, *Veterans Benefits Administration: Audit of VA Regional Office's Appeals Management Processes*, at 2 (May 30, 2012), available at http://www.va.gov/oig/pubs/VAOIG-10-03166-75.pdf. The appeals backlog swelled by 30% from 2008 to 2010. The OIG found that VBA had not "allocat[ed] sufficient staff to work on appeals." *Ibid.* And it found that "[w]ithout change, the age of the appeals comprising the inventory will continue to increase and veterans will continue to face unacceptable delays." *Ibid.*

2. The district court initially denied respondents' motion to dismiss and held that "§ 511 does not preclude review of all of Plaintiffs' claims in this Court." App., *infra*, 328a. The court acknowledged that the circuits are divided as to the interpretation of Section 511, and that "the D.C. Circuit interpreted the preclusive effect of § 511 more narrowly" than the Sixth Circuit. App., *infra*, 325a.

After a seven-day bench trial, the district court denied relief in an 82-page decision, making extensive findings of fact—none of which were contested by the government on appeal. The district court concluded that it lacked authority to order the requested remedies. App., *infra*, 264a-280a. With regard to benefits adjudications, the district court concluded that Section 511(a) barred its review. App., *infra*, 275a.

3. A divided three-judge panel of the court of appeals reversed as to the challenges at issue here.

a. The panel held that Section 511(a) does not preclude the district court from considering petitioners' constitutional and statutory challenges. The court of appeals explained that petitioners' due process challenge to the delays in mental-health care services is not barred because petitioners "need not, and do not, seek to relitigate in federal court whether VA staff actually '*acted* properly in handling' individual veterans' requests for appointments." App., *infra*, 123a-124a.

The panel also concluded that petitioners' due process challenge to the process for adjudicating claims for disability benefits was not precluded by Section 511 because the conduct that petitioners "challenge is not a 'decision' within the meaning of § 511"; rather, "that their appeals languish *un*decided is the very basis for their claim." App., *infra*, 145a-146a.

In interpreting Section 511, the panel expressly agreed with the interpretations of the D.C. Circuit and the Federal Circuit. App., *infra*, 146a-148a. The panel, however, disagreed with the Sixth Circuit, stating: "We fail to understand how the Sixth Circuit squared its reasoning with the plain text of the statute * * * ." App., *infra*, 149a.

b. Chief Judge Kozinski dissented. He concluded that the district court lacked jurisdiction under Section 511 to hear petitioners' challenges. App., *infra*, 170a-189a.

4. The Ninth Circuit granted rehearing en banc and affirmed the district court. The divided en banc panel held that "the district court lacks jurisdiction to reach" petitioners' due process challenges under Section 511. App., *infra*, 54a.

a. The majority acknowledged that there is a lack of clarity in the Circuits concerning the scope of Section 511(a)'s preclusion of judicial review. The court explained that "most other circuits have not articulated a comprehensive test to determine the preclusive contours of § 511." App., *infra*, 22a.

The majority concluded that the district court lacked jurisdiction over petitioners' delay-in-treatment challenges because "there is no way for the district court to resolve whether the VA acted in a timely and effective manner in regard to the provision of mental health care without evaluating the circumstances of individual veterans and their requests for treatment, and determining whether the VA handled those requests properly." App., *infra*, 33a. Likewise, the majority concluded that the court lacked jurisdiction over petitioners' challenges relating to delays in adjudication of disability claims because the "district court cannot decide such claims without determining whether the VA acted properly in handling individual veterans' benefits requests at each point in the process." App., *infra*, 35a. The court of appeals reached these conclusions by relying on and citing to petitioners' complaint, rather than the findings of fact that the district court made after a week-long trial.

b. Judge Schroeder dissented. She explained that Section 511 precludes only a review of a "decision" granting or denying benefits, not "a decision to delay making a decision." App., *infra*, 57a. Judge Schroeder stated that petitioners' "concern is not with the substance of any benefits decision. Their concern is with process." App., *infra*, 58a.

Judge Schroeder further explained that the majority's interpretation of Section 511 conflicted with the D.C. Circuit's "narrow interpretation of § 511's bar." App., *infra*, 65a.

REASONS FOR GRANTING THE PETITION

REVIEW IS WARRANTED BECAUSE THE COURTS OF APPEALS ARE SHARPLY DIVIDED OVER A QUESTION OF VITAL IMPORTANCE TO OUR NATION'S VETERANS

Three circuits have rejected the Ninth and Sixth Circuit's overbroad reading of Section 511(a). That irreconcilable division in the courts of appeals alone warrants this Court's immediate review.

Under the ruling below, veterans and their organizations have no recourse to challenge the systemic failures of the VA to provide expedient medical care. Nor can veterans or their families seek review of the VA's failures to make timely determinations regarding disability and death benefits requests—meanwhile, those systemic failures force veterans to navigate the Kafkaesque cycle of benefits denials, appeals, and remands. This is the case even though this Court consistently has construed jurisdiction-stripping statutes narrowly, particularly where their application would foreclose all judicial review and bar constitutional challenges.

The question presented is far too important to await further percolation in the lower courts. The sacrifices our soldiers make while serving the United States are compounded by the struggles they face in dealing with the VA upon returning home. Under the ruling below, they have no redress. This Court should grant review and reverse the Ninth Circuit's erroneous

conclusion that the federal district courts are powerless to entertain petitioners' systemic challenges.

A. The Circuits Are Divided Three To Two Regarding The Scope Of Section 511(a)

1. Three circuits construe Section 511(a) to preclude review only of "decisions" actually made by the Secretary

Contrary to the ruling below, the D.C. Circuit, the Second Circuit, and the Federal Circuit have held that 38 U.S.C. § 511(a) does not preclude systemic challenges that do not seek to overturn "decisions" by the Secretary.

a. The D.C. Circuit has construed Section 511(a) as granting the Secretary authority to make decisions about veterans' benefits, and as only precluding district court review of any decision actually made by the Secretary. *Broudy v. Mather*, 460 F.3d 106, 112 (D.C. Cir. 2006).

In *Broudy*, veterans were injured as a result of exposure to atomic radiation in Japan during World War II. *Id.* at 108-109. The veterans alleged that the government "intentionally covered * * * up" tests that "accurately describe[d] the levels of radiation to which each veteran was exposed" and instead used "flawed dose reconstructions" in deciding veterans' eligibility for benefits. *Id.* at 109-110. The veterans explained that their challenges were "not about whether they should have received Government compensation for their sicknesses" but rather "about whether Government officials denied them a constitutional right of

meaningful access to administrative proceedings before the" VA. *Id.* at 108.

The D.C. Circuit rejected the government's contention that Section 511(a) precluded district court jurisdiction over the veterans' challenges. The court of appeals held that the government's "argument misreads the statute." *Id.* at 112. "Section 511(a) does not give the VA *exclusive* jurisdiction to construe laws affecting the provision of veterans benefits or to consider all issues that might somehow touch upon whether someone receives veterans benefits." *Ibid*. "Rather, it simply gives the VA authority to consider such questions when making a decision about benefits * * * and, more importantly for the question of our jurisdiction, prevents district courts from 'review[ing]' the Secretary's decision once made." *Ibid.* (citations omitted; brackets in original). Thus, the D.C. Circuit explained:

> [W]hile the Secretary is the sole arbiter of benefits claims and issues of law and fact that arise during his disposition of those claims, district courts have jurisdiction to consider questions arising under laws that affect the provision of benefits as long as the Secretary has not actually decided them in the course of a benefits proceeding.

Id. at 114.

Nor did the D.C. Circuit agree (as the Ninth Circuit did below) "that if the District Court exercises jurisdiction here, it would need to determine whether

the VA 'acted properly' in handling the claims of at least those plaintiffs who were denied full benefits." *Id.* at 115. The court explained that was "[n]ot so," because the veterans were "not asking the District Court to decide whether any of the veterans whose claims the Secretary rejected [we]re entitled to benefits. Nor [were] they asking the District Court to revisit any decision made by the Secretary in the course of making benefits determinations." *Ibid.*; *see also Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 659 (D.C. Cir. 2010) (*Broudy* "indicated that only questions '*explicitly* considered' by the Secretary would be barred by § 511, not questions he could be 'deemed to have decided' or, presumably, implicitly decided." (quoting *Broudy*, 460 F.3d at 114)).

b. The Second Circuit also has held that district courts have jurisdiction over challenges relating to veterans' benefits so long as the challenges do not seek review of the Secretary's decision to deny benefits in any particular case. *Disabled Am. Veterans v. United States Dep't of Veterans Affairs*, 962 F.2d 136, 141 (2d Cir. 1992).

In *Disabled American Veterans*, the Second Circuit interpreted the VJRA as not precluding district court jurisdiction over a facial constitutional challenge to a statute that denied benefits eligibility to any "incompetent" veteran without a spouse, child, or dependent parent until the veteran's estate is reduced to less than $10,000 in value. *Id.* at 137-138,

141.[7] The court held that "since the Veterans neither make a claim for benefits nor challenge the denial of such a claim, but rather challenge the constitutionality of a statutory classification drawn by Congress, the district court had jurisdiction to consider their claim." *Id.* at 141.

c. The Federal Circuit is in accord with the D.C. Circuit and Second Circuit. The Federal Circuit has held that Section 511(a) does not preclude district court review of every suit that involves a law affecting the provision of veterans' benefits. *Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir. 2000).

In *Hanlin*, a decision on which the D.C. Circuit relied, the Federal Circuit refused to "read the statute to require the Secretary, *and only the Secretary*, to make all decisions related to laws affecting the provision of benefits." *Ibid*. (emphasis added). "Rather, once the Secretary has been asked to make a decision in a particular case (e.g., through the filing of a claim with the VA), 38 U.S.C. § 511(a) imposes a duty on the Secretary to decide all questions of fact and law necessary to a decision in that case." *Ibid.*

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[7] The Second Circuit applied the VJRA, when it referred to Section 211 rather than Section 511. As the Ninth Circuit noted, "Section 211 was recodified as § 511 by the Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, 105 Stat. 378 (1991)." App., *infra*, 19a. That recodification did not change the statutory language, and for that reason the Ninth Circuit "refer[red] to the pre-VJRA provision as § 211 and the post-VJRA provision as § 511." *Ibid.*

The Federal Circuit subsequently has reaffirmed its holding in *Hanlin* that "Section 511(a) does not apply to every challenge to an action by the VA." *Bates v. Nicholson*, 398 F.3d 1355, 1365 (Fed. Cir. 2005). The court of appeals reiterated that Section 511(a) "only applies where there has been a 'decision by the Secretary.'" *Ibid.*

d. There can be little doubt that had the reasoning of the D.C. Circuit, Second Circuit, and Federal Circuit been applied to the present case, the district court would have been permitted to exercise jurisdiction over petitioners' challenges. Nowhere do petitioners seek review of the Secretary's "decision" as to any veteran's entitlement to medical treatment or disability benefits. Indeed, the government has proffered no evidence that it actually has decided any of the issues in this case—i.e., made a "decision" that would be barred from review under Section 511(a). Rather, petitioners contend that the VA's practices and procedures—which lead to long delays in medical treatment and the adjudication of benefit claims—violate due process and the Administrative Procedure Act. Such suits are precisely the type that would survive in other Circuits under *Broudy*, *Disabled American Veterans*, and *Hanlin*.

2. Two circuits hold that Section 511(a) broadly precludes jurisdiction over systemic challenges to the VA's practices and policies

On the other side of the divide, both the Sixth Circuit and the ruling below have construed Section 511(a) to preclude systemic challenges so long as the challenge, in some attenuated way, might "affect[ ] the provision of benefits"—even if the suit seeks no redress for any "decision" by the Secretary. 38 U.S.C. § 511(a).

a. In *Beamon*, three individual veterans "asked the district court to review the legality and constitutionality of the procedures that the VA uses to decide benefits claims." *Beamon v. Brown*, 125 F.3d 965, 970 (6th Cir. 1997). The veterans alleged "that VA procedures cause unreasonable delays in benefits decisions." *Ibid.* Notwithstanding the fact that the veterans did not challenge any benefits decision, the Sixth Circuit held that "[d]etermining the proper procedures for claim adjudication is a necessary precursor to deciding veterans benefits claims" and thus the Secretary of the VA has exclusive jurisdiction over the challenge. *Ibid.* Moreover, contrary to the ruling of other courts, the Sixth Circuit reasoned that to adjudicate the veterans' challenges would require "review [of] individual claims for veterans benefits, the manner in which they were processed, and the decisions rendered by the regional office of the VA and the [Board]." *Id.* at 970-971.

b. The ruling below adopted the reasoning of the Sixth Circuit. App., *infra*, 35a ("[W]e find ourselves in accord with the Sixth Circuit, which resolved a similar question in *Beamon v. Brown*."). The en banc majority concluded that there was "no way for the district court to resolve whether the VA acted in a timely and effective manner in regard to the provision of mental-health care without evaluating the circumstances of individual veterans and their requests for treatment, and determining whether the VA handled those requests properly." App., *infra*, 33a. Accordingly, the Ninth Circuit concluded the district court was without jurisdiction to decide petitioners' challenges.

While the en banc court purported to "[s]ynthesize" the various out-of-circuit precedents under Section 511, the court nevertheless acknowledged that not all circuits agreed with its approach. App., *infra*, 23a (citing the Second Circuit's decision in *Disabled American Veterans* as contrary to its statutory construction). Indeed, in dissenting from the ruling below, Judge Schroeder concluded that the D.C. Circuit and Second Circuit precedents could not be reconciled with the en banc majority's decision. App., *infra*, 61a-65a. The majority of the three-judge Ninth Circuit panel likewise had rejected the Sixth Circuit's approach. It had "agree[d] with the Federal Circuit's interpretation of" Section 511(a) that a "decision" immune from district court review means "a formal 'decision' by the Secretary or his delegate." App., *infra*, 146a-147a (quoting *Bates*, 398 F.3d at 1365).

This inter-circuit conflict alone is sufficient to warrant this Court's review.

B. The Ninth Circuit's Ruling Cannot Be Reconciled With This Court's Longstanding Precedent

Review also should be granted because the Ninth Circuit's ruling conflicts with this Court's well-settled rule requiring "'clear and convincing' evidence of congressional intent * * * before a statute will be construed to restrict access to judicial review." *Johnson v. Robison*, 415 U.S. 361, 373-374 (1974) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)); *see also Webster v. Doe*, 486 U.S. 592, 603 (1988) ("where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear").

1. In *Robison*, this Court held that the predecessor statute to Section 511 contained "no explicit provision" that "bars judicial consideration of [the veterans'] constitutional claims." *Robison*, 415 U.S. at 367. The Court explained that "[s]uch a construction would, of course, raise serious questions concerning the constitutionality of" the provision. *Id.* at 366.

Congress provided no such "explicit provision" when it amended the statute by enacting Section 511. Section 511 contains no "clear and convincing evidence" that it intended to "restrict access to judicial review" where no benefits decision is being challenged. The plain language of Section 511 precludes district courts from reviewing only a "*decision* of the

Secretary as to any such question"—i.e., as to "all questions of law and fact *necessary to a decision* by the Secretary under a law that affects the provision of benefits." 38 U.S.C. § 511(a) (emphasis added).

The statute does not preclude judicial review of anything else. In particular, the text of Section 511 makes no reference to any constitutional or other systemic challenges that might be prohibited. Indeed, the legislative history confirms that Congress did not intend to divest district courts of jurisdiction over such systemic challenges. H.R. Rep. No. 100-963, 1988 U.S.C.C.A.N. 5782, 5801-5804 ("*Robison* was correct in asserting judicial authority to decide whether statutes meet constitutional muster * * * ."). [8] Thus, as other courts have concluded when examining Section 511(a)'s similarly phrased predecessor statute, "the structure of our constitutional form of government dictate[s] that [the court] not read § 211(a) to preclude all judicial review of a veteran's serious constitutional claims." *Marozsan v. United States*, 852 F.2d 1469, 1472 (7th Cir. 1988) (en banc). [9]

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[8] While the Veterans Court can interpret the Constitution, 38 U.S.C. § 7261(a)(1), nothing in that provision, or elsewhere in the VJRA, deprives district courts of jurisdiction where no benefits "decision" is being challenged.

[9] Before the enactment of the VJRA, Section 211(a) provided:

> [T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the

(Continued on following page)

To be constitutional, the statute must be construed "to allow substantial constitutional challenges to the veterans' benefits statutes and regulations, as well as to the procedures established by the V.A. to administer them." *Ibid.* This is particularly the case where "the statute itself contains no explicit language barring judicial consideration of a veteran's constitutional challenge to the benefits system." *Id.* at 1474.

Here, petitioners challenge no "decision" by the Secretary. Indeed, the government's own regulations concede that a question concerning medical treatment is not even a "decision" (and thus is outside of the Board of Veterans' Appeals' review). 38 C.F.R. § 20.101(b) ("Medical determinations * * * are not adjudicative matters and are beyond the Board's jurisdiction.").

2. The Ninth Circuit dismissively swept aside *Robison*, contending that this Court's "warning of 'serious questions' concerning statutes that preclude all judicial review is of limited application here." App., *infra*, 40a. Relying on review of benefits decisions by the Veterans Court (and ultimately the Federal Circuit), the Ninth Circuit held that, under its reading of Section 511, "Congress did not leave veterans without a forum for their constitutional claims." App., *infra*, 41a.

United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. § 211(a) (1982).

But that cannot be squared with this Court's recent decision in *Free Enterprise Fund*. There, the Court held that granting exclusive jurisdiction "to review any Board rule or sanction" does not "limit the jurisdiction that other statutes confer on district courts," where no "rule" or "sanction" is at issue. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3150 (2010). In particular, this Court "presume[d] that Congress d[id] not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Ibid.* (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-213 (1994)).

This Court in *Free Enterprise Fund* also rejected the government's argument that the constitutional challenge could be raised as part of a "sanction," because that would require the petitioner to unnecessarily suffer "before 'testing the validity of the law.'" *Id.* at 3151 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)). Here, it would make little sense to require veterans to mount a systemic challenge to the Secretary's policies and procedures as they navigate through the benefits process with their own individual claims for particular benefits. But that is what the Ninth Circuit did in this case.

C. This Case Is An Ideal Vehicle To Decide This Question Of National Importance

1. The petition presents a question of paramount national importance in need of prompt resolution.

Ensuring that combat veterans timely receive the care and support that the Nation has promised them in return for their service is one of the Nation's highest priorities. As the President has stated:

> For their service and sacrifice, warm words of thanks from a grateful nation are more than warranted, but they aren't nearly enough. We also owe our veterans the care they were promised and the benefits that they have earned. We have a sacred trust with those who wear the uniform of the United States of America. It's a commitment that begins at enlistment, and it must never end.

President Barack Obama, Remarks by the President on Improving Veterans' Health Care (Apr. 9, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Improving-Veterans-Health-Care-4/9/2009/).

The government, however, is not backing up its words with action. Veterans returning from the wars in Afghanistan and Iraq are afflicted in unprecedented numbers with PTSD because of the unique challenges of waging those wars, such as multiple deployments, the inability to identify the enemy, the lack of real safe zones, and the inadvertent killing of innocent civilians. App., *infra*, 223a-224a. PTSD is one of the

two "signature wounds of today's wars." App, *infra*, 78a n.5. Indeed, during the first two years of the Iraq War, from 2003 to 2005, there was a 232% increase in PTSD diagnoses among veterans born after 1972. App., *infra*, 224a. As of 2008, 18.5% of service members who returned from the wars had PTSD. *Ibid*.

Prompt treatment of veterans with PTSD symptoms is critical to prevent PTSD from causing severe depression, antisocial behavior, and suicide. App., *infra*, 78a-79a. The VA does not dispute this. App., *infra*, 82a. Yet veterans must wait weeks or months even to receive a mental-health evaluation. App., *infra*, 233a. These delays are not aberrant circumstances; they are now the norm. And these delays have led to another tragic new norm: extraordinary rates of suicide among veterans.

The VA does no better with respect to providing disability and death benefits. Veterans and their families often are forced to wait years for the VA's Regional Offices to reach a decision and the appellate process to be completed. The average time to pursue a claim that involves an appeal is now 4.4 years. App., *infra*, 252a. Even though these benefits could help provide food and shelter, many veterans give up before completing the process. Indeed, during a single six-month period, 1,467 veterans died during the pendency of their appeals. App., *infra*, 255a.

Given the sheer number of veterans with PTSD returning home each day and the importance of treatment and benefits, the outcome of this case will

affect the livelihoods of hundreds of thousands of veterans at a crucial time in their lives. Absent this Court's review, veterans who are forced to wait for treatment or are locked in a years-long struggle to secure benefits will have no recourse.

To be sure, the Ninth Circuit en banc majority hypothesized that such a veteran could seek a writ of mandamus from the Veterans Court. App., *infra*, 33a-34a n.18. The bitter irony in this suggestion is that the majority ruled against petitioners on one of their challenges because it concluded that granting the "requested relief would transform the adjudication of veterans' benefits into a contentious, adversarial system." App., *infra*, 4a. It is difficult to imagine a more adversarial system than one in which thousands of veterans must seek mandamus relief from a court to receive the disability benefits to which they are entitled by statute.

Veterans should not be forced to depend on such illusory relief. As Judge Schroeder observed in dissent, "such an extraordinary writ is rarely granted." App., *infra*, 66a (citing *Erspamer v. Derwinski*, 1 Vet. App. 3, 9-11 (Vet. App. 1990) (declining to issue mandamus even after concluding that a delay of ten years for benefits was unreasonable)). And "[t]he writ is not binding in any case other than the case in question, and thus would have no [e]ffect on the procedures" that would continue to apply to countless other veterans facing the same obstacles to having

their claims timely resolved. *Ibid.* (citation omitted).[10]

Congress has done its part by requiring that our veterans receive medical care and disability benefits when they return home and by providing the necessary funding. The executive branch, however, has fallen woefully short. This Court should not allow the government's systemic failures to be insulated from judicial review.

2. The Court should grant review now because any delay is at the expense of our Nation's veterans. Indeed, this case likely presents the *only* opportunity for this Court to intervene in time for the veterans of the Iraq and Afghanistan wars. Combat veterans are entitled to free health care from the VA for only 5 years after their service ends. 38 U.S.C. § 1710(e)(3)(A). If left unreviewed, the Ninth Circuit's decision will condemn these "veterans to suffer intolerable delays inherent in the VA system." App., *infra*, 67a.

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[10] Under the VA's own policies, veterans with mental health issues should receive an evaluation within *24 hours*. App., *infra*, 82a-83a. The amount of time it would take to pursue mandamus relief would make that relief far too late for veterans with symptoms of PTSD.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 5, 2012

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VETERANS FOR COMMON SENSE, a District of Columbia nonprofit organization; VETERANS UNITED FOR TRUTH, INC., a California nonprofit organization, representing their members and a class of all veterans similarly situated,

Plaintiffs-Appellants,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; STEVEN L. KELLER, Acting Chairman, Board of Veterans' Appeals; ALLISON A. HICKEY, Under Secretary, Veterans Benefits Administration; BRADLEY G. MAYES, Director, Compensation and Pension Service; ROBERT A. PETZEL, Under Secretary, Veterans Health Administration; ULRIKE WILLIMON, Veterans Service Center Manager, Oakland Regional Office, Department of Veterans Affairs; UNITED STATES OF AMERICA,

Defendants-Appellees.

No. 08-16728

D.C. No. 3:07-cv-03758-SC

OPINION

Appeal from the United States District Court
for the Northern District of California,
Samuel Conti, Senior District Judge, Presiding.

Argued and Submitted En Banc
December 13, 2011—San Francisco, California

Filed May 7, 2012

Before: Alex Kozinski, Chief Judge,
Mary M. Schroeder, Sidney R. Thomas,
Susan P. Graber, M. Margaret McKeown,
Kim McLane Wardlaw, Johnnie B. Rawlinson,
Jay S. Bybee, Consuelo M. Callahan, Sandra S. Ikuta,
and N. Randy Smith, Circuit Judges.

Opinion by Judge Bybee;
Dissent by Judge Schroeder

COUNSEL

Gordon P. Erspamer, Morrison & Foerster LLP, San Francisco, California, for the plaintiffs-appellants.

Charles W. Scarborough, United States Department of Justice, Civil Division, Appellate Section, Washington, D.C., for the defendants-appellees.

OPINION

BYBEE, Circuit Judge:

After a decade of war, many of our veterans are returning home with physical and psychological wounds that require competent care. Faced with the daunting task of providing that care, as well as adjudicating the claims of hundreds of thousands of

veterans seeking disability benefits, the Department of Veterans Affairs ("VA")[1] is struggling to provide the care and compensation that our veterans deserve. *See, e.g., Review of Veterans' Claims Processing: Are Current Efforts Working? Hearing Before the S. Comm. on Veterans' Affairs,* 111th Cong. 9 (2010) (statement of Michael Walcoff, Acting Under Secretary for Benefits, U.S. Dep't of Veterans Affairs) ("Secretary Shinseki, the Veterans Benefits Administration (VBA), and the entire VA leadership fully share the concerns of this Committee, Congress as a whole, the Veterans Service Organizations (VSOs), the larger Veteran community, and the American public regarding the timeliness and accuracy of disability benefit claims processing.").

Two nonprofit organizations, Veterans for Common Sense and Veterans United for Truth (collectively "VCS"), ask us to remedy delays in the provision of mental health care and the adjudication of service-connected disability compensation claims by the VA. VCS's complaint leaves little doubt that affording VCS the relief it seeks would require the district court to overhaul the manner in which the VA provides mental health care and adjudicates claims

[1] In 1988, Congress reorganized the Veterans Administration as a cabinet-level executive department and redesignated it as the Department of Veterans Affairs. Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988). As used here, "VA" may refer to the Department and its predecessor, the Veterans Administration.

for benefits. VCS would have the district court, among other things, order the implementation of new procedures for handling mental health care requests, create an accelerated appeals process for claims, and convert the claims-adjudication process into an adversarial proceeding.

We conclude that we lack jurisdiction to afford such relief because Congress, in its discretion, has elected to place judicial review of claims related to the provision of veterans' benefits beyond our reach and within the exclusive purview of the United States Court of Appeals for Veterans Claims and the Court of Appeals for the Federal Circuit. *See* 38 U.S.C. §§ 511, 7252, 7292; *see also Yakus v. United States,* 321 U.S. 414, 443 (1944). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868). We conclude that the majority of VCS's claims must be dismissed for lack of jurisdiction. And where we do have jurisdiction to consider VCS's claims, we conclude that granting VCS its requested relief would transform the adjudication of veterans' benefits into a contentious, adversarial system—a system that Congress has actively legislated to preclude. *See Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 323-24 (1985). The Due Process Clause does not demand such a system.

As much as we as citizens are concerned with the plight of veterans seeking the prompt provision of the health care and benefits to which they are entitled by law, as judges we may not exceed our jurisdiction. We conclude that the district court lacked jurisdiction to resolve VCS's claims for system-wide implementation of the VA's mental health care plans, as well as VCS's request for procedures intended to address delays in the provision of mental health care. We similarly determine that the district court lacked jurisdiction to consider VCS's statutory and due process challenges to delays in the system of claims adjudication. We do conclude, however, that the district court had jurisdiction to consider VCS's claims related to the adjudication procedures in VA Regional Offices and that the district court properly denied those claims on the merits.

We therefore affirm the district court in part, reverse in part, and remand with instructions to dismiss the case.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

There are approximately 25 million veterans in the United States and, as of May 2007, between 5 and 8 million of those veterans were enrolled with the

[2] Parts of this opinion are drawn from the three-judge panel majority's opinion. The panel's contribution should be noted and is appreciated.

VA.[3] A significant number of veterans, many of whom have returned recently from operations in Iraq and Afghanistan, suffer from service-related disabilities, and therefore seek mental health care from the Veterans Health Administration ("VHA") and disability compensation from the Veterans Benefits Administration ("VBA").[4]

A. *The Suit*

In 2007, two nonprofit organizations, Veterans for Common Sense and Veterans United for Truth, filed suit in the Northern District of California. On behalf of themselves, their members, and a putative class of veterans with post-traumatic stress disorder ("PTSD") eligible for or receiving medical services, and veterans applying for or receiving service-connected disability benefits, VCS seeks sweeping declaratory and injunctive relief. Such relief is warranted, VCS alleges, because the VA's hand[l]ing of mental health care and service-related disability claims deprives VCS of property in violation of the Due Process Clause of

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[3] The district court found these facts. We take judicial notice of current official figures provided by the VA: 23 million veterans, a third of whom are enrolled for health care with the VHA and of whom 3 million receive disability benefits. *See* Nat'l Ctr. for Veterans Analysis of Statistics, VA Benefits & Health Care Utilization (July 30, 2010), *available at* http://www.va.gov/VETDATA/Pocket-Card/4X6_summer10_sharepoint.pdf.

[4] The VA is divided into three branches: the Veterans Benefits Administration, Veterans Health Administration, and the National Cemetery Administration.

the Constitution and violates the VA's statutory duty to provide timely medical care and disability benefits. VCS specifically disavows seeking relief on behalf of any individual veteran, but instead challenges "average" delays in the VA's provision of mental health care and disability benefits. Compl. ¶¶ 12, 38-39. We briefly summarize VCS's claims.

First, with respect to the VHA's duty to provide veterans with mental health care, VCS challenges VHA procedures that allegedly result in delayed care. *Id.* ¶¶ 31, 184-200, 277. VCS also challenges the lack of procedures for veterans to expedite that care. *Id.* ¶¶ 31, 277. VCS therefore asked the district court to declare, among other things, that the lack of procedures to remedy delays in the provision of medical care and treatment violates due process. *Id.* ¶¶ 31, 258-60. VCS also seeks to enjoin the VA from permitting protracted delays in the provision of mental health care and to compel the VHA to implement governmental recommendations for improving the provision of mental health care.[5] *Id.* ¶¶ 31, 277.

Second, VCS challenges VBA delays in the adjudication and resolution of disability-compensation claims under both the Administrative Procedure Act

[5] Those recommendations are found in the VA's 2004 Mental Health Strategic Plan ("Plan") and a June 2007 memorandum from the then-Deputy Under Secretary for Health Operations and Management, William Feeley. Both documents set out specific recommendations intended to improve the VA's provision of mental health care services to veterans.

("APA") and the Due Process Clause of the Fifth Amendment. *Id.* ¶¶ 31, 145-83, 277. VCS asserts that the adjudication of those claims, which begins at one of the VA's 57 Regional Offices and proceeds through the Board of Veterans' Appeals, the Court of Appeals for Veterans Claims ("Veterans Court"),[6] an Article I court, 38 U.S.C. §§ 7251, 7266(a), and the Federal Circuit, 38 U.S.C. § 7292(a), is plagued by unreasonable delays that result in a functional denial of benefits. Compl. ¶¶ 31, 145-83, 277. VCS therefore seeks both declaratory and injunctive relief to remedy those delays. *Id.* ¶ 277.

Finally, VCS challenges the constitutionality of numerous VBA practices and procedures, including the absence of trial-like procedures at the VA's Regional Offices. *Id.* ¶¶ 30, 201-03, 262-63. VCS also seeks to enjoin the VBA from prematurely denying PTSD and other service-connected disability compensation claims. *Id.* ¶¶ 31, 277.[7]

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[6] The court as initially established was called the United States Court of Veterans Appeals. The name was later changed by the Veterans Programs Enhancement Act of 1998 to the U.S. Court of Appeals for Veterans Claims. Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341.

[7] In its complaint, VCS brought other challenges to VA procedures, including a challenge to the absence of class action procedures in the adjudication of benefits claims, as well as a challenge arguing that VA practices deny veterans access to the courts. Compl. ¶¶ 202, 261-63. VCS, however, appears to have abandoned these claims on appeal, and thus we address only those claims that VCS has preserved on appeal.

B. *The District Court Denies VCS Relief*

After the district court denied in large part the VA's motion to dismiss, VCS requested a preliminary injunction on its mental health claims. The district court held an evidentiary hearing, but deferred ruling on the preliminary injunction, instead merging the request with a bench trial on the merits that would address all of VCS's claims.[8]

The district court held a seven-day bench trial and, two months later, issued a comprehensive Memorandum of Decision, Findings of Fact and Conclusions of Law. *See Veterans for Common Sense v. Peake* ("*Veterans*"), 563 F. Supp. 2d 1049 (N.D. Cal. 2008). The district court denied VCS's various claims and concluded that ordering the relief requested by VCS would draw the district court into resolving when and how care is provided—a role that it was not equipped to undertake. *Id.* at 1080-82. First, with respect to the VHA's provision of mental health care, the district court rejected VCS's challenge because VCS failed to identify a discrete, final agency action that the VA was required to take. *Id.* at 1082-83; *see* 5 U.S.C. § 706(1); *see also Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 64 (2004). Similarly, the district court rejected VCS's due process claims challenging the VA's failure to provide timely and effective mental

[8] VCS objected to the trial schedule, as well as the limitations on discovery the district court imposed, and the district court overruled those objections.

health care because the VA's health care system reflected "an appropriate balance between safeguarding the veteran's interest in medical treatment and permitting medical treatment without overly burdensome procedural protections." *Veterans,* 563 F. Supp. 2d at 1082.

With respect to the VBA's administration of service-related disability compensation, the district court denied VCS relief on the grounds that both 38 U.S.C. § 511 and § 502 precluded its review. The court reasoned that, because "[t]he issue . . . of whether a veteran's benefit[s] claim adjudication has been substantially delayed will often hinge on specific facts of that veteran's claim," it lacked jurisdiction under 38 U.S.C. § 511(a) to review the causes of delayed adjudication. *Id.* at 1083-84. It likewise found that ordering the VBA to remedy delays by implementing new procedures would "invariably implicate VA regulations," review of which may be conducted only by the Federal Circuit under 38 U.S.C. § 502. *Id.* at 1084. The district court, however, reached the merits of VCS's disability-based claims, but concluded that neither delays in the VBA's Regional Offices' adjudication of disability-related claims, nor the lack of trial-like protections for veterans raising such claims, was unreasonable under the APA or violative of due process. *Id.* at 1085-86. The district court therefore denied VCS's request for a permanent injunction and declaratory relief, and granted judgment in favor of the VA. *Id.* at 1092.

VCS appealed. A panel of this court, by a 2-1 majority, reversed on the constitutional claims. *Veterans for Common Sense v. Shinseki,* 644 F.3d 845, 878 (9th Cir. 2011). The panel affirmed the district court's conclusion that the VA's procedures at its Regional Offices satisfied due process. *Id.* at 887-88. We granted the VA's petition for rehearing en banc. *Veterans for Common Sense v. Shinseki,* 663 F.3d 1033 (9th Cir. 2011).

II. JURISDICTION

Before we may address VCS's claims on the merits, we must consider the government's argument that the Veterans' Judicial Review Act, Pub. L. No. 100-687, div. A, 102 Stat. 4105 (1988) ("VJRA"), codified at various sections in Title 38, deprives us of jurisdiction over these claims. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998) (holding that a court must have jurisdiction to reach the merits). We first review the history of the VJRA and Congress's long-held concern with judicial intrusion into the VA's handling of veterans' requests for benefits. We then consider the way in which the courts have construed the provision in the VJRA that precludes review of VA decisions, 38 U.S.C. § 511.

A. *Jurisdiction over Veterans Benefits*

Article III confers "[t]he judicial Power of the United States" on a supreme court and "such inferior Courts as the Congress may from time to time ordain

and establish." U.S. Const. art. III, § 1. The "judicial Power" vested in such courts "extend[s] to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made." *Id.* art. III, § 2, cl. 1. Article III is not self-executing, however, so the jurisdiction of inferior federal courts depends on an affirmative statutory grant. *See United States v. Hudson,* 11 U.S. (7 Cranch) 32, 33 (1812) ("[Only] the Supreme Court[ ] possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer."). Article III's "federal question jurisdiction" is statutorily conferred on federal district courts in 28 U.S.C. § 1331, which VCS cites as the source of the district court's jurisdictional authority. That section provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. But the fact that federal courts are vested with such jurisdiction over "all civil actions" does not mean that all federal courts may exercise jurisdiction over all such civil actions. The Constitution also grants to Congress the power to control federal court jurisdiction through "such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. art. III, § 2, cl. 2; *see Palmore v. United States,* 411 U.S. 389, 400-01 (1973) (holding that Congress is not required to vest inferior

federal courts "with all the jurisdiction it was authorized to bestow under Art. III"). And Congress is under no obligation to confer jurisdiction upon inferior federal courts equally; indeed, no court "can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all." *Sheldon v. Sill,* 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.").

In cases involving benefits owed to veterans, Congress has created a scheme conferring exclusive jurisdiction over claims affecting veterans' benefits to some federal courts, while denying all other federal courts any jurisdiction over such claims. The source of that statutory scheme is the Veterans' Judicial Review Act of 1988. To understand the import of the VJRA, and how it affects our jurisdiction to consider VCS's claims here, it is helpful to examine the history of judicial review of VA decisions.

1. History of Judicial Review

Our discussion will be brief because the history of judicial review of VA decisionmaking is a short one. Congress established the VA in 1930. Act of July 3, 1930, ch. 863, § 1, 46 Stat. 1016, 1016. Three years later, Congress prohibited judicial review of the VA's benefits decisions. Act of Mar. 20, 1933, ch. 3, § 5, 48 Stat. 8, 9 ("All decisions rendered by the Administrator

under . . . this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review . . . any such decision."); *see also Lynch v. United States,* 292 U.S. 571, 587 (1934) (construing the statute to "remove the possibility of judicial relief"). Congress has "consistently precluded judicial review of veterans' benefits determinations" thereafter. *Larrabee ex rel. Jones v. Derwinski,* 968 F.2d 1497, 1499 (2d Cir. 1992).

Over time, however, exceptions to the preclusion provision began to appear. This development occurred most notably in the D.C. Circuit, *see, e.g., Tracy v. Gleason,* 379 F.2d 469, 472-73 (D.C. Cir. 1967), where a "procession of decisions . . . 'significantly narrow[ed] the preclusion statute'" and limited its application to bar review of challenges related to initial filing of claims. *Larrabee ex rel. Jones,* 968 F.2d at 1500 (quoting Note, *Judicial Review of Allegedly* Ultra Vires *Actions of the Veterans' Administration: Does 38 U.S.C. § 211(a) Preclude Review?,* 55 Fordham L. Rev. 579, 596 (1987) (alteration in original)). In response to the D.C. Circuit's "fairly tortured construction" of the jurisdictional limitation, in 1970 Congress reemphasized its "clear" intent that the "exemption from judicial review . . . be all inclusive," and it amended the statute to "provide that except for certain contractual benefits, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration" shall be unreviewable.

H.R. Rep. No. 91-1166 at 10 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3723, 3730-31. The result was 38 U.S.C. § 211,[9] the precursor to § 511, which we construe here.

Four years later, the Supreme Court interpreted § 211 in the context of an equal protection challenge to statutes related to veterans' benefits. *Johnson v. Robison,* 415 U.S. 361 (1974). The Supreme Court held that § 211 precluded only review of decisions "that arise in the *administration* by the Veterans' Administration of a *statute* providing benefits for veterans." *Id.* at 367 (emphasis added). Declaring that construing § 211 to eliminate all federal court review of constitutional challenges to veterans' benefits legislation would raise "serious questions concerning the constitutionality of § 211," and invoking the constitutional avoidance doctrine, the Court construed § 211 to allow federal court review of a challenge to the constitutionality of the statute itself. *Id.* at 366-67. The *Robison* Court therefore concluded that district courts had jurisdiction to consider a direct facial

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[9] That section provided:

> [T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. § 211(a) (1970).

challenge to statutes affecting veterans' benefits. *Id.* at 367.

Fourteen years after deciding *Robison,* the Supreme Court revisited the jurisdictional limitations of § 211 in *Traynor v. Turnage,* 485 U.S. 535 (1988). There, the Court held that § 211 did not bar federal courts from reviewing whether the VA's regulations conflicted with § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which requires that federal programs not discriminate against handicapped individuals solely because of their handicap. *Traynor,* 485 U.S. at 545. Section 211(a), the Court said, "insulates from review decisions of law and fact . . . made in interpreting or applying a particular provision of that statute to a particular set of facts." *Id.* at 543. The Court noted that the VA had no "special expertise in assessing the validity of its regulations" against "a later passed statute of general application." *Id.* at 544. The Court doubted that permitting federal court review would interfere with the VA or burden the agency with "expensive and time-consuming litigation." *Id.* (internal quotation marks omitted). The Court invited the VA to "seek[ ] appropriate relief from Congress" if "experience proves otherwise." *Id.* at 544-45.

2. The Veterans' Judicial Review Act

Congress responded almost immediately to the Court's invitation in *Traynor.* For Congress, *Traynor* threatened to increase the judiciary's involvement in

"technical VA decision-making." *See* H.R. Rep. No. 100-963, at 20-21, 27 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5802-03, 5809-10. In order to dissuade the judiciary from ignoring "the explicit language that Congress used in isolating decisions of the Administrator from judicial scrutiny," *id.* at 21, 1988 U.S.C.C.A.N. at 5802, Congress overhauled both the internal review mechanism and § 211 in the VJRA. Pub. L. No. 100-687, 102 Stat. 4105.

The VJRA made three fundamental changes to the procedures and statutes affecting review of VA decisions. First, the VJRA placed responsibility for reviewing decisions made by VA Regional Offices and the Board of Veterans' Appeals in a new Article I court, the United States Court of Appeals for Veterans Claims. 38 U.S.C. §§ 7251, 7261. As Congress explained, the creation of the Veterans Court was "intended to provide a more independent review by a body which is not bound by the Administrator's view of the law, and that will be more clearly perceived as one which has as its sole function deciding claims in accordance with the Constitution and laws of the United States." H.R. Rep. No. 100-963, at 26, 1988 U.S.C.C.A.N. at 5808. The statute also "provide[d] claimants with an avenue for the review of VA decisions that would otherwise have been unreviewable" under prior veterans-related legislation. *Beamon v. Brown,* 125 F.3d 965, 972 (6th Cir. 1997).

Congress indicated that the Veterans Court's authority would extend to "*all* questions involving benefits under laws administered by the VA. This

would include factual, legal, and constitutional questions." H.R. Rep. No. 100-963, at 5, 1988 U.S.C.C.A.N. at 5786 (emphasis added). To that end, Congress conferred on the Veterans Court "*exclusive* jurisdiction" to review decisions of the Board of Veterans' Appeals, 38 U.S.C. § 7252(a) (emphasis added), and its powers include the authority to decide any question of law relevant to benefits proceedings, *id.* § 7261(a)(1), and "compel action of the Secretary unlawfully withheld or unreasonably delayed," *id.* § 7261(a)(2). The Veterans Court also has authority under the All Writs Act to issue "writs necessary or appropriate in aid of [its] jurisdiction[ ]." 28 U.S.C. § 1651(a); *see also Erspamer v. Derwinski,* 1 Vet. App. 3, 7 (1990) (holding "that this court has jurisdiction to issue extraordinary writs under the All Writs Act").

Second, decisions of the Veterans Court are reviewed exclusively by the Federal Circuit, which "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(a), (c), (d)(1).[10] Although the Federal Circuit may not review factual determinations, it may review the application of law to facts if a constitutional issue is implicated. *Id.* § 7292(d)(2). The decisions of the Federal Circuit are final and only "subject to review by the Supreme Court upon certiorari." *Id.* § 7292(c). As the Second Circuit observed, "[b]y

[10] The VJRA also vested the Federal Circuit with exclusive jurisdiction over challenges to VA rules, regulations, and policies. 38 U.S.C. §§ 502, 7292.

providing judicial review in the Federal Circuit, Congress intended to obviate the Supreme Court's reluctance to construe [§ 211] as barring judicial review of substantial statutory and constitutional claims, while maintaining uniformity by establishing an exclusive mechanism for appellate review of decisions of the Secretary." *Larrabee ex rel. Jones,* 968 F.2d at 1501 (citations omitted).

Third and finally, Congress expanded the provision precluding judicial review, formerly § 211. Under the new provision, eventually codified at 38 U.S.C. § 511,[11] the VA "shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. § 511(a).[12] Whereas § 211(a) prohibited review of "decisions . . . under any law . . . providing benefits for veterans," 38 U.S.C. § 211(a) (1970), § 511(a) prohibits review of "all

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[11] Section 211 was recodified as § 511 by the Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, 105 Stat. 378 (1991). We will refer to the pre-VJRA provision as § 211 and the post-VJRA provision as § 511.

[12] 38 U.S.C. § 511(a) states in full:

> The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

questions of law and fact necessary to a decision . . . that affects the provision of benefits," 38 U.S.C. § 511(a) (2006). With this change, Congress intended to "broaden the scope of section 211" and limit outside "court intervention" in the VA decisionmaking process. *See* H.R. Rep. No. 100-963, at 27, 1988 U.S.C.C.A.N. at 5809; *see also Larrabee ex rel. Jones,* 968 F.2d at 1501 ("The VJRA . . . broadens section 211's preclusion of judicial review by other courts."). The nonreviewability provision in § 511(a) is subject to four exceptions, one of which is relevant here and we have previously discussed: The Veterans Court and the Federal Circuit may review the Secretary's decisions regarding veterans' benefits. 38 U.S.C. § 511(b)(4); *see id.* §§ 7252, 7292.

In sum, the VJRA supplies two independent means by which we are disqualified from hearing veterans' suits concerning their benefits. First, Congress has expressly disqualified us from hearing cases related to VA benefits in § 511(a) ("may not be reviewed by any . . . court"), and second, Congress has conferred exclusive jurisdiction over such claims to the Veterans Court and the Federal Circuit, *id.* §§ 511(b)(4), 7252(a), 7292(c). The provisions may not be co-extensive, so if a claim comes within either provision, the district court is divested of jurisdiction that it otherwise might have exercised under 28 U.S.C. § 1331, and we are divested of any power of appellate review. *See* H.R. Rep. No. 100-963, at 28, 1988 U.S.C.C.A.N. at 5810 ("By vesting jurisdiction of challenges brought under the APA solely in the Court

of Appeals for the Federal Circuit, the bill deprives United States District Courts of jurisdiction to hear such matters under 28 U.S.C. 1331."). Together, these provisions demonstrate that Congress was quite serious about limiting our jurisdiction over anything dealing with the provision of veterans' benefits.

B. *Judicial Construction of § 511*

We have had limited opportunity to address the scope of the jurisdictional limitation in § 511. In *Chinnock v. Turnage*, we noted that § 511 precluded our review of the VA's interpretation of a regulation that affected the denial of a veteran's disability benefits. 995 F.2d 889, 893 n.2 (9th Cir. 1993). Then, in *Hicks v. Small,* we concluded that § 511 prevented us from considering a veteran's state tort claims brought against a VA doctor because adjudication of those claims "would necessitate a 'consideration of issues of law and fact involving the decision to reduce Hicks' benefits,' a review specifically precluded by 38 U.S.C. § 511(a)." 69 F.3d 967, 970 (9th Cir. 1995) (quoting *Hicks v. Small,* 842 F. Supp. 407, 413-14 (D. Nev. 1993)). And in *Littlejohn v. United States,* we concluded that, although "the Federal Circuit [is] the only Article III court with jurisdiction to hear challenges to VA determinations regarding disability benefits," we could consider a veteran's Federal Tort Claims Act ("FTCA") claim alleging negligence against VA doctors because doing so would not "possibly have

any effect on the benefits he has already been awarded." 321 F.3d 915, 921 (9th Cir. 2003).[13] In neither *Chinnock, Hicks,* nor *Littlejohn* did we articulate a clear standard for evaluating our jurisdiction when a party raises claims regarding VA benefits.

Similarly, most other circuits have not articulated a comprehensive test to determine the preclusive contours of § 511. That being said, a survey of cases from various circuits that have analyzed § 511 demonstrates some consistent, largely undisputed conclusions as to what § 511 does (and does not) preclude. In general, review of decisions made in the context of an individual veteran's VA benefits proceedings are beyond the jurisdiction of federal courts outside the review scheme established by the VJRA. This is true even if the veteran dresses his claim as a constitutional challenge, *see Zuspann v. Brown,* 60 F.3d 1156, 1159-60 (5th Cir. 1995) (finding no remedy for alleged constitutional violations because veteran was ultimately "complaining about a denial of benefits"); *Sugrue v. Derwinski,* 26 F.3d 8, 10-11 (2d Cir. 1994) ("[T]he courts do not acquire jurisdiction to hear challenges to benefits determinations merely because those challenges are cloaked in constitutional terms."); *Larrabee ex rel. Jones,* 968 F.2d at 1498 (dismissing veteran's due process challenge where "[t]he

[13] The FTCA specifically confers jurisdiction on federal district courts to hear such claims. *See* 28 U.S.C. § 1346(b)(1). We also noted that the VA had separate procedures for dealing with FTCA claims. *See Littlejohn,* 321 F.3d at 921 n.5.

gravamen of the amended complaint [was] that the VA ha[d] failed to provide [the veteran] with adequate care"); *Hicks v. Veterans Admin.,* 961 F.2d 1367, 1369-70 (8th Cir. 1992) (veteran's claim that his benefits were reduced because he exercised his First Amendment rights was ultimately a "challenge to a decision affecting benefits" and precluded by § 511), and even where the veteran has challenged some other wrongful conduct that, although unrelated to the VA's ultimate decision on his claim, affected his or her benefits proceeding, *see Weaver v. United States,* 98 F.3d 518, 519-20 (10th Cir. 1996) (finding no jurisdiction where the claimant sued for conspiracy and fraud, claiming that VA employees concealed his medical records); *cf. In re Russell,* 155 F.3d 1012, 1013 (8th Cir. 1998) (per curiam) (court could not issue writ of mandamus ordering the Board of Veterans' Appeals and Veterans Court to act on veteran's request for benefits). *But see Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs,* 962 F.2d 136, 141 (2d Cir. 1992) ("[S]ince the Veterans neither make a claim for benefits nor challenge the denial of such a claim, but rather challenge the constitutionality of a statutory classification drawn by Congress, the district court had jurisdiction. . . .").

The Federal Circuit has also addressed the scope of § 511, albeit primarily in cases that do not involve a veteran's challenge to the VA's administration of benefits. In *Hanlin v. United States,* an attorney sued the VA for attorney's fees in the Court of Federal Claims, claiming a breach of implied contract under a

fee arrangement with a veteran. 214 F.3d 1319, 1320 (Fed. Cir. 2000). Although the government argued that § 511 precluded review in that court, the Federal Circuit disagreed, holding that "§ 511(a) does not require the Secretary to address such a claim and thus does not provide the VA with exclusive jurisdiction over [the attorney]'s claim." *Id.* at 1321. Then, in *Bates v. Nicholson,* the Federal Circuit held that a determination of whether to terminate the certification of an attorney to practice before the VA was subject to the jurisdiction of the Board of Veterans' Appeals. 398 F.3d 1355, 1365-66 (Fed. Cir. 2005). Rejecting the concurrence's criticism that its decision needlessly expanded § 511, the court noted that § 511's preclusion "contemplates a formal 'decision' by the Secretary or his delegate" and does not apply to every decision that may indirectly affect benefits. *Id.* at 1365.

The D.C. Circuit, in a series of cases, and the Sixth Circuit, in a case very similar to this one, have articulated the most comprehensive and relevant standard for determining the scope of § 511. *See Broudy v. Mather,* 460 F.3d 106, 115 (D.C. Cir. 2006); *Thomas v. Principi,* 394 F.3d 970, 974 (D.C. Cir. 2005); *Price v. United States,* 228 F.3d 420, 422 (D.C. Cir. 2000) (per curiam); *Beamon,* 125 F.3d at 971. In *Price,* the D.C. Circuit held that § 511 precluded the district court's jurisdiction to consider a veteran's claim for reimbursement of medical expenses because, in order for the court to resolve whether the VA had failed to reimburse the veteran, it "would require

the district court to determine first whether the VA acted properly in handling Price's request for reimbursement." 228 F.3d at 422. As the court noted, "courts have consistently held that a federal district court may not entertain constitutional or statutory claims whose resolution would require the court to intrude upon the VA's exclusive jurisdiction." *Id.*[14]

The D.C. Circuit confirmed this analysis in *Thomas*. There, the veteran brought an action under the FTCA in which he alleged that the VA had "failed to render the appropriate medical care services" and thereby denied him "medical care treatment." *Thomas,* 394 F.3d at 975 (internal quotation marks omitted). Relying on *Price,* the D.C. Circuit held that the relevant test was "whether adjudicating Thomas's claims would require the district court 'to determine first whether the VA acted properly in handling' Thomas's benefits request." *Id.* at 974 (quoting *Price,* 228 F.3d at 422). The court concluded that some of Thomas's tort claims were barred by § 511, while others survived. *Id.* at 974-75.

The D.C. Circuit confirmed this test again in *Broudy,* 460 F.3d at 114-15, and also identified a situation in which § 511 did not preclude its jurisdiction. There, the plaintiffs sued the VA for allegedly withholding radiation test results, effectively denying the plaintiffs access to the courts. *Id.* at 109-10. The

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[14] We previously cited *Price* with approval in *Littlejohn,* 321 F.3d at 921.

plaintiffs requested, among other things, the "immediate release of all relevant records and documents" and an injunction preventing future instances of such misconduct. *Id.* at 110. Distinguishing the case from *Price* and *Thomas,* the D.C. Circuit held that it had jurisdiction to consider the plaintiffs' claims because those claims did not require the district court "to decide whether any of the veterans whose claims the Secretary rejected [we]re entitled to benefits." *Id.* at 115. Nor did their claims require the court to "revisit any decision made by the Secretary *in the course of making* benefits determinations." *Id.* (emphasis added). Thus, the D.C. Circuit concluded that it had jurisdiction. *Id.*

In addition to these cases from the D.C. Circuit, we find a closely analogous case in the Sixth Circuit's decision in *Beamon v. Brown.* In *Beamon,* the plaintiffs claimed that "the VA's procedures for processing claims cause[d] unreasonable delays, thereby violating their rights under the Administrative Procedure Act . . . and under the Due Process Clause of the Fifth Amendment." 125 F.3d at 966. The Sixth Circuit held that "the VJRA explicitly granted comprehensive and exclusive jurisdiction to the [Veterans Court] and the Federal Circuit over claims seeking review of *VA decisions that relate to benefits decisions* under § 511(a)." *Id.* at 971 (emphasis added). The court therefore concluded that it could not hear "constitutional issues and allegations that a VA decision has been unreasonably delayed" by the inadequacies of the VA's procedures. *Id.* Because adjudicating the plaintiffs'

claims would require the district court to "review individual claims for veterans' benefits, the manner in which they were processed, and the decisions rendered by the regional office of the VA" and the Board of Veterans' Appeals, "[t]his type of review falls within the exclusive jurisdiction of the [Veterans Court] as defined by [38 U.S.C.] § 7252(a)." *Id.* at 970-71.

Synthesizing these cases, we conclude that § 511 precludes jurisdiction over a claim if it requires the district court to review "VA decisions that relate to benefits decisions," *Beamon,* 125 F.3d at 971, including "any decision made by the Secretary in the course of making benefits determinations," *Broudy,* 460 F.3d at 115. This standard is consistent with Congress's intention to "broaden the scope" of the judicial preclusion provision, H.R. Rep. No. 100-963, at 27, 1988 U.S.C.C.A.N. at 5809, and is reflected in § 511(a)'s plain statement that we may not review a "decision by the Secretary under a law that affects the provision of [veterans'] benefits," 38 U.S.C. § 511(a). This preclusion extends not only to cases where adjudicating veterans' claims requires the district court to determine whether the VA acted properly in handling a veteran's request for benefits, but also to those decisions that may affect such cases. *See Price,* 228 F.3d at 422; *Thomas,* 394 F.3d at 974; *Broudy,* 460 F.3d at 114-15; *accord Beamon,* 125 F.3d at 971. If that test is met, then the district court must cede any claim to jurisdiction over the case, and parties must

seek a forum in the Veterans Court and the Federal Circuit.

III. APPLICATION

In this case, we must determine whether VCS has raised claims that involve "questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary." 38 U.S.C. § 511(a). Under the VA's regulations, "benefit" is defined as "any payment, service, . . . or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans and their dependents and survivors." 38 C.F.R. § 20.3(e). Here, VCS claims that delays in the VHA's provision of mental health care and the VBA's adjudication of service-related disability benefits violate the VA's statutory obligations to provide veterans with care and, therefore, deprive veterans of "property" under the Due Process Clause. Mental health care and disability compensation are clearly "benefits," so any "question of fact or law" that "affects the provision of [them] by the Secretary" falls under the ambit of § 511. Accordingly, we turn first to VCS's various mental health claims and then to VCS's disability compensation claims to determine whether the district court had jurisdiction under § 511.

A. *Mental Health Care Claims*

VCS claims that delays in the VHA's provision of mental health care violate the APA and the Due Process Clause.[15] VCS also requests the adoption of a formal appeals process to allow veterans to challenge an administrator's decision to place a veteran on a wait list for mental health care, more transparent clinical appeals procedures, and an expedited procedure for veterans presenting PTSD symptoms to receive access to mental health care.[16]

Section 511 undoubtedly would deprive us of jurisdiction to consider an individual veteran's claim that the VA unreasonably delayed his mental health care. VCS attempts to circumvent this jurisdictional limitation by disavowing relief on behalf of any

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[15] The district court exercised jurisdiction but denied VCS's APA claim because, among other things, VCS's claim did not pertain to a "final agency action," and thus could not be brought under the APA. *Veterans,* 563 F. Supp. 2d at 1059 (citing *Norton,* 542 U.S. at 64). The district court denied VCS's due process challenge to the VHA's failure to provide timely care on the merits because VCS "did not prove a systemic denial or unreasonable delay in mental health care." *Id.* at 1082. We do not address these conclusions because we hold that the district court lacked jurisdiction.

[16] So, for example, VCS argues that the VA should be compelled to implement remedial measures recommended in the VA's Mental Health Strategic Plan and the Feeley Memorandum. VCS claims that these measures would improve the circumstances of veterans experiencing delays in the provision of mental health care, and the failure to adopt them violates the Due Process Clause of the Fifth Amendment.

individual veteran, and instead proffering evidence of *average* delays to demonstrate statutory and constitutional violations.[17] VCS emphasized in its complaint that the "constitutional defects with the VA's systems, as set forth herein, are . . . divorced from the facts of any individual claim." Compl. ¶ 12. On appeal, VCS repeats that its claims regarding average delays do not involve questions of law or fact necessary to a decision about providing benefits to an individual veteran.

VCS's allegations bear a close resemblance to those made by veterans' organizations who "went out of their way to forswear any individual relief for" veterans in a challenge to the VA's adjudication of benefits appeals recently considered by the D.C. Circuit. *See Viet. Veterans of Am. v. Shinseki,* 599 F.3d 654, 662 (D.C. Cir.), *cert. denied,* 131 S. Ct. 195 (2010). There, much like here, the veterans' organizations alleged that "[n]othing in this complaint is

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[17] For example, VCS alleges:

> The facts herein pertaining to the [veterans and organizational plaintiffs] are included for the specific purpose[ ] of . . . illustrating the Challenged VA Practices, and not for the purpose of obtaining review of decisions by the VA or [the Veterans Court]. Nothing herein is intended or should be construed as an attempt to obtain review of any decision relating to benefits sought by any veteran . . . or to question the validity of any benefits decisions made by the Secretary of the VA.

Compl. ¶ 39.

intended as . . . an attempt to obtain review of an individual determination by the VA or its appellate system," *id.* at 658 (internal quotation marks omitted), and they submitted evidence of average delays in the VA's appellate process, *id.* at 657, 662. But, noting the plaintiffs' "rather apparent effort to avoid the preclusive bite" of § 511(a), the D.C. Circuit concluded that, by disavowing relief based on any individual veteran, the plaintiffs overlooked the fact that "the average processing time does not cause [veterans] injury; it is only *their* processing time that is relevant." *Id.* at 661-62. The court reasoned that even "assuming the alleged 'illegality'—that the average processing time at each stage is too long—that illegality does not cause the [plaintiffs] injury." *Id.* at 662. This analysis led the D.C. Circuit to conclude that the plaintiffs lacked standing to pursue their claims. *Id.* ("If the affiants were suing by themselves—which is how we must analyze the claim—asserting that the average time of processing was too long, it would be apparent that they were presenting a claim not for themselves but for others, indeed, an unidentified group of others. But one can not have standing in federal court by asserting an injury to someone else.").

Here, it may be that VCS similarly does not have standing for its claims, because a claim based on average harm seems contrary to the Supreme Court's requirement of a "particularized" harm that "affect[s] the plaintiff in a personal and individual way." *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 561

n.1 (1992). Nevertheless, because it is clear that there is an independent statutory bar to our jurisdiction, we need not reach the standing issue.

The fact that VCS couches its complaint in terms of *average* delays cannot disguise the fact that it is, fundamentally, a challenge to thousands of individual mental health benefits decisions made by the VA. In order to determine whether the average delays alleged by VCS are unreasonable, the district court would have to review the circumstances surrounding the VA's provision of benefits to individual veterans. The district court does not acquire jurisdiction over VCS's complaint just because VCS challenges many benefits decisions rather than a single decision. Indeed, an *average* processing time tells us nothing about the causes for such processing time. VCS alleges that the average processing time for mental health claims is too long, but the district court would have no basis for evaluating that claim without inquiring into the circumstances of at least a representative sample of the veterans whom VCS represents; then the district court would have to decide whether the processing time was reasonable or not as to each individual case. *Cf. Viet. Veterans of Am.,* 599 F.3d at 662; *Price,* 228 F.3d at 422.

Moreover, in order to provide the relief that VCS seeks, the district court would have to prescribe the procedures for processing mental health claims and supervise the enforcement of its order. To determine whether its order has been followed, the district court would have to look at individual processing times. In

addition to our general concern that "this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action," *Laird v. Tatum,* 408 U.S. 1, 15 (1972), it would embroil the district court in the day-to-day operation of the VA and, of necessity, require the district court to monitor individual benefits determinations.

In sum, there is no way for the district court to resolve whether the VA acted in a timely and effective manner in regard to the provision of mental health care without evaluating the circumstances of individual veterans and their requests for treatment, and determining whether the VA handled those requests properly. We therefore lack jurisdiction to consider VCS's various claims for relief related to the VA's provision of mental health care, including its challenge to the lack of procedures by which veterans may appeal the VA's administrative scheduling decisions. *See* 38 U.S.C. § 511(a).[18]

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[18] Of course, to the extent that any individual veteran claims unreasonable delay in the provision of his benefits, he may file a claim in the Veterans Court, which has the power to "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. § 7261(a)(2); *see also Stegall v. West,* 11 Vet. App. 268, 271 (1998) (concluding that its authority to "'compel action of the Secretary unlawfully withheld or unreasonably delayed'" gave the Veterans Court authority to "remand the claim with directions that the Secretary order an additional medical examination that complies with all pertinent statutory and regulatory requirements" (quoting 38 U.S.C. § 7261(a)(2))); *cf. Ebert v. Brown,* 4 Vet. App. 434, 436-37 (1993) (considering but denying as moot the claimant's challenge to the

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B. *Disability Benefits Claims*

VCS next claims that the VA's system for adjudicating veterans' eligibility for disability benefits suffers from unconscionable delays and therefore violates the statutory and constitutional rights of veterans. The district court concluded that, because "determination of whether the delay [in benefits adjudication] is unreasonable may depend on the facts of each particular claim, § 511 prevents this Court from undertaking such a review." *Veterans,* 563 F. Supp. 2d at 1083-84 (citation omitted).[19] We agree

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VA's two-year delay in the scheduling of medical appointments). Likewise, both the Veterans Court and the Federal Circuit have confirmed their jurisdiction to hear challenges to administrative decisions by the VHA that affect the provision of benefits to veterans, such as the VHA "scheduling decisions" challenged by VCS. *See E. Paralyzed Veterans Ass'n v. Sec'y of Veterans Affairs,* 257 F.3d 1352, 1358 (Fed. Cir. 2001) (holding that a veteran's "right of appeal covers a challenge to the priority [treatment] category to which the veteran has been assigned," as well as " 'decisions regarding enrollment and disenrollment' " in systems providing for hospital and medical care (quoting Enrollment—Provision of Hospital and Outpatient Care to Veterans, 64 Fed. Reg. 54,207, 54,211 (Oct. 6, 1999))); *Meakin v. West,* 11 Vet. App. 183, 187 (1998) (reversing the Board's conclusion that it lacked jurisdiction to resolve a veteran's eligibility for fee-basis medical care because, inter alia, such review would require only "an administrative decision as to whether the VA facility is capable of furnishing a previously determined course of care, services, or treatment"); *accord* 38 C.F.R. § 20.101(b) (permitting Board review of "questions of eligibility for hospitalization, outpatient treatment, . . . and for other benefits administered by the [VHA]" that do not involve "[m]edical determinations").

[19] The district court also concluded that resolving VCS's claims would "invariably implicate VA regulations," *Veterans,*

(Continued on following page)

with the district court for the same reason that we explained earlier with respect to delays in mental health care—we simply lack jurisdiction.

Like VCS's challenge to delays in the VA's provision of mental health care, VCS's challenge to delays in the VA's adjudication of veterans' disability benefits plainly implicates questions of law and fact regarding the appropriate method of providing benefits to individual veterans. The district court cannot decide such claims without determining whether the VA acted properly in handling individual veterans' benefits requests at each point in the process. Section 511 deprives the district court of jurisdiction over such questions.

In reaching this conclusion, we find ourselves in accord with the Sixth Circuit, which resolved a similar question in *Beamon v. Brown*. There, a group of veterans "asked the district court to review the legality and constitutionality of the procedures that the VA uses to decide benefits claims." *Beamon,* 125 F.3d at 970. The Sixth Circuit concluded that the plaintiffs' claims raised questions of law and fact

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563 F. Supp. 2d at 1084, such as regulations requiring the VA to assist the veteran in collecting evidence, 38 C.F.R. § 3.159(c), and regulations establishing the procedural requirements for an appeal, *id.* §§ 20.200-.202. Because "38 U.S.C. § 502 permits litigation of challenges to VA regulations only in the Federal Circuit," the district court viewed § 502 as an independent bar to its jurisdiction. *Veterans,* 563 F. Supp. 2d at 1084. Because we find § 511 controlling and dispositive of VCS's disability benefits claims, we express no view on the impact of § 502.

regarding the provision of benefits by the VA and that "[d]etermining the proper procedures for claim adjudication is a necessary precursor to deciding veterans benefits claims. Under § 511(a), the VA Secretary shall decide this type of question." *Id.* Because the plaintiffs alleged that "VA procedures cause unreasonable delays" in the resolution of benefits claims, "[t]o adjudicate this claim, the District Court would need to review individual claims for veterans' benefits, the manner in which they were processed, and the decisions rendered by the regional office of the VA and the BVA." *Id.* at 970-71.[20]

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[20] The dissent's answer to the jurisdictional question is to distinguish between "direct or indirect challenges to actual benefit decisions," which the dissent agrees are beyond the district court's jurisdiction, and "claims that would have no effect on the substance of any actual benefit award," which the dissent argues are not precluded by § 511 and are the type of claims raised by VCS here. Dissenting Op. at 4869-70; *see also id.* at 4869 ("Plaintiffs' concern is not with the substance of any benefits decision. Their concern is with process."). VCS, even if it could, is not asking for process for its own sake but rather process to ensure timely and accurate benefits decisions. *Cf. Gometz v. Henman,* 807 F.[2]d 113, 116 (7th Cir. 1986) ("The right of access to the courts, like all procedural rights under the due process clause of the fifth amendment, is an entitlement to enough process to ensure a reasonable likelihood of an accurate result, not to process for its own sake.").

In this respect, VCS is much like the three veterans in *Beamon* who sought to represent a "class of similarly-situated veterans, to challenge the manner in which the [VA] processes claims for veterans' benefits," 125 F.3d at 966, which makes the dissent's reliance on that case all the more perplexing, Dissenting Op. at 4870-71. There, by the time the veterans' appeal

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VCS claims that no such review is required here because it challenges *average* delays in the adjudication of service-related disability benefits (as opposed to delay in the processing of any one individual claim). For reasons we previously discussed, that is a distinction without difference. Whether the average delays of which VCS complains are reasonable depends on the facts of individual veterans' claims, such as the complexity of the claim (PTSD claims being some of the most difficult to resolve), the severity of the disability, and the availability and quality of the evidence. As the district court noted, "a veteran who raises seven or eight issues in his or her claim will likely face a more protracted delay than a veteran who raises only one or two issues." *Veterans,* 563 F. Supp. 2d at 1083. Because the district court lacks jurisdiction to review the circumstances or decisions that created the delay in any one veteran's case, it

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reached the Sixth Circuit, two of the representative plaintiffs had received final decisions on the merits of their claims and the third was still waiting for a final decision. *Beamon,* 125 F.3d at 966. Those plaintiffs sought, like VCS here, to do more than merely litigate their individual claims to conclusion; rather, they challenged the "legality and constitutionality of the procedures that the VA uses to decide benefits claims." *Id.* at 970. The Sixth Circuit held exactly as we do here: "Determining the proper procedures for claim adjudication is a necessary precursor to deciding veterans benefits claims," and "[u]nder § 511(a), the VA Secretary shall decide this type of question." *Id.*

cannot determine whether there has been a systemic denial of due process due to unreasonable delay.[21]

VCS asserts that if the district court lacks jurisdiction to hear its claims, then it will be unable to secure adequate relief because compelling the VA to issue a decision on individual benefits is not the same as curing the deficiencies that cause widespread delay. To that end, VCS contends that the district court must retain jurisdiction over its "challenge to the administrative gridlock plaguing the adjudication" of benefits claims under the Supreme Court's decision in *Johnson v. Robison,* 415 U.S. 361. VCS notes that the drafters of § 511 recognized that *Robison* "was correct in asserting judicial authority to decide whether statutes meet constitutional muster." H.R. Rep. No. 100-963, at 22, 1988 U.S.C.C.A.N. at 5803.

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[21] VCS relies on the D.C. Circuit's decision in *Broudy,* 460 F.3d at 115, for the proposition that its challenge to the VA's delays avoids the preclusive effect of § 511. But *Broudy* does not support VCS's position. *Broudy* involved a challenge to the VA's withholding of radiation test results and the plaintiffs' request for a release of those records and an injunction against future misconduct. *Id.* at 109-10. The D.C. Circuit held that it had jurisdiction over these claims only after finding that resolving them did not require the district court "to decide whether any of the veterans whose claims the Secretary rejected [we]re entitled to benefits" or to "revisit any decision made by the Secretary *in the course of making* benefits determinations." *Id.* at 115 (emphasis added). Conversely, adjudicating VCS's claims here would require us to revisit the decisions the VA made in handling a veteran's request "in the course of making benefits determinations." *Id.* According to *Broudy,* such claims are beyond the district court's jurisdiction, and on this we agree.

Although we discussed *Robison* in the context of § 511's history, it requires further discussion here. In *Robison,* a conscientious objector who completed alternative service was denied veterans' educational benefits under a program granting such benefits to persons who served full-time duty in the Armed Forces. 415 U.S. at 362-64. He claimed that this violated the equal protection component of the Due Process Clause. *Id.* at 364-65. The government argued that § 211, the predecessor to § 511, deprived the district court of jurisdiction. *Id.* Indeed, under the government's view of § 211, no court had jurisdiction to review the plaintiff's equal protection claims.[22] *Id.* at 366.

The Supreme Court held that the district court had jurisdiction. Although § 211 provided that "no court of the United States shall have power or jurisdiction to review" the VA's decisions concerning veterans' benefits, *id.* at 367 (internal quotation marks omitted), the Court held that precluding federal court review of constitutional questions would "raise serious questions concerning the constitutionality of § 211(a)," *id.* at 366 & n.8. The Court construed § 211 to bar only federal review of challenges to "the *administration*" of the benefits program. *Id.* at 367.

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[22] Significantly, the Board of Veterans' Appeals had "expressly disclaimed authority to decide constitutional questions." *Robison,* 415 U.S. at 368. Construing § 211 to preclude judicial review would have meant that neither the VA nor any court would have been able to consider the constitutional challenges.

Because the conscientious objector had challenged *Congress's* design on constitutional grounds, § 211's preclusion of review of the *Secretary's* actions did not bar the exercise of jurisdiction.[23] *Id.* Following *Robison,* the Supreme Court confirmed that "district courts have jurisdiction to entertain constitutional attacks on the operation of the claims systems" under the precursor to § 511. *Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 311 n.3 (1985).

Robison's warning of "serious questions" concerning statutes that preclude all judicial review is of limited application here. First, the fact that VCS drapes its claims in constitutional terms is not itself sufficient to confer jurisdiction on us. Numerous courts have recognized that § 511 broadly divests district courts of jurisdiction over constitutional claims related to benefits even where those claims concern agency procedures and do not challenge specific VA benefits determinations. *See, e.g., Beamon,* 125 F.3d at 971 ("[T]he VJRA explicitly granted comprehensive and exclusive jurisdiction to the CVA and the Federal

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[23] In *Moore v. Johnson,* we concluded that *Robison* "established the principle that 38 U.S.C. § 211(a) does not bar the determination by a federal court of the constitutionality of veterans' benefits legislation." 582 F.2d 1228, 1232 (9th Cir. 1978). We interpreted *Robison* to require an examination of the "substance" of an action to determine whether it challenges a "decision of the Administrator on a 'question of law or fact concerning a benefit[']" provided by the VA, or instead challenges the constitutionality of an act of Congress. *Id.* Under our precedent, "[o]nly actions within the latter category are reviewable" under § 211. *Devine v. Cleland,* 616 F.2d 1080, 1084 (9th Cir. 1980).

Circuit over claims seeking review of VA decisions that relate to benefits decisions under § 511(a). This jurisdiction includes constitutional issues. . . ."); *Hall v. U.S. Dep't Veterans' Affairs,* 85 F.3d 532, 535 (11th Cir. 1996) (per curiam) (holding that a direct constitutional challenge to a VA regulation must be brought in the Federal Circuit); *Hicks,* 961 F.2d at 1370 ("These provisions amply evince Congress's intent to include all issues, even constitutional ones, necessary to a decision which affects benefits in this exclusive appellate review scheme."); *Addington v. United States,* 94 Fed. Cl. 779, 783 (2010) ("The exclusive remedy for claims of due process violations lies in the [Veterans Court].").

More importantly, nothing in the VJRA forecloses judicial review of constitutional questions as VCS suggests. After *Robison* read § 211 broadly, Congress "subsequently established the [Veterans Court], effectively stripping district courts of any such jurisdiction," *Beamon,* 125 F.3d at 973 n.4; *cf. Bates,* 398 F.3d at 1364 (explaining that the VJRA's "specialized review process" exchanged court review for "independent judicial review of the [VA]'s final decisions by a new Article I Court"). But Congress did not leave veterans without a forum for their constitutional claims. When Congress created the Veterans Court, it expressly empowered that court to "decide all relevant questions of law, interpret *constitutional,* statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary." 38 U.S.C. § 7261(a)(1) (emphasis

added). That same statute leaves no doubt that the Veterans Court has the authority to adjudicate veterans' constitutional claims that benefits have been "unlawfully withheld or unreasonably delayed." *Id.* § 7261(a)(2); *Vietnam Veterans of Am.,* 599 F.3d at 659-60 & n.6; *see also Beamon,* 125 F.3d at 968 (finding that the Veterans Court "has the power to provide adequate relief for the plaintiffs" seeking to challenge the VA's "unreasonably delayed benefits decisions"). The Veterans Court's power is such that its orders not only affect how a single veteran's claim is handled, but will dictate how similar claims are handled by the VA in the future. *See Beamon,* 125 F.3d at 970 ("Plaintiffs may bring their claims individually, and the [Veterans Court]'s decisions of individual claims will have a binding effect on the manner in which the VA processes subsequent veterans' claims."). That power, together with the authority to issue extraordinary writs pursuant to the All Writs Act, 28 U.S.C. § 1651(a); *see Vietnam Veterans of Am.,* 599 F.3d at 659-60 & n.6; *see also Erspamer,* 1 Vet. App. at 7, makes the Veterans Court an adequate forum for this type of claim.

Beyond the Veterans Court, Congress also ensured that an Article III court can review such claims. Congress granted the Court of Appeals for the Federal Circuit the "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and

necessary to a decision." 38 U.S.C. § 7292(c). To drive the point home, Congress affirmed that the Federal Circuit "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." *Id.* § 7292(d)(1). In tandem, the availability of review by both the Veterans Court and the Federal Circuit evinces Congress's intent to protect the federal courts and the VA from time-consuming veterans' benefits litigation, while providing a specialized forum wherein complex decisions about such benefits can be made. Congress has fully answered the Supreme Court's "serious question" concerning the constitutionality of § 511's limitation on our jurisdiction.

In sum, Congress may have foreclosed *our* review of the VA's decisions related to claims adjudication, but it has not foreclosed federal judicial review *in toto.*[24] Whatever "serious questions," *Robison,* 415 U.S. at 366, might arise if Congress were to preclude all review of constitutional challenges, there can be no question that Congress may eliminate our jurisdiction to review the VA's decisions, while preserving such review elsewhere. U.S. Const. art. III, § 2, cl. 2. As the Supreme Court stated in *Lockerty v. Phillips,*

[24] Although the dissent accuses us of "leav[ing] millions of veterans" without an available remedy to address delays affecting benefits determinations, it has failed to acknowledge (let alone analyze) the versatility of the VA system. Dissenting Op. at 4868. The dissent is correct that there is a "forum" available for veterans to challenge the operation of the VA system, *id.,* but that forum does not involve the district court.

"[t]he Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" 319 U.S. 182, 187 (1943) (quoting *Cary v. Curtis,* 44 U.S. (3 Howe) 236, 245 (1845)). We lack jurisdiction over VCS's claims challenging delays in the VA's adjudication of service-related disability benefits.

C. *Regional Office Procedures*

VCS argues that there is a lack of adequate procedures when veterans file their claims for service-related disability benefits at VA Regional Offices. In its complaint, VCS framed this claim as a challenge to the constitutionality of the VJRA, claiming that the statutes codified by the act deny veterans adequate procedural safeguards. *See* Compl. ¶ 202 ("The VJRA violates Plaintiffs' due process rights in a multitude of respects. . . ."). On appeal, VCS argues that its members are denied due process because existing procedures do not provide necessary protections to veterans during the initial claims process. Procedures that VCS wishes to see implemented include a pre-decision hearing, discovery and subpoena power, and the retention of paid counsel to assist in the submission of an initial claim. The district court denied this claim on the merits, holding that the VA's procedures did not violate the Due Process Clause of

the Fifth Amendment. *Veterans,* 563 F. Supp. 2d at 1088-89. We agree with the district court.

1. Jurisdiction

The jurisdictional question is a complex and close one, but we conclude that we have jurisdiction over these claims. As we have discussed, we lack jurisdiction either if § 511 prohibits our jurisdiction, or if review of VCS's claim is entrusted to the exclusive review mechanism established by the VJRA. We first hold that § 511 does not bar our jurisdiction to consider this claim. We then conclude that VCS's claim does not fall within the exclusive jurisdiction of the Veterans Court or the Federal Circuit.

First, VCS has carefully structured its complaint to avoid § 511's preclusive effect. As pled, VCS asserts a facial challenge to the constitutionality of the VJRA based not on any average delays experienced by veterans, but on the absence in the statute of certain procedures VCS claims are necessary to safeguard veterans' rights. Were the former 38 U.S.C. § 211 applicable here, there is little doubt that we would have jurisdiction to hear this claim because the Supreme Court held that facial constitutional challenges were exempted from § 211's jurisdictional preclusion. *See Robison,* 415 U.S. at 366-74. But since the enactment of the VJRA, the courts of appeals appear split on the issue of whether that portion of *Robison*'s analysis survives the VJRA. We question, however, whether these courts have thoroughly analyzed the efforts

Congress undertook to broaden § 511 and the concurrent effort it took to establish an exclusive review scheme for claims related to veterans' benefits. The Second and Fifth Circuits, as well as the Veterans Court, have affirmed that facial constitutional challenges to acts of Congress—including challenges brought by individual claimants—may be brought in federal district court despite § 511's broad preclusive mandate. *See, e.g., Zuspann,* 60 F.3d at 1159 (addressing whether the claimant's "complaint challenges the VA's decision to deny him benefits, or whether it makes a facial challenge to an act of Congress"); *Larrabee ex rel. Jones,* 968 F.2d at 1500 (the VJRA "precludes judicial review of non-facial constitutional claims"); *Disabled Am. Veterans,* 962 F.2d at 141 (same); *Dacoron v. Brown,* 4 Vet. App. 115, 119 (1993). The Eighth Circuit appears to have taken a different view. *See Hicks,* 961 F.2d at 1369-70 (concluding that provisions of the VJRA "amply evince Congress's intent to include all issues, even constitutional ones, necessary to a decision which affects benefits in [an] exclusive appellate review scheme"); *see also Hall,* 85 F.3d at 534-35 (recognizing that "[t]he Eighth Circuit Court of Appeals appears to have taken a different view" as to whether *Robison*'s preservation of facial constitutional challenges survives the VJRA). And in the case most analogous to the claims presented here, *Beamon v. Brown,* the Sixth Circuit appears to have equivocated on the matter, holding that "district court jurisdiction over facial challenges to acts of Congress survived [§ 511]," 125 F.3d at 972, yet concluding that "Congress . . . effectively stripp[ed] district courts of

any such jurisdiction" over "constitutional attacks on the operation of the claims system," *id.* at 973 n.4 (internal quotation marks omitted). *Beamon,* however, involved a putative class action brought by three veterans challenging delays in the processing of veterans' benefits, *id.* at 966, and the Sixth Circuit concluded that the plaintiffs' own claims could be brought in the Veterans Court, *id.* at 972-74.

Ultimately, we need not decide whether an individual seeking benefits would be barred by § 511 from bringing a facial constitutional challenge in the district court. The immediate question before us is whether VCS's challenge to the VJRA is similar to its claims challenging the conduct of the VHA and the delays in adjudication of service-related disability claims, which we have already concluded would require review of the circumstances of individual requests for benefits by veterans. Unlike those previous claims, reviewing the VA's procedures for filing and handling benefits claims at the Regional Offices does not require us to review "decisions" affecting the provision of benefits to any individual claimants. 38 U.S.C. § 511; *see also id.* § 5104 (requiring notice to a veteran of a "decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant"). Indeed, VCS does not challenge decisions at all. A consideration of the constitutionality of the procedures in place, which frame the system by which a veteran presents his claims to the VA, is different than a consideration of the decisions that emanate through the course of the presentation of those claims.

In this respect, VCS does not ask us to review the decisions of the VA in the cases of individual veterans, but to consider, in the "generality of cases," the risk of erroneous deprivation inherent in the existing procedures compared to the probable value of the additional procedures requested by VCS. *See Mathews v. Eldridge,* 424 U.S. 319, 344 (1976). Evaluating under the Due Process Clause the need for subpoena power, the ability to obtain discovery, or any of the other procedures VCS requests is sufficiently independent of any VA decision as to an individual veteran's claim for benefits that § 511 does not bar our jurisdiction.[25]

Second, unlike VCS's challenge to delays in the administration of the benefits program, the exclusive review scheme established by the VJRA in 38 U.S.C. §§ 7252, 7261, and 7292 does not deprive us of jurisdiction over this claim. Although an individual

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[25] To that extent, VCS's claim bears a close resemblance to other due process challenges we are institutionally competent to evaluate, for example, whether the lack of notice or a hearing requires us to order specific procedures capable of implementation, *see Goldberg v. Kelly,* 397 U.S. 254, 285 (1970); *see also Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 18-19 (1978) (hearing required before terminating utilities for nonpayment); *Gagnon v. Scarpelli,* 411 U.S. 778, 789-91 (1973) (there is no automatic right to an attorney at probation revocation hearings), or whether *any* process is due in the first place, *e.g., Ingraham v. Wright,* 430 U.S. 651, 680-82 (1977) (due process does not require a hearing before corporal punishment is inflicted); *Goss v. Lopez,* 419 U.S. 565, 581-83 (1975) (requiring a hearing before a student is suspended or as soon thereafter as practicable).

veteran may challenge "VA procedures during the adjudication of individual claims contesting delayed benefits decisions," *Beamon,* 125 F.3d at 969, in the Veterans Court or the Federal Circuit, the VJRA does not provide a mechanism by which the organizational plaintiffs here might challenge the absence of system-wide procedures, which they contend are necessary to afford due process. This case does not involve individual veterans seeking to challenge the lack of procedures in place at VA Regional Offices, but rather organizations representing their members claiming a system-wide risk of erroneous deprivation. *See Dacoron,* 4 Vet. App. at 119 (noting that constitutional challenges could be "presented to this Court only in the context of a proper and timely appeal taken from such decision made by the VA Secretary through the [Board]"). In other words, because VCS cannot bring its suit in the Veterans Court, that court cannot claim exclusive jurisdiction over the suit. Because VCS would be unable to assert its claim in the review scheme established by the VJRA, *see* 38 U.S.C. §§ 7252, 7261, 7292, that scheme does not operate to divest us of jurisdiction.[26]

[26] Even if an individual veteran could raise these claims in an appeal in the Veterans Court or the Federal Circuit, that fact alone does not deprive us of jurisdiction here. The Veterans Court has exclusive jurisdiction over decisions of the Board of Veterans' Appeals, not over every issue capable of being raised in an appeal from the Board. *See* 38 U.S.C. § 7252(a).

We conclude that we have jurisdiction over VCS's claim related to procedures affecting adjudication of claims at the Regional Office level. We are not precluded from exercising jurisdiction by either § 511 or the provisions conferring exclusive jurisdiction on the Veterans Court and the Federal Circuit.

2. Merits

Satisfied of our jurisdiction, we turn to the merits of this claim. We affirm the district court because the nonadversarial procedures at the Regional Office level are sufficient to satisfy due process. The district court conducted an analysis of the *Mathews v. Eldridge* factors and ruled that although "veterans and their families have a compelling interest in" their benefits, and "the consequences of erroneous deprivation can be devastating," the risk of error was low and the government's interest weighed strongly in favor of denying VCS the additional procedures requested.[27] *Veterans,* 563 F. Supp. 2d at 1087-88.

We agree with the district court's analysis on this point and reproduce it here:

> Under the *Mathews* factors, the current system for adjudicating veterans' [disability]

[27] In evaluating whether a procedure satisfies due process, courts balance (1) the private interest; (2) the risk of erroneous deprivation and the likely value, if any, of extra safeguards; and (3) the government's interest, especially in avoiding the burden any additional safeguards would impose. *Mathews,* 424 U.S. at 335.

claims satisfies due process. It is without doubt that veterans and their families have a compelling interest in receiving disability benefits and that the consequences of erroneous deprivation can be devastating. In looking at the totality of [disability] claims, however, the risk of erroneous deprivation is relatively small. 11% of veterans file Notices of Disagreement upon adjudication of their claims by [Regional Offices]. Only 4% proceed past the NOD to a decision by the [Board]. Thus, while the avoidable remand rates at the VA are extraordinarily high, only 4% of veterans who file benefits claims are affected. Plaintiffs here "confront the constitutional hurdle posed by the principle enunciated in cases such as *Mathews* to the effect that a process must be judged by the generality of cases to which it applies, and therefore, process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them." *Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 330 (1985).

Moreover, although the additional safeguards Plaintiffs seek would likely reduce the number of avoidable remands and erroneous deprivations, the fiscal and administrative burdens of these additional procedural requirements are significant. Plaintiffs seek, in essence, to transform the claims adjudication process at the [Regional Office] level from an ostensibly non-adversarial proceeding into one in which the full panoply of trial procedures that protects civil litigants is available

> to veterans. For example, Plaintiffs seek the general right of discovery, including the power to subpoena witnesses and documents, the ability to examine and cross-examine witnesses, the ability to pay an attorney, and the right to a hearing. Implementation and maintenance of such a system would be costly in terms of the resources and manpower that the VA would need to commit to the [Regional Office] proceedings.

Id. (footnotes omitted).

We emphasize, as the district court did, that Congress purposefully designed a non-adversarial system of benefits administration. *See Walters,* 473 U.S. at 323-24 (VA matters should be kept "as informal and nonadversarial as possible"); *see also Nat'l Ass'n of Radiation Survivors v. Derwinski,* 994 F.2d 583, 588-89 (9th Cir. 1992) ("[I]n passing the [V]JRA Congress reaffirmed the government's interest [in an informal benefits administration system]. . . ."). This is particularly true as it pertains to the retention of counsel during the initial claim phase, which the Supreme Court found "would seriously frustrate the oft-repeated congressional purpose" to maintain the non-adversarial bent of benefits administration. *Walters,* 473 U.S. at 323. Although VCS challenges more procedural restrictions than just the lack of an attorney at the Regional Office stage, the Supreme Court's analysis in *Walters* compels a similar outcome. Subpoena power, discovery, pre-decision hearings, and the presence of paid attorneys would transform the VA's system of benefits administration into an adversarial

system that would tend to reflect the rigorous system of civil litigation that Congress quite plainly intended to preclude. The choice between a vigorously adversarial system and a less adversarial one reflects serious policy considerations and is a permissible one. Congress must be afforded "considerable leeway to formulate" additional processes and procedures to cure deficiencies in the VA's administration of benefits "without being forced to conform to a rigid constitutional code of procedural necessities." *Walters,* 473 U.S. at 326. Because VCS cannot overcome the paramount interest Congress has in preserving a non-adversarial system of veterans' benefits administration, we affirm the district court's ruling.

IV. CONCLUSION

VCS's complaint sounds a plaintive cry for help, but it has been misdirected to us. As much as we may wish for expeditious improvement in the way the VA handles mental health care and service-related disability compensation, we cannot exceed our jurisdiction to accomplish it. The Constitution "protects us from our own best intentions" by "divid[ing] power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States,* 505 U.S. 144, 187 (1992). There can be no doubt that securing exemplary care for our nation's veterans is a moral imperative. But Congress and the President are in far better position "to care for him

who shall have borne the battle, and for his widow and his orphan." Abraham Lincoln, President of the United States of America, Second Inaugural Address (Mar. 4, 1865), *available at* http://www.loc.gov/rr/program/bib/ourdocs/Lincoln2nd.html. We would work counter to the political branches' own efforts by undertaking the type of institutional reform that VCS requests. Such responsibilities are left to Congress and the Executive, and to those specific federal courts charged with reviewing their actions; that is the overriding message of the VJRA, and it is one that we must respect here.

We conclude that the district court lacks jurisdiction to reach VCS's statutory and due process challenges to the alleged delays in the provision of mental health care and to the absence of procedures to challenge such delays. We likewise conclude that the district court lacks jurisdiction to reach VCS's claims related to delays in the adjudication of service-related disability benefits. We conclude that the district court has jurisdiction to consider VCS's challenges to the alleged inadequacy of the procedures at the Regional Office level, and properly exercised that jurisdiction to deny VCS's claim on the merits.[28]

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[28] VCS contends that the district court erred in refusing to compel discovery of additional instances of suicide incident briefs (some of which had already been produced) and refusing to compel a response to an interrogatory seeking the average number of days PTSD claims take at the Regional Office level.

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AFFIRMED in part, REVERSED in part, and REMANDED with instructions to DISMISS. The panel opinion, *Veterans for Common Sense v. Shinseki,* 644 F.3d 845 (9th Cir. 2011), is hereby VACATED and shall not be cited as precedent by or to any court of the Ninth Circuit. Costs on appeal awarded to Defendants-Appellees.

SCHROEDER, Senior Circuit Judge, dissenting:

> "Let me see if I've got this straight: in order to be grounded, I've got to be crazy and I must be crazy to keep flying. But if I ask to be grounded, that means I'm not crazy any more and I have to keep flying." *Catch-22* (Paramount Pictures 1970), *adaptation of the novel by* Joseph Heller (1961).

I agree with the majority's holding that the district court had jurisdiction to consider the claim brought by the plaintiff-veterans organizations that the procedures used in the handling of the initial filing of benefits claims are inadequate. I further agree with affirming the denial of that claim on the merits, because what Plaintiffs seek is inconsistent with the congressional purpose of simplified, nonadversarial proceedings. *See Walters v. Nat'l Assoc. of Radiation Survivors,* 473 U.S. 305 (1985).

But because we have disposed of VCS's claims, we do not reach VCS's challenge to the district court's discovery rulings.

Because I agree with the majority's holding that there is jurisdiction to consider that claim of inadequate procedures, however, I am confounded by the majority's holding that the district court lacked jurisdiction to consider claims that other procedural inadequacies are causing intolerable systemic delays in the VA's processing of benefits claims and in providing mental health services. While review of substantive benefits decisions is, of course, limited to the Court of Appeals for Veterans Claims (the "Court of Veterans Appeals") and the Federal Circuit under 38 U.S.C. § 511, the claims of systemic delay do not, in my view, require any review of the VA's actual benefits decisions.

The majority thus leaves millions of veterans—present, past, and future—without any available redress for claims that they face years of delay in having their rights to hard-earned benefits determined. No one could think this is just or what Congress intended.

The language and history of § 511 demonstrate instead to me that Congress did not leave veterans without any forum to challenge the way the system is operating. The district court should be able to hear a systemic challenge, because § 511 does not pertain to such a challenge. Section 511 is about actual benefits decisions. It refers to "questions of law and fact necessary to a decision by the Secretary." It then provides that the "decision of the Secretary as to any such question" shall be subject only to review by the veterans courts and Federal Circuit. *See* 38 U.S.C.

§§ 7104(a), 7252(a), 7266(a), 7292(a). The purpose of the administrative veterans courts is to decide whether individual veterans are entitled to benefits. The statute therefore must be referring to an actual decision by the Secretary granting or denying benefits.

This is apparent from Congress' use of the term "decision" in the provision that requires the Secretary to give a claimant notice "of a decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant." 38 U.S.C. § 5104(a). This must mean a decision granting or denying benefits. It cannot include a decision to delay making a decision. Yet that is the senseless majority conclusion. *See* slip op. at 4846, 4853 n. 20.

Plaintiffs do not challenge any "decision of the Secretary." Plaintiffs seek injunctive relief affecting the procedures that the Regional Offices, the Board of Veterans Appeals, and the Court of Veterans Appeals utilize to process and decide claims. The complaint alleges a denial of due process because allegedly unreasonable delays deprive Plaintiffs' members of property, i.e. benefits, without due process of law. Such a claim can be established by showing that there is a risk of wrongful deprivation. *See Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). Accordingly, I conclude the district court had jurisdiction to consider all of the claims alleged in Plaintiffs' complaint.

The fundamental flaw in the majority's reasoning is its mistaken assumption that adjudication of

Plaintiffs' systemic delay claims requires individualized examination of actual benefits determinations. Plaintiffs' concern is not with the substance of any benefits decision. Their concern is with process. Courts have routinely considered claims that excessive delay has resulted in a denial of due process. *See, e.g., Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 547 (1985) (delay of administrative hearing would at some point become a constitutional violation); *Fusari v. Steinberg,* 419 U.S. 379, 389 (1975) (length of delay important factor); *Kraebel v. NYC Dep't of Housing Pres. and Dev.,* 959 F.2d 395, 405 (2d Cir. 1992); *Schroeder v. City of Chicago,* 927 F.2d 957, 960 (7th Cir. 1991) ("Justice delayed is justice denied, the saying goes: and at some point delay must ripen into deprivation, because otherwise a suit alleging deprivation would be forever premature"); *Coe v. Thurman,* 922 F.2d 528, 530-31 (9th Cir. 1990) (delay in state appeal); *Rodrigues v. Donovan,* 769 F.2d 1344, 1348-49 (9th Cir. 1985); *Kelly v. R.R. Ret. Bd.,* 625 F.2d 486, 490-91 (3d Cir. 1980) (four year delay in reviewing disability application). Indeed, the district court did decide the merits of Plaintiffs' claim of unreasonable delay in the VA's provision of mental health services, and a majority of the three-judge panel held it should have fashioned some relief. *Veterans for Common Sense v. Shinseki,* 644 F.3d 845, 878 (9th Cir. 2011).

There may be sound reasons for courts to be wary of intruding too much on the day-to-day operation of the executive branch. *See Heckler v. Day,* 467 U.S.

104 (1984). But § 511 should not be an absolute bar to district court jurisdiction for claims of due process denials on account of systemic delay. The principle which the majority announces for its contrary holding is that because of § 511, veterans cannot bring any constitutional challenge in district court that might affect a benefits decision, including the way it is processed. The case law does not support that principle.

The case law, as I understand it, reflects a clear delineation between claims that represent direct or indirect challenges to actual benefits decisions, and for which district court jurisdiction is lacking, and claims that would have no effect on the substance of any actual benefit award, and thus where § 511 is no bar. In the Ninth Circuit, our decisions in *Chinnock v. Turnage,* 995 F.2d 889 (9th Cir. 1993), and *Hicks v. Small,* 69 F.3d 967 (9th Cir. 1995), represent direct and indirect challenges to actual benefits decisions, where we properly found that district court jurisdiction was lacking. In *Chinnock,* the plaintiff-veteran brought a direct challenge in district court to the denial of his benefits by asking that court to review the VA's interpretation of a regulation that resulted in the denial. 995 F.2d at 890. We held the district court lacked jurisdiction. *Id.* In *Hicks,* the plaintiff filed a *Bivens* action in district court against a VA doctor for conduct that allegedly reduced his benefits, and we held this was also a challenge, albeit indirect, to the denial of benefits. 69 F.3d at 968-70. In contrast, we have held that a veteran can sue in district court for

tort claims unrelated to his benefits determination. *See Littlejohn v. United States,* 321 F.3d 915 (9th Cir. 2003). In *Littlejohn,* the plaintiff brought a Federal Tort Claims Act ("FTCA") action against VA doctors for negligence. *Id.* at 918. We held there was jurisdiction because adjudication of the tort claim would have no effect on his benefits award. *Id.* at 921.

The decisions of other circuits are in accord. In *Weaver v. United States,* 98 F.3d 518, 520 (10th Cir. 1996), the Tenth Circuit held that where the veteran tried to sue the VA for conspiracy and fraud in concealing records that resulted in a denial of benefits, the district court lacked jurisdiction. Like our decision in *Hicks, Weaver* reflected an indirect challenge to the denial of benefits. The Eighth Circuit in *In re Russell,* 155 F.3d 1012 (8th Cir. 1998) (per curiam), refused to issue a writ of mandamus to require the VA courts to act on a request for benefits pending in the Court of Veterans Appeals. Relying on *Beamon v. Brown,* 125 F.3d 965, 974 (6th Cir. 1997), the *Russell* court reasoned that under the Veterans Judicial Review Act and the All Writs Act, only the Court of Veterans Appeals and Federal Circuit had the power to require the VA to act with respect to a particular claim for benefits. 155 F.3d at 1012-13.

Beamon is relied upon by the majority to support its holding, but *Beamon* is, in fact, consistent with my understanding of the cases. *Beamon* concerned a claim in the district court for injunctive relief by plaintiffs who were pursuing their individual claims for benefits in the VA administrative courts. 125 F.3d

at 966. The Sixth Circuit held that under § 511, the plaintiffs' avenue of relief from the delay in each of their cases was to seek a writ of mandamus from the Court of Veterans Appeals pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Beamon,* 125 F.3d at 968-70. The Sixth Circuit, however, did not view the plaintiffs' allegations to be a systemic due process challenge similar to the one before us. It characterized the plaintiffs' "bare allegations" of procedural delays as being "closer to challenges to individual benefit decisions than a constitutional" attack on VA procedures. *Id.* at 973 n.5. That is why I believe it does not support the majority's conclusion that Plaintiffs here cannot sue for the systemic denial of due process. As the majority does recognize, slip op. at 4862-63, the plaintiffs in *Beamon* were individuals whose interests were primarily personal and not, as here, organizations whose concerns must reflect the operation of the system in all cases. Thus although the majority attempts to draw from the cases a rule that any claim concerning the VA's conduct during benefits proceedings is outside the jurisdiction of the district court, the cases actually establish only that challenges to particular benefits decisions cannot be brought in district court and must be brought in the VA administrative courts.

The federal courts have, in fact, repeatedly entertained challenges to statutes or procedures affecting the conduct of VA claims adjudication. The Second Circuit in *Disabled American Veterans v. U.S. Department of Veterans Affairs,* 962 F.2d 136, 137-38 (2d

Cir. 1992), considered an equal protection challenge to a statute that eliminated the availability of veterans' family benefits in certain circumstances. The Second Circuit held there was jurisdiction to consider the equal protection challenge, because consideration of such a constitutional claim did not involve review of any individual benefits determination. *Id.* at 140-41; *see also Larrabee ex rel. Jones,* 968 F.2d 1497, 1501 (2d Cir. 1992) (rejecting a challenge of inadequate care and noting that "district courts continue to have jurisdiction to hear *facial* challenges of legislation affecting veterans' benefits" (internal quotation marks and citation omitted) (emphasis in original)); *Zuspann v. Brown,* 60 F.3d 1156, 1159 (5th Cir. 1995) (district court would have jurisdiction over a facial challenge to an act of Congress).

Applying a similar principle, the D.C. Circuit in *Broudy v. Mather,* 460 F.3d 106, 108, 115 (D.C. Cir. 2006), held the district court had jurisdiction to consider claims of veterans who contended VA officials denied them their constitutional right of meaningful access to administrative proceedings. The veterans alleged the VA withheld accurate information about their exposure to radiation and thereby rendered access to VA administrative proceedings meaningless. *Id.* at 108-11. Jurisdiction existed because the case was "not about whether they should have received Government compensation for their sickness," but whether they were denied meaningful access to administrative proceedings before the VA. *Id.* at 108.

The D.C. Circuit's decision in *Broudy* is particularly instructive here, because the court there reviewed its prior decisions in *Price v. United States,* 228 F.3d 420 (D.C. Cir. 2000) (per curiam), and *Thomas v. Principi,* 394 F.3d 970 (D.C. Cir. 2005). These are decisions on which the majority here relies in concluding that § 511 has nearly universal sweep. Yet, as *Broudy* recognized, those cases actually concern attempts to second guess actual benefits determinations. *See* 460 F.3d at 114-15.

In *Price,* an individual veteran filed a complaint in the district court alleging that the VA wrongfully failed to reimburse him for certain medical expenses. 228 F.3d at 421. The D.C. Circuit held that even construing his complaint as alleging a federal tort claim for intentional or negligent failure to pay medical bills, the district court lacked jurisdiction because the plaintiff was indirectly seeking review of his benefits determination. *Id.* at 422. This was because "a necessary predicate of [the plaintiff's] claim [was] a determination that the [VA] acted in bad faith." *Id.* Since determining whether the VA acted in bad faith, or was negligent, would require the district court to determine first whether the VA acted properly in handling Price's request for reimbursement, i.e. awarded proper benefits, judicial review was foreclosed by § 511(a). *Id.* The court explained that "the district court lacked jurisdiction to consider [the plaintiff's] federal claim because the underlying claim [was] an allegation that the VA unjustifiably denied him a veterans' benefit." *Id.* at 421.

Similarly, in *Thomas,* the VA had denied an individual veteran's claim for benefits, and the plaintiff-veteran filed a federal tort claim in district court. 394 F.3d at 972. He alleged claims that the VA committed medical malpractice by failing to inform him that he had a mental illness and in failing to provide him with medical services appropriate for his condition. *Id.* The court, following *Price,* held that only those allegations that the VA deprived him of medical care were barred by § 511, because review of such claims would require the "district court to determine first whether the VA acted properly in providing Thomas benefits." *Id.* at 974-75 (quoting *Price,* 228 F.3d at 422). The court held it did have jurisdiction over the claims alleging failure-to-inform, because they did not involve reviewing any issues decided by the VA in the benefits determination. *Id.* The *Price* and *Thomas* cases therefore do not support the majority.

The D.C. Circuit in *Broudy* later summed it up when it said that district courts "have jurisdiction to consider questions arising under laws that affect the provision of benefits so long as the Secretary has not actually decided them in the course of a benefits proceeding." 460 F.3d at 114. *Broudy* expressly rejected the government's argument (that had been premised on a phrase used in *Price* and quoted in *Thomas*) that § 511 barred any district court consideration of procedural matters relating to the conduct of benefits proceedings. *Id.* at 114-15. The relevant phrase in those cases described § 511's preclusive scope as encompassing "whether the VA 'acted properly' in handling" the

veterans claims for benefits. *Id.* at 115. The Government had contended that the phrase "acted properly" meant that the district court lacked jurisdiction to consider any suit that challenged any aspect of the handling of claims, including procedures. *Id.* at 114-15.

The D.C. Circuit in *Broudy* went to some pains to make it clear that the district court lacked jurisdiction to review only the "actual decisions" denying benefits. The court said:

> Section 511(a) does not give the VA *exclusive* jurisdiction to construe laws affecting the provision of veterans benefits or to consider all issues that might somehow touch upon whether someone receives veterans benefits. Rather, it simply gives the VA authority to consider such questions when making a decision about benefits, . . . and, more importantly for the question of our jurisdiction, prevents district courts from reviewing the Secretary's decision once made. . . .

Broudy, 460 F.3d at 112 (internal quotation marks and citations omitted) (emphasis in original). The D.C. Circuit has since confirmed this narrow interpretation of § 511's bar. *See Vietnam Veterans of Am. v. Shinseki,* 599 F.3d 654, 659 (D.C. Cir. 2010) (noting that in *Broudy,* it deemed "that only questions '*explicitly* considered' by the Secretary [in making a benefits determination] would be barred by § 511, not questions he could be 'deemed to have decided' or,

presumably, implicitly decided" (emphasis in the original)).

The upshot of the majority's holding with respect to the claims of systemic delay is that veterans have no place to go to adjudicate such claims. The majority may believe that there is an adequate remedy for unreasonable delay by means of individual mandamus proceedings in the Court of Veterans Appeals or the Federal Circuit to require the VA administrative courts to act more promptly. Slip op. at 4850-51 n. 18, 4857-58. Yet such an extraordinary writ is rarely granted. *See Erspamer v. Derwinski,* 1 Vet. App. 3, 9-11 (1990) (declining to issue the writ even after concluding that a delay of ten years for benefits was unreasonable). The writ is not binding in any case other than the case in question, see *Star Editorial, Inc. v. United States Dist. Court,* 7 F.3d 856, 859 (9th Cir. 1993) (reasoning that whether to grant the writ is based on the facts of the individual case), and thus would have no affect on the procedures that apply to the millions of potential claims represented by these Plaintiffs.

The majority's position appears to rest principally upon another aspect of the D.C. Circuit's opinion in *Vietnam Veterans of America.* The plaintiffs in that case framed their attack on the appeals process as an attack on "average" delay, rather than on delay in the handling of any particular case. *Vietnam Veterans of Am.,* 599 F.3d at 661-62. The court held that since no plaintiff could show an injury caused by "average" delay, the plaintiffs lacked standing to assert the claim.

Id. at 662. The court did not discuss whether the plaintiffs might use past evidence of aggregate delay to demonstrate a risk of a wrongful deprivation of property in the future. *See Mathews,* 424 U.S. at 335.

Vietnam Veterans focused on the causal relationship of the harm alleged in the complaint, "average delay," to the actual harm suffered by individuals. 599 F.3d at 661-62. The court concluded there was no causal nexus sufficient to confer standing. *Id.* The majority accepts this reasoning and goes much further to conclude that any claim to remedy a systemic delay must be treated as a challenge to individual benefits determinations, hence reviewable only in the Veterans Court of Appeals and Federal Circuit, and thus condemning veterans to suffer intolerable delays inherent in the VA system.

The majority's holding thus reduces itself to a "Catch 22": To challenge delays in the system, you must bring a systemic claim and not just an individual claim. But if you bring a systemic claim, it has to be treated as an individual claim and you must suffer the delays in the system. Get it?

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VETERANS FOR COMMON SENSE, a District of Columbia nonprofit organization; VETERANS UNITED FOR TRUTH, INC., a California nonprofit organization, representing their members and a class of all veterans similarly situated,

Plaintiff-Appellants,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; JAMES P. TERRY, Chairman, Board of Veterans' Appeals; MICHAEL WALCOFF, Acting Under Secretary, Veterans Benefits Administration; BRADLEY G. MAYES, Director, Compensation and Pension Service; ROBERT A. PETZEL, M.D., Under Secretary, Veterans Health Administration; PRITZ K. NAVARA, Veterans Service Center Manager, Oakland Regional Office, Department of Veterans Affairs; UNITED STATES OF AMERICA,

Defendants-Appellees.

No. 08-16728

D.C. No. 3:07-cv-03758-SC

OPINION

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued August 12, 2009
San Francisco, California
Submitted September 14, 2009

Filed May 10, 2011

Before: Alex Kozinski, Chief Judge, Proctor Hug, Jr. and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Chief Judge Kozinski

COUNSEL

Gordon P. Erspamer (argued), Heather A. Moser, Ryan G. Hassanein, M. Natalie Naugle, and Stacey M. Sprenkel, Morrison & Foerster LLP, San Francisco, California; and Sidney M. Wolinsky, Ronald Elsberry, Katrina Kasey Corbit, and Jennifer Bezoza, Disability Rights Advocates, Berkeley, California, for the plaintiffs-appellants.

Michael F. Hertz, Acting Assistant Attorney General; Joseph P. Russoniello, United States Attorney; and William Kanter and Charles W. Scarborough (argued), Appellate Staff, Civil Division, Department of Justice, for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

On an average day, eighteen veterans of our nation's armed forces take their own lives. Of those, roughly one quarter are enrolled with the Department of Veterans Affairs ("VA") health care system. Among all veterans enrolled in the VA system, an additional 1,000 attempt suicide each month. Although the VA is obligated to provide veterans mental health services, many veterans with severe depression or post-traumatic stress disorder ("PTSD") are forced to wait weeks for mental health referrals and are given no opportunity to request or demonstrate their need for expedited care. For those who commit suicide in the interim, care does not come soon enough. Like the cavalry of Alfred, Lord Tennyson's "Charge of the Light Brigade," these veterans may neither "make reply" nor "reason why" to the "blunder" of those responsible for their safety.

Veterans who return home from war suffering from psychological maladies are entitled by law to disability benefits to sustain themselves and their families as they regain their health. Yet it takes an average of more than four years for a veteran to fully adjudicate a claim for benefits. During that time many claims are mooted by deaths. The delays have worsened in recent years, as the influx of injured troops returning from deployment in Iraq and Afghanistan has placed an unprecedented strain on the VA, and has overwhelmed the system that it employs

to provide medical care to veterans and to process their disability benefits claims. For veterans and their families, such delays cause unnecessary grief and privation. And for some veterans, most notably those suffering from combat-derived mental illnesses such as PTSD, these delays may make the difference between life and death.

In this context, two non-profit organizations, Veterans for Common Sense and Veterans United for Truth (collectively "Veterans"[1]), seek injunctive and declaratory relief to remedy the delays in (1) the provision of mental health care and (2) the adjudication of service-connected death and disability compensation claims by the VA. Among other issues, Veterans ask us to decide whether these delays violate veterans' due process rights to receive the care and benefits they are guaranteed by statute for harms and injuries sustained while serving our country. We conclude that they do.

We do not reach this answer lightly. We would have preferred Congress or the President to have remedied the VA's egregious problems without our intervention when evidence of the Department's harmful shortcomings and its failure to properly address the needs of our veterans first came to light years ago. Had Congress taken the requisite action and rendered this case unnecessary even while it was

[1] We use the term Veterans to refer to the two plaintiff organizations as well as to their members throughout.

pending before us, we would have been happy to terminate the proceedings and enter an order of dismissal. Alternatively, had the VA agreed with Veterans following oral argument to consider a practical resolution of the complex problems, the end result surely would have been more satisfactory for all involved. We joined in our dissenting colleague's suggestion that we defer submission of this case in order to permit the parties to explore mediation, and we regret that effort proved of no avail. We willingly acknowledge that, in theory, the political branches of our government are better positioned than are the courts to design the procedures necessary to save veterans' lives and to fulfill our country's obligation to care for those who have protected us. But that is only so if those governmental institutions are willing to do their job.

We are presented here with the question of what happens when the political branches fail to act in a manner that is consistent with the Constitution. The Constitution affirms that the People have rights that are enforceable against the government. One such right is to be free from unjustified governmental deprivation of property—including the health care and benefits that our laws guarantee veterans upon completion of their service. Absent constitutionally sufficient procedural protections, the promise we make to veterans becomes worthless. When the government harms its veterans by the deprivations at issue here, they are entitled to turn to the courts for relief. Indeed, our Constitution established an independent

Judiciary precisely for situations like this, in which a vulnerable group, that is being denied its rights by an unresponsive government, has nowhere else to turn. No more critical example exists than when the government fails to afford its injured or wounded veterans their constitutional rights. Wars, including wars of choice, have many costs. Affording our veterans their constitutional rights is a primary one.

There comes a time when the political branches have so completely and chronically failed to respect the People's constitutional rights that the courts must be willing to enforce them. We have reached that unfortunate point with respect to veterans who are suffering from the hidden, or not hidden, wounds of war. The VA's unchecked incompetence has gone on long enough; no more veterans should be compelled to agonize or perish while the government fails to perform its obligations. Having chosen to honor and provide for our veterans by guaranteeing them the mental health care and other critical benefits to which they are entitled, the government may not deprive them of that support through unchallengeable and interminable delays. Because the VA continues to deny veterans what they have been promised without affording them the process due to them under the Constitution, our duty is to compel the agency to provide the procedural safeguards that will ensure their rights. When the stakes are so high for so many, we

must, with whatever reluctance, fulfill our obligation to take this extraordinary step.[2]

We affirm the district court's rulings with respect to Veterans's various claims for specific forms of relief under the Administrative Procedure Act, including their claims for system-wide implementation of various VA mental health care initiatives and their claims for the alteration of disability compensation adjudication procedures in VA regional offices. We conclude, as did the district court, that the relevant provisions of the Administrative Procedure Act prevent us from granting Veterans the statutory relief that they seek. We reverse, however, the district court's rulings on Veterans's constitutional claims. We hold that the VA's failure to provide adequate procedures for veterans facing prejudicial delays in the delivery of mental health care violates the Due Process Clause of the Fifth Amendment, and that the district court erred when it found otherwise. We further hold that the district court erred in concluding that it lacked jurisdiction to review Veterans's due process challenge to delays and procedural deficiencies in the compensation claims adjudication system, and that it erroneously denied Veterans the relief to which they are

[2] We emphasize that we are presented with grave questions of life and death, and fundamental structural problems with the government's fulfillment of its duty to veterans. This is a serious matter, which deserves to be taken seriously, rather than as an opportunity to employ military metaphors in a failed effort to entertain the reader.

entitled under the Due Process Clause. We therefore affirm the district court in part, reverse in part, and remand for further proceedings.

BACKGROUND

There are approximately 25 million veterans in the United States. As of May 2007, roughly one-quarter of them were enrolled for health care with the VA,[3] the mission of which is "to fulfill President Lincoln's promise 'To care for him, who shall have borne the battle and for his widow and for his orphan' by serving and honoring the men and women who are America's veterans."[4] The VA has three branches: the Veterans Health Administration ("VHA"), the Veterans Benefits Administration ("VBA"), and the National Cemetery Administration ("NCA"). This case involves statutory and constitutional challenges to the actions of two of those branches, the VHA and the VBA.

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[3] The district court found these facts. We take judicial notice of the more current official figures provided by the VA: 23 million veterans, of whom one-third (8 million) are now enrolled for health care with the Veterans Health Administration, and of whom 3 million receive disability benefits. *See* VA Benefits & Health Care Utilization (July 30, 2010), *available at* http://www1.va.gov/NETDATA/Pocket-Card/4X6_summer10_sharepoint.pdf.

[4] United States Department of Veterans Affairs, Mission Statement, *available at* http://www4.va.gov/about_va/mission.asp.

I. Veterans Health Administration

Under Chapter 17 of Title 38 of the United States Code, veterans have a statutory entitlement to hospital care and other medical services. *See* 38 U.S.C. § 1710. This care is provided by the Veterans Health Administration. The VHA is required by law to provide free medical care to all veterans who served in any conflict after November 1, 1998, for up to five years from the date of separation from military service for any medical condition, even if the condition is not attributable to military service. 38 U.S.C. §§ 1710(e)(3)(C)(i); 1710(e)(1)(D). Medical services that the VHA is required to provide to veterans include "medical examination, treatment, and rehabilitative services." 38 U.S.C. § 1701(6).

The VHA is also required, by statute, to provide readjustment counseling and related mental health care services to eligible veterans. *See* 38 U.S.C. § 1712A. The Secretary of Veterans Affairs is required to "furnish counseling to the veteran to assist the veteran in readjusting to civilian life. Such counseling may include a general mental and psychological assessment of the veteran to ascertain whether such veteran has mental or psychological problems associated with readjustment to civilian life." 38 U.S.C. § 1712A(a)(1)(A). If a veteran requests a "general mental health assessment" the VA must provide such an assessment "as soon as practical after receiving the request, but not later than 30 days after receiving the request." 38 U.S.C. § 1712A(a)(3). If the physician or psychologist who conducts the mental health

evaluation determines that the veteran requires mental health services "to facilitate the successful readjustment of the veteran to civilian life" the veteran shall be "furnished such services." 38 U.S.C. § 1712A(b)(1).

The VHA provides healthcare services to veterans via 21 regional Veterans Integrated Service Networks, which administer 153 VA hospitals (or medical centers), approximately 800 community-based outpatient clinics, and 200 Readjustment Centers (or "Vet Centers") throughout the United States. The Secretary is required by statute to ensure that this health care system is "managed in a manner to ensure that the provision of care to enrollees is timely and acceptable in quality." 38 U.S.C. § 1705(b)(3).

Most veterans enrolled with the VA receive medical care at the VHA's community-based outpatient clinics. These clinics do not provide mental health care services, even though an unprecedented number of newly-discharged veterans have been diagnosed as suffering from mental disorders, in particular PTSD, as a result of military service in Iraq or Afghanistan. Approximately one out of every three soldiers returning from Iraq was seen in a VHA facility for mental health related treatment within a year of his return to the United States. The total number of patients is high; since October 2001, more than 1.6 million military personnel have served in Iraq or Afghanistan, and as of the end of 2007, over 800,000 veterans of the wars in Iraq and Afghanistan were eligible for VA health care.

PTSD is a leading mental health disorder diagnosis for those veterans.[5] According to Dr. Arthur Blank, a psychiatric expert who testified before the district court, this disorder is a "psychological condition that occurs when people are exposed to extreme, life-threatening circumstances, or [when they are in] immediate contact with death and/or gruesomeness, such as [what] occurs in combat, severe vehicular accidents or natural disasters. It produces a complex of psychological symptoms which may endure over time." Those symptoms include anxiety, persistent nightmares, depression, uncontrollable anger, and difficulties coping with work, family, and social relationships. From 2002 to 2003 there was a 232 percent increase in PTSD diagnoses among veterans born after 1972. A 2008 study by the RAND Institute shows that 18.5 percent of U.S. service members who have returned from Iraq and Afghanistan currently have PTSD, and that 300,000 service members now deployed to Iraq and Afghanistan "currently suffer PTSD or major depression." Delays in the treatment of PTSD can lead to alcoholism, drug addiction, homelessness, anti-social behavior, or suicide.

Veterans in general face a heightened risk of suicide. Studies show that suicide rates among veterans are much higher than among the general population.

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[5] As the Commander-in-Chief recently acknowledged, PTSD is one of the two "signature wounds of today's wars." President Barack Obama, Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010).

One such study considered by the district court, the "Katz Suicide Study" of February 2006, found that suicide rates among veterans were approximately 3.2 times higher than among the general population. The author of that study, a senior physician and administrator at the VHA, also estimated that "[t]here are about 18 suicides per day among American's 25 million veterans" and that there are four to five suicides per day among veterans currently receiving treatment from the VA. Dr. Katz subsequently noted that the VHA's "suicide prevention coordinators" had identified approximately 1,000 suicide attempts per month among the veterans treated in VHA medical facilities.

In July 2004, the VA developed and adopted a five-year Mental Health Strategic Plan to improve the provision of mental health care services. One of its core objectives was to "[r]educe suicides among veterans." In May 2007, however, the VA Office of Inspector General ("OIG") issued a report concluding that many components of the Mental Health Strategic Plan, including those relating to suicide reduction, had not been implemented. Moreover, the district court record shows that even in areas in which the VA has attempted to follow the Mental Health Strategic Plan, the measures introduced have fallen short of the Plan's express goals. For example, the Plan called for thorough mental health screening for "[e]very returning service man/woman . . . as part of the post-deployment and separation medical examination." Mental health screening is now a component of the primary health care examination when veterans first

enroll in the VA, but that screening is not rigorous and does not always evaluate veterans' risk of suicide. Although veterans are screened for PTSD, depression, traumatic brain injury, military sexual trauma, and problem drinking, their risk of suicide is not automatically assessed. All veterans who specifically present[6] with mental health or addiction disorders are screened for suicide risk, but just two questions are asked:

> (1) "During the past two weeks, have you felt down, depressed, or hopeless?"
>
> (2) "During the past two weeks, have you had any thoughts that life was not worth living or any thoughts of harming yourself in any way?"

Veterans who answer "yes" to the first question, but "no" to the second question are not given any further suicide risk screening, unless they are being admitted to an inpatient psychiatric unit.[7]

The May 2007 OIG report concluded that there was a widespread absence of effective suicide prevention measures at VHA facilities. The report found

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[6] The intransitive verb "present" is used by healthcare professionals to mean "to come before a physician (with a particular symptom, medical history, etc.)" Webster's New World College Dictionary (2010).

[7] Although the record does not state explicitly that those who answer "no" to both questions also receive no further treatment, even if they experienced frequent suicidal impulses previously, we note that this is also a logical inference.

that 61.8 percent of VHA facilities had not introduced a suicide prevention strategy to target veterans returning from Iraq and Afghanistan and that 42.7 percent of such facilities had not introduced a program to educate first-contact, non-medical personnel about how to respond to crisis situations involving veterans at risk for suicide. This report also found that 70 percent of VHA facilities had not introduced a system to track veterans who presented risk factors for suicide and 16.4 percent of VHA facilities had not implemented a medical referral system for veterans with risk factors. By 2009, each of the 153 VHA Medical Centers had a suicide prevention officer, charged with overseeing the clinical care of at-risk patients.[8] There were, however, no suicide prevention officers at any of the approximately 800 community-based outpatient clinics, where most veterans receive their medical care.

The effect of VHA's failure to implement a systematic program designed to reduce veterans' risk of suicide has been magnified by its failure to adopt measures to ensure that veterans with mental health disorders are swiftly identified and offered treatment. As the district court found, the May 2007 OIG report identified significant delays that prevented veterans from obtaining timely physician referrals for the treatment of depression and PTSD. For example, the

[8] The district court noted that these officers receive just two and one half days of special training for their role.

report found that where a primary care provider refers a veteran suffering from depression with symptoms of moderate severity, only 40 percent of VA facilities reported a same-day evaluation, whereas 24.5 percent of VA facilities reported a waiting period of two to four weeks, and 4.5 percent of facilities reported a waiting period of four to eight weeks. Similarly, only 33.6 percent of VA facilities reported same-day evaluation for individuals referred with symptoms of PTSD, while 26 percent reported wait times of two to four weeks, and 5.5 percent reported wait times of four to eight weeks. These extensive waiting times can have devastating results for individuals with serious mental illnesses.

The VA has acknowledged the crucial importance of timely clinical treatment for individuals with mental illnesses, and the district court record is replete with examples of statements, both written and oral, by senior VHA physicians and administrators underscoring the importance of timely medical care. One such example is a memorandum written by William Feeley, who, until April 2009, was the Deputy Under Secretary for Health Operations and Management at the VHA. In June 2007, he issued a memorandum instructing the directors of all 21 Veterans Integrated Service Networks to begin implementing the specific initiatives set forth in the 2004 Mental Health Strategic Plan, including those guaranteeing timely mental health treatment. The memo instructed that a veteran who presents with mental health issues for the first time at a medical center or community-based

outpatient clinic should be evaluated within 24 hours. It also provided that a veteran who seeks an appointment for mental health issues should be given a follow-up appointment within 14 days. Yet, VA administrators testified before the district court during the 2009 trial that they had no reports showing that either initiative mentioned in the Feeley memo had been implemented system-wide. Indeed, the district court found that as of April 2008, approximately 85,450 veterans remained on VHA waiting lists for mental health services.[9]

Veterans suffering from mental illnesses who are told that they must wait for extended periods of time before receiving treatment have little recourse. A veteran has neither the right nor the opportunity to appeal an *administrative* decision to place him on a wait list, if that decision is made by a clerical appointment scheduler such as a medical center receptionist. By contrast, a veteran may appeal a doctor or nurse's *clinical* decision that he must wait for a certain period of time before receiving mental health care. To do so, he must complain to a so-called "Patient Advocate," an employee of the VHA Medical

[9] These numbers may, however, significantly under-represent the number of veterans actually awaiting mental health care. During the trial before the district court, the chief medical officer of the Veterans Integrated Service Network in the Great Lakes Region testified that, in his region, a veteran was only placed on the wait list for a mental health appointment after he had *already* waited for 30 days to see a mental health professional.

Center at which the veteran was treated who is a colleague of the doctor or nurse who placed the veteran on the wait list. The Patient Advocate logs the veteran's complaint in a database and refers the complaint to the Medical Center's Chief of Staff, who must decide how to respond to the complaint within seven days. If the veteran disagrees with the Chief of Staff's decision, he may further appeal to the Director of the Veterans Integrated Service Network, who makes a final decision on the veteran's complaint. If the veteran disagrees with the Director's decision, he may ask the Director to request an external review. The veteran himself may not request such a review; only the Director may do so. Moreover, even if the Director does request an external review, the veteran has no right to know the results of that review. The veteran's only way to independently learn the outcome of an external review is to file request under the Freedom of Information Act.

II. Veterans Benefits Administration

The Veterans Benefit Administration is the branch of the VA responsible for veterans' benefits programs, including pensions and "Service-Connected Death and Disability Compensation" benefits. Veterans with service-connected disabilities—*i.e.*, disabilities that are the result of a disease or injury incurred through, or aggravated during, active military service—are entitled to monetary benefits as compensation. *See* 38 U.S.C. § 1110; 38 C.F.R. § 3.303(d). Approximately 3.4 million veterans currently receive monetary benefits

from the VBA. The district court found that many recipients of service-connected death or disability compensation benefits are totally or primarily dependent upon those benefits for financial support. The application procedures for such benefits are complex, and the district court found that, in light of statistics showing the limited formal education of the majority of recent veterans, many of them may have difficulty applying for the benefits to which they are entitled without substantial third-party assistance.

A

The labyrinthine process of applying for benefits from the VBA begins at one of the 57 VA Regional Offices located throughout the United States. To apply for service-connected disability compensation benefits, a veteran must complete a 23-page application and submit it to the VA Regional Office in his area. In support of his application, the veteran must present evidence of his disability, service in the military that would entitle him to benefits, and a nexus between the disability and the military service.[10]

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[10] A veteran whose claim includes PTSD must additionally provide proof of a "stressor" event that occurred during his military service. *See* 38 C.F.R. § 3.304(f)(1) ("if the evidence establishes that the veteran engaged in combat . . . and the claimed stressor is related to that combat, in the absence of clear and convincing evidence to the contrary . . . the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.") According to Ronald Aument, formerly Deputy

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The Veterans Claims Assistance Act, 38 U.S.C. § 5103, states that the VBA has a "duty to assist" veterans, requiring it to aid them in developing all evidence in support of their disability claims. Under the Act, upon receipt of a veteran's benefits claim application, a VBA Veterans Service Representative must contact the veteran and notify him of any further evidence that the VBA requires in order to adjudicate the claim. *Id.* The Veterans Service Representative must send the veteran a "duty to notify letter" detailing what information the veteran is expected to provide and what evidence the VBA will seek on his behalf under the Veterans Claims Assistance Act. In accordance with its "duty to assist" under the Act, the VBA must seek all government records that may pertain to the claim, including, *inter alia,* service personnel and medical records, VA medical records, and social security records. The "duty to

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Under Secretary for Benefits, this additional requirement renders PTSD-based disability benefit claims among the most difficult claims that the VA adjudicates. Specifically, the district court found that veterans often make mistakes completing their application forms and submitting evidence in support of their disability claims, and veterans suffering from PTSD had a particularly hard time furnishing the information properly. We note, however, that the VA recently amended its regulations "by liberalizing in some cases the evidentiary standard for establishing the required in-service stressor" to make it simpler for veterans to file claims for PTSD based on stressors "related to the veteran's fear of hostile military or terrorist activity." Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,843, 39,843 (July 13, 2010); *see* 38 C.F.R. § 3.304(f)(3) (2010).

assist" also requires the VBA to undertake "reasonable efforts" to acquire non-federal records, most notably private medical records identified by the veteran, if the veteran furnishes the VBA with a signed release form. Veterans have 60 days to respond to the "duty to notify letter" and to furnish the VBA with any applicable releases.

Section 5103A of the Veterans Claims Assistance Act states that the VBA's "duty to assist" also includes "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A. This medical examination is intended to confirm that a disability exists and to assess the medical implications of that disability in order to assist the claim adjudicator in determining the percentage the veteran will be considered disabled pursuant to the VBA's rating schedule. The VBA arranges and pays for Compensation and Pension Examinations, and the current wait time for such examinations is approximately 30-35 days. Individuals who have been treated for a recognized disability, such as PTSD, at a VHA medical facility may nonetheless be required to undergo a Compensation and Pension Examination. Moreover, a veteran who has been previously diagnosed by a physician at a VHA medical center as having PTSD, may nonetheless be diagnosed as not having PTSD during a VBA Compensation and Pension Examination.

Once all of the evidence in support of a veteran's service-connected disability compensation benefits

claim has been gathered, a Rating Veterans Service Representative (known as a "rating specialist") decides whether the veteran's disability is service connected, and, if it is, assigns a rating to his claim. Approximately 88 percent of all ratings claims are at least partially granted. The rating given operates on a sliding scale from zero percent disabled to 100 percent disabled, with increases at ten percent increments. Compensation currently ranges from $123 per month for a ten percent rating to $2,673 per month for a 100 percent rating. 38 U.S.C. § 1114.

During the pendency of a veteran's claim to his local VBA Regional Office, he is statutorily barred from paying a lawyer to represent him. *See* 38 U.S.C. § 5904. He may, however, be represented by a pro bono attorney or a representative from a Veterans Service Organization—a non-profit organization that is dedicated to working on behalf of veterans.[11]

If a veteran disagrees with the rating accorded him by the ratings specialist in his local Regional Office he may appeal. The multi-phase appeals process is, however, extremely difficult to navigate, especially for those suffering from mental disabilities

[11] VSOs are not affiliated with the VA. The district court found that in some cases, the VA provides VSOs with office space in its VBA Regional Offices, computer systems, and access to VA databases. The court also found, however, that the VA does not provide training to VSOs regarding how to assist veterans, and that all of the VSOs combined cannot meet the needs of all the veterans seeking benefits.

such as PTSD, and embarking upon an appeal may delay a veteran's receipt of benefits for many years.

A veteran may initiate his appeal of a rating specialist's rating decision by filing an informal Notice of Disagreement with his local Regional Office, or by filing a direct appeal to the Board of Veterans' Appeals with that Regional Office. A Notice of Disagreement may be filed within one year of the issuance of the VBA Regional Office's ratings decision. The veteran may appeal any part of the rating decision, including the denial of a ground of disability, the percentage of the disability assigned to the veteran, or the effective date of the disability. During the appeals process, the veteran's record remains open, and the veteran may submit additional evidence at any time.

When a Regional Office receives a Notice of Disagreement from a veteran it sends the veteran an election letter asking the veteran to choose between two non-exclusive appeals processes: (1) *de novo* review of his claim by a Decision Review Officer (a senior ratings specialist) who is empowered to reverse the initial rating decision if he believes that it is not warranted; or (2) issuance of a Statement of the Case by the Regional Office, providing a more detailed rationale for the underlying ratings decision, to be used in a formal appeal to the Board of Veterans' Appeals. *See* 38 U.S.C. § 7105. A veteran is entitled to retain paid counsel at this stage of the proceedings. *See* 38 U.S.C. § 5904.

If the veteran elects *de novo* review by a Decision Review Officer, and that officer resolves some, but not all of the appeal, or if the officer fails to resolve the appeal, a Statement of the Case will be prepared and the veteran may pursue a formal appeal to the Board of Veterans' Appeals. If the veteran decides to file a formal appeal with the Board, the veteran must file a VA Form 9 with his local Regional Office within 60 days of receiving the Regional Office's Statement of the Case, or within a year of receiving the Regional Office's rating decision, whichever is longer. *See* 38 U.S.C. § 7105(d)(3). The Regional Office must then certify the veteran's appeal to the Board of Veterans' Appeals. 38 C.F.R. § 19.35.

A veteran who disagrees with the Board's decision can further appeal the decision to the Court of Appeals for Veterans Claims ("Veterans Court"), an independent Article I court created by the Veterans' Judicial Review Act of November 18, 1988, Pub.L. No. 105-687.[12] A veteran claimant must file a notice of appeal with the Veterans Court within 120 days of the Board of Veterans' Appeals' final decision. 38 U.S.C. § 7266(a). He may then further appeal an adverse decision by the Veterans Court to the U.S. Court of Appeals for the Federal Circuit, which has authority to "decide all relevant questions of law," 38 U.S.C. § 7261(a), and he may ultimately petition

[12] The Court of Appeals for Veterans Claims has seven judges, who are appointed by the President and confirmed by the Senate to serve a fifteen-year appointment.

for certiorari in the Supreme Court of the United States.

B

More than 830,000 ratings claims are filed with the VBA each year. On April 12, 2008, there were 400,450 claims for service-connected death and disability compensation pending before the VBA. The district court found that approximately 11 percent of all ratings claims lead to a Notice of Disagreement being filed by a veteran and four percent of all ratings claims proceed to an appeal to the Board of Veterans' Appeals.

Throughout the appeals process, veterans (or their surviving relatives) seeking service-connected death and disability compensation are constrained by various time limits, and a failure to timely file at any point in the process can result in forfeiture of the appeal.[13] In contrast, the VBA is not subject to any statutory or regulatory time limits at any step of the process.

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[13] Following the Supreme Court's recent decision in *Henderson ex rel. Henderson v. Shinseki,* 131 S. Ct. 1197 (2011), the 120-day deadline within which veterans may file an appeal from the Board of Veterans' Appeals to the Veterans Court is no longer treated as jurisdictional. *Id.* at 1206. The deadline is nevertheless strict, and it remains unclear whether it is subject to equitable tolling or any other exception. *Id.* at 1206 & n.4.

Veterans experience long delays in the consideration and adjudication of service-connected death and disability claims, particularly when such claims are appealed. The VBA's stated goal is to process all initial ratings claims within 125 days. The district court found, however, that it takes, on average, 182 days for a regional office to issue an initial decision on a veteran's claim for service-connected death and disability compensation. Indeed, as of April 12, 2008, there were 101,019 rating-related claims that had been pending for over 180 days. The district court found that, because of the inherent complexities in proving a PTSD diagnosis, service-connected death and disability compensation claims that are based on PTSD take longer to adjudicate than other "average" claims.

In cases in which a veteran files a Notice of Disagreement with a Regional Office, the district court found that in 2008 it took approximately 261 days for a Regional Office to mail a Statement of the Case to the veteran. In some cases, veterans had to wait more than 1,000 days for the Regional Office to issue the Statement of the Case. The district court found that upon receipt of the Statement of the Case, it took the veteran 43 days, on average, to file a Form 9 substantive appeal. The district court then found that it took 573 days, on average, for the Regional Office to certify an appeal to the Board of Veterans' Appeals upon receipt of the veteran's Form 9—a merely ministerial act. Some veterans have had to

wait more than 1,000 days for the Regional Office to certify their appeal to the Board.

The district court found that veterans who appeal directly to the Board wait, on average, 336 days for the Board to issue a decision in their cases. Some veterans elect to have a hearing—at their own expense—in front of a Board of Veterans' Appeals judge. Those veterans who receive hearings are more likely to prevail on their appeal, but they must wait an average of 455 days for that hearing.

For veterans who pursue an appeal by filing a Notice of Disagreement with the Regional Office's initial decision, seeking a Statement of the Case, and then file an appeal with the Board, the district court found that it takes on average 1,419 days (3.9 years) from the veteran's initial filing of the Notice of Disagreement to the veteran's receiving a decision from the Board. It therefore takes approximately 4.4 years from the date of the veteran's initial filing of a service-connected death and disability compensation claim to the final decision by the Board (not including any time that may have elapsed between the Regional Office's initial rating decision and the veteran's filing of his Notice of Disagreement, which may be up to one year).

During the district court proceedings in this case, senior VA officials were questioned about the extraordinary delays in the VBA's claims adjudication appeal system. None of those officials, however, was able to provide the court with a sufficient justification

for the delays incurred. Bradley Mayes, the Director of Compensation and Pension Services at the VBA, testified at a deposition that the VBA had not "made a concerted effort to figure out what [wa]s causing" the lengthy delays in its resolution of the appeals of veterans claims for service-connected death and disability compensation. And at trial, James Terry, the Chairman of the Board of Veterans' Appeals, was unable to explain the lengthy delays inherent in the appeals process before the Board.

The record before the district court suggests that errors made by ratings specialists at the Regional Office level play a significant role in the lengthy delays that veterans experience in the adjudication of their claims. On average, the Board affirms a Regional Office's disposition of a case only 40 percent of the time, grants a veteran's appeal 20 percent of the time, and remands the case to the VBA for further proceedings in 40 percent of cases. Between 19 and 44 percent of these remands are so-called "avoidable remands," defined as occurring when "an error is made by the R[egional] O[ffice] before it certifies the appeal to the B[oard]." The district court found that almost half of the "avoidable remands" between January 1, 2008, and March 31, 2008, occurred as a result of violations by VBA employees of their duty to assist veterans. Approximately 75 percent of the claims that are remanded by the Board of Veterans['] Appeal[s] are subsequently appealed to the Board a second time. The district court found that it takes the Board, on average, 149 days to render a second

decision on a claim that it has already remanded once to the VBA.

The district court found that, following remand, it takes the VBA an average of 499.1 days to grant or withdraw a service-connected death and disability compensation claim, or to return it once again to the Board. It takes even longer, on average, for PTSD claims to be processed on remand—563.9 days. Many veterans suffering from serious disabilities, including PTSD, suffer substantial and severe adverse consequences as a result of this lengthy delay. In just the six months between October 2007 and April 2008, at least 1,467 veterans died during the pendency of their appeals.

III. History of the Case

On July 23, 2007, Veterans for Common Sense and Veterans United for Truth filed a complaint in the district court seeking declaratory and injunctive relief, on behalf of themselves, their members, and a putative class composed of all veterans with PTSD who are eligible for or receive VA medical services, and veteran applicants for and recipients of service-connected death or disability compensation benefits based upon PTSD. In the complaint, Veterans raised numerous statutory and constitutional challenges to the procedures the VA employs in its provision of

health care services and adjudication of benefits claims.[14]

With respect to the VHA's duty to provide veterans with mental health care, the Veterans challenged the following VHA practices and procedures, which, they claim, violate veterans' statutory entitlements and constitutional right to due process:

> (1) VHA mental health care waiting lists are extremely long, resulting in lengthy delays and in some cases "the absence of any care," and there are no transparent procedures in place for a veteran to appeal his placement on such a waiting list
>
> (2) Mental health care is unavailable or inaccessible at some VHA facilities and there are no procedures in place to improve accessibility
>
> (3) The VHA has no procedure through which Veterans can obtain expedited relief in urgent cases such as an imminent suicide threat
>
> (4) The VHA had delayed implementing governmental recommendations for improve procedures pertaining to clinical care and education

With respect to the VBA's duty to provide veterans with service-connected death and disability

[14] Not all of these claims are maintained on appeal, and this opinion addresses only those that are.

benefits, the Veterans challenged the constitutionality of the following VBA practices and procedures:

(1) The VBA acts as both the trier of fact and adversary at the Regional Office stage of the adjudication of claims for service-connected death and disability compensation claims

(2) There are no neutral judges or trial-like procedures at the VBA Regional Office stage of the adjudication of claims for service-connected death and disability compensation claims

(3) There is no procedure through which veterans may obtain discovery to support SCDDC claims

(4) There is no procedure whereby a veteran might compel the attendance of any VA employees or most other witnesses to testify and support their claims at service-connected death and disability compensation claim hearings

(5) There is no class action procedure available in front of the VA

(6) The Veterans Court has a limited role and is unable to award injunctive or declaratory relief

(7) There is no judicial authority or mechanism to enforce judicial decisions or to require the agency of original jurisdiction (the Regional Offices of the VBA) to obey or comply with the rule of law

> (8) The attorney's fee prohibition of 38 U.S.C. § 5904(c)(1) and the related provision for criminal penalties, 38 U.S.C. § 5905[,] prejudice veterans by curtailing their ability to bring suit

Veterans therefore sought declaratory and injunctive relief. Veterans asked the district court to declare, among other things, that:

> (1) The challenged VA practices, including the lack of procedures to remedy delays in the provision of medical care and treatment, violate Veterans's right to due process
>
> (2) Veterans are not barred from pursuing remedies in the federal courts
>
> (3) The VA has a mandatory obligation to provide medical care to returning veterans under 38 U.S.C. § 1710(e)(1)(D)

Veterans sought to compel the VA to:

> (1) Implement the recommendations of the Mental Health Strategic Plan
>
> (2) Implement the recommendations of the Feeley Recommendation
>
> (3) Provide free medical care to all returning veterans for the maximum period specified in 38 U.S.C. § 1710(e)(1)(2) (5 years)[15]

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[15] Veterans's complaint states that this period is "two years." The statute, however, specifies that the relevant period is five years. *See* 38 U.S.C. § 1710(e)(1)(1), (e)(3)(C)(i). The district

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> (4) Expand the VHA clinical appeals process to allow for appeals of administrative scheduling delays for the provision of mental health care
>
> And Veterans sought to enjoin the VA from:
>
> (1) Permitting very protracted delays in the provision of medical care to individuals with PTSD and in the adjudication of PTSD benefits claims
>
> (2) Destroying, altering, or doctoring records in veterans' claim files
>
> (3) Prematurely denying PTSD and other service-connected death and disability compensation claims
>
> (4) Allowing Washington, DC-based officials to assert extra-judicial pressure and influence upon the adjudication of individual claims by VA Regional Offices

The VA filed a motion to dismiss, which the district court denied. After Veterans moved for a preliminary injunction on their mental health care claims, the district court held an evidentiary hearing. Instead of ruling on the motion for a preliminary injunction, the district court deferred its ruling and merged the hearing with a trial on the merits, which began six weeks later. The trial addressed both Veterans's

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court correctly found "that this language create[s] an entitlement to health care for veterans for five years after separation from active duty."

mental health care claims and their compensation adjudication claims.

Veterans objected to the expedited trial schedule and limitations on discovery, and the district court overruled the objections. To meet the advanced trial date, the district court created a modified, expedited discovery schedule. On appeal, Veterans challenge two discovery rulings—one relating to the production of suicide incident briefs and the other relating to an interrogatory concerning the average length of time to process a PTSD compensation claim at the initial Regional Office level—which are addressed further in the Analysis, *infra.* Veterans argue that, in each instance, they were substantially prejudiced by the district court's ruling.

The district court held a seven-day bench trial. Two months later, the district court issued a thorough Memorandum of Decision, Findings of Fact and Conclusions of Law. *Veterans for Common Sense v. Peake,* 563 F. Supp. 2d 1049 (N.D. Cal. 2008). The district court concluded that Veterans had standing to bring suit on behalf of their members, because the interests at stake in the case were germane to the purposes of both organizations, both organizations' members had suffered injuries in fact, there was a causal connection between the injuries and the VA's conduct, and the relief sought would likely result in the amelioration of the injuries. 563 F. Supp. 2d at 1077 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,*

Inc., 528 U.S. 167, 181 (2000); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992)).[16]

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[16] We agree with the district court's conclusion on this point, and the government does not challenge it. Veterans' members would individually have standing; the "interests [they] seek[ ] to protect are germane to the organization[s'] purpose[s]"; and because their challenge is a systemic one seeking prospective relief —not an attack on past, individual benefits determinations— "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *See Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977).

We note that in a recent case, the D.C. Circuit concluded that a different veterans' organization did not have standing to bring a suit against the VBA on behalf of its members because the suit expressly sought judicial review of "the average processing time at each stage of the claims process." *Vietnam Veterans of Am. v. Shinseki,* 599 F.3d 654, 662 (D.C. Cir. 2010). The D.C. Circuit, noting that "an association has standing to sue only if one member would have standing on his or her own right," interpreted the organization's claim as not seeking relief for an injury to any individual member of the organization, because "the average processing time does not cause affiants injury; it is only their processing time that is relevant." *Id.*

Here, by contrast, Veterans complain of a variety of injuries actually being experienced or likely to be experienced in the near future by their members, including stalled disability claims pending in the VBA, and mental health that is deteriorating in the absence of treatment by the VHA. They allege that those injuries are caused by the VA's systemic failures, particularly the lack of adequate procedures for processing veterans[']requests for health care from the VHA or claims adjudication by the VBA, and that appropriate procedural safeguards would redress their members' injuries by ensuring that the services and benefits to which they are entitled are delivered before it is too late—*i.e.,* before their illnesses worsen or result in their deaths, and before their families are financially ruined. Veterans do rely

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The district court nonetheless denied each of Veterans's claims. With respect to their APA challenge to the VHA's untimely and/or ineffective healthcare appeals procedures and the inadequacies of the implementation of the Mental Health Strategic Plan, the court concluded that Veterans's claim did not pertain to a discrete, "final agency action," and thus it could

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upon average waiting times, among much other data and evidence, to *illustrate* those failures, but, unlike in *Vietnam Veterans,* Veterans do not allege that the "average" wait times themselves cause their members' injuries. Rather, they argue that it is the absence of constitutionally required procedural safeguards that causes those injuries and the high risk of future injury. In a suit for prospective relief, that potential for immediate harm is sufficient to establish organizational standing. *See, e.g., Florida State Conference of NAACP v. Browning,* 522 F.3d 1153, 1160 (11th Cir. 2008) ("When the alleged harm is prospective, we have not required that the organizational plaintiffs name names [of individual members] because *every* member faces a probability of harm in the near and definite future.") (emphasis added). Veterans may represent their members['] interests now; individual members need not wait to bring individual claims until it is too late to obtain meaningful relief. *Cf. Sandusky County Democratic Party v. Blackwell,* 387 F.3d 565, 574 (6th Cir. 2004) ("[Plaintiff organizations] have not identified specific voters who will seek to vote at a polling place that will be deemed wrong by election workers, but this is understandable. . . . [A] voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker who mistakenly believes the voter is at the wrong polling place. It is inevitable, however, that there will be such mistakes. The issues [plaintiffs] raise are not speculative or remote; they are real and imminent."). Veterans have simply done a better job alleging the facts required to establish their standing than did the plaintiff organization in *Vietnam Veterans.*

not be raised under the APA. *See* 5 U.S.C. §§ 704, 706(1); *Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55 (2004). Moreover, the court found that 38 U.S.C. § 1710 "commits decisions about the provision of medical care to the Secretary's discretion," and that "courts [have] no meaningful standards against which to judge the agency's exercise in discretion." Finally, the court found insufficient evidence of system-wide delays in the provision of mental health care to support a determination that agency action was "unreasonably delayed" under the APA, even if the VA's action were reviewable.

The district court further ruled that it did not have jurisdiction to order the VA, within 150 days, to fully implement the Mental Health Strategic Plan, because Veterans's request was barred by the APA for three separate reasons. First, the district court considered Veterans's complaint to be one pertaining to the manner and speed with which the plan had been implemented—the sufficiency of an agency action, rather than a complaint about the agency's failure to act. Second, because the MHSP "consists of 265 recommendations" the district court found it "dubious" that it could be characterized as "discrete agency action" and found that such "recommendations" were not "actions the VA 'is required to take.'" Third, and finally, the district court found that as the MHSP was a five-year plan and was, at the time of the court's ruling, in its fourth year of implementation, it was still ongoing, and thus was not a final agency action. The district court used the same rationale to reject

Veterans's request that it order the VA to fully implement the recommendations of the Feeley memo within 150 days.

As to Veterans's due process challenge to the VHA's failure to provide timely care, the district court found no constitutional violation. It reasoned that while veterans presenting with mental health emergencies are not treated immediately "every time," Veterans "did not prove a systemic denial or unreasonable delay in mental health care." The court deemed adequate the VA's clinical appeals process, which struck "an appropriate balance between safeguarding the veteran's interest in medical treatment and permitting medical treatment without overly burdensome procedural protections."

The district court also denied each of Veterans's claims pertaining to benefits adjudication. The district court concluded that 38 U.S.C. § 511 prevented it from reviewing delays in the adjudication of individual veterans' claims, and "the issue of whether a veteran's benefits claim adjudication has been substantially delayed will often hinge on specific facts of that veteran's claim." Furthermore, it concluded that if it were to provide the injunctive relief that Veterans sought, including ordering the VBA to shorten its average wait times, "such an order would invariably implicate VA regulations," which are subject to judicial review in the Federal Circuit only under 38 U.S.C. § 502.

The district court further concluded that neither the delays in adjudicating service-connected death and disability compensation benefits claims, nor the lack of procedural protections for individuals making such claims, was unreasonable under the APA or violative of due process. While the court found these delays "significant" and did not "dispute that the health and welfare of veterans is at stake," it determined that it could not find the delays "unreasonable" under the APA because Congress had established no specific timetable for claims adjudication and because the delays resulted, in part, from "the VA's decision to emphasize initial claim adjudication at the expense of appeals." Finally, the court found no due process violation because "'[d]elay is a factor but not the only factor'" in "'determining when due process is no longer due process because past due.'" (Quoting *Wright v. Califano,* 587 F.2d 345, 354 (7th Cir. 1978)).

Ultimately, the district court concluded that the remedies sought by Veterans were beyond its power "and would call for a complete overhaul of the VA system, something clearly outside of this Court's jurisdiction." The district court therefore denied Veterans's request for a permanent injunction, and granted judgment in favor of the VA. Veterans timely appealed.[17]

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[17] The district court denied Veterans's request for injunctive relief based upon its answers to questions of law, so we review its decision *de novo. See Gathright v. City of Portland,* 439 F.3d 573, 576 (9th Cir. 2006). We rely on the facts as they were found

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ANALYSIS

I

We begin by confirming our jurisdiction to hear Veterans's constitutional claims.[18]

A. Sovereign Immunity

By seeking an injunction against the VA and its agencies, Veterans have brought suit against the federal government. The federal government has historically enjoyed immunity from suit, notwithstanding that the principle of sovereign immunity derives from the English legal notion that "the King can do no wrong"; this surely was not a principle that those who fought for our country's independence happily imported into our legal system. Nevertheless, it is well-established that "the United States cannot be lawfully sued without its consent in any case." *United States v. Lee,* 106 U.S. 196, 205 (1882). The VA does not assert that it is immune from suit over Veterans's constitutional claims, but we address the issue because the district court determined that sovereign immunity precluded consideration of those claims.

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by the district court, except to the extent those findings were clearly erroneous. *Preminger v. Peake,* 552 F.3d 757, 765 n.7 (9th Cir. 2008).

[18] For the reasons that are set forth below, the agency actions Veterans challenge under the Administrative Procedure Act are not reviewable under the terms of that statute, so we need not consider other bars to review of those claims.

We hold that sovereign immunity does not bar adjudication of Veterans's constitutional claims, because Congress has expressly waived such immunity. The second sentence of § 702 of the APA states:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. As the Supreme Court has held with regard to this provision, "complaints [for] declaratory and injunctive relief [are] certainly not actions for money damages." *Bowen v. Massachusetts,* 487 U.S. 879, 893 (1988). Veterans's prayers for declaratory relief and an injunction thus fit squarely within this waiver.

The district court nonetheless found that "waiver of sovereign immunity under § 702 of the APA is limited by § 704." Section 704 states, in relevant part, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." The district court reasoned that because the delays Veterans challenge are neither made reviewable by any statute nor a "final agency action," even their constitutional claims fall outside of § 702's waiver of sovereign immunity. This was error. Whether the

challenged delays constitute "final agency action" is an inquiry that is relevant to Veterans's claims under the APA itself, which are addressed below. But § 704 in no way limits § 702's broad waiver of sovereign immunity with respect to suits for injunctive relief against the federal government—suits for which the APA itself is not the cause of action.

In *Presbyterian Church (U.S.A.) v. United States,* 870 F.2d 518 (9th Cir. 1989), we held that "§ 702's waiver of sovereign immunity is [not] limited to instances of 'agency action'" as defined by the APA. *Id.* at 525. We found that the *first* sentence of § 702 *does* address "agency action" specifically: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. But we determined that the waiver of sovereign immunity in the second sentence, which was added to the statute in 1976, "contains no such limitation."[19] *Presbyterian Church,*

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[19] Reviewing the legislative history of the 1976 amendment, we explained:

> Congress observed that before the amendment to § 702, litigants seeking such nonmonetary relief were forced to resort to the "legal fiction" of naming individual officers, rather than the government, as defendants[,] an approach that was "illogical" and "becloud[ed] the real issue whether a particular governmental activity should be subject to judicial review, and, if so, what form of relief is appropriate." The need to channel and restrict judicial control over administrative agencies, Congress concluded, could better be achieved through doctrines

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870 F.2d at 525. To the contrary, "[n]othing in the language of the amendment suggests that the waiver of sovereign immunity is limited to claims challenging conduct falling in the narrow definition of 'agency action.'" *Id.* We therefore found that sovereign immunity had been waived as to the Church's First and Fourth Amendment challenges to surveillance conducted by the Immigration and Naturalization Service in its congregations, even though the INS's investigations did not constitute "agency action" under the APA. *Id.*

The district court noted, however, that nine years after *Presbyterian Church*, we stated summarily: "[T]he APA's waiver of sovereign immunity contains several limitations. Of relevance here is § 704, which provides that only '[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to

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> such as statutory preclusion, exhaustion, and justiciability, rather than through "the confusing doctrine of sovereign immunity." Accordingly, § 702 was designed to "eliminate the defense of sovereign immunity as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency or by an officer or employee of the agency."

Presbyterian Church, 870 F.[2]d at 524 (internal citations and footnote omitted) (citing H. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6123-6130). We assumed that the "legal fiction" referred to by Congress was that created by *Ex parte Young,* 209 U.S. 123 (1908), and its progeny. *Presbyterian Church,* 870 F.[2]d at 524 n.7.

judicial review.'"[20] *Gallo Cattle Co. v. Department of Agriculture,* 159 F.3d 1194, 1198 (9th Cir. 1998). But it is *Presbyterian Church* and not *Gallo Cattle* that controls where, as here, a plaintiff's challenge is constitutional and thus not dependent on the APA for a cause of action.

The first and second sentences of § 702 play quite different roles, each one significant. The first sentence entitles aggrieved individuals to "judicial review of federal agency action." The second sentence, added to the statute decades later, waived sovereign immunity for "[a]n action in a court of the United States seeking relief other than money damages. . . ." One such action, of course, is a suit for "judicial review of federal agency action" of the sort authorized by the first sentence. But other actions exist too. Injunctions may be sought, for example, to enforce the Constitution itself; courts need no statutory authorization to undertake constitutional review. *See, e.g., Bell v. Hood,* 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution. . . .").

Gallo Cattle considered a challenge to an agency order denying the plaintiffs preliminary relief while they adjudicated the merits of their petition before an administrative board—that is, interim relief to which

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[20] *Gallo Cattle* did not cite *Presbyterian Church* or any other authority for this holding.

the plaintiffs believed themselves entitled by *statute* and the agency's regulations.[21] *Id.* at 1198-1200. The plaintiffs sought "judicial review of agency action" not because it was unconstitutional, but because it violated the rules governing the agency. For that type of suit, the plaintiffs' cause of action was the APA itself, so we applied § 704's limitation on what agency action is reviewable—meaning subject to "judicial review" under the first sentence of § 702—and concluded that because § 704's terms were not satisfied, the *first* sentence of § 702 did not authorize judicial review. Consequently, sovereign immunity could not be waived because the plaintiffs failed to bring a cognizable "action" in court. *Id.* at 1198 (addressing the "waiver of sovereign immunity in *suits seeking judicial review of a federal agency action* under [28 U.S.C.] § 1331"[ ] (emphasis added)).

As in *Presbyterian Church,* the plaintiffs here raise a constitutional challenge, which does not depend on the cause of action found in the first sentence of § 702. Section 704's limitation of that first sentence is thus inapplicable, and the district court's reliance

[21] The plaintiff's claim on the *merits* before the administrative board concerned a First Amendment challenge. *Gallo Cattle,* 159 F.3d at 1196. That claim was not before the court, however. The plaintiffs appealed only from the agency's denial of its request "to pay [the challenged] assessments into escrow pending a decision on the merits of the petition"—a matter solely of the agency's procedure for adjudicating disputes through its administrative process. *Id.*

on *Gallo Cattle* was incorrect.[22] Instead, because Veterans have brought "[a]n action in a court of the United States seeking relief other than money damages" that arises under the Constitution itself, as in *Presbyterian Church,* we find that sovereign immunity has been waived by § 702's second sentence.

We find additional support for this conclusion in a decision of the D.C. Circuit that rejected similar arguments to those made by the government and accepted by the district court here. In *Trudeau v. FTC,* 456 F.3d 178 (D.C. Cir. 2006), that court declined to adopt the FTC's position that "(1) the waiver [of sovereign immunity under § 702] applies only to actions arising under the APA; and (2) since review under APA § 704 is limited to 'final agency action,' the waiver of sovereign immunity is similarly restricted to conduct that falls within that compass." *Id.* at 186. Undertaking an analysis identical to ours in *Presbyterian Church,* the court determined that "nothing in

[22] While incorrect, the district court's confusion was reasonable. The district court cited *Gros Ventre Tribe v. United States,* 469 F.3d 801 (9th Cir. 2006), a prior decision of this court that discussed both *Presbyterian Church* and *Gallo Cattle* and observed in passing that it "saw no way to distinguish" the two cases. *Id.* at 809. The *Gros Ventre Tribe* court ultimately resolved the case on other grounds. For the reasons just provided, we find *Presbyterian Church* and *Gallo Cattle* readily distinguishable: *Presbyterian Church* concerns § 702's waiver of sovereign immunity as to constitutional challenges, while *Gallo Cattle* concerns challenges under the APA itself. Section 704 constrains only the latter situation, and it is the former type that we are presented with here.

the language of the second sentence of § 702 . . . restricts its waiver to suits brought under the APA," and thus the waiver applied to the plaintiff's First Amendment claim there. *Id.* Moreover, the court "h[e]ld that the waiver applies regardless of whether the [agency's challenged conduct] constitutes 'final agency action'" under § 704. *Id.* at 187 (citing *Presbyterian Church,* 870 F.2d at 525). This is consistent with our holding that § 702's waiver of sovereign immunity applies more broadly than to actions under the APA itself. We therefore hold that, as to Veterans's constitutional claims for "relief other than money damages," § 702 waives sovereign immunity regardless of whether the claims arise from "agency action" as defined by the APA.[23]

B. The Veterans Judicial Review Act

The Veterans Judicial Review Act ("VJRA") prohibits judicial review of "the decision of the Secretary [of Veterans Affairs] as to any" "question[ ] of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." 38 U.S.C. § 511(a). The VA argues that this provision precludes us from considering Veterans's

[23] We note that even if we did not find a waiver of sovereign immunity here, Veterans's constitutional challenge could proceed against all individual defendants under *Ex Parte Young*—precisely the fiction for which Congress sought to eliminate the need in adding the second sentence of § 702.

second constitutional challenge, concerning the procedure for the adjudication of claims for disability benefits. The dissent goes even further and suggests that the VJRA forecloses our ability to decide Veterans's first constitutional challenge, regarding delays in mental health care services, as well. We disagree as to both challenges, and shall explain why below in the context of each claim.

II

We first address Veterans's statutory and constitutional claims concerning the delays in VHA's provision of mental health care. The number of veterans diagnosed as suffering from mental illnesses, and the percentage of those who are awaiting treatment, is simply staggering. As of April 2008, at least 85,450 veterans were languishing on VHA waiting lists for mental health care—a number that may significantly under-represent the scale of the problem both then and now.[24] The urgent need to provide veterans with the mental health care to which they are entitled is clear, not least in light of the high suicide rate among this vulnerable population. In the absence of procedures designed specifically to safeguard veterans' rights to timely, effective treatment, veterans are suffering and dying, heedlessly and needlessly.

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[24] As noted earlier, *supra* note 9, some veterans are not even placed on formal waiting lists until they have already waited for a month.

Veterans contend that the introduction of a formal appeals process to allow a veteran to contest an administrator's decision to place him on a waiting list for mental health care, of more transparent clinical appeals procedures, and of a procedure permitting veterans with PTSD to seek expedited access to mental health care in acute cases, would save lives. The district court ruled that Veterans have no recourse in the federal courts to contest the VA's systematic failure to provide veterans with procedures safeguarding their access to the mental health care to which they are statutorily entitled. In some respects, the district court is correct. In others, it erred in so ruling. Although our power is limited under the APA and we cannot grant Veterans the relief they seek as to their statutory challenge, we hold that their constitutional right to due process has been violated, reverse the district court's ruling in this respect, and remand this appeal for further proceedings.

A. APA Challenge to Mental Health Care Delivery Delays

Given the provisions of the APA and controlling Supreme Court law, the district court properly denied Veterans's APA challenge to the VHA's delays in providing timely and effective mental health care, notwithstanding the many evident deficiencies in the VHA's provision of such care.

Under the APA, courts are empowered to "compel agency action unlawfully withheld or unreasonably

delayed." 5 U.S.C. § 706(1). In *Norton v. Southern Utah Wilderness Alliance,* however, the Supreme Court interpreted the scope of this statutory provision and held that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take.*" 542 U.S. 55, 64 (2004). With regard to the discreteness requirement, the Court stated that the "failure to act" is "properly understood as . . . a failure to take one of the agency actions (including their equivalents) earlier defined in [5 U.S.C.] § 551(13)." *Id.* at 62. Agency actions defined in 5 U.S.C. § 551(13) include issuance of a rule, order, license, sanction, relief or equivalent benefit. The *Norton* Court suggested that, for example, "the failure to promulgate a rule or take some decision by a statutory deadline" would constitute the failure to take a discrete agency action. *Norton,* 542 U.S. at 63.

An agency action may therefore be reviewed and compelled by a federal court under § 706(1) only if that action is one which is legally required. *Id.* Quoting the Attorney General's Manual on the APA, the *Norton* Court stated "§ 706(1) empowers a court only to compel an agency 'to perform a ministerial or nondiscretionary act,' or 'to take action upon a matter, without directing *how* it shall act.'" *Id.* at 64 (quoting Attorney General's Manual on the Administrative Procedure Act 108 (1947)). In limiting APA review to required agency actions, the Court held, Congress "rule[d] out judicial direction of even discrete agency action that is not demanded by law" under the APA. *Id.* at 65.

Veterans assert here that the VA has unreasonably delayed the provision of timely and effective mental health care to eligible veterans by failing to implement the Mental Health Strategic Plan and the Feeley Memorandum. Implementation of the Plan and Memorandum would undoubtedly improve the lot of veterans who are suffering unduly as a result of delays in the provision of their mental health care. Such implementation does not, however, fall within the definition provided by the Supreme Court in *Norton* of a "discrete action" that the agency is "required" to take, because no statute or regulation demands it. Veterans contend that the VA is statutorily required to provide timely and acceptable medical care under 38 U.S.C. § 1710(a) and 38 U.S.C. § 1705. True, but those requirements are not so specific as the particular action Veterans seek to compel.

In relevant part, 38 U.S.C. § 1710 requires that the VA furnish hospital care and medical services to certain veterans:

> The Secretary . . . shall furnish hospital care and medical services which the Secretary determines to be needed—
>
> (A) to any veteran for a service-connected disability; and
>
> (B) to any veteran who has a service-connected disability rated at 50 percent or more.

38 U.S.C. § 1710(a)(1). Veterans "who served on active duty in a theater of combat operations . . . after

November 11, 1998" are eligible for health care and services for five years following discharge. 38 U.S.C. § 1710(e)(1)(D), (e)(3)(C)(i). Section 1705(a) then obligates the Secretary "[i]n managing the provision of hospital care and medical services under section 1710(a)" to prescribe, establish, and operate a system of annual patient enrollment. In designing this "enrollment system," the Secretary "shall ensure that the system will be managed in a manner to ensure that the provision of care to enrollees is timely and acceptable in quality. . . ." 38 U.S.C. § 1705(b)(1).

Veterans claim that § 1705(a) creates an obligation to ensure that the VHA as a whole is managed so as to provide timely care of acceptable quality. We agree. We disagree, however, with Veterans's contention that this statutory obligation mandates the implementation of the Mental Health Strategic Plan and the Feeley Memorandum, which Veterans characterize as the VA's "own determination of what § 1710 requires." Such a reading overstates the reach of the specific provisions of § 1705—particularly in light of the fact that Veterans have not filed any direct challenge to the Secretary's management of the enrollment system itself.

The VA does not dispute that it is required to provide mental health care to certain veterans. Nor should it dispute that a delay in providing necessary mental health care would amount to a wholesale failure to provide care to at-risk veterans under § 1710 and § 1705, insofar as some at-risk veterans will take their own lives during the delay. The VA is, thus,

obviously required to take action to ensure that, system-wide, mental health care is provided to at risk veterans in a timely manner. There is, however, no statutory language that would specifically obligate the VA to fully implement the remedies sought by Veterans—the Mental Health Strategic Plan or the Feeley Memorandum. We are therefore bound by the Supreme Court's instruction in *Norton* that: "General deficiencies in compliance, unlike the failure to issue a ruling . . . lack the specificity requisite for agency action." *Norton,* 542 U.S. at 66.

As the *Norton* Court recognized, however, agencies may be required to take actions not only by Congress, but also by themselves. Agency action "demanded by law . . . includes, of course, agency regulations that have the force of law." *Norton,* 542 U.S. at 65. Even a less formal agency "plan" may "itself create[ ] a commitment binding on the agency," if there is "clear indication of binding commitment in the terms of the plan." *Id.* at 69, 71. Thus we have held that "agencies may be required to abide by certain internal policies," such as their own "internal procedures." *Alcaraz v. INS,* 384 F.3d 1150, 1162 (9th Cir. 2004) (citing *Morton v. Ruiz,* 415 U.S. 199, 235 (1974)).

Veterans argue that the Mental Health Strategic Plan and Feeley Memorandum are such required internal policies. But neither document supports that view. The Plan was designed to "identif[y] overlap, include[ ] gap analyses, and present[ ] goals and objectives that articulate a set of proposed strategies

that directly support all the mental health needs of the enrolled veteran population." The VA cast the Plan's particular strategies as "recommendations." Nowhere did the agency commit to binding itself, and we do not find any implied intent to do so.

The Feeley Memorandum, by contrast, does impose the affirmative obligation that procedures to ensure veterans receive mental health evaluations within twenty-four hours of seeking help "must be implemented by August 1, 2007." But the memorandum—a document sent from the Deputy Under Secretary for Health for Operations and Management to the VA's Network Directors—is an internal administrative communication that lacks the force of law. *See Rank v. Nimmo,* 677 F.2d 692, 698-99 (9th Cir. 1982). Unlike an internal rule that is officially published within an agency and binding on its employees, for example, the Memorandum is merely a charge from a supervisor to his subordinates.

Veterans's APA claim concerning timely and acceptable mental health care therefore cannot proceed because Veterans do not assert that the VA "failed to take a *discrete* agency action that it is *required to take*" within the meaning of § 706(1), *Norton,* 542 U.S. at 64, and so we affirm the district court's ruling on Veterans's APA-based challenge.

B. Due Process Clause Challenge to Mental Health Care Delivery Delays

Veterans also claim that the lack of adequate procedures to ensure that veterans will not suffer needlessly because of severe delays in the receipt of mental health care violates the Due Process Clause of the Fifth Amendment. We agree.

1

We first consider whether the VJRA deprives us of jurisdiction to consider this claim. We note at the outset that while the VA argues vigorously that the VJRA forecloses our consideration of Veterans's second due process claim, regarding the disability benefits adjudication process, it does not contend that it affects *this* claim at all. To the contrary, the VA acknowledges that "the general nature of plaintiffs' claims—which asserted 'systemic' delays in the provision of health care"—falls outside the VJRA's jurisdictional bar to "challenges to the medical care or other benefits provided in *specific* cases." Gov't Br. 33 n.7. A potential jurisdictional flaw is not a litigant's issue to waive, of course, so we must consider the issue ourselves notwithstanding the parties' agreement. *See Arbaugh v. Y & H Corp.,* 546 U.S. 500, 514 (2006). Still, because the sole participant in this case to even suggest that the VJRA precludes review of Veterans's constitutional challenge to the mental health care delays is our dissenting colleague, we discuss the issue only briefly.

Section 511(a) provides,

> The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. . . . [T]he decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.[25]

The "question of law" presented here is whether the VA's lack of procedural safeguards to ensure that veterans timely obtain the mental health care to which they are entitled—such as an appeals process to challenge appointment scheduling—violates the Due Process Clause by providing insufficient process. It is debatable whether that question of law is one that is "*necessary* to a decision by the Secretary" affecting veterans' benefits, like the question of what evidence is required to make out a benefits claim for service-connected PTSD. *See, e.g.,* Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,843, 39,843 (July 13, 2010); *see* 38 C.F.R. § 3.304(f)(3) (2010). We need not resolve the issue of

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[25] Section 511(b) provides for four exceptions, none applicable here: (1) the review of VA rules and regulations under § 502, (2) suits in district court concerning claims related to federally provided insurance, (3) suits under specific provisions relating to housing and small business loans, and (4) review by the Board of Veterans' Appeals and the Veterans Court.

necessity, however, because the Secretary has not actually issued a "decision" answering this constitutional question at all. The VA may assume and even argue that its system for providing mental health care services is constitutionally sound, but it has not issued a "*decision*" on the question that is "final and conclusive and" unreviewable, the way it might issue, for example, a "rating decision" concerning a particular veteran's degree of disability for purposes of calculating compensatory benefits. *See* 38 U.S.C. § 1156(b)(1)(B).

The dissent argues that "there is simply no way to adjudicate the due process claim without 'determining first' whether the VA's administrative staff 'acted properly in handling' veterans' requests for appointments," which "will depend on the facts of each veteran's case"—which we may not review. Dissenting op. at 6383 (quoting *Price v. United States,* 228 F.3d 420, 422 (D.C. Cir. 2000) (per curiam) and citing *Thomas v. Principi,* 394 F.3d 970, 974 (D.C. Cir. 2005)) (internal alterations omitted). But of course there is: Veterans challenge the lack of adequate *procedural safeguards* to ensure that veterans receive timely care. To make out that claim they must simply demonstrate "the *risk* of an erroneous deprivation" of care "through the procedures [currently] used, and the probable value, if any, of additional of substitute procedural safeguards." *Mathews v. Eldridge,* 424 U.S. 319, 335 (1975) (emphasis added). Veterans need not, and do not, seek to relitigate in federal court whether VA staff actually "*acted* properly in

handling" individual veterans' requests for appointments, dissenting op. at 6383; no individual veteran is before us seeking to challenge the timing of an individual appointment that *he* just received. Rather, Veterans point to the past as evidence of the "*risk* of an erroneous deprivation" their members now face.

Put differently, this is not a tort suit brought by an individual veteran, as in the two cases cited by the dissent, where "underlying the claim is an allegation that the VA *unjustifiably denied him* a veterans' benefit." *Thomas,* 394 F.3d at 974 (emphasis added). The relevant "decision[s]" as to "question[s] of law and fact" in those cases were "decision[s]" about individual benefit determinations, which were insulated from review as soon as the Secretary had made those "decision[s]." Instead, this is a suit for an injunction to require that "additional or substitute procedural safeguards" be provided *in the future,* if the cost to the government of such safeguards is justified by the reduction in risk they would produce. *Mathews,* 424 U.S. at 335. The relevant "decision" here as to a "question of law" is whether the existing safeguards are constitutionally sufficient; the Secretary has not rendered a "decision" on that question, so the triggering condition for § 511's preclusive effect does not now exist—assuming the Secretary's answer to a "question of law" such as this could ever fit within the meaning of "decision," which is most unlikely. *See infra,* at 6355. The VA is not mistaken in understanding that the nature of Veterans's suit falls outside the reach of § 511(a).

2

We turn, then, to the merits of Veterans's due process claim. The record before us shows that some veterans with severe depression or PTSD are forced to wait over eight weeks for mental health referrals. During that period, some of those veterans take their own lives. The district court found that there are about 18 suicides per day among veterans, including four to five suicides per day among veterans enrolled to receive VA health care.[26] In 2008, one VHA physician identified "about 1,000 suicide attempts per month" among the veterans seen in VHA facilities.[27]

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[26] The VA's statistics do not differentiate between veterans who are simply enrolled with the VA, veterans who are receiving other types of (non-mental health related) medical treatment, veterans who are on waiting lists for mental health treatment, and veterans currently receiving mental health care.

[27] This figure comes from an email written by the Deputy Chief of Patient Care Services for VA's Office of Mental Health on February 13, 2008. The email read as follows:

> Shh!
>
> Our suicide prevention coordinators are identifying about 1000 suicide attempts per month among the veterans we see in our medical facilities. Is this something we should (carefully) address ourselves in some sort of release before someone stumbles on it?

That email was obtained by Veterans during discovery in this litigation, and first made public as a result. This message and others like it generated significant media attention. *See, e.g.,* Armen Keteyian, *VA Hid Suicide Risk, Internal E-Mails Show,* CBS News (Apr. 21, 2008), *available at* http://www.cbsnews.com/stories/2008/04/21/cbsnews_investigates/main4032921.shtml. That attention, in turn, prompted a congressional investigation. *See*

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The precise constitutional question with which we are presented is whether the VA's delays in the provision of care amount to a deprivation of "property" without due process, a violation of the Fifth Amendment.

a

First we must find that Veterans allege a deprivation of life, liberty, or property. As we discuss above, 38 U.S.C. § 1710 creates an entitlement to health care for eligible veterans. The VA does not dispute that this entitlement creates a property interest protected by the Due Process Clause. Indeed, it is well-established that "the interest of an individual" in receipt of government benefits or services to which he is entitled "is a statutorily created 'property' interest

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The Truth About Veterans' Suicides, Hearing Before the H.R. Comm. on Veterans Affairs, 110th Cong., 2d Sess. (May 6, 2008).

The dissent gets political reality exactly backwards when it asserts that "Congress already exercises vigorous oversight of the VA through its ability to hold hearings on the agency's operations," and that "[b]ecause Congress is already actively involved in the agency's affairs, programmatic improvements should be made in the offices of the VA or the halls of Congress, not through litigation." Dissenting op. at 6397 (internal quotation marks and brackets omitted). To the contrary, this case demonstrates the crucial role for litigation initiated by injured parties in forcing the government to respond. Had the resulting oversight then yielded actual solutions, this case might have become moot. It is only because the government continued to fail to correct the VA's problems that we are compelled to address the constitutional questions presented here.

protected by the Fifth Amendment." *Mathews,* 424 U.S. at 332.

b

Second, we must determine whether Veterans's members have been deprived of their property interest. In cases involving the termination of government benefits, the "deprivation" is clear. *See, e.g., Goldberg v. Kelly,* 397 U.S. 254, 257 (1970). Similarly, we have long held that the outright denial of benefits to which an individual is entitled constitutes deprivation of a recognized property interest. *See, e.g., Nat'l Ass'n of Radiation Survivors v. Derwinski,* 994 F.2d 583, 588 n.7 (9th Cir. 1992) (denial of application for veterans' benefits implicates due process); *Griffeth v. Detrich,* 603 F.2d 118, 120-21 (9th Cir. 1979). Veterans's claim differs somewhat. They argue not that their members' requests for care have been decided by the VA and finally rejected, but instead that the delay in the provision of care sought "is tantamount to a denial of care," particularly for veterans who are suicidal. We agree.

In a related context, the Supreme Court has recognized that "the possible length of wrongful deprivation of . . . benefits is an important factor in assessing the impact of official action on . . . private interests." *Fusari v. Steinberg,* 419 U.S. 379, 389 (1975). Thus in *Fusari*, the Court found that excessive delay in the adjudication of claims for unemployment benefits, during which time benefits were withheld, could yield

a deprivation in its own right regardless of whether benefits were ultimately restored. And in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), the Court reasoned that "[a]t some point, a delay in [a] post-termination hearing would become a constitutional violation," though that point had not been reached in that case. *Id.* at 547; *see also Barry v. Barchi,* 443 U.S. 55, 66 (1979) ("[I]t was necessary that Barchi be assured a prompt post-suspension hearing, one that would proceed and be concluded without appreciable delay. Because the statute as applied in this case was deficient in this respect, Barchi's suspension was constitutionally infirm under the Due Process Clause of the Fourteenth Amendment."). Indeed, "at some point delay must ripen into deprivation, because otherwise a suit alleging deprivation would forever be premature." *Schroeder v. City of Chicago,* 927 F.2d 957, 960 (7th Cir. 1991) (Posner, J.).

We understand these cases to support the commonsense proposition that an unreasonable delay in the delivery of an entitlement can amount to a deprivation of that entitlement.[28] Veterans who are deprived of timely mental health care are denied the opportunity to rehabilitate in a more timely manner and to avoid sinking deeper into depression and disability. And, of course, for those veterans whose

[28] Whether that deprivation is actually *unconstitutional*, because inflicted without due process, is a distinct question to which we turn next.

illness causes them to take their own lives in the interim, the deprivation is final.

c

Finally, we must decide whether the process designed to protect veterans against the deprivation of their property interest is sufficient, or whether additional process is due. We apply the traditional balancing test *Mathews v. Eldridge* in the context of veterans' entitlements. *See, e.g., National Ass'n of Radiation Survivors v. Derwinski,* 994 F.2d 583, 588 (9th Cir. 2002).[29] The *Mathews* Court explained that

[29] Contrary to the dissent's suggestion, *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985), did not create a new, special "high hurdle" for all due process challenges involving veterans. *See* Dissenting op. at 6390, 6396. *Walters* applied the *Mathews* formulation and determined that, *in light of* the government's strong, centuries-old interest in maintaining a veterans' claims system that is "as informal and nonadversarial as possible," "[i]t would take an extraordinarily strong showing of probability of error under the present system —and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law." *Id.* at 323, 326.

Moreover, *Walters* was clear that government's interest in an "informal and nonadversarial" system, as defined by that case, was limited to "the system for administering benefits" within the VA. *Id.* at 321. The dissent cannot be serious when it suggests that the government has an interest in an "informal and nonadversarial" resolution to the years of federal-court litigation in *this* case. Dissenting op. at 6373, 6390. Although our decision today is the product of adversarial litigation and results in an injunction being entered against the VA, it does

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"procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Fifth . . . Amendment," *Mathews,* 424 U.S. at 332. *According to Mathews,* the "identification of the specific dictates of due process" with regard to a deprivation of a protected interest "generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

(1) The district court correctly concluded that, with respect to the first *Mathews* factor, "the private interest of veterans in receiving health care is high." Proper care can alleviate the severe toll that PTSD takes on veterans and their families, and it reduces the incidence of suicide. The district court erred, however, in its conclusion that the risk of erroneous

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nothing to compromise the "informal and nonadversarial" procedures *within* the VA during the initial adjudication of claims for veterans benefits. Indeed, in part IV of this opinion we reaffirm *Walters's* holding that the limitation on payments to attorneys during regional-level agency adjudications does not violate due process.

deprivation was low, and in its determination that Veterans had failed to prove a systemic denial or unreasonable delay in mental health care provision that would create a high risk of erroneous deprivation. It similarly erred in its conclusion that the third *Mathews* factor weighs against imposing additional procedural safeguards, based upon its erroneous assumption that such safeguards would impose undue administrative burdens on the VA. We examine each of the latter two factors in turn.

(2) In weighing the second *Mathews* factor, the district court substantially underestimated the risk of erroneous deprivation faced by veterans with serious mental illnesses and disorders. Veterans did not prove conclusively at trial that veterans seeking mental health care face a *high* risk of detrimental delays in the provision of care, but the district court's factual findings support the conclusion that there is a *significant* risk that delays in treatment will harm veterans. *Mathews* requires us to balance that risk of erroneous deprivation against the "probable value, if any, of additional . . . procedural safeguards." *Mathews,* 424 U.S. at 335. In the area of scheduling veterans for mental health care appointments, the marginal value of "additional" procedural safeguards is extraordinarily high, because at present *no* procedure is in place to ensure that mental health appointments are provided soon enough to be effective.

Although a "clinical" decision made by a mental health care professional—such as a nurse, doctor, or psychologist—to place a veteran on a waiting list for

care may be appealed, a veteran has no opportunity at all to appeal a receptionist or call center's "administrative" decision that he must wait to receive mental health care.[30] In the district court, Dr. Murawsky, the chief medical officer of one of the VA's 21 national regions, was asked what would happen "if the veteran is told that 'You get an appointment in 60 days,' and the veteran wants an earlier appointment." He responded that the VA's "policy *doesn't cover appointment time*." (Emphasis added.) Indeed, veterans whose delayed care stems from administrative decisions have no right to speak with a supervising administrator about their need for more immediate care, nor to insist that they be evaluated by a medical professional, nor to secure any other review that would lessen the likelihood that diagnosis and treatment are delayed too long for their cases.

Only if a scheduling decision were made by a medical professional—for example if a "nurse or physician sa[id] 'You're medically stable . . .—an appointment in six weeks is appropriate' "—would a veteran have any opportunity to request a review, through the clinical appeals process. Of course, at that point the veteran would at least have been *evaluated* by a medical professional—something that a veteran calling by phone or speaking to a receptionist would *not* automatically get, unless he walked into a

[30] Veterans do not challenge the clinical appeals process, described *supra* at 6308-09, here, and so we do not address its adequacy.

VA emergency room or clinic and actually "expressed suicidal intentions." Like most medical patients, veterans are generally scheduled first by administrative staff, and then seen second by medical personnel (at their scheduled appointments)—not the other way around, as the dissent suggests.

There is, quite simply, no process for review of a scheduler's assignment of a mental health care appointment weeks in the future. The district court's suggestion that the clinical appeals process offers a sufficient procedural safeguard for all veterans on VHA waiting lists, including those placed on such lists by administrators, is clearly contrary to the record. So too does the dissent improperly confuse the distinction between clinical delays, for which some process is provided, and administrative ones, for which there is none.[31]

The record before us is replete with examples of deleterious delay in the VHA's provision of mental health care, and shows that many veterans throughout the country have no means available to appeal the delays to which they are subjected. The record contains one story, for example, of a veteran who

[31] We have not "misunderst[ood] [the] evidence" of the existing procedural safeguards, as the dissent suggests, dissenting op. at 6390; we have simply avoided the error made by the district court and the dissent of improperly confusing the distinction between clinical delays and administrative ones and conflating the issues unique to each. *See* Dissenting op. at 6390-95.

committed suicide after calling the VA to report his suicidal thoughts but was told he would be over 25 places down on a waiting list for treatment. In another case, a former U.S. Marine who was at the Pentagon on September 11, 2001, and later served in Iraq, reported a delay of almost eight weeks before the VA would see him after "telling the VA repeatedly that I was suicidal" and having already been diagnosed with PTSD. All told, over 84,000 veterans are on waiting lists for mental health care. The district court made no finding as to the number of veterans who were placed on waiting lists by administrators, as opposed to clinicians. Veterans argue that vast numbers of veterans are denied access to mental health care by administrators, and the VA offers no evidence to rebut this claim. What is clear is that veterans have no recourse when they are told that they cannot be scheduled sooner for a mental health appointment.

This absence of procedural safeguards is particularly alarming in view of the apparent ineffectiveness in the scheduling system. In July 2005, an "Audit of the Veterans Health Administration's Outpatient Scheduling Procedures" conducted by the VA's Office of Inspector General found that the "VHA did not follow established procedures when scheduling medical appointments for veterans seeking outpatient care," including mental health care. Two years later, a follow-up audit revealed that five of the eight recommendations for improvement made in 2005 had not been implemented. Specifically, the 2007 report

found: 72 percent of patient appointments had "unexplained" delays between dates care was requested by veterans and their clinicians and the dates appointments were scheduled; schedulers were not adequately trained, particularly on scheduling consult appointments with specialists; and that pressure to reduce the length of patient waiting lists had caused schedulers to avoid placing patients on lists for appointments at all.

Similarly, a 2005 U.S. Government Accountability Office report on VA services for PTSD found that the VA had not developed referral mechanisms to provide PTSD services when those services were not available at community-based clinics, and challenged the "VA's capacity to identify and treat veterans returning from military combat who may be at risk for developing PTSD, while maintaining PTSD services for veterans currently receiving them." And the district court found that, while the Feeley Memorandum states that veterans who present to a Medical Center or Community Based Outreach Center for the first time with mental health issues should be evaluated within 24 hours, the VA lacks any method to ensure compliance with this 24-hour evaluation policy and does not know whether the policy has been implemented.

This is therefore not a case in which existing procedures are sufficient, such that additional process is unlikely to produce significant marginal reductions in the risk of erroneous deprivation. *See, e.g., Mathews,* 424 U.S. at 343-46. Instead, the underlying

scheduling system is flawed, and there is no procedure whatsoever for veterans to challenge their delays. Consequently, *any* additional procedure would produce a meaningful improvement in ensuring that veterans are not left to wait too long to get the care they need.

(3) The district court's weighing of the third *Mathews* factor was similarly erroneous. It concluded that "additional safeguards" in the VHA's system for treating veterans with mental health issues would impose unwarranted "burdens on the VA." The district court did not make any specific factual findings based on the record in the case before us as to the nature and extent of additional administrative burdens that would be imposed upon the VA, if additional procedural safeguards were introduced to facilitate veterans' ability to secure their entitlement to mental health care in a timely and effective manner. Instead, it appears to have based this conclusion solely on a quotation plucked from a Supreme Court case regarding the government's "'genuine interest in allocating priority to the diagnosis and treatment of patients . . . rather than to time-consuming procedural minuets.'" (Quoting *Parham v. J.R.,* 442 U.S. 584, 605 (1979)). The VA now cites this same language.

Cases are not quotations, however, to be relied upon like entries in *Bartlett's* purely for their convenient turns of phrase.[32] Rather, cases are clusters of

[32] *See* BARTLETT'S FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE (17th ed. 2002).

facts and applications of legal principles to those facts that must be read in whole. *Parham,* which examined the due process rights of minors committed to state psychiatric facilities by their parents, emphasized Georgia's "significant interest in not imposing unnecessary procedural obstacles that may discourage the mentally ill or their families from seeking needed psychiatric assistance." 442 U.S. at 605. That is, the Court was concerned that additional procedure would *create* delay, which would harm the state's interest in making hassle-free treatment available to families that need it. Indeed, the unabridged sentence from *Parham* is: "The State also has a genuine interest in allocating priority to the diagnosis and treatment of patients *as soon as they are admitted to a hospital* rather than to time-consuming procedural minuets *before the admission.*" *Id.* (emphasis added). Here, the government is not prioritizing the diagnosis and treatment of patients over unnecessary delay. To the contrary, it is embracing delay over effective treatment.

If there is any justification for the VA's interest in maintaining the status quo, it has not told us, and we cannot imagine one. Cost—often claimed by the government as an interest in less robust process—does not seem to be at issue here. The VA does not mention expense, and as the district court found, "the VHA's Chief Financial Officer testified that the VHA is not currently facing a budget crisis and has adequate money to 'meet the mission requirements.'" Moreover, the VA has hired more than 3,800 new mental health staff over the past few years, and 500-600 positions

still remain unfilled. In fact, the only governmental interest we can conceive of is the same as Veterans's: expediting the provision of mental health care to save the lives of men and women who have fought for our country. As the government represented at oral argument, "The VA is firmly committed to ensuring that our nation's veterans receive top-quality health care." Oral Arg. Audio at 25:12.

* * *

We have determined that veterans have a towering interest in avoiding delays in their mental health care, the risk of erroneous deprivation is high given the absence of review procedures, the value of additional procedural safeguards would be great, and the government's interest does not weigh against additional protections. The current delays therefore constitute a deprivation of Veterans's mental health care without due process, in violation of the Fifth Amendment.

We reverse the district court's judgment to the contrary, and remand for further proceedings. On remand, the district court shall conduct hearings in order to determine what additional procedures or other actions would remedy the existing due process violations in three core areas. The district court shall consider what procedural protections are necessary to ensure that:

(1) individuals placed on VHA waiting lists for mental health care have the opportunity to appeal the decision in a timely

manner and to explain their need for earlier treatment to a qualified individual;

(2) individuals determined to be in need of mental health care receive that treatment in a timely manner; and

(3) individuals with urgent mental health problems, particularly those at imminent risk of suicide, receive immediate mental health care.

Although, as we have noted earlier, the district court may not order the VHA to implement the Mental Health Strategic Plan or institute the recommendations of the Feeley Memorandum, it may consider specific procedures or measures mentioned in both to aid in its determination as to what procedures are necessary. The district court's determination may also draw upon the findings of the 2007 VA Office of Inspector General Report, and other evidence already in the record or adduced at a hearing following remand; we recognize that circumstances may have evolved since the district court last took evidence three years ago.

We still remain hopeful that at least some of the problems in this case can be resolved by the parties working together. The district court should encourage them to meet and confer to propose a remedial plan that addresses the mental health care delivery problems described above, to be presented to the court for approval. It is within the discretion of the district court to consider obtaining the assistance of a

Magistrate Judge or appointing a Special Master to aid the court in any way deemed necessary. In the end, the district court shall either approve a plan agreed upon by the parties or enter an appropriate order instructing the VHA to provide Veterans with the procedural safeguards to which they are entitled.

III

We next address Veterans's statutory and constitutional claims concerning the delays in the VBA's claims adjudication system, particularly in the claims appeals process.

On appeal, Veterans challenge the district court's denial of relief for these claims and contend that relief is warranted under both the APA and the Due Process Clause. Once again, we affirm the district court's denial of Veterans's statutory claim, but reverse the district court's ruling on their constitutional claim. We hold that Veterans's entitlement to service-connected death and disability compensation is a property interest protected by the Due Process Clause, and that the lack of adequate procedures to prevent undue delay in the provision of that property constitutes a deprivation that violates Veterans's constitutional rights.

A. APA Challenge to Delays in Compensation Claim Appeals

In considering Veterans's APA claim with respect to benefits adjudication, we are, once again, bound by the Supreme Court's instruction in *Norton* that: "General deficiencies in compliance, unlike the failure to issue a ruling . . . lack the specificity requisite for agency action." *Norton,* 542 U.S. at 66. Veterans's APA claim concerning timely and acceptable adjudication of veterans' service-connected death and disability claims cannot proceed because Veterans do not assert that the VA "failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64.

The district court erred in stating: "It is uncontested the adjudication of benefits claims is a discrete agency action that the VA is required to take." That analysis failed to consider the cornerstone of Veterans's APA claim. Veterans are challenging pervasive deficiencies in the adjudication process that harm their members, not delays in discrete benefits adjudications that the VA is required to make. As discussed above, agency action to remedy widespread delays is not a discrete, "required" action under § 706(1). On this basis alone, Veterans are barred from seeking statutory relief that is dependent upon the VA's waiver of sovereign immunity under the APA. *See Norton,* 542 U.S. at 63-65. We therefore affirm the district court's dismissal of Veterans's APA claim, on

the basis that it does not meet the APA requirement for reviewability.[33]

B. Due Process Clause Challenge to Delays in Compensation Claim Appeals

1

First we must consider whether we may hear Veterans's constitutional claim. The VA argues that we lack jurisdiction to do so, because the VJRA divests all federal courts but the Veterans Court and the United States Court of Appeals for the Federal Circuit of jurisdiction to review any question concerning veterans benefits. We reject that contention. In our view, the VJRA does not strip district courts of jurisdiction to hear constitutional challenges to the VA's system-wide conduct, divorced from challenges to individual benefits determinations.

The VA points to two sections of the VJRA, sections 502 and 511. Neither applies here.

a. Section 502. 38 U.S.C. § 502 states, "An action of the Secretary to which [5 U.S.C. §§ 552(a)(1), 553 (the APA provision concerning rulemaking)] refers is subject to judicial review. Such review . . . may be sought only in the United States Court of Appeals

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[33] Because Veterans are barred from seeking statutory relief under the APA, we need not consider the VA's alternative arguments that 38 U.S.C. § 502 or § 511 also bar consideration of Veterans's statutory claims.

for the Federal Circuit." The district court determined that, given § 502's grant of exclusive jurisdiction to the Federal Circuit, "any challenge by [Veterans] to VA regulations is not reviewable in this Court." It found that provision relevant because, in its view, granting Veterans the relief they seek "would invariably implicate VA regulations." Consequently, it held that "any such challenge is reviewable only in the Federal Circuit" under § 502.

By its plain text, however, § 502 concerns only "judicial review" of "action[s] of the Secretary" as defined by the APA. We are thus presented with *Norton's* complement: for the same reason that the delays Veterans challenge are not "action[s] of the Secretary" that are reviewable under the APA, *see supra* at 6333-37, they are not actions that may be challenged in the Federal Circuit only. Section 502 is clear in its purpose of directing APA-based challenges to the VA's rules and regulations to a single federal court, in derogation of the APA's general grant of judicial review in all courts. So we cannot read its jurisdiction-stripping provision any more broadly than the narrow class of actions that may actually be challenged under the APA after *Norton*.

In addition to § 502's plain text, our precedent dictates this result. In *Preminger v. Principi,* 422 F.3d 815 (9th Cir. 2005), we held that § 502 bars review outside the Federal Circuit of "*direct* challenges to VA rules and regulations" only. *Id.* at 821 (emphasis added). And in *Nehmer v. Department of Veterans Affairs,* 494 F.3d 846 (9th Cir. 2007), we determined

that § 502 concerns only suits that "*directly* challenge either the merits of the VA's regulation or the VA's rulemaking authority." *Id.* at 857-858 (emphasis added). Veterans challenge neither, but only the VA's failure to discharge its duty to veterans in a short enough time to avoid depriving them of their property interest without due process.

Finally, we find that the district court's concern that "an order expediting claims adjudications . . . would force the VA to alter or repeal some of [its] regulations," and thus would violate § 502, was entirely misplaced. As just explained, § 502 limits judicial review of discrete agency actions, not claims of the type asserted here. Veterans's only surviving claim with regard to benefits is a facial constitutional challenge to the VA's actual *conduct,* not its codified *rules,* so § 502 is not implicated at all. *See Nehmer,* 494 F.3d at 858-859 (where plaintiffs "challenge[d] the *actions* of the VA in failing to comply with the terms of" a court order, § 502 did not bar review "irrespective of the existence of the VA regulations" that were adopted in response to the order, because the claim was not a "facial challenge to VA regulations"). While the VA may *choose* to modify its regulations to comply with a remedial order, that future remedy would not convert Veterans's suit into an action for judicial review of an agency action subject to § 502. Thus, § 502 does not affect our ability to review Veterans's constitutional claims.

b. Section 511. The district court understood § 511 to preclude "review of individual benefits decisions," but not "facial constitutional challenges to the

VA benefits system." Nonetheless, the court determined that § 511 barred review, because "the determination of whether the delay is unreasonable may depend on the facts of each particular claim," which individually may not be reviewed in district court.

Section 511 blocks review of "decision[s] of the Secretary" as to any "questions of law and fact *necessary to a decision* by the Secretary *under a law that affects the provision of benefits.*" 38 U.S.C. § 511(a) (emphasis added). Under the statute's plain text, there are three problems with the district court's analysis.

First, the conduct Veterans challenge is not a "decision" within the meaning of § 511. While the term "decision" is not expressly defined in the statute, we understand it in the context of the statute to mean individual benefits adjudications — the type of individualized decisions Congress sought to keep out of the district courts. *See* H.R. Rep. No. 100-963, 1988 U.S.C.C.A.N. 5782, 5803-5804. Section 1156, for example, discusses "ratings decision[s]" by the Secretary that determine the degree of disability of a temporarily disabled veteran. 38 U.S.C. § 1156(b)(1)(B). Section 3107 concerns vocational rehabilitation benefits for veterans, and provides that "[t]he Secretary shall review [a veteran's] statement [of disagreement with his rehabilitation plan] and render a decision on such review. . . ." 38 U.S.C. § 3107(c)(3). Later sections that refer to § 511 shed further light on the meaning of "decisions" as "individual determinations." Section 5104, for example, is titled "Decisions

and notices of decisions," and explains that the Secretary must give a claimant notice "of *a decision* by the Secretary *under § 511* of this title affecting the provision of benefits to *a claimant*." 38 U.S.C. § 5104(a) (emphasis added). And § 7104, which outlines the jurisdiction of the Board of Veterans' Appeals, provides, "All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board [of Veterans' Appeals]." 38 U.S.C. § 7104. Veterans do not challenge a "decision by the Secretary" here. Instead, they challenge systemic delays in the benefits adjudication process that deprive them of the aid to which they are entitled.

Second, even if the term "decision" did apply, § 511 precludes judicial review only of "decision[s]" actually made by the Secretary. As with Veterans's constitutional challenge to the delays in the delivery of mental health care, whatever "questions of law" the challenge may require us to answer are not questions the VA has already answered. Nor has the VA made a final decision in Veterans's members' appeals; that their appeals languish *un*decided is the very basis for their claim.[34] We thus agree with the Federal

[34] The VA's argument (Gov't Br. 41 n.10) that "there is no question that the VA is actually deciding benefits claims" is thus misplaced; § 511 is concerned only with extant, not potential, decisions.

Circuit's interpretation of this provision: "Section 511(a) does not apply to every challenge to an action by the VA. As we have held, it only applies where there has been a 'decision by the Secretary.' In the context of the history of this provision, the statute plainly contemplates a formal 'decision' by the Secretary or his delegate." *Bates v. Nicholson,* 398 F.3d 1355, 1365 (Fed. Cir. 2005) (citation omitted). Veterans do not challenge the VA's initial ratings decision in their members' cases here, just the VA's systematic failure to timely render decisions on appeal.

Finally, unlike § 502, § 511 does not grant *exclusive* jurisdiction to any agency or court over a class of legal claims, except challenges to "decision[s]" within the meaning of § 511 that have actually been made by the Secretary. Nothing in § 511 prevents claims that could be (but have not yet been) adjudicated by the Secretary, and then reviewed by the Court of Veterans Claims and the Federal Circuit, from being raised in another court of competent jurisdiction instead. Our view in this regard accords with that of the D.C. Circuit:

> Section 511(a) does not give the VA *exclusive* jurisdiction to construe laws affecting the provision of veterans benefits or to consider all issues that might somehow touch upon whether someone receives veterans benefits. Rather, it simply gives the VA authority to *consider* such questions when making a decision about benefits, and . . . prevents district

> courts from "review[ing]" the Secretary's decision *once made*.

Broudy v. Mather, 460 F.3d 106, 112 (D.C. Cir. 2006) (emphasis added). Thus in *Broudy,* the plaintiffs' claim that VA officials had obstructed their access to benefits proceedings by withholding or covering up relevant information was not barred by § 511 because "the Secretary ha[d] never decided th[o]se questions." *Id.* at 114.

The Federal Circuit agrees as well. In *Hanlin v. United States,* 214 F.3d 1319 (Fed. Cir. 2000), that court explained:

> "We do not read [§ 511] to require the Secretary, and only the Secretary, to make all decisions related to laws affecting the provision of benefits. Rather, once the Secretary has been asked to make a decision in a particular case (e.g., through the filing of a claim with the VA), 38 U.S.C. § 511(a) imposes a duty on the Secretary to decide all questions of fact and law necessary to a decision in that case."

Id. at 1321. Consequently, the plaintiff in that case, an attorney for a veteran to whom the VA was supposed to send a portion of his client's benefit award as a fee, was permitted to sue the VA in the Court of Federal Claims, notwithstanding the fact that his "claim arises under [the attorney's fees provision of title 38], which is 'a law that affects the provision of benefits' within the meaning of" § 511. *Id.* at 1321.

We recognize, however, that the Sixth Circuit has construed § 511 more broadly than have the D.C. Circuit and Federal Circuit. In *Beamon v. Brown,* 125 F.3d 965 (6th Cir. 1997), the court considered a putative class action brought by veterans to challenge delays in the processing of veterans' benefits. The court found these claims barred by § 511, reasoning:

> Such a challenge raises questions of law and fact regarding the appropriate methods for the adjudication of veterans' claims for benefits. Determining the proper procedures for claim adjudication is a necessary precursor to deciding veterans benefits claims. Under § 511(a), the VA Secretary shall decide this type of question.

Id. at 970. We fail to understand how the Sixth Circuit squared its reasoning with the plain text of the statute, which makes no mention of "precursors" or "procedures," but only decisions. Its conclusion is all the more odd in light of § 511(b), which excepts from § 511(a) challenges to the VA's rules and regulations. Even if the term "decision" did encompass the Secretary's "[d]etermin[ation] [of] the proper procedures for claim adjudication," that determination would typically be made by rule and thus exempt from § 511(a)'s bar to review.

Not only do we find more persuasive the positions of the D.C. Circuit and Federal Circuits, but we would be prohibited from adopting the Sixth Circuit's view even if we were inclined to do so because of the particular nature of this case. The Sixth Circuit relied

heavily in its analysis on the availability to the plaintiffs of an alternate forum for their constitutional claims in the Veterans Court. *Beamon,* 125 F.3d at 971-974. But, as the district court recognized, the Veterans Court would lack jurisdiction over the type of claims raised by the plaintiffs here, even if they were raised by Veterans' members individually. The Veterans Court has acknowledged that "[n]owhere has Congress given this Court either the authority or the responsibility to supervise or oversee the *ongoing adjudication process* which results in a BVA decision." *Cleary v. Brown,* 8 Vet. App. 305, 308 (1995) (emphasis added); *see also Dacoron v. Brown,* 4 Vet. App. 115 (1993) (noting that constitutional challenges could be "presented to this Court only in the context of a proper and timely appeal taken from such decision *made* by the VA Secretary through the BVA") (emphasis added).

Moreover, *organizations* such as Veterans could not present claims to the Veterans Court, whose jurisdiction is limited to appeals from the BVA. If we were to adopt the Sixth Circuit's broad reading of § 511, then the plaintiff organizations would be deprived of any forum in which to raise their claims.[35]

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[35] The plaintiff organizations are, of course, separate entities from their members. We fail to understand how the dissent can suggest that these independent corporate persons litigating in their own names, although borrowing their members' standing, are no different from a group of individual veterans litigating as a plaintiff class. *See* Dissenting op. at 6381-82. Indeed, the Supreme Court years ago rejected the argument that "[b]oth

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As the *Beamon* court itself noted, the possibility of interpreting the predecessor to § 511 "as a complete bar to the judicial review of all challenges to such decisions" has led the Supreme Court to decide that the provision did not preclude district courts from hearing *constitutional* challenges relating to veterans benefits, for fear "of the constitutional danger of precluding judicial review of constitutional claims." *Id.* at 971-972 (citing *Johnson v. Robison,* 415 U.S. 361 (1974)). For that same reason, we could not

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associational standing and [class actions] are 'designed to serve precisely the same purpose.' " *United Auto. Workers v. Brock,* 477 U.S. 274, 288 (1986). The Court explained,

> While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital. Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack. These resources can assist both courts and plaintiffs. As one court observed of an association's role in pending litigation: "[T]he interest and expertise of this plaintiff, when exerted on behalf of its directly affected members, assure 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.' "

Id. at 289 (first internal quotation marks and citations omitted). That is, an organization is much more than a mere "tool, like class actions, for vindicating individual members' interests." Dissenting op. at 6382.

construe § 511 so broadly here given the specific nature of this case.[36]

The purpose of the VJRA was to keep thousands of suits concerning individual benefits determinations from crowding the dockets of the federal courts, on top of the social security cases and immigration petitions for review that already keep them busy reviewing agency actions. Although the VA and the dissent struggle mightily to ignore the nature of this suit, it is plain that a structural constitutional challenge is beyond the jurisdiction of the Veterans Court

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[36] A recent case before the D.C. Circuit considered a challenge similar to Veterans's claim here as to the benefits adjudication system. *See Vietnam Veterans of Am. v. Shinseki,* 599 F.3d 654 (D.C. Cir. 2010). That case was decided solely on standing grounds, as noted *supra* at 6321-22 n.16. *See Vietnam Veterans,* 599 F.3d at 661-662. In the six pages of dicta that preceded that holding, however, the court discussed *Beamon* favorably before stating, "[o]ur discussion of this issue is tentative." *Id.* at 659-661. We give no weight to the tentative dictum of other courts. In any event, *Vietnam Veterans* considered *Beamon* not for its holding as to § 511, but rather for its finding that the adequate alternative remedy in the Veterans Court barred review of the plaintiffs' APA-based challenge, because APA § 704 precludes review if an alternate remedy exists elsewhere. *Id.* at 659 (citing *Beamon,* 125 F.3d at 967-970). *Vietnam Veterans* went on to muse, "we think it virtually inevitable that it would be held that the [Veterans Court] has exclusive jurisdiction to hear due process claims" too, because those claims were "essentially identical" to the plaintiffs' "unreasonable delay claim" under the APA. *Id.* at 660 & n.7. We are aware of no principle that limitations on a statutory cause of action may be transferred wholesale to a constitutional claim simply because it arises from the same underlying events.

to hear and, due in part to the Secretary's prolonged indecision on appeals, outside the preclusive sweep of § 511.

2

Turning, at last, to the merits of Veterans's constitutional claim, we hold that the district court rightly acknowledged that "many veterans have a protected property interest [under the Due Process Clause] as applicants for and recipients of SCDDC benefits." *Accord Cushman v. Shinseki,* 576 F.3d 1290, 1298 (Fed. Cir. 2009) (holding that veterans' benefits are a protected property interest under the Fifth Amendment, because they are statutorily mandated and nondiscretionary in nature).

Confronted with the stark and sobering evidence of inexplicable delays in the benefits adjudication process, the district court stated that it could not conclude that the due process rights of veterans were violated by the absence of procedures designed to reduce delays in claim appeals, "in light of many of the factors creating these delays." To reach this conclusion, the district court relied primarily on the Seventh Circuit's decision in *Wright v. Califano,* 587 F.2d 345 (7th Cir. 1978), which found that 180-day delays in the adjudication of social security benefits did not constitute a due process violation under *Mathews v. Eldridge,* given the Social Security Administration's "severe resource constraints." *Id.* at 354-356. The

court found *Wright's* "reasoning applicable to the present case."

In so ruling, however, the district court failed to properly analyze Veterans's due process claim by conducting a *Mathews* analysis of its own based on the facts of this case. "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 895 (1961). Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). *Wright* itself acknowledged that there could come a time "when due process is no longer due process because past due"; it just found that, on the facts of that case, that time had not yet been reached. *Wright,* 587 F.2d at 354. So we must undertake that analysis to see if process is "past due" here by "examin[ing] the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *FDIC v. Mallen,* 486 U.S. 230, 242 (1988).

First, we find that veterans' property interest in their service-connected death and disability compensation could not be more vital—many recipients of such benefits are totally or primarily dependent upon that compensation for their financial support and the support of their families. A veteran receives

no monies from the VA until his claim has been approved, which means that during the initial period of claim assessment and during the pendency of any appeal he and his family suffer tremendous privation. To pursue a claim to completion, for example, may take in excess of 4.4 years, even excluding "the time between an . . . initial decision [at the Regional Office level] and a veteran's NOD filing, which may be as long as one year"[ ]. During the pendency of such appeals, the record before us shows that many veterans perish, after living in want. The district court's memorandum of decision states, for example, that "[b]etween October 1, 2007, and March 31, 2008, alone, at least 1,467 veterans died during the pendency of their appeals," thus extinguishing their appeals. The private interest is thus strong—as is, indeed, the public interest, given the nature of the claimants.

Second, the VA attributes the delays in claims appeals, in part, to its placing a priority on adjudicating initial claims. We fail to understand, however, why prioritizing initial claim adjudications must come at the expense of timely appeals processing. Much of the delay appears to arise from gross inefficiency, not resource constraints. We are particularly doubtful, for example, that any government interest could justify the 573-day average delay for a Regional Officer to certify an appeal to the BVA after receiving a veteran's form requesting an appeal—a step that we understand to be a ministerial task. We are as confounded as the Chairman of the BVA, who at trial "was unable to explain" the overall "lengthy delay in

the resolution of appeals." If resource constraints are an issue, the VA has not asserted as much, and the record does not suggest that staffing or funding shortages are responsible for the delays in the adjudication process. To the contrary, the district court found that the VBA is rapidly increasing its staff.

Finally, we might find the VA's argument more compelling if it were not clear that prioritizing initial determinations over appeals has not worked, given the high reversal rate of those determinations. Only forty percent of initial decisions appealed are affirmed.[37] Between 19 and 44 percent of remands by the BVA, when appellate decisions are eventually reached, are "avoidable," meaning "an error [was] made by the R[egional] O[ffice] before it certifie[d] the appeal to the B[oard]." It is unlikely that initial adjudications can approach perfect accuracy even if priority is given to them. Under those circumstances,

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[37] *See also* Transcript of Oral Arg., *Astrue v. Ratliff,* No. 08-1322 (U.S. Feb. 22, 2010):

> [Assistant to the Solicitor General Anthony] YANG: [The reversal rate in the VA context is] in the order of either 50 or maybe slightly more than 50 percent. It might be 60. But the number is substantial that you get a reversal. . . .
>
> CHIEF JUSTICE ROBERTS: Well, that's really startling, isn't it? In litigating with veterans, the government more often than not takes a position that is substantially unjustified?
>
> MR. YANG: It is an unfortunate number, Your Honor. And it is—it's accurate.

we do not find that the VA's interest outweighs veterans' in ensuring that those initial determinations that are incorrect get corrected quickly, even if the VA did actually have to make such a trade-off. Given that 60 percent of all appeals result in grants or remands, the risk of prolonged erroneous deprivation during these delays is high. We therefore find that the delays in the VA's claims appeals process amount to deprivation of property without due process.

We find support for our conclusion in the reasoning of other courts facing similar balancing determinations. Some courts, like the Seventh Circuit in *Wright*, have found no due process violation when faced with relatively short delays in the provision of benefits and substantial government interests. In *Barrett v. Roberts,* 551 F.2d 662 (5th Cir. 1977), for example, the Fifth Circuit found that 8- to 20-day delays in the receipt of a single month's welfare check did not deny due process, because those delays occurred during a semi-annual review for program eligibility, which was necessary to the government's interest in preventing undeserving recipients from claiming entitlements. In *Littlefield v. Heckler,* 824 F.2d 242 (3d Cir. 1987), the Third Circuit determined that a nine-month delay between the issuance of an ALJ's "recommended decision" in a social security benefits case and a final decision by the Social Security Administration's Appeals Council was constitutional, given the volume of cases before the Appeals Council. *Id.* at 246-247. And the Second Circuit found that a 19-month delay in Medicare reimbursements of

claims of under $500, caused by the government's requirement that claim disputes be heard by a private hearing officer prior to being adjudicated by an ALJ, was justified because (1) the private interest was low where the amount of benefits was small and not related to financial need, (2) the lack of information about the risk of erroneous deprivation during the delay, and (3) the government's substantial interest in resolving more claims through the informal procedure. *Isaacs v. Bowen,* 865 F.2d 468 (2d Cir. 1989).

By contrast, the Third Circuit determined that a three-year and nine-month delay in evaluating an application for a disabled child's annuity under the Railroad Retirement Act violated due process. *Kelly v. R.R. Retirement Bd.,* 625 F.2d 486 (3d Cir. 1980). The applicant sought disability benefits to sustain her while she fought severe depression. The court found it "wholly inexcusable" that "the administrative review process of a single disability application extended to nearly four years." *Id.* at 490. It reasoned, "Although there is no magic length of time after which due process requirements are violated, we are certain that three years, nine months, is well past any reasonable time limit, when no valid reason for the delay is given." *Id.* The court rejected the Board's argument that the delay was necessary to gather evidence, because it found that no decision issued until more than one year after all evidence was gathered. Moreover, it found "the backlog of cases and limited resources of the Board" to be no excuse, because

"[w]hatever its internal problems, the Board has the power to implement regulations that would accelerate the agency review process. Four years is totally out of phase with the requirements of fairness." *Id.* at 491.

And in *Kraebel v. New York City Department of Housing Preservation & Development,* 959 F.2d 395 (2d Cir. 1992), the Second Circuit found a likely due process violation when the city delayed granting property tax benefits to a landlord who was entitled to the tax benefits after rehabilitating her buildings as part of a city program. It took one and a half years for the city to determine that the landlord was in fact entitled to the benefit. But, the court reasoned, "even before the state makes a definitive decision as to entitlement, the road to that determination must be paved by due process." *Id.* at 405. The court remanded for the district court to consider in the first instance whether the delay was justified, weighing the landlord's interest in prompt payment for her voluntary participation in a socially beneficial program against the difficulty faced by the city in making eligibility determinations. *Id.* at 406.

We are confident that the present case fits comfortably within the latter category of cases rather than the former. This is not a case involving short but justified delays of critical benefits, *cf. Barrett,* moderate delays of important benefits caused by a system overload, *cf. Littlefield,* or long delays of minor benefits due to government interest in efficiency, *cf. Isaacs.* Instead, like *Kelly,* this case involves critical benefits to sustain those incapacitated by mental

disability, delayed for an excessive period of time without satisfactory explanation.

Again, we remand to the district court with the instruction that it conduct evidentiary hearings in order to determine what procedures would remedy the existing due process violations in the VBA claims adjudication process. The hearings shall explore what procedural protections are most appropriate to permit the appeals of veterans to be expedited in the most efficient manner, with a particular emphasis on the procedural protections necessary for veterans suffering the most financial hardship during the adjudication of their claims. The district court may consider the need for setting maximum time periods for determinations at various stages of the claims adjudication process and/or the need for a procedure to expedite claims where emergency circumstances are shown to exist. As stated above, the district court may seek the assistance of a Magistrate Judge or Special Master in creating and implementing a remedial plan, and the court should first encourage the parties to meet and confer to propose a remedial plan. In the end, the district court shall either approve an agreement reached by the parties or enter an appropriate order instructing the VBA to provide Veterans with the procedural safeguards to which they are entitled.

IV

Veterans also assert that there is a lack of adequate procedures when veterans initially file their

claims for service-connected death and disability benefits at their local VBA Regional Office ("RO").

Veterans file an initial claim for service-connected death and disability compensation with their RO. Veterans claim that the VA violates veterans' due process rights by failing to afford adequate procedural protections to veterans during the initial submission of their claims and the adjudication of those claims at the RO level, because there is no right to a pre-decisional hearing and discovery and veterans are prohibited from retaining paid counsel to assist them in the submission of their initial claim.[38] Veterans do not challenge the time period required for the initial adjudication of claims at the RO level, but rather they challenge solely the procedures in place (or lack thereof) to facilitate veterans' submission of their claims. We affirm the district court on this claim because the non-adversarial procedures at the VA level are sufficient to satisfy the dictates of due process.

In reaching its conclusion that the RO level procedures do not violate veterans' due process rights, the district court conducted an analysis of the *Mathews* factors. While the first factor weighs in favor of relief ("veterans and their families have a compelling interest in receiving disability benefits

[38] After the veteran files a Notice of Disagreement, thereby appealing from the RO level, the veteran is exempt from the prohibition on retaining paid counsel. 38 U.S.C. § 3904(c)(1).

and . . . the consequences of erroneous deprivation can be devastating"), the district court concluded that the second and third factors do not support relief. In concluding that the risk of erroneous deprivation at the RO level is relatively low, the district court noted that a small percentage of cases are affected, given the small percentage of RO determinations that are appealed.[39] In addition, the district court noted that the third factor weighed against relief where the VA would face "significant" fiscal and administrative burdens if required to implement Veterans's proposed additional procedural requirements at the RO level.

We note that the government also has an interest in maintaining the non-adversarial nature of RO level proceedings. With regard to the prohibition on retaining paid counsel, the Supreme Court has said:

> The Government interest, which has been articulated in congressional debates since the fee limitation was first enacted in 1862 during the Civil War, has been this: that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the

[39] We accord little weight to this fact as a measure of actual accuracy, in light of the uninviting appeals process.

> award without having to divide it with a lawyer.

Walters, 473 U.S. at 322. The Court noted that allowing the payment of attorneys "would seriously frustrate the oft-repeated congressional purpose for enacting [the fee limitation]." *Id.* at 323. The *Walters* Court characterized the government's interest as warranting "great weight," and concluded that "[i]t would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law." *Id.* at 326. The plaintiffs in *Walters* failed to make this strong showing, and the court therefore held that there was no due process violation. *Id.* at 334. We are bound by that holding. If the Supreme Court's view of the benefits and consequences of allowing veterans to have legal representation is to be changed or modified, it will have to be done by the Supreme Court itself, and not by a circuit court.

Although Veterans challenge a wider array of procedural restrictions than those at issue in *Walters,* the Supreme Court's analysis is directly applicable to the case before us. Underlying all the procedural restrictions cited by Veterans is what the Court has already held to be the government's interest in the creation and preservation of a non-adversarial system. Instead of allowing for paid attorneys to represent claimants and formal discovery, Congress imposed on the VA a duty to assist claimants in

substantiating their claims for benefits. *See* 38 U.S.C. § 5103A. Veterans have failed to make a strong showing that the current system carries with it a high probability of error or that a more formal process would decrease the probability of error. Accordingly, we affirm the district court's ruling.

V

Finally, Veterans contend that the district court erred in refusing to compel discovery of all suicide incident briefs and refusing to compel a response to an interrogatory seeking the average number of days PTSD claims take at the RO level.

We review for abuse of discretion the district court's discovery rulings and management of the trial. "[B]road discretion is vested in the trial court to permit or deny discovery, and its decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." *Hallett v. Morgan,* 296 F.3d 732, 751 (9th Cir. 2002) (quoting *Goehring v. Brophy,* 94 F.3d 1294, 1305 (9th Cir. 1996)). To succeed on this challenge, Veterans must show "actual and substantial prejudice" resulted from the discovery rulings. *Hallett,* 296 F.3d at 751.

A. Suicide Incident Briefs

At a status conference, Veterans sought to compel discovery of suicide incident briefs—reports prepared by the VA following the suicide or attempted suicide of a veteran under VA care. The VA represented that there are 15,000 suicide incident briefs that would be subject to extensive redaction and argued that the redacted suicide incident briefs would be of little probative value. The district court asked Veterans what they would do with that information. Veterans responded: "I think it would potentially subject to analysis . . . to try to amalgamate the data across the system to show in practice how the procedures and policies that are in place with respect to mental health care, in fact, the small—." The district court interjected "I don't think I have any authority to talk about their policies," and thereafter denied Veterans's motion to compel production.

Veterans claim that full discovery of all suicide incident briefs would have allowed them to establish links between the VA's failure to comply with its policies and procedures and veterans' suicides. Veterans, however, do not argue *how* they were prejudiced by the discovery ruling in the context of their specific APA and due process claims. There is no contention that the suicide incident briefs would have allowed Veterans to fulfill the APA's statutory requirements for judicial review set forth at 5 U.S.C. § 706(1) and delineated in *Norton*. It is possible that access to the suicide incident briefs might have provided Veterans with additional useful material in support of their

due process claim concerning veterans' inability to appeal administrative scheduling decisions that delay necessary mental health care. However, such material is not necessary for Veterans to make out a valid claim—ndeed, as we hold above, their eligibility for relief under *Mathews* has already been established by the district court's factual findings. In light of our holding reversing and remanding this case to the district court for the entry of an appropriate order remedying the due process violation that Veterans have suffered because of the VHA's delay in the provision of mental health care, we conclude that it is unnecessary to address this discovery issue.

B. Average Time for Processing PTSD Claims at the RO Level

Veterans also sought to compel a response to their interrogatory requesting the average amount of time it takes to process PTSD compensation claims at the Regional Office level. During the trial, Veterans raised the issue with the district court. The VA represented that Michael Walcoff, then Deputy Under Secretary for Benefits in the Department of Veterans Affairs,[40] would testify as to what data the VA has and why the VA cannot produce the data sought by Veterans. After Walcoff testified, Veterans filed a motion to compel by letter contending that "Walcoff's

[40] Walcoff was appointed Acting Under Secretary for Benefits in the Department of Veterans Affairs on Jan. 4, 2010.

testimony, although consistent with the explanation provided by counsel for Defendants, does not support the 'not available' interrogatory answer provided by Defendants." The following day, April 29, 2008, the court denied Veterans's motion to compel.

Veterans contend that the district court abused its discretion in refusing to compel an answer to that interrogatory. We fail to see how this specific information would bolster Veterans's APA or due process claims. Veterans's statutory claims are foreclosed for the reasons we discuss above. Veterans's due process arguments concerning delays in claims adjudication focus on the time it takes to appeal benefits determinations. At the RO level, Veterans claim only that the failure to provide more formal procedures for adjudicating benefits claims and the VA's use of a procedure to reduce benefits awards system violates due process. Veterans make no argument as to how further information on delays in processing PTSD claims at the RO level would support their due process claims regarding RO-level procedures. In the absence of any showing of how this additional information would have strengthened Veterans claims, we affirm the district court's ruling on this issue.

CONCLUSION

The United States Constitution confers upon veterans and their surviving relatives a right to the effective provision of mental health care and to the just and timely adjudication of their claims for health

care and service-connected death and disability benefits. Although the terms of the Administrative Procedure Act preclude Veterans from obtaining relief in our court for their statutory claims, their entitlements to the provision of health care and to veterans' benefits are property interests protected by the Due Process Clause of the Fifth Amendment. The deprivation of those property interests by delaying their provision, without justification and without any procedure to expedite, violates veterans' constitutional rights. Because neither Congress nor the Executive has corrected the behavior that yields these constitutional violations, the courts must provide the plaintiffs with a remedy. We therefore remand this case to the district court with the instruction that, unless the parties resolve this dispute first, it enter an order consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

Chief Judge KOZINSKI, dissenting in large part:*

The majority hijacks the Department of Veterans Affairs's (VA's) mental health treatment and disability compensation programs and installs a district judge as reluctant commandant-in-chief. That judge must now decide "what procedural protections are necessary" to satisfy the majority's due process concerns, "enter an appropriate order instructing" the VA to change its procedures and then monitor the VA, perhaps indefinitely. Maj. op. at 6350-51, 6366. The majority tramples over the strict jurisdictional limits Congress has imposed on our ability to review the VA's decisions on veterans' benefits. *See* 38 U.S.C. §§ 502, 511. Not content to ignore Congress, the majority also brushes aside the Supreme Court's admonition that we must accommodate the strong government interest in making the VA's proceedings "as informal and nonadversarial as possible." *Walters* v. *Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 323-24 (1985). This is a recipe for endless rounds of litigation over the meaning of "necessary" and "appropriate," and the procedures the majority orders the district court to consider—imposing deadlines on the VA and requiring another layer of appeals—are

* I join those portions of the opinion denying plaintiffs' Administrative Procedure Act claims, rejecting their challenge to the procedures for filing a claim at a Regional Office and affirming the district court's refusal to compel a response to one of their interrogatories. For the reasons articulated by the district court, I would affirm its refusal to compel production of all suicide incident briefs.

the antithesis of an "informal and nonadversarial" system. Today's decision will undoubtedly distract the VA from its ultimate mission: taking care of veterans who risked their lives for our nation. Because I cannot join in today's Article III putsch, I dissent.

I

Much as the VA's failure to meet the needs of veterans with PTSD might shock and outrage us, we may not step in and boss it around. Congress erected a big "keep out" sign for us in the Veterans' Judicial Review Act (VJRA), which provides that:

> The Secretary [of Veterans Affairs] shall decide *all questions of law and fact* necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans. . . . [T]he decision of the Secretary as to any such question shall be final and conclusive *and may not be reviewed by any other official or by any court*. . . .

38 U.S.C. § 511(a) (emphasis added). The VJRA precludes us from reviewing all decisions "by the Secretary or his delegate," *Bates* v. *Nicholson,* 398 F.3d 1355, 1365 (Fed. Cir. 2005), on "*all* questions of law and fact necessary to a decision" on veterans benefits, 38 U.S.C. § 511(a) (emphasis added). The statute also covers claims where review of such decisions is a "necessary predicate." *Price* v. *United States,* 228 F.3d 420, 422 (D.C. Cir. 2000) (per curiam). Thus, we lack jurisdiction if adjudicating a claim "would

require the district court to determine first whether the VA acted properly in handling [the veteran's] request." *Id.*; *accord Thomas* v. *Principi,* 394 F.3d 970, 974 (D.C. Cir. 2005); *see also Broudy* v. *Mather,* 460 F.3d 106, 115 (D.C. Cir. 2006).

The *exclusive* avenue for review of the VA's decisions is to file an appeal with the Board of Veterans' Appeals (BVA), a tribunal within the VA. 38 U.S.C. § 7104(a); *see Price,* 228 F.3d at 421 (VJRA "precludes judicial review in Article III courts of VA decisions affecting the provision of veterans' benefits"). From the BVA, a veteran may appeal to the Court of Appeals for Veterans Claims (Veterans Court), an independent Article I court, 38 U.S.C. § 7252(a), and then to the Federal Circuit, populated by Article III judges just like us, *id.* § 7292(c).

Applying the VJRA here should be short work. Plaintiffs claim that the VA's extensive delays in providing mental health care and disability compensation constitute a deprivation of statutory entitlements under the Fifth Amendment's Due Process Clause. *See* 38 U.S.C. § 1710(a)(1) (the VA must "furnish hospital care and medical services" that it "determines to be needed" to "any veteran for a service-connected disability"); *id.* § 1705(b)(1) (the VA must "ensure that the provision of care to [veterans] is timely and acceptable in quality"); *id.* § 1110 (veterans are entitled to compensation for "disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in

line of duty"). Mental health care and disability compensation are clearly "benefits." *See* 38 C.F.R. § 20.3(e) (defining "benefit" to include "any payment, service . . . or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans"). Therefore, we lack jurisdiction to review the VA's decisions as to them. *See Thomas,* 394 F.3d at 975 (claims that VA "failed to render the appropriate medical care services" and denied "known needed and necessary medical care treatment" are "barred by section 511"); *Vietnam Veterans of Am.* v. *Shinseki,* 599 F.3d 654, 656 (D.C. Cir. 2010) (recognizing that decisions as to disability compensation fall under the VJRA); *Littlejohn* v. *United States,* 321 F.3d 915, 921 (9th Cir. 2003) (same). But we can't decide plaintiffs' due process claims without "determin[ing] first" whether the VA "acted properly in hand[l]ing" requests for benefits; thus, we lack jurisdiction over these claims. *See Price,* 228 F.3d at 422; *Thomas,* 394 F.3d at 974; *Broudy,* 460 F.3d at 115. Because we lack jurisdiction, we must dismiss. *Cf. Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514-15 (1868).

The majority appears to believe that Congress didn't mean what it said when it enacted the VJRA, and roves far and wide for reasons to circumvent its limitations on our jurisdiction. *See* maj. op. at 6337-40, 6341-61. This is nothing less than a rebellion against Congress's consistent policy of limiting judicial review of the VA's affairs. *See* H.R. Rep. No. 100-963, at 9 (1988) ("[O]ver the years, the Congress has

declared its views that there should be *no judicial remedy* with respect to claims for veterans benefits, and this policy was honored for nearly 170 years." (emphasis added)).[1] The majority eviscerates a statute Congress erected to beat back the last major judicial offensive against the VA. *See id.* at 6311; *Beamon* v. *Brown,* 125 F.3d 965, 971-72 (6th Cir. 1997) (discussing history of the VJRA). As President Reagan might have said, "Here we go again."

A. *Systemwide claims*: Plaintiffs claim that the VA's failure to (1) "timely provide medical care to PTSD recipients and claimants" and to (2) "timely resolve [service-connected disability] claims for PTSD"

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[1] The majority believes that its interference is justified because "the stakes are so high for so many" and plaintiffs' claims involve "grave questions of life and death." Maj. op. at 6301 & n.3. But Congress has enacted numerous restrictions on our power to review the VA's provision of benefits, none of which contain an exception for "grave questions of life and death." *See* Act of Mar. 20, 1933, ch. 3, § 5, 48 Stat. 8, 9; Act of Oct. 17, 1940, ch. 893, § 11, 54 Stat. 1193, 1197; Act of Aug. 12, 1970, Pub. L. No. 91-376, § 8, 84 Stat. 787, 790; Veterans' Judicial Review Act, Pub. L. No. 100-687, § 101, 102 Stat. 4105, 4105-06 (1988) (VJRA); *see also* World War Veterans' Act, 1924, ch. 320, § 5, 43 Stat. 607, 608-09. There's no doubt that Congress has the power to divest us of jurisdiction over such cases. *See Lockerty* v. *Phillips,* 319 U.S. 182, 187 (1943).

In any event, Congress didn't foreclose judicial review. Veterans can bring their claims to the Veterans Court and from there to the Federal Circuit, whose judges enjoy Article III independence. The majority disparages our Federal Circuit colleagues by presuming that they are unable or unwilling to protect veterans' fundamental rights.

deprives "claimants of their property and liberty without . . . due process." Complaint ¶¶ 254(b), 260. Were an individual veteran to allege that the VA deprived him of these veterans' benefits, section 511 would preclude us from reviewing his case. *See* p.6375 *supra*. Seeking to escape section 511's jurisdiction-stripping command, plaintiffs disavowed any intention of seeking relief for individual veterans:

> The facts herein pertaining to the [veterans and the organizational plaintiffs] are included for the specific purpose[ ] of . . . illustrating the Challenged VA Practices, and not for the purpose of obtaining review of decisions by the VA or CAVC. Nothing herein is intended or should be construed as an attempt to obtain review of *any decision* relating to benefits sought by *any veteran* . . . or to question the validity of *any benefits decisions* made by the Secretary of the VA.

Complaint ¶ 39 (emphasis added). Plaintiffs went out of their way to represent that "constitutional defects with the VA's systems, as set forth herein, are . . . divorced from the facts of any individual claim," *id.* ¶ 12, and that the "nature of the claims alleged herein and of the relief sought does not make the individual participation of each injured member and/or constituent indispensable to proper resolution of the lawsuit," *id.* ¶ 38.[2]

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[2] The majority thus misreads the complaint when it suggests that plaintiffs "complain of a variety of injuries actually

(Continued on following page)

Plaintiffs submitted evidence of *average* delays to the district court. Based on this evidence, the court found that 4.5 percent "of VA facilities . . . reported a wait time of 4-8 weeks" to see patients with "symptoms of moderate severity for depression" and 5.5 percent reported similar wait times for PTSD referrals. There were "approximately 84,450 veterans on VHA waiting lists for mental health services." The court also made findings as to the VA's average delay in processing a disability claim, concluding that it took "approximately 4.4 years . . . for a veteran to adjudicate a [disability compensation] claim all the way to a BVA decision."[3] The court didn't find that any individual veteran was actually denied or likely to be denied his statutory entitlement to mental health care or disability compensation.

The majority concludes that "the conduct [plaintiffs] challenge is not a 'decision' within the meaning of § 511" because they don't "challenge the timing of an individual [benefit]," and instead "challenge

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being experienced or likely to be experienced in the near future by their members," who "would individually have standing." Maj. op. at 6321-22 n.16.

[3] The court made the following findings (with emphasis added and acronyms spelled out): "On *average*, . . . it was taking 261 days for [a] Regional Office to mail [a] Statement of the Case to a veteran." It takes "573 days, on *average,* for [a] Regional Office to certify an appeal to the BVA." "On *average,* it takes the BVA 336 days to issue a decision. . . ." If a veteran requests a hearing, he "will have to wait, on *average,* 455 days." The majority cites these averages in its discussion. *See* maj. op. at 6315.

systemic delays in the benefits adjudication process." Maj. op. at 6339, 6356. And it expressly relies on the average delays found by the district court: "All told, over 84,000 veterans are on waiting lists for mental health care." *Id.* at 6346-47. "To pursue a claim to completion, for example, may take in excess of 4.4 years . . . . [during which] many veterans perish, after living in want. . . . We are particularly doubtful . . . that any government interest could justify the 573-day *average* delay for a Regional Office[ ] to certify an appeal to the BVA . . . ." *Id.* at 6362-63 (emphasis added).

The majority purports to side with the D.C. Circuit in construing section 511 to permit plaintiffs' claims, *id.* at 6357, but that court in fact heard a case where plaintiffs disavowed precisely the same individual claims and held that it *lacked* jurisdiction, *see Vietnam Veterans of Am.,* 599 F.3d at 661-62. There, as here, plaintiffs "went out of their way to forswear any individual relief for the [veterans]." *Id.* at 662. Their complaint stated:

> To the extent any of the facts presented herein apply to individuals rather than to veterans as a whole, they are intended for illustrative purposes only. Nothing in this complaint is intended as, nor should it be construed as, an attempt to obtain review of an individual determination by the VA or its appellate system.

Id. at 657-58 (alteration and internal quotation marks omitted). Compare the quoted language from the two

complaints: The only difference is that plaintiffs in our case have more explicitly disavowed individual relief. The D.C. Circuit plaintiffs also submitted affidavits alleging average delays in the VA's benefits appeals. *Id.* at 657; *see id.* at 662 ("[T]he asserted illegal action the VA has committed is described as the *average* length of time it takes at each stage of the claims process.").

The D.C. Circuit persuasively explained that plaintiffs' "rather apparent effort to avoid the preclusive bite" of section 511 ended up stripping them of standing. *Id.* at 661. I reproduce the court's discussion below, as the D.C. Circuit has said all there is to say about plaintiffs' attempt to circumvent section 511.

> [T]he average processing time does not cause affiants injury; it is only *their* processing time that is relevant. If, for example, affiants fell at the quick-processing end of a bell-shaped curve, a high average processing time would be irrelevant to them, and to reverse the analysis, a low average would not avoid injury if affiants were at the other end of the curve. In sum, assuming the alleged illegality—that the average processing time at each stage is too long—that "illegality" does not cause the affiants injury. And causation is a necessary element of standing.
>
> If the affiants were suing by themselves —which is how we must analyze the claim— asserting that the average time of processing was too long, it would be apparent that they

> were presenting a claim not for themselves but for others, indeed, an unidentified group of others. But one can not have standing in federal court by asserting an injury to someone else. It seems the district judge intuited this point by noting the claims were "not monolithic."

Id. at 662 (citations omitted). Although the quoted paragraphs focus on delays in processing disability compensation appeals, their reasoning extends to delays in providing mental health care. The D.C. Circuit explained that plaintiffs alleging average, non-individual delays are actually "presenting a claim not for themselves but for . . . an unidentified group of others." *Id.* Such allegations can't establish standing. *Id.* Like plaintiffs in the D.C. Circuit, plaintiffs here disavowed all individual injuries to their members —both actual and likely—and relied on evidence of average delays.[4] Thus, like plaintiffs in the D.C.

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[4] It makes no difference that this is a "suit for prospective relief." Maj. op. at 6322 n.16. Plaintiffs stated in their complaint that their claims were "divorced from the facts of any individual claim" before the VA, so they can't sue on behalf of veterans now being injured by the VA's alleged delays. Nor can they sue on behalf of veterans who have received medical care or whose claims have already been processed. *See Vietnam Veterans of Am.,* 599 F.3d at 661 n.11. And they can't sue on behalf of veterans who haven't requested benefits from the VA because any injury there would be purely "conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (internal quotation marks omitted).

Circuit, they lack standing to pursue their non-individualized claims. The majority's not just dead wrong; it creates a square circuit split on an issue that requires national uniformity.

B. *Alternative forum*: The majority compounds its error by holding that a "broad reading of § 511" would "deprive [plaintiffs] of any forum in which to raise their claims" and thus contravene the Supreme Court's warning about "the constitutional danger of precluding judicial review of constitutional claims." Maj. op. at 6359. The majority claims that the Veterans Court "lack[s] jurisdiction over the type of claims raised by" plaintiffs because: (1) constitutional challenges must be made "in the context of a proper and timely appeal" from a BVA decision, while plaintiffs have challenged delays before the BVA issues a decision; and (2) organizations can't present claims to the Veterans Court. *Id.* at 84. But the Sixth and D.C. Circuits addressed the exact same issues and concluded that the Veterans Court *could* adequately adjudicate veterans' claims that their benefits had been unreasonably delayed. *See Beamon,* 125 F.3d at 967-70; *Vietnam Veterans of Am.,* 599 F.3d at 659-60 & n.6.

The Veterans Court "has authority to reach constitutional issues in considering extraordinary writs [of mandamus]," which it may grant "when the claimant has demonstrated that he . . . has *no adequate alternative* means of obtaining the relief sought." *Beamon,* 125 F.3d at 969 (emphasis added) (quoting *Dacoron* v. *Brown,* 4 Vet.App. 115, 119 (1993)). This

"power to issue writs of mandamus compelling VA officials to take action that has been unreasonably delayed" extends to cases where "there has been *no final decision by the Board.*" *Vietnam Veterans of Am.,* 599 F.3d at 659 n.6 (emphasis added) (citing *Erspamer* v. *Derwinski,* 1 Vet.App. 3, 6-9 (1990)). Individual veterans can bring their constitutional claims in the Veterans Court; should the court find a due process violation, it will issue a writ of mandamus ordering appropriate relief. Those veterans denied a writ can appeal their constitutional claim to the Federal Circuit. *See Nielson* v. *Shinseki,* 607 F.3d 802, 805 (Fed. Cir. 2010) ("[W]e have jurisdiction to review all legal questions decided by the Veterans Court."). Construing section 511 to preclude plaintiffs from bringing their claims in our court doesn't foreclose all relief.[5]

Nor should we trouble ourselves that organizational plaintiffs can't present constitutional claims in

[5] Although the Sixth and D.C. Circuits addressed alleged delays in the VA's processing of disability claims, their analysis applies with equal force to claims that the VA unreasonably delayed needed mental health care. The Veterans Court can hear appeals of any issue raised before the BVA, and the BVA's governing regulations extend its appellate jurisdiction to "questions of eligibility for . . . benefits administered by the Veterans Health Administration," other than "[m]edical determinations" of the type that "an attending physician" might face. 38 C.F.R. § 20.101(b). Appointment scheduling decisions are not by any means medical determinations, so the BVA—and therefore the Veterans Court—have jurisdiction to review claims that such scheduling decisions violate due process.

the Veterans Court. Congress has broad powers to shape the procedural rules and constitutional remedies available to veterans. *See Walters,* 473 U.S. at 333-34; *cf. Tietjen* v. *U.S. Veterans Admin.,* 884 F.2d 514, 515 (9th Cir. 1989) (construing section 511's predecessor to foreclose *all* review of claim that VA violated due process by ignoring its own regulations); *Anderson* v. *Veterans Admin.,* 559 F.2d 935, 936 (5th Cir. 1977) (per curiam) (same for claim that hearing procedures violated veteran's constitutional rights). The majority actually points to *Walters,* where the Supreme Court recognized these broad powers, when it rejects plaintiffs' claim that veterans' constitutional rights were violated by the absence of a class action procedure in the VJRA. Maj. op. at 6369 ("Underlying all the procedural restrictions cited by [plaintiffs] is what the [Supreme] Court has already held to be the government's interest in the creation and preservation of a non-adversarial system."); *see* complaint ¶ 30. Because plaintiffs brought "this action as the representatives of their members . . . and as class representatives," organizational standing in our case would simply be a tool, like class actions, for vindicating individual members' interests. Complaint ¶ 38. If the absence of one tool doesn't render judicial review constitutionally inadequate, then, given the broad powers Congress has to shape veterans' remedies, the

absence of the other shouldn't either.[6] And the Veterans Court's holdings are binding on subsequent BVA and Veterans Court adjudications, so a ruling on one veteran's due process claim will have a system-wide effect. *See Beamon,* 125 F.3d at 970 (citing *Lefkowitz* v. *Derwinski,* 1 Vet.App. 439, 440 (1991) (en banc) (per curiam)).

C. *The* Price-Thomas *Rule*: The majority spends pages and pages creating circuit splits, but it never applies the correct test for determining our jurisdiction. *Price* and *Thomas* held that we lack jurisdiction if adjudicating a claim "would require the district court to determine first whether the VA acted properly in handling [the veterans'] benefits request[s]." *Broudy,* 460 F.3d at 115 (emphasis omitted) (quoting *Thomas,* 394 F.3d at 974 (quoting *Price,* 228 F.3d at 422)) (internal quotation marks omitted). This is the case for plaintiffs' mental health care and disability compensation claims, so even if plaintiffs had standing to bring these claims, we would lack jurisdiction over them.

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[6] The majority misses the point entirely when it notes that organizational standing doesn't serve "precisely the same purpose" as a class action. Maj. op. at 6359 n.35. *Walters* held that Congress could effectively deny veterans access to counsel without violating due process. 473 U.S. at 320, 326. The right to counsel is far more important to a litigant seeking to vindicate his rights than the option of bringing his claim through an organization. If Congress has broad enough powers to effectively deny veterans the former, then it can certainly deny them the latter.

Mental health care: The majority claims that "vast numbers of veterans are denied access to mental health care by administrators," and that the absence of "an appeals process to challenge appointment scheduling . . . violates the Due Process Clause by providing insufficient process." Maj. op. at 6338, 6347. The lack of an appeal can't be unconstitutional unless administrators schedule appointments in a way that actually deprives veterans of their statutory entitlement to mental health care: If there's no deprivation, there's no need for process. *See Bd. of Regents of State Colls.* v. *Roth,* 408 U.S. 564, 569 (1972). This will depend on the facts of each veteran's case: An eight-week wait for an appointment constitutes a deprivation for a veteran who's pointing a gun at his head, but it may be acceptable for a veteran who's mildly depressed. And there can be no deprivation if the veteran caused the delay by rejecting earlier available appointments. Thus, there is simply no way to adjudicate the due process claim without "determin[ing] first" whether the VA's administrative staff "acted properly in handling" veterans' requests for appointments. Because plaintiffs' mental health care claim requires consideration of the VA's decisions on individual requests for benefits, the VJRA precludes us from reviewing it.

The majority brushes aside the VJRA's limits on our jurisdiction by construing a footnote in the VA's appellate brief to "acknowledge[ ] that" plaintiffs' purportedly systemic claims "fall[ ] outside the VJRA's jurisdictional bar." Maj. op. at 6337. But the VA

argued in district court that the VJRA *does* preclude review of plaintiffs' mental health care claim. The supposed "acknowledgment" on appeal only pointed out that *plaintiffs* framed their claims generally. *See* VA Br. 33 n.7 ("[P]laintiffs cannot now criticize the district court for using a 'systemic' standard to assess delay when the generality of their own claims compelled this approach."). The VA didn't concede that the district court had jurisdiction over plaintiffs' mental health care claim, and it's wrong for a court to wring a concession from a party's ambiguous language. But it doesn't matter anyhow, because we have an "independent obligation to ensure that [we] do not exceed the scope of [our] jurisdiction." *Henderson ex rel. Henderson* v. *Shinseki,* 131 S. Ct. 1197, 1202 (2011).

The majority responds by arguing that the VA "has not issued a decision . . . that is final and conclusive and unreviewable." Maj. op. at 6338 (emphasis and internal quotation marks omitted). But the VJRA's prohibition on judicial review isn't limited to final decisions. It extends to the VA's resolution of any "question[ ] of law [or] fact necessary to a decision by the [agency] under a law that affects the provision of benefits." 38 U.S.C. § 511(a). Decisions by administrative schedulers setting up mental health care appointments for veterans are fully covered by the VJRA's preclusive reach, and we lack jurisdiction over any claim that would require a district court to review

them. *See Price,* 228 F.3d at 422; *Thomas,* 394 F.3d at 974; *see also Broudy,* 460 F.3d at 115.[7]

It makes no difference that *Price* and *Thomas* were "tort suit[s] brought by an individual veteran," while plaintiffs filed "a suit for an injunction." Maj. op. at 6339. Like the claims in *Price* and *Thomas,* plaintiffs' claim is based on an allegation that the VA unjustifiably denied benefits to veterans—here, by taking too long to provide them with mental health care. And when plaintiffs in *Broudy* requested an injunction, the D.C. Circuit still applied the *Price-Thomas* rule, although it concluded that the district court had jurisdiction over the particular claim there. 460 F.3d at 110, 115. The majority's clumsy effort to avoid a conflict with *Price* and *Thomas* will not fly.

Disability compensation: The district court concluded that section 511 barred plaintiffs' disability compensation claim because the issue of "whether a veteran's [disability] benefit claim adjudication has been substantially delayed will often hinge on specific facts of that veteran's claim." This is absolutely correct: The time the VA needs to adjudicate a claim

[7] The majority seems to think that the "relevant 'decision' here . . . is whether the existing safeguards are constitutionally sufficient." Maj. op. at 6339. But that's the essence of plaintiffs' mental health care claim. The VJRA strips us of jurisdiction over any claim that would require us to review any VA decision on a question of law or fact necessary to the agency's resolution of a benefits request. *See* p. 6382-83 *supra.* Here, we'd have to review the decisions by VA administrative schedulers setting up mental health care appointments.

depends on its complexity as well as the amount of evidence the VA needs to generate for the veteran, and PTSD claims are among the most complex and fact-intensive. We can't say whether a delay is unreasonable without "determin[ing] first" how much time the VA *should* have taken to process that veteran's disability compensation claim, and section 511 precludes us from making that determination. *See Price,* 228 F.3d at 422; *Thomas,* 394 F.3d at 974; *see also Broudy,* 460 F.3d at 115.

The majority rejects this conclusion because, supposedly, the VA hasn't "made a final decision in [plaintiffs'] members' appeals; that their appeals languish undecided is the very basis for their claim." Maj. op. at 6356. But that's not right: Plaintiffs claim that most of the VA's unreasonable delays occur well before the BVA is able to rule on the veterans' appeals. *See id.* at 6317-18; *see also id.* at 6315 (BVA's time to issue a ruling represents less than a *third* of the VA's average delay in processing an appeal of a ratings decision). The VA's decisions before the appeal reaches the BVA are also final and nonreviewable, except through the VJRA's "specialized review process." *Bates,* 398 F.3d at 1364; *see* p.6374 *supra.* Because we lack jurisdiction to review the decisions creating these alleged delays, we can't determine whether the time the VA takes to process an appeal is unreasonable.

The majority clearly errs when it claims that "§ 511 does not grant exclusive jurisdiction to any agency or court over a class of legal claims, except

challenges to 'decision[s]' . . . that have actually been made by the Secretary." Maj. op. at 6356 (alteration in original) (emphasis omitted). *Price, Thomas* and *Broudy* held that section 511 grants the VA exclusive jurisdiction over any *claim* the district court can't decide without "determin[ing] first whether the VA acted properly in handling [the veteran's] benefits request." *Thomas,* 394 F.3d at 974 (quoting *Price,* 228 F.3d at 422); *see also Broudy,* 460 F.3d at 115. The very essence of plaintiffs' delay claim is that the VA so mishandled veterans' requests for benefits that it deprived them of a protected property interest. *See* maj. op. at 6340-41, 6363-64. We can't adjudicate this claim without evaluating whether the VA "acted properly" at each step in deciding the benefits requests.

The majority's citation to *Broudy* doesn't help them a bit. Plaintiffs there alleged that the VA's cover-up of radiation test results denied them access to the courts. *Broudy,* 460 F.3d at 109-10. They requested the "immediate release of all relevant records and documents," an injunction prohibiting any further cover-up, damages and related relief. *Id.* The D.C. Circuit held that it had jurisdiction over this denial of access claim, which is again consistent with the *Price-Thomas* rule. *See id.* at 115. Plaintiffs weren't "asking the District Court to decide whether any of the veterans whose claims the Secretary rejected [were] entitled to benefits" or "to revisit any decision made by the Secretary in the course of making benefits determinations." *Id.* Because the court

didn't need to determine whether the VA "acted properly in handling [a] benefits request," the VA didn't have exclusive jurisdiction. *Id.* (emphasis and internal quotation mark omitted).

Here, there's no way to adjudicate plaintiffs' due process claim without revisiting the VA's decision-making. *See* pp.6385 *supra. Broudy* recognized that in such situations, the rule set out in *Price* and *Thomas* grants the VA exclusive jurisdiction. *See* 460 F.3d at 115. Rather than supporting the majority's position, *Broudy* actually undermines it.

The other case on which the majority relies—*Hanlin* v. *United States,* 214 F.3d 1319 (Fed.Cir. 2000)—is entirely inapposite. There, an attorney sued the VA for attorney's fees under a breach of contract theory. *Id.* at 1320. The Federal Circuit held that it had jurisdiction over his claim, which is fully consistent with the *Price-Thomas* rule. *See id.* at 1322. The attorney didn't challenge anything about the VA's underlying decision on his client's request for veterans' benefits. *See id.* at 1320-21. And the statute governing attorney's fees didn't force him to pursue his claim through the VA's administrative process: He had the option of suing in district court. *Id.* at 1321-22; *see* 38 U.S.C. § 5904(d). Section 511 therefore didn't "require the Secretary to address [the attorney's] claim and thus [did] not provide the VA with exclusive jurisdiction." *Hanlin,* 214 F.3d at 1321.

Plaintiffs here represent veterans who could file their benefits claims only with the VA. *See* 38 U.S.C.

§ 5101(a) ("A specific claim in the form prescribed by the Secretary . . . must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary."). When they did, the VA *was* required to address their claims and therefore acquired exclusive jurisdiction. *See Hanlin,* 214 F.3d at 1321 ("[T]hrough the filing of a claim with the VA[ ], 38 U.S.C. § 511(a) imposes a duty on the Secretary to decide all questions of fact and law necessary to a decision in that case.").

II

The majority creates a second conflict with the VJRA by installing a district judge as arbiter of whether the VA's appeals procedures violate due process. The VA has already considered the process due to veterans[8]

[8] *See, e.g.,* Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,843, 39,849 (July 13, 2010) (to be codified at 38 C.F.R. pt. 3) (rejecting claim that restriction on using private doctors to rebut VA determinations violates due process); Board of Veterans' Appeals: Obtaining Evidence and Curing Procedural Defects Without Remanding, 67 Fed. Reg. 3099, 3101 (Jan. 23, 2002) (to be codified at 38 C.F.R. pts. 19 and 20) ("We think this time-tested approach will adequately serve the interests of veterans both in being heard and in receiving a prompt decision on appeal. In sum, we believe we are protecting the important due process rights of all appellants."); Well-grounded Claims, 64 Fed. Reg. 67,528, 67,528 (Dec. 2, 1999) (to be codified at 38 C.F.R. pt. 3) (recognizing that "grave questions of due process can arise if there is apparent disparate treatment" in the VA's "volunt[eering of] assistance" to claimants); Compensation for Certain Undiagnosed Illnesses, 60 Fed. Reg. 6660, 6663 (Feb. 3, 1995) (to be codified at 38 C.F.R. pt. 3)

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and promulgated regulations establishing informal, nonadversarial appeals processes. *See Vietnam Veterans of Am.,* 599 F.3d at 656.[9] But the VJRA precludes review of VA regulations anywhere but in the Federal Circuit. *See* 38 U.S.C. § 502; *Preminger* v. *Principi,*

("[T]hose sections of the regulations also provide for a 60-day predetermination period . . . in order to safeguard a veteran's due process rights."); Appeals Regulations; Rules of Practice, 54 Fed. Reg. 34,334, 34,342 (Aug. 18, 1989) (to be codified at 38 C.F.R. pts. 14, 19 and 20) (explaining that appeal certification "ensure[s] that the appeals development procedures have been adequate, particularly as they affect the [veteran's] due process rights").

[9] The VA's regulations, which must be construed to "secure a just and speedy decision in every appeal," 38 C.F.R. § 20.1, provide far more help to individual veterans than do our circuit's rules of appellate procedure. A veteran may initiate an appeal by filing a "written communication . . . expressing dissatisfaction or disagreement" with the rating decision "and a desire to contest the result." *Id.* §§ 20.200, 20.201. The VA "must reexamine the claim and determine whether additional review or development is warranted." *Id.* § 19.26(a). The veteran can also ask to have the rating decision reviewed by a more senior VA official. *Id.* § 3.2600(a). If the VA concludes after initial review that the rating is correct, it must "prepare a Statement of the Case" that "must contain" a summary of the evidence and applicable laws, "with appropriate citations," and the reason for the denial of benefits. *Id.* §§ 19.26(d), 19.29. The VA will then send the Statement of the Case to the veteran, who can use it to file a more detailed "Substantive Appeal" of the VA's decision. *Id.* §§ 19.30(a), 20.202. The final step before the BVA begins its review is for the Regional Office to certify the veteran's appeal. *Id.* § 19.35. Certification "primarily functions as a check list for the [VA] to insure [sic] that all appeal processing procedures have been completed." Appeals Regulations; Rules of Practice, 57 Fed. Reg. 4088, 4091 (Feb. 3, 1992) (to be codified at 38 C.F.R. pts. 14, 19 and 20).

422 F.3d 815, 821 (9th Cir. 2005). The district court can't review the VA's procedures without also reviewing its regulations, and it therefore lacks jurisdiction to carry out the majority's marching orders.

The majority vainly attempts to distinguish section 502 by characterizing plaintiffs' claims as challenges to "the VA's actual conduct," and "not its codified rules." Maj. op. at 6354 (emphasis omitted); *see id.* at 6354 ("[Plaintiffs] challenge . . . only the VA's failure to discharge its duty to veterans in a short enough time to avoid depriving them of their property interest without due process."). This is a distinction without a difference: Were the district court to order the VA to engage in or cease a certain course of conduct, the VA would have to conform its regulations to the district court's order. *See Nehmer* v. *U.S. Dep't of Veterans Affairs,* 494 F.3d 846, 860 (9th Cir. 2007) ("[T]he VA cannot usurp the power of a district court to construe the provisions of an order it has issued . . . simply by issuing a regulation interpreting that order or declining to follow it."). Had plaintiffs "solely challenged the VA's non-regulatory failure to act," the district court and our court might have jurisdiction. *See id.* at 858. But they didn't: They challenged conduct that the VA's existing regulations either permit or require. Their suit is a direct challenge to the regulations themselves and therefore barred by section 502.

III

Even if we had jurisdiction, plaintiffs' due process claims would fail on the merits. The Supreme Court explained in *Walters* v. *National Association of Radiation Survivors* that the due process balancing test must accommodate Congress's strong, centuries-old interest in administering veterans' benefits in a manner that's "as informal and nonadversarial as possible." 473 U.S. at 323; *see id.* at 326 ("[U]nder the *Mathews* v. *Eldrige* analysis great weight must be accorded to the Government interest at stake here."); *see also Nat'l Ass'n of Radiation Survivors* v. *Derwinski,* 994 F.2d 583, 588-89 (9th Cir. 1992) (concluding that "in passing the [V]JRA Congress reaffirmed the government's interest"). Installing a judge as overseer of the VA's appeals procedures will unquestionably harm that interest: Plaintiffs must therefore make "an extraordinarily strong showing of probability of error under the present system . . . to warrant a holding that [a VA procedure] denies claimants due process of law." *Walters,* 473 U.S. at 326. Plaintiffs fail to clear this high hurdle.

A. *Mental health care*: The majority claims that veterans "placed on waiting lists by administrators" are denied their statutory entitlement to timely medical care. Maj. op. at 6347. Because "*no* procedure is in place to ensure that mental health appointments are provided soon enough to be effective," the "marginal value of 'additional' procedural safeguards is extraordinarily high." *Id.* at 6345. But Dr. Murawsky, a VA Chief Medical Officer, testified about several

such existing safeguards; the district court credited this testimony. Because the majority misunderstands this evidence, I summarize those safeguards below.

The VA's most important safeguard protects any veteran who "shows up at a medical center . . . and expresses suicidal intentions." He will be "evaluated by a nurse and then would be seen in the emergency department by a physician." Should the veteran come to a VA clinic, he'll "be shown to a doctor"; if he speaks "to a non-medical personnel, then . . . they would refer [the veteran] to a nurse" and "[m]ight bring the [veteran] to the emergency department or to the mental health center" at the clinic. The VA conducts "secret shopper" tests where actors posing as suicidal veterans test clinic compliance with the immediate-treatment policy.

Nor does the veteran need to "walk[ ] into a VA emergency room or clinic," as the majority claims. Maj. op. at 6346. Dr. Murawsky explained that if a veteran calls up and expresses a need for care:

> A number of things could happen. The [veteran] could be referred directly to the [VA's] suicide hotline, the 800 number that's set up by the VHA. The individual could be transferred to a nurse or a provider to speak to that individual and determine what is happening at that time. . . . [I]f it's nighttime. . . . [the] call is directed to [a VA] call center, where an RN [registered nurse] will answer the line directly, take a patient's concern and complaint, and then make a

> decision on . . . calling a provider on call or taking care of the—whatever happens to be the need immediately.

Thus, veterans who can't make it to a clinic can reach a medical professional at any time.

The majority entirely ignores the VA's national 24/7 suicide prevention hotline. In its first six months, this hotline received 26,000 calls and referred 2,000 veterans to a Suicide Prevention Coordinator. The VA reported that its hotline received 260,000 calls and recorded its *10,000th* rescue after only three years of operations. Dep't of Veterans Affairs, FY 2010 Performance and Accountability Report at I-15 [hereinafter "VA Report"].[10] VA's National Suicide Prevention Coordinator described these callers as:

> [P]eople who call us but they've already taken pills, or they have a gun in their hands, or they're standing on a bridge. . . . These are the calls where we can't wait. We call emergency services right away. . . . [T]his one call is their last resort.

Id. The hotline is an effective tool for delivering care to veterans who are unwilling or unable to come to a clinic, or who suffer a crisis before their scheduled appointment.

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[10] The VA's annual report is an official document that the Secretary prepares and submits to the President and Congress. VA Report I-1.

Veterans who don't need emergency care are protected by a policy set out in the Feeley Memo requiring that "those individuals who either self request [a mental health appointment] or were consulted for mental health . . . have an initial evaluation within 24 hours and . . . be seen within 14 days of that initial evaluation." Dr. Murawsky testified that his facilities met the 24-hour rule "about 60 to 80 percent" of the time and "do very well with the 14 day access component," with most delays "based on the veteran's choice: work schedules, family needs." The majority focuses on the fact that the "VA lacks any method to ensure compliance" with these policies systemwide, maj. op. at 6348, but plaintiffs didn't produce evidence that the VA failed to follow the policy. The evidence in the record showing longer wait times is from May 2007, one month before the Feeley Memo was issued. There is no evidence that most veterans aren't seen within 24 hours after they initiate a request or consultation.

The majority also seems to think that administrative schedulers control the timing of veterans' mental health care appointments. *See id.* at 875 ("[V]eterans whose delayed care stems from administrative decisions have no right . . . to insist that they be evaluated by a medical professional. . . ."). Not true. Plaintiffs' lawyer proposed the following hypothetical to Dr. Murawsky:

> If a veteran shows up to one of your clinics and says, "Well, I'm not feeling too well, I think I need to speak to someone," and if the

> person there tells them, "Well, we don't have any appointments right now, why don't you come back in six weeks," what is the veteran to do?
>
> Dr. Murawsky testified:
>
> That wouldn't happen. As far as I'm aware, I have not heard *any* incidents of that happening. What you describe is a clerk making a medical decision. . . . That [veteran] would be referred to a nurse who could triage the patient and make a determination of whether they were medically safe or psychiatrically safe. (Emphasis added.)

Plaintiffs never rebutted this testimony.

The majority gets the order of events backwards: *Medical* staff see the veteran first, and only then does he speak to an administrative scheduler to set up an appointment within the time determined to be appropriate by the medical professional. As the quoted paragraphs indicate, administrative staff do not turn away veterans who want to speak with medical personnel. None of the "examples" or "stor[ies]" the majority cites come anywhere near proving that administrative staff deny needed care to veterans.[11]

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[11] Plaintiffs provided eight redacted declarations by veterans suffering from PTSD or friends and family of veterans who committed suicide. The majority cites two of these, but neither actually states that administrative scheduling staff denied medical care. *Contra* maj. op. at 6345-46. In one, the veteran went to the emergency room but decided not to check in after "a veteran

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Dr. Murawsky testified that because a veteran who shows up at a clinic will have "spoke[n] to a nurse," he "would have had a medical triage or a decision made." Should the veteran disagree when

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in the waiting room told me that [it] was full of hardcore drug-addicts." Veteran 1 Decl. ¶ 14 (name redacted in the record). The veteran later fired two VA psychiatrists: the first because she stopped prescribing him a highly addictive sleep aid, and the second because she didn't read the first psychiatrist's notes. *Id.* ¶¶ 18-19. The second veteran committed suicide after being denied inpatient treatment at a VA hospital because "there were no beds available"; one "staff member" said "he didn't have time to see" the veteran that day but he "should call back the next day." Mother 1 Decl. ¶¶ 8-10 (name redacted in the record). The VA's failure to provide care to the veteran was due to a lack of medical resources, not the actions of an appointment scheduler.

One of the declarants described his case as "helpful" and stated that his VA counselor helped him avoid suicide. Veteran 2 Decl. ¶¶ 10, 13. Three of the other declarants described denials of care by *medical* staff. Here's what they said, with names redacted in the record and emphasis added: "The VA *doctors* failed to acknowledge . . . my brother's behavior and suicidal intent . . . and failed to make every effort to treat the cause of his condition." Sister 1 Decl. ¶ 19. "[H]e was prescribed medications and allowed to see a *therapist* once per month." Girlfriend 1 Decl. ¶ 4. "[T]he Marine Corps *doctors* would not order an MRI or a CAT Scan, . . . and only gave him narcotic pain medications. . . . " Brother 1 Decl. ¶ 13. One veteran was unhappy with the frequency of his appointments and his caregivers' qualifications, but he didn't state that a VA administrator denied him more frequent appointments. *See* Veteran 4 Decl. ¶ 10. And the other declarant did fall through the cracks and waited many months for mental health care, but he also didn't claim that a VA administrative staffer denied a request for an earlier appointment. *See* Veteran 3 Decl. ¶¶ 15-19. In none of these examples did a VA administrative scheduler deny a veteran's request for mental health care.

the nurse tells him, "'You are . . . safe to wait' for however long it might be, . . . then the veteran has the right to appeal that decision" by saying, "I want an earlier appointment." (Internal quotation marks omitted.) This is essentially the same as saying, "I disagree with the decision that it's okay for me to wait; I'm not all right." (Internal quotation marks omitted.)

Veterans don't even have to file an appeal themselves; they can seek the help of a Patient Advocate, who will champion their cause within the VA. As anyone who's been to the hospital recently knows, having such an advocate can be invaluable. The VA's Patient Advocates are either onsite or reachable by phone; they will appeal the nurse or doctor's decision up the chain of command, and, according to VA policy, senior medical staff must respond "within seven calendar days . . . to a patient complaint." If the veteran disagrees with the response, he can continue to appeal, asking for a third opinion, and the doctor giving that opinion may bring in a non-VA specialist.

Creating additional processes for reviewing administrative scheduling decisions would be pointless. Veterans who require immediate care can walk into a clinic, tell a medical professional how they feel over the phone or call the 24/7 suicide hotline. *See* p.6391 *supra*. Veterans who don't need immediate care and request their first mental health care appointment are protected by the Feeley Memo's policy that they receive an initial evaluation within twenty-four hours and be seen within fourteen days of that evaluation.

See p. 6392 *supra*. And for ongoing care, administrative schedulers set appointments within the time determined to be safe by the medical staff. *Contra* maj. op. at 6345-46. If a medical professional says it's OK to wait six weeks, it makes no difference whether the appointment scheduler sets up an appointment in two weeks or four.

The majority claims that schedulers routinely set up appointments that deviate from the doctor or nurse's medical assessment, but the only evidence it cites are a 2005 report on the VA's progress in implementing several PTSD treatment programs and a 2007 audit of the VA's general outpatient waiting times. *Id.* at 6347. The 2005 PTSD treatment report didn't address administrative scheduling and is six years out of date, in any event. The 2007 audit has *no* data or conclusions on mental health wait times. It "reviewed a non-random sample of 700 appointments with . . . reported waiting times of 30 days or less" and concluded that schedulers' incomplete record-keeping and "some 'gaming' of the scheduling process" for electronic waiting lists rendered unreliable the VA-collected data on waiting times and the number of patients on such waiting lists.[12] This proves at most

[12] The audit found that, due to differences between the appointment date requested by the nurse or doctor and the actual appointment date shown in the VA's systems, waiting times were overreported in 25 percent of appointments and underreported in 47 percent of them. The VA claimed that most of these differences could "be attributed to patient preference for specific appointment dates that differ from the date recommended by

(Continued on following page)

that large systems involving many participants are subject to occasional glitches; it comes nowhere near proving that administrative schedulers systematically delay veterans' mental health care treatment beyond the maximum wait time determined by a medical professional.[13]

The VA has rolled out multiple, overlapping safeguards to ensure that veterans receive necessary mental health care. The evidence shows that these safeguards, while not perfect, work reasonably well. Plaintiffs have failed to show that current procedures create an "extraordinarily strong showing of probability of error." *Walters* therefore precludes us from finding a due process violation.

B. *Disability compensation*: The majority is "particularly doubtful" that "*any* government interest could justify" the average delays in adjudicating veterans' disability claims. Maj. op. at 6363 (emphasis added). But *Walters* holds that we must accord

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medical providers." But because schedulers often failed to note in the VA's systems that the veteran had requested a different date, the auditors couldn't verify the VA's claim. The differences were "unexplained," maj. op. at 6347, only because the VA couldn't produce such notations.

[13] The majority also quotes a fragment of the introduction to the 2007 audit describing an earlier 2005 audit of outpatient waiting times. *See* maj. op. at 6347-48. That audit has the same flaws as the 2007 audit and is equally unhelpful. *See generally* Dep't of Veterans Affairs, Office of Inspector General, No. 04-02887-169, Audit of the Veterans Health Administration's Outpatient Scheduling Procedures (2005).

"considerable leeway to" Congress's judgment that existing procedures adequately protect veterans against the risk of erroneous deprivation. 473 U.S. at 326. Congress hasn't been shy about imposing rules on the VA to address perceived failures in processing disability benefits. *See Nehmer,* 494 F.3d at 849 (discussing Congress's enactment of legislation simplifying the claims process for Agent Orange-connected ailments); *see also* 38 U.S.C. § 1112(b) (former POWs); *id.* §§ 1112(c) (radiation); *id.* §§ 1117-18 (Gulf War veterans' illnesses). But it imposed no such rules on mental health-related disability benefits, nor did it impose any statutory deadline on the VA's processing of appeals.

Congress recently had an opportunity to tighten control over the VA's administration of mental health disability benefits when it passed the Veterans' Benefits Act of 2010, Pub. L. No. 111-275, 124 Stat. 2864. But it didn't: The Act relaxes only the rules for compensating disabilities caused by a Traumatic Brain Injury (TBI). *Id.* § 601(b), 124 Stat. at 2884. TBI is commonly linked to PTSD and depression; that Congress specifically addressed one but not the other is strong evidence that Congress doesn't want us to impose our own remedies. *See Heckler* v. *Day,* 467 U.S. 104, 111-12 (1984).

When Congress has "committed the timing of hearings and reviews to the discretion of the" agency, "courts should be hesitant to require [additional procedures]." *Wright* v. *Califano,* 587 F.2d 345, 353 (7th Cir. 1978). That's particularly true where, as

here, the delays are systemwide and "the result of a tremendous explosion in the number of claims that have had to be processed." *Id.*; *see* maj. op. at 6304. Congress already exercises vigorous oversight of the VA through its ability to hold hearings on the agency's operations. *See* Dep't of Veterans Affairs, *VA Testimony before Congressional Committees,* http://www.va.gov/oca/testimony/testimony_index.asp (last visited Mar. 26, 2011) (collecting House and Senate testimony by VA officials). Because Congress is already actively involved in the agency's affairs, "programmatic improvements" should be made "in the offices of the [VA] or the halls of Congress," not through litigation. *Lujan* v. *Nat'l Wildlife Fed'n,* 497 U.S. 871, 891 (1990); *see also Heckler* v. *Campbell,* 461 U.S. 458, 466-67 (1983).[14]

The majority's judicial adventurism is exceedingly troubling because the VA is no ordinary agency: It provides medical care to over 5.8 million patients and pays pension and disability benefits to approximately 4 million people. VA Report at I-24. It employs

[14] This litigation wouldn't be possible without the reports Congress ordered the VA and GAO to produce, such as the 2007 waiting time audit, the 2005 PTSD implementation report and the May 2007 report on mental health waiting times. And Congress can and does subpoena executive agency documents when there's a concern that the executive branch is hiding important information. *See* Josh Chafetz, *Executive Branch Contempt of Congress,* 76 U. Chi. L. Rev. 1083, 1132-43 (2009). It's the majority that "gets political reality exactly backwards." Maj. op at 6341 n.27.

hundreds of thousands, spends more than $100 billion a year, and has numerous responsibilities above and beyond mental health disability compensation.[15] *Id.* at I-27. These responsibilities require the VA to make tough decisions on how to allocate its resources. We lack the institutional competence to revisit these decisions and "the many variables involved in the proper ordering of [the agency's] priorities." *Heckler* v. *Chaney,* 470 U.S. 821, 831-32 (1985).

The majority's instructions on remand illustrate the folly of its due process holding. The district court must "conduct evidentiary hearings in order to determine what procedures would remedy the existing due process violations in the [VA's] claims adjudication process" and "explore what procedural protections are most appropriate to permit the appeals of veterans to be expedited in the most efficient manner." Maj. op. at 6366. But the district court already held a four-day preliminary injunction hearing and a seven-day trial; together, these generated 2230 pages of transcripts. The parties prepared well over a thousand exhibits, and the district court admitted over a hundred of them at trial. I can't imagine what new evidence there is for the district court

[15] The VA in its last fiscal year provided services to 90,000 homeless veterans, paid education benefits to hundreds of thousands of service members, reservists and family members, managed 7 million life insurance policies, paid for vocational rehabilitation for 107,000 people, guaranteed 314,000 housing loans and maintained just over 3 million graves. VA Report at I-3, I-7, I-24.

to discover or how it will order systemwide changes to the VA's adjudicative and administrative processes.

* * *

The majority dramatically oversteps its authority, tearing huge gaps in the congressional scheme for judicial review of VA actions. It overrules both Congress's and the VA's judgment on the amount of process due to veterans seeking benefits. And it rearranges the VA's organizational chart by appointing a district judge to head the agency. Congress enacted the VJRA to beat back the last judicial power-grab targeted at the VA. Unless corrected, today's decision will surely prompt Congress to pass a new "VJRA Restoration Act" to rein in the majority.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VETERANS FOR COMMON SENSE and VETERANS UNITED FOR TRUTH, INC., Plaintiffs, v. JAMES B. PEAKE, Secretary of Veterans Affairs, UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; JAMES P. TERRY, Chairman, Board of Veterans Appeals; DANIEL L. COOPER, Under Secretary, Veterans Benefits Administration; BRADLEY G. MAYES, Director, Compensation and Pension Service; DR. MICHAEL J. KUSSMAN, Under Secretary, Veterans Health Administration; PRITZ K. NAVARA, Veterans Service Center Manager, Oakland Regional Office, Department of Veterans Affairs, UNITED STATES OF AMERICA, Defendants.	No. C-07-3758 SC MEMORANDUM OF DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Jun. 25, 2008)

I. INTRODUCTION

As a preliminary summary to this decision, the Court concludes: In reviewing each of the items of relief requested by Plaintiffs, the grievances of Plaintiffs are misdirected. The remedies to the problems, deficiencies, delays and inadequacies complained of are not within the jurisdiction of this Court. Rather, this authority lies with Congress, the Secretary of the Department of Veterans Affairs ("VA"), the adjudication system within the VA, and the Federal Circuit. Congress has bestowed district courts with limited jurisdiction. Congress has specifically precluded district courts from reviewing veterans' benefits decisions and has entrusted decisions regarding veterans' medical care to the discretion of the VA Secretary. The Court can find no systemic violations system-wide that would compel district court intervention. The broad injunctive relief that Plaintiffs request is outside the scope of this Court's jurisdiction. The statutes and caselaw are quite clear as to the extent of this Court's authority. Among them is 38 U.S.C. § 511, which states in part: "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to Veterans or the dependents or survivors of veterans. . . . [T]he decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court. . . ."

In addition, 38 U.S.C. § 1710(a)(1) provides that the medical care veterans receive is to be determined

by the Secretary, and under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, judicial review is prohibited where actions are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). For the foregoing and following reasons, Plaintiffs' requested relief is DENIED. The Court now proceeds with its finding of facts and conclusions of law.

II. BACKGROUND

Veterans for Common Sense and Veterans for Truth ("Plaintiffs") are non-profit organizations devoted to improving the lives of veterans. Plaintiffs filed the present lawsuit in July 2007, seeking declaratory and injunctive relief against the VA, alleging that the manner in which the VA provides mental health care and the procedures for obtaining veteran disability benefits violate various statutory and constitutional rights. Plaintiffs' Complaint seeks declaratory relief for the following: (1) denial of due process in violation of the Fifth Amendment; (2) denial of access to the courts in violation of the First and Fifth Amendments; (3) violation of 38 U.S.C. § 1710(e)(1)(D) relating to medical care for returning veterans; and (4) violation of Section 504 of the Rehabilitation Act. Compl., Docket No. 1, ¶¶ 258-72. In addition, Plaintiffs' fifth cause of action seeks injunctive relief. *Id.* ¶¶ 273-78.

On January 10, 2008, this Court issued an Order Granting in Part and Denying in Part Defendants' Motion to Dismiss ("Motion to Dismiss Order"). Docket

No. 93. In that Order, the Court held that Plaintiffs' first, second, and third claims survived Defendants' various challenges, including standing, sovereign immunity, and subject matter jurisdiction. The Court dismissed Plaintiffs' fourth claim.

After Defendants submitted their Motion to Dismiss, Plaintiffs filed a Motion for Preliminary Injunction. Docket No. 88. The Court scheduled a hearing on this motion and from March 3 through March 6, the Court heard testimony and received evidence. At the close of the hearing, in light of the issues raised by Plaintiffs and the importance of addressing Plaintiffs' allegations promptly, the Court continued the matter and set an expedited schedule for discovery and for consideration of Plaintiffs' Request for Permanent Injunction and Declaratory Relief. A bench trial was then held from April 21 through April 30, 2008.

After hearing testimony and argument during almost three weeks of trial and reviewing the parties' voluminous submissions, two things have become clear to the Court: the VA may not be meeting all of the needs of the nation's veterans, and the remedies proposed by Plaintiffs are beyond the power of this Court.

III. LEGAL FRAMEWORK

A. Standing

An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in

> their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000).

For Plaintiffs' members to have standing to sue in their own right, they must satisfy three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical. . . . Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. (internal quotation marks, citations, and alterations omitted). "Since [these elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the

manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. Thus, at the final stage of the proceedings, any disputed facts "must be supported adequately by the evidence adduced at trial." *Id.* at 561 (internal quotation marks omitted).

B. Sovereign Immunity

"The United States must waive its sovereign immunity before a federal court may adjudicate a claim brought against a federal agency." *Rattlesnake Coalition v. U. S. Envtl. Prot. Agency*, 509 F.3d 1095, 1103 (9th Cir. 2007) (citing *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). As discussed in the Conclusions of Law, various of Plaintiffs' challenges fail because of the lack of a valid waiver of sovereign immunity. The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, provides such a waiver in certain circumstances and "permits a citizen suit against an agency when an individual has suffered 'a legal wrong because of agency action' or has been 'adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Id.* (quoting 5 U.S.C. § 702). "This provision contains two separate requirements." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). "First, the person claiming a right to sue must identify some 'agency action' that affects him in the specified fashion. . . ." *Id.* Second, "the party seeking review under § 702 must show that he has suffered legal wrong because of the challenged agency action or is adversely affected or aggrieved by that action

within the meaning of the relevant statute." *Id.* at 883 (internal quotation marks omitted).

1. Agency Action

"Agency action" is "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. . . ." 5 U.S.C. § 551(13). The APA defines "agency rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." *Id.* § 551(4).

As an initial matter, Plaintiffs argue that their constitutional claims are not limited by the requirement that they challenge an agency action. In support of their argument, they rely on *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989). In analyzing whether there was valid waiver of sovereign immunity, the court in *Presbyterian Church* held that "§ 702's waiver of sovereign immunity is not limited to suits challenging 'agency action.'" *Id.* at 525 n.8.

Although *Presbyterian Church* has not been overruled, its vitality has been called into question. As this Court noted in its Motion to Dismiss Order, in *Gallo Cattle Co. v. Department of Agriculture*, 159 F.3d 1194 (9th Cir. 1998), the Ninth Circuit held that "the APA prescribes standards for judicial review of an agency action. . . ." *Id.* at 1198. The tension between *Presbyterian Church* and *Gallo Cattle* was recognized

in *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), where the court stated:

> Under *The Presbyterian Church*, § 702's waiver is not conditioned on the APA's "agency action" requirement. Therefore, it follows that § 702's waiver cannot then be conditioned on the APA's "final agency action" requirement. . . . But that is directly contrary to the holding in *Gallo Cattle* where we stated that "the APA's waiver of sovereign immunity contains several limitations," including § 704's final agency action requirement.

Id. at 809 (citing *Gallo Cattle*, 159 F.3d at 1198). Although the court in *Gros Ventre* declined to resolve the conflict between the two cases, it did note that it "saw no way to distinguish *Presbyterian Church* from *Gallo Cattle.*" *Id.* at 809. Plaintiffs urge that the court in *Gros Ventre* "may have been mistaken in suggesting that [these two cases] are not distinguishable." Pls.' Post-Trial Br., Docket No. 229, at 6. Plaintiffs argue that because *Presbyterian Church* dealt with constitutional violations, while *Gallo Cattle* addressed statutory violations, it should be inferred that constitutional claims are not constrained by the requirement that a plaintiff, for a valid waiver of sovereign immunity under the APA, challenge an agency action.

Plaintiffs' argument fails for several reasons. First and foremost, the Ninth Circuit found this distinction unremarkable and held that the cases were not distinguishable. *Gros Ventre*, 469 F.3d at 809. This Court is constrained by that holding. Second, the court in

Presbyterian Church did not rely on the fact that the claims before it were constitutional, rather than statutory. *See Presbyterian Church*, 870 F.2d at 524-26. If such a distinction were meaningful, as Plaintiffs suggest, then the court would have so noted. Instead, in reaching its conclusion about the limits of § 702's waiver, the court relied on the legislative history and on the plain language of the statute itself. *Id.*

Third, subsequent to *Presbyterian Church*, the Supreme Court decided *National Wildlife Federation*. In *National Wildlife Federation*, the Court made clear that waiver of sovereign immunity under § 702 is constrained by the provisions contained in § 704. The Court stated: "[T]he person claiming a right to sue [under § 702] must identify some 'agency action' that affects him in the specified fashion. . . ." 497 U.S. at 882. The Ninth Circuit, more recently, reiterated this proposition, holding that when a suit is brought against an agency pursuant to a waiver of sovereign immunity under the APA, the suit must challenge agency action. *Rattlesnake Coalition*, 509 F.3d at 1103. Finally, the Court notes that it has already ruled on this issue, stating, in its Motion to Dismiss Order, that "waiver of sovereign immunity under § 702 of the APA is limited by § 704." Mot. to Dismiss Order at 10. Nonetheless, as Plaintiffs raised a new argument in their Post-Trial Brief, the above discussion was warranted. For these reasons, Plaintiffs must challenge an "agency action" to establish a valid waiver of sovereign immunity.

In addition, when a claim is brought pursuant to the general review provisions of the APA, rather than under a private right of action or authorization for judicial review under a substantive statute, "the 'agency action' in question must be 'final agency action.'" *Nat'l Wildlife Fed'n*, 497 U.S. at 882 (quoting 5 U.S.C. § 704[1]); *see also Rattlesnake Coalition*, 509 F.3d at 1103; *Ecology Ctr. v. U. S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999). Neither party argues that the agency action in question is made reviewable by any statute. Accordingly, the additional limitations of § 704 also apply to the present case, and Plaintiffs must show that the agency action they challenge is not only "final agency action" but also that there is no adequate alternative remedy. 5 U.S.C. § 704; *Nat'l Wildlife Fed'n*, 497 U.S. at 882; *Gallo Cattle*, 159 F.3d at 1198.

Finally, the APA provides that a "reviewing court shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original). "Review of an agency's failure to act has been referred to as an exception to the final agency

[1] Section 704 states, in part, that only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review."

action requirement." *Ctr. for Biological Diversity v. Abraham*, 218 F. Supp. 2d 1143, 1157 (N.D. Cal. 2002). "Courts have permitted jurisdiction under the limited exception to the finality doctrine only when there has been a genuine failure to act." *Ecology Ctr.*, 192 F.3d at 926. The Ninth Circuit "has refused to allow plaintiffs to evade the finality requirement with complaints about the sufficiency of an agency action dressed up as an agency's failure to act." *Id.* (internal quotation marks omitted).

a. Final Agency Action

An agency action is "final" under the APA where two conditions are met: (1) the action "mark[s] the consummation of the agency's decisionmaking process . . .—it must not be of a merely tentative or interlocutory nature," and (2) the action is one "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal citations and quotation marks omitted).

b. Adequate Alternative Remedy

In addition to final agency action, § 704 also requires that "there is no other adequate remedy in a court" for there to be a valid waiver of sovereign immunity under the APA. 5 U.S.C. § 704.

2. Legal Wrong/Adverse Effect

"[T]he party seeking review under § 702 must [also] show that he has suffered legal wrong because of the challenged agency action or is adversely affected or aggrieved by that action within the meaning of the relevant statute." *Nat'l Wildlife Fed'n*, 497 U.S. at 883 (internal quotation marks omitted). Neither party disputes that this prong of APA waiver of sovereign immunity is satisfied.

C. Jurisdictional Limitations of the VJRA

The VJRA contains several statutory provisions that preclude review of various challenges to the VA in federal district courts. Although this issue was also dealt with extensively in the Motion to Dismiss Order, it too must be revisited.

1. § 502

Pursuant to 38 U.S.C. § 502, "VA rulemaking is subject to judicial review only in the Federal Circuit." *Chinnock v. Turnage*, 995 F.2d 889, 893 (9th Cir. 1993); *see also Preminger v. Principi*, 422 F.3d 815, 821 (9th Cir. 2005) (stating "Congress has explicitly provided for judicial review of direct challenges to VA rules and regulations only in the Federal Circuit"). Thus, any challenge by Plaintiffs to VA regulations is not reviewable in this Court.

2. § 511

38 U.S.C. § 511 states, in part:

> The Secretary [of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

38 U.S.C. § 511(a). As previously held by various courts, including this one in its Motion to Dismiss Order, § 511 does not strip district courts of the ability to hear facial constitutional challenges to the VA benefits system. *See* Mot. to Dismiss Order at 20-30; *see also Larabee v. Derwinski*, 968 F.2d 1497, 1501 (2d Cir. 1992) (stating "district courts continue to have jurisdiction to hear facial challenges of legislation affecting veterans' benefits") (internal quotation marks and emphasis omitted); *Broudy v. Mather*, 460 F.3d 106, 114 (D.C. Cir. 2006) (stating "district courts have jurisdiction to consider questions arising under laws that affect the provision of benefits as long as the Secretary has not actually decided them in the course of a benefits proceeding"); *Beamon v. Brown*, 125 F.3d 965, 972-73 (6th Cir. 1997) (stating "district court jurisdiction over facial challenges to acts of Congress survived the statutory revisions that established the CVA").

Thus, while review of individual benefits decisions is clearly precluded by § 511, facial constitutional challenges are not. In addition, as this Court held in its Motion to Dismiss Order, where Plaintiffs challenge VA decisions that were made outside the course of a benefits proceeding, § 511 does not necessarily preclude review in this Court. For reasons discussed below, however, it is unnecessary to determine the precise contours of § 511's preclusive effect. Suffice it to say, § 511 does not provide the extremely broad preclusive effect advocated by Defendants.

D. Due Process

1. Delay

Under the APA, a district court "shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). In assessing whether agency action has been unreasonably delayed or withheld, courts look to the so-called *TRAC* factors. *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997). These factors are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"[;] (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason[;] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake[;]

> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;] (5) the court should also take into account the nature and extent of the interests prejudiced by the delay[;] and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

Id. at 507 n.7 (quoting *Telecomms. Research & Action v. F.C.C.*, 750 F.2d 70, 79-80 (D.C. Cir. 1984)) (modifications in original).

2. Other Due Process Violations

Plaintiffs also argue that the medical clinical appeals process and the benefits adjudication process violate veterans' Due Process rights under the Fifth Amendment. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In evaluating whether a procedure satisfies Due Process, courts balance (1) the private interest, (2) the risk of erroneous deprivation and the probable value, if any, of extra safeguards, and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or procedural requirement would entail. *Id.* "Procedural due process requires adequate notice and an opportunity to be heard." *Kirk v. U. S. Immigration and Naturalization Serv.*, 927 F.2d 1106, 1107 (9th Cir. 1991). It does not, however, "always require

an adversarial hearing." *Hickey v. Morris*, 722 F.2d 543, 549 (9th Cir. 1983).

IV. FINDINGS OF FACT

1. Plaintiffs are two non-profit organizations that represent the interests of veterans. RT 661:10-666:10; 811:20-812:6.[2] Veterans United for Truth is an advocacy organization with between 1,200 and 1,300 members hailing from 40 states. *Id.* 661:11-13; 664:20; 665:18-19. A large percentage of these members are enrolled with the VA, many of them suffer from a service-connected disability, including Post Traumatic Stress Disorder ("PTSD"), and many have sought benefits within the VA. *Id.* 665:22-666:7; 674:1-4. Veterans for Common Sense, based in Washington D.C., represents approximately 12,000 members. *Id.* 811:20-812:1. Among these ranks are members who receive services from the VA for mental health issues, including those who have received treatment from the VA for depression and PTSD, and members who have served in Iraq or Afghanistan. *Id.* 813:24-814:9. In addition, within the last year, members of Veterans for Common Sense have experienced problems with delays in processing benefits claims and delays in receiving health care. *Id.* 813:17-19; 815:4-816:16. Veterans for Common Sense devotes more than half

[2] "RT" refers to the transcript of record from the trial, held April 21-30, 2008. "PIRT" refers to the transcript of record from the preliminary injunction hearing held March 3-6, 2008.

of its resources to advocating for better veterans' health care and benefits. *Id.* 813:12-16.

2. The mission of the VA is: "To care for him, who has borne the battle and for his widow and for his orphan." PIRT 245:4-6. Defendants concede that the VA not only has a "broad obligation," but also a "moral imperative[ ] to provide medical care to the men and women who have served our country." Defs.' Proposed Findings of Fact and Conclusions of Law ("Defs.' Post-Trial Brief "), Docket No. 230, at 11.

3. The VA has approximately 230,000 employees and 1,400 sites of care. RT 778:19-24. The VA is comprised of three major organizations: the Veterans Health Administration ("VHA"), the Veterans Benefits Administration ("VBA"), and the National Cemetery Administration ("NCA"), only the first two of which are relevant to the present case.

4. There are approximately 25 million veterans in the United States today. Ex. 1247.[3] As of May 2007, between 5 and 8 million of these veterans were enrolled with the VA. PIRT 254:23; Exs. 133, 357.

5. On any given night in the United States, it is estimated that 154,000 veterans are homeless. RT 503:19-20.

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[3] Unless otherwise noted, all exhibits refer to Plaintiffs' Trial Exhibits.

A. Veterans Health Administration

6. The VHA, one of the largest health-care systems in the world, is divided into approximately 21 geographical areas called Veteran's Integrated Service Networks ("VISNs"). PIRT 623:16-17; RT 703:1. Each VISN contains a number of VA hospitals, also known as medical centers, of which there are 153 throughout the country. PIRT 245:17; 246:6; 623:16-17. Each VISN also has numerous community-based outpatient clinics ("CBOCs"), of which, nationwide, there are approximately 800. *Id.* 247:2-7. CBOCs typically provide, at a minimum, primary health care. *Id.* 247:10-11. Most veterans enrolled in the VA receive their care at CBOCs. Ex. 357; RT 1318:15-17.

7. The VHA also has approximately 200 Readjustment Counseling Centers, known as "Vet Centers." PIRT 247:24-25. Vet Centers are small, community-based counseling centers, with average staff sizes of four to six people. *Id.* 55:7-9.

1. Veterans' Mental Health and Suicide Rates

8. More than 1.6 million men and women have served in Iraq and/or Afghanistan since October 2001. Answer, Docket No. 110, ¶ 7; Ex. 1253 at iii. As of December 31, 2007, 803,757 veterans of Iraq and Afghanistan were eligible for VA health care. Answer ¶ 7; Ex. 420 at 5. Defendants concede that veterans have complained of long wait times for PTSD

treatment and difficulties in obtaining mental health care in rural areas. Answer ¶ 10.

9. Approximately one out of every three soldiers returning from Iraq was seen in the VA for a mental health visit within a year of their return. RT 220:7-11; PIRT 219:3-220:17. PTSD is a leading diagnosis for the mental health disorders of veterans returning from Iraq. PIRT 216:17.

10. Dr. Arthur Blank testified for Plaintiffs as an expert in psychiatry, specializing in treatment of veterans with mental health problems, including PTSD. PIRT 59:23-62:3. Dr. Blank spent 10 years as a teaching and supervising psychiatrist at the Westhaven VA Medical Center, was a national director of the Vet Centers at the VA headquarters in Washington from 1982-1994, and was the chief psychiatrist on the PTSD team at the Minneapolis VA from 1994-1997. *Id.* 54:19-25; 55:1-3; 57:18-23.

11. Dr. Blank testified that PTSD is a "psychological condition that occurs when people are exposed to extreme, life-threatening circumstances, or [when they are in] immediate contact with death and/or gruesomeness, such as [what] occurs in combat, severe vehicular accidents or natural disasters. It produces a complex of psychological symptoms which may endure over time." PIRT 62:25-63:6.

12. Dr. Gerald Cross, the Deputy Under Secretary for Health in the VA, testified that the high rates of PTSD among Iraq veterans are the result of various factors, including multiple deployments, the inability

to identify the enemy, the lack of real safe zones, and the inadvertent killing of innocent civilians. PIRT 216:23-218:2.

13. In 2008, Dr. Robert Rosenheck, Director of VA's Northeast Program Evaluation Center ("NEPEC"), issued a report entitled "Recent Trends in VA Treatment of Post-Traumatic Stress Disorder and other Mental Disorders." Exs. 442, 444. The report found that during 2003-2005, there was a 232% increase of PTSD diagnosis for veterans born after 1972. Ex. 442 at 1722. In addition, while the number of veterans diagnosed with PTSD doubled between 1997 and 2005, "the number of clinic contacts per veteran per year declined steadily and relatively uniformly across the years." *Id.* at 1722, 1723.

14. A study released on April 17, 2008, by the RAND Corporation found that 18.5% of U.S. service members who have returned from Iraq and Afghanistan currently have PTSD. Ex. 1191 at 1. The RAND study also found that approximately half of those who need treatment for PTSD seek it, and of those who actually receive treatment, only slightly more than half get "minimally adequate care." *Id.* The study estimates that 300,000 soldiers now deployed to Iraq and Afghanistan "currently suffer PTSD or major depression." Ex. 1253 at xxi.

15. Studies indicate that the suicide rate among veterans is significantly higher than that of the general population. RT 274:15-275:19. One study, the "Katz Suicide Study," dated February 21, 2008, found

that suicide rates among veterans are approximately 3.2 times higher than the general population. *Id.*; Ex. 1183.

16. Dr. Stephen Rathbun, the interim head of the Department of Epidemiology and Biostatistics at the University of Georgia, testified as Plaintiffs' expert in biostatistics. PIRT 303:13-18. Dr. Rathbun analyzed data provided to him by CBS News and concluded that, in 2005, the last year for which suicide data was available, the suicide rate among male veterans aged 20 to 24 years old was three or four times the non-veteran rate in that group. *Id.* 304:11-17; 307:1; 310:9-311:2. Internal VA emails state that Dr. Rathbun's methodology was "defensible" and "appears to be correct." Exs. 1306, 1248.

17. Dr. Ira Katz, Deputy Chief of Patient Care Services Office for Mental Health for the VA, testified that his primary job is to direct mental health services at the VA. PIRT 736:24-25. Suicide prevention is an important component of his job. *Id.* 738:21-24.

18. Dr. Katz, in an internal VA email dated December 15, 2007, wrote that "[t]here are about 18 suicides per day among American's 25 million veterans." Ex. 1247. The email further states that the "VA's own data demonstrate 4-5 suicides per day among those who receive care from us." *Id.*

19. In another internal VA email dated February 13, 2008, Dr. Katz wrote: "Shh! Our suicide prevention coordinators are identifying about 1,000 suicide attempts per month among the veterans we see in our

medical facilities. Is this something we should (carefully) address ourselves in some sort of release before someone stumbles on it?" Ex. 1249.

2. VHA Budget

20. Paul Kearns, the VHA's Chief Financial Officer, testified that the VHA is not currently facing a budget crisis and has adequate money to "meet the mission requirements." PIRT 574:13-18. Dr. Cross agreed with this assessment and testified that the VA has sufficient funding to carry out its mission of ensuring that veterans have the medical care they need. *Id.* 225:12-23. Dr. Katz testified that the VHA's current budget provides enough funding to cover a "worst-case scenario" of an influx of veterans returning from Iraq and Afghanistan with mental illness. *Id.* 787:17-20.

21. In 2006, VHA spending on mental health care was approximately $2.4 billion. PIRT 555:17020. In 2007, this figure rose to $3.2 billion. *Id.* 557:8-10. In 2008, the VHA is on target to spend $3.5 billion on mental health care. *Id.* 558:2-3. The estimated budget for 2009 is $3.9 billion. RT 774:25-775:3.

22. Over the past few years, the VA has hired more than 3,800 new mental health staff. PIRT 739:12-13. There remain 500-600 unfilled mental health staff positions, out of a total of 16,500. *Id.* 419:12-22. In addition, for general health staff, the VA has approximately 1,400 unfilled physician positions

out of 21,000 and 2,400 unfilled nursing positions out of 40,000. *Id.* 224:2-7; 231:9-13.

23. Dr. Rosenheck, Director of VA's NEPEC, concluded that for every $100 increase in per capita outpatient mental health spending, there was an associated 6% decrease in the rate of suicide. Ex. 446 at 118.

3. Depression, PTSD, and Suicide

24. Dr. Ronald Maris, an expert witness for Plaintiffs in suicidology, testified that depression and PTSD are two of the leading risk factors for suicide. RT 270:3-10; 273:1-276:24. In general, Dr. Maris was highly critical of the manner in which the VA is treating suicidal or potentially suicidal veterans. *Id.*

25. Dr. Alan Berman testified as an expert witness for Defendants in suicidology. RT 1272:4-10. Dr. Berman agreed that depression is a leading risk factor for suicide and that PTSD is a "significant risk factor." *Id.* 1322:25-1323:6. Dr. Berman also agreed that it is important to treat PTSD on a timely basis, and that PTSD, if not properly treated, can lead to depression, and that depression and PTSD, if not properly treated, increase the risk of suicide. *Id.* 13237-20. Dr. Berman agreed that soldiers returning from Iraq have an elevated rate of suicide. *Id.* 1324:1-6. Dr. Berman testified that the quality of the VA suicide prevention program is "terrific." *Id.* 1294:7-10.

26. Dr. Blank testified that there is a strong connection between PTSD and suicide. RT 69:23-70:6. He also testified that depression is one outcome of untreated PTSD and that depression increases the risk of suicide. *Id.* 70:21-25; 71:1-7. Dr. Blank was critical of the VA's treatment methods for veterans with PTSD. *Id.* 83:14-22; 83:10-13.

4. Mental Health Strategic Plan

27. In July 2004, the VA developed and adopted the Mental Health Strategic Plan ("MHSP"). Ex. 398. The MHSP consists of 265 recommendations and was developed as a five year plan. RT 777:22-24; PIRT 477:24-478:1. It currently is in its fourth year of implementation. *Id.* Plaintiffs concede that the MHSP is a good plan. RT 705:14-706:7.

28. In fiscal year 2006, the VHA spent approximately $118 million out of a targeted $200 million on the MHSP. PIRT 553:1-4. In fiscal year 2007, the VHA spent approximately $325 million on the MHSP and for fiscal year 2008 the VHA is on target to increase this spending to $370 million. *Id.* 553:5-554:6.

29. One of the goals of the MHSP is to "[r]educe suicides among veterans." Ex. 398 at A-2. Among the initiatives intended to help reduce veteran suicides are ones to "[d]evelop a national systemic program for suicide prevention" and to "develop[ ] a plan to educate all staff that interact with veterans, including clerks and telephone operators, about responding to crisis situations involving at-risk veterans." *Id.* at

A-2. Other key components of the MHSP are to develop "methods for tracking veterans with risk factors for suicide," and to "[r]equire annual screening for Mental Health and Substance Abuse Disorders." *Id.* at A-29. In addition, the MHSP called for mental health screening for "[e]very returning service man/woman . . . as part of the post-deployment and separation medical examination." *Id.* at A-5.

30. Dr. Katz testified that his office is responsible for "strategic planning about program development." PITR 737:4-5. He further testified that he was hired "specifically to oversee the implementation of the 2004, 2005 Mental Health Strategic Plan." *Id.* 738:5-6.

31. On May 10, 2007, the VA Office of Inspector General ("OIG") issued a report titled "Implementing VHA's Mental Health Strategic Plan Initiatives for Suicide Prevention" ("May 2007 OIG Report"). Ex. 133. This report concluded that many components of the MHSP had not been implemented. *Id.* Initiatives such as screening veterans at risk, a suicide prevention database, emerging best practices for treatment, and education programs were all still at the "Pilot Stage" three years after the MHSP was implemented. *Id.* at 53.

32. The May 2007 OIG Report also found 61.8% of VA facilities had not implemented a suicide prevention strategy to target veterans returning from Iraq and Afghanistan. Ex. 133 at 37. In addition, 42.7% of VA facilities had not implemented a program to

educate first-contact, non-medical personnel about how to respond to crisis situations involving veterans at risk for suicide. *Id.* at 46. 70% of VA facilities had not implemented a tracking system for veterans with risk factors for suicide. *Id.* at 33. 16.4% of VA facilities had not implemented a system to facilitate referral of veterans with risk factors for suicide. *Id.* at 30.

5. Feeley Memo

33. William Feeley has been the Deputy Under Secretary for Health Operations and Management since February 10, 2006. Ex. 1259 at 1, Feeley Depo. Tr. Mr. Feeley, in his own words, is "responsible for the 21 [VISN] network directors in implementing policy and procedure that comes in, that gets developed at headquarters." *Id.* Mr. Feeley, as the number three person in the VHA, is tasked with ensuring that the VA Medical Centers and CBOCS comply with the "policies and the rules and regulations of the organization." *Id.* 2. He testified that when it comes to compliance in implementing procedures, the "[b]uck stops with me." *Id.*

34. On June 1, 2007, Mr. Feeley issued a memorandum to all VISN directors regarding "Mental Health Initiatives" ("the Feeley Memo"). Ex. 1259 at 4; Defs.' Ex. 513. The purpose of the Feeley Memo was to direct the VISN directors to begin implementing the specific initiatives of the mental health plan. Ex. 1259 at 8; Defs.' Ex. 513. According to Mr. Feeley, even though the MHSP was developed in 2004, he

was unaware of whether the VHA had actually begun to implement the plan prior to June 2007. Ex. 1259 at 4. Furthermore, Mr. Feeley was unaware of whether the VISN directors were supposed to begin implementing the MHSP prior to his Memo. *Id.* Mr. Feeley conceded that he is unaware of "whether there's compliance with the tracking of veterans with risk factors for suicide," but agreed that such tracking, in addition to being part of the MHSP, was "a good suggestion." *Id.* at 7-8.

35. Part of the Feeley Memo states that veterans who present to a Medical Center or CBOC for the first time with mental health issues should be evaluated within 24 hours. Ex. 1259 at 11; Defs.' Ex. 513. Mr. Feeley conceded that he has no way of knowing whether any of the Medical Centers or CBOCS have implemented this initial 24 hour evaluation directive. Ex. 1259 at 12. Mr. Feeley testified that Drs. Zeiss and Katz were going to perform site visits to ensure compliance with this directive. *Id.* at 11.

36. Dr. Antoinette Zeiss is the Deputy Chief Consultant for the Office of Mental Health Services. PIRT 395:11-12. She has held this position since September of 2005 and she reports to Dr. Katz. *Id.* 395:13-16. Her section's responsibilities include "oversight for mental health programs in VA. That means working with those above [her section] on policies, working on consultation [with] the field about appropriate implementation of programs, and particularly implementing the Mental Health Strategic Plan." *Id.* 3961-6. Since the Feeley Memo was issued in June 2007,

Dr. Zeiss testified that as of March 5, 2008, only two site visits to ensure implementation had been conducted. *Id.* 457:19-25. The first of these visits occurred approximately three weeks prior to Dr. Zeiss's testimony. *Id.* 457:9-12. Other than these site visits, Dr. Zeiss has seen no reports that would otherwise indicate whether the Feeley Memo directives were being implemented system-wide. *Id.* 456:20-23.

37. The Feeley Memo also directs that a veteran who seeks an appointment for mental health issues be given a follow-up appointment within 14 days. RT 443:1-4; PIRT 481:12-17; Defs.' Ex. 513.

38. The VHA does not have the staff or resources to directly track whether the 24 hour evaluation policy outlined in the Feeley Memo is being implemented systemwide. RT 446:18-21.

39. Instead, in order to monitor compliance with the Feeley Memo directives, the VA uses two tangential metrics. RT 449:1-452:23. The first metric tracks the number of mental health providers hired at medical facilities within a VISN and the second tracks whether medical centers are complying with the requirement that a veteran who presents with mental health needs be given an appointment within 14 days. *Id.* 443:1-23; 446:6-25; 454:10-17.

6. Delays in Mental Health Care

40. The May 2007 OIG Report found delays in obtaining referrals for depression and PTSD. Ex. 133

at 31. Where a primary care provider refers a patient with symptoms of moderate severity for depression, 40% of VA facilities reported same-day evaluation, 24.5% reported a wait time of 2-4 weeks and 4.5% reported a wait time of 4-8 weeks. *Id.* The wait times for PTSD referrals were longer, with only 33.6% reporting same-day evaluation, 26% reporting 2-4 weeks, and 5.5% 4-8 weeks. *Id.* at 31-32. Nonetheless, the majority of veterans of Iraq and Afghanistan are being seen at clinics offering mental health services within 30 days. PIRT 594:11-595:16; Defs.' Ex. 514.

41. On September 10, 2007, the VA's OIG issued a report titled, "Audit of the Veterans Health Administration's Outpatient Waiting Times" ("September 2007 OIG Report"). Ex. 169. This report was prepared at the request of the U.S. Senate Committee on Veterans Affairs. *Id.* at i. The purpose of the report was to follow up on a July 2005 audit that found that the "VHA did not follow established procedures when scheduling medical appointments for veterans seeking outpatient care." *Id.* The July 2005 report made eight recommendations for corrective action, five of which the September 2007 OIG Report found had not been implemented. *Id.* at vi.

42. The September 2007 OIG Report found that "25 percent[ ] of the appointments we reviewed had waiting times over 30 days when we used the desired date of care that was established and documented by the medical providers in the medical records." Ex. 169 at ii. The report also found that "72 percent[ ] of the 600 appointments for established patients had

unexplained differences between the desired date of care documented in medical records and the desired date of care the schedulers recorded. . . ." *Id.* at iii. In addition, the report concluded that "[o]f the 100 pending consults, 79 (79 percent) were not acted on within the 7-day requirement and were not placed on the electronic waiting list. Of this number, 50 veterans had been waiting over 30 days without action on the consult request." *Id.* at vi.

43. The September 2007 OIG Report found that schedulers were not adequately trained. Ex. 169 at vi. Of 113 schedulers interviewed, 47% had no training on consults within the last year, and 53% had no training on the electronic waiting list in the last year. *Id.* Furthermore, the report stated the following: "While waiting time inaccuracies and omissions from electronic waiting lists can be caused by a lack of training and data entry errors, we also found that schedulers at some facilities were interpreting the guidance from their managers to reduce waiting times as instruction to never put patients on the electronic waiting list. This seems to have resulted in some 'gaming' of the scheduling process." *Id.* The report concluded that "VHA's method of calculating the waiting times of new patients understates the actual waiting times," *id.* at 7, and that even though the "VHA has established detailed procedures for schedulers to use when creating outpatient appointments[, it] has not implemented effective mechanisms to ensure scheduling procedures are followed." *Id.* at 9.

44. As of April 2008, according to VHA's data, there are approximately 85,450 veterans on VHA waiting lists for mental health services. Ex. 1244. As of February 1, 2008, there were 37,902 veterans having to wait more than 30 days for any type of medical appointment, not just one for mental health issues. Defs.' Ex. 528. According to the VA, as recently as February 2007, there were as many as 182,141 veterans waiting more than 30 days for a medical appointment. *Id.*

45. Dr. Jeffery Murawsky is the Chief Medical Officer for VISN Number 12, Great Lakes Region. PIRT 623:12-13. Dr. Murawsky testified that in his VISN, as of February 15, 2008, there were no Iraq or Afghanistan veterans on the wait list for a mental health appointment. *Id.* 635:7-9. Dr. Murawsky also testified that a veteran is not placed on the wait list until after he or she has had to wait 30 days. *Id.* 635:10-19.

46. In February 2005, the U.S. Government Accountability Office ("GAO"), prepared a report for the ranking Democratic Member of the House Committee on Veterans' Affairs. Ex. 37. The report was titled, "VA Should Expedite the Implementation of Recommendations Needed to Improve Post-Traumatic Stress Disorder Services." *Id.* Although the report began by noting that the VA "is a world leader in PTSD treatment and offers PTSD services to eligible veterans," *id.* at 1, it was also critical of the VA's lack of progress in implementing various recommendations, including some dating as far back as 1985. *Id.* at 5. For

example, the report found that the VA had not developed referral mechanisms in all CBOCs that do not offer mental health services. *Id.* at 26, 27. The report summarized: "VA's delay in fully implementing the recommendations raises questions about VA's capacity to identify and treat veterans returning from military combat who may be at risk for developing PTSD, while maintaining PTSD services for veterans currently receiving them." *Id.* at 3.

47. Dr. Frances Murphy was the Deputy Under Secretary of Health Policy Coordination within the VA from October 2002 through April 2006. Ex. 1262 at 1. Dr. Murphy had helped draft the MHSP. *Id.* at 4. In the fall of 2005, Dr. Murphy informed then-Secretary Nicholson that there were "still significant gaps in delivery of substance abuse care, and that in certain areas of the country mental health access was still not meeting VHA standards." *Id.* at 4. In a speech on March 29, 2006, Dr. Murphy, while acknowledging that the VA "has achieved benchmark performance in quality, patient satisfaction, patient safety and coordination of healthcare services," also noted that "[i]n some communities, VA clinics do not provide mental health or substance abuse care or waiting lists render that care virtually inaccessible." Ex. 397 at 6, 7. In February 2006 Dr. Murphy's office was eliminated. Ex. 1262 at 1, 2.

48. Every VA Medical Center now has a Suicide Prevention Coordinator. RT 1280:21-23. The Coordinators are charged with the task of overseeing the clinical care and tracking at-risk patients. *Id.*

In preparation for their roles as Suicide Prevention Coordinators, the Coordinators, who are all mental health professionals, received only two and one half days of special training, which took place at the University of Rochester School of Medicine's center for the study of suicide. *Id.* 1290:6-11. As Defendants' expert Dr. Berman testified, the primary role of the Coordinators includes "identifying or making sure that suicidal patients are identified, in tracking, that they are getting the appropriate treatment, in educating and training the staff of the medical center, in promoting suicide awareness and education." *Id.* 290:18-23. As of May 2007, only 30% of the facilities polled had suicide tracking systems. Ex. 133 at 33.

49. The Suicide Prevention Coordinators are only at the 153 VA medical centers, and are not located at any of the roughly 800 CBOCs. RT 1318:10-1319:3. Most veterans receive their care at CBOCs. Ex. 357; RT 1318:15-17.

50. CBOCS only provide outpatient services during regular business hours, generally Monday through Friday from 8:00 a.m. until 4:30 or 5:00 p.m. PIRT 169:22-25.

51. In July 2007, the VA implemented a national Suicide Prevention Hotline. PIRT 746:12-749:9. Between July 2007 and January 2008, the Hotline received 26,000 calls, of which 9,000 were confirmed to be from veterans and 900 from the families of veterans. *Id.* 778:1-9. In that same time period, the Suicide Prevention Hotline made approximately 2000

referrals of veterans seeking help to the Suicide Prevention Coordinators. *Id.* 745:7-14.

7. Medical Appeals Process

52. Veterans may appeal clinical medical decisions that affect eligibility determinations. For example, a veteran may appeal a clinical determination by a nurse or doctor but a veteran may not appeal the decision of an appointment scheduler. PIRT 713:2-714:13. If a veteran is told that the next available appointment is two weeks away but the veteran wants something sooner, the veteran cannot appeal this type of administrative scheduling decision. *Id.* 712:4-8. If, however, the veteran is told by a nurse or doctor that it is ok for him to wait those two weeks before his appointment—i.e., if a nurse or doctor makes a clinical decision regarding the veteran's need for access to health care—then the veteran may appeal this decision. *Id.*; *Id.* 656:25-657:25. The veteran appeals this decision by asking to speak with a "Patient Advocate." *Id.* 656:25.

53. The Patient Advocate Program is a system that VHA has in place to provide patients with an individual to help them with any issues or problems they might have with VHA. PIRT 638:16-19.

54. The Patient Advocate, after receiving a complaint from a veteran, is then supposed to log the veteran's complaint into the Patient Advocate database. PIRT 657:6-10. If the complaint deals with a clinical decision about the need for treatment, it will be

referred up to the chief of staff, who then has seven days to make a decision on how to handle the complaint. *Id.* 657:7-15.

55. If the veteran disagrees with the decision by the chief of staff, he or she can then appeal the decision to the VISN director at the network level, who would make the final decision. *Id.* 659:13-18. If the veteran disagrees with the VISN director's decision, the veteran can ask the VISN director to request an external review. *Id.* 661:14-663:4. Only the VISN director can request external review, and the veteran, on his or her own, has no way of independently securing it. *Id.* If the VISN director does request an external review, the veteran does not have the right to know the results of this review. *Id.* 719:5-10. If the VISN director refuses to share the results of the external review with the veteran, the only manner in which the veteran might obtain the results would be through a Freedom of Information Act request. *Id.* 719:10-17.

8. PTSD and Suicide Screening

56. When veterans first enroll in the VHA after separating from the service, they are given a mental health screen at their initial primary care visit. PIRT 518:5-21. They are screened for PTSD, depression, traumatic brain injury, military sexual trauma, and problem drinking. *Id.*

57. In addition, all veterans who present for evaluation of primary mental health and/or addiction

disorders are screened for suicide risk. Ex. 365. This screening consists of the following two questions: (1) "During the past two weeks, have you felt down, depressed, or hopeless?" and (2) "During the past two weeks, have you had any thoughts that life was not worth living or any thoughts of harming yourself in any way?" *Id.* If the patient answers "yes" to the first question but "no" to the second, no further suicide risk assessment is called for, unless the veteran is being admitted to an inpatient psychiatric unit. *Id.* Thus, unless the veteran admits to having suicidal thoughts within the last two weeks, no further suicide screening is performed, even if the veteran admits to having recently felt depressed or hopeless. *Id.*

58. Dr. Maris, Plaintiffs' suicidology expert, was highly critical of this screening mechanism and made a strong argument that it fell below the acceptable standard of care. RT 288:5-8. Dr. Maris stated that a more comprehensive screening procedure, which would take only an additional 10 or 15 minutes, would be far more accurate in screening suicidal veterans. *Id.* 288:12-289:23.

59. Defendants' suicide expert, Dr. Berman, testified that he "was singularly impressed" with what the VA is doing for screening and treating suicidal veterans. RT 1279:21-25. Dr. Berman testified that the two screening questions detailed above "are perfectly appropriate." *Id.* 1292:2. He further testified that the level of screening embodied by these two questions "is the standard of care with regard to

screening for suicide prevention—suicidal patients." *Id.* 1292:10-11.

B. Veterans Benefits Administration

60. The Veterans Benefits Administration ("VBA") administers benefit programs for veterans, including service-connected death and disability compensation ("SCDDC") benefits. RT 885:8-22. Under the Compensation and Pension Service, which includes nonservice-connected disabilities, approximately 3.4 million veterans receive benefits. *Id.* 887:12-14; 885:20-23. In fiscal year 2008, VBA will pay out approximately $38 billion in compensation and pension benefits. *Id.* 887:20.

61. Service connected injuries frequently interfere with the quality of life and/or preclude employment of a veteran upon return to civilian life, while deaths often deprive a veteran's dependents of their principal or sole means of support. Compl. ¶ 93; Answer, ¶ 93. Many benefits recipients are totally or primarily dependent upon SCDDC for support. *Id.*

62. After deployment to Iraq, soldiers aged 18-24 comprised 50% of the Army and 80% of the Marines. RT 357:9-19. 82% of the Army personnel deployed have a high school diploma or less. *Id.* 358:3-7. 89% of the Marines deployed have a high school diploma or less. *Id.* These figures indicate that many of these soldiers, once they separate and become veterans, may have difficulty navigating complex benefit application

procedures unless they are provided with substantial assistance.

1. Adjudication Process for SCDDC Claims

63. Veterans may file a claim for compensation and pension benefits at any of the 57 VA Regional Offices ("ROs") throughout the country. RT 887:21-888:8.

64. A rating claim may seek compensation for more than one injury and each separate injury is considered an "issue" in the claim. RT 930:11-15.

65. In fiscal year 2007, the VBA received 838,141 ratings claims. Defs.' Ex. 542; RT 972:16-22. Of these, 225,173 were "original" claims, that is, first time requests for benefits by veterans. Ex. 543. The remaining 612,968 claims were "reopened" claims—claims from veterans who had previously sought benefits from the VA. Exs. 542, 543. Of the original claims that year, 58,532 had 8 or more issues and 166,641 had 7 or fewer issues. Ex. 543. Since fiscal year 2005, the number of claims with 8 or more issues has increased by 34%, while the number of claims with 7 or fewer issues has remained mostly constant. *Id.*; RT 983:16-984:13.

66. Roughly 88% of veterans are granted SCDDC for at least one claimed disability. RT 1042:10-24.

67. Average Days to Complete ("ADC") measures the time required to adjudicate all rating claims

over a finite period. RT 900:12-902:8. ADC is computed by taking all rating claims adjudicated during a period, adding the number of days it took to complete each one, and dividing by the total number of claims that were adjudicated. *Id.* 900:12-18. As of trial, the ADC for fiscal year 2008 was approximately 183 days. Defs.' Ex. 541; RT 936:11-12. Thus, on average, it takes the VBA 183 days to adjudicate a claim filed by a veteran. RT 936:11-15.

68. To establish a claim for SCDDC, a veteran must present evidence of (1) a disability; (2) service in the military that would entitle him or her to benefits; and (3) a nexus between the disability and the service. RT 887:8-11.

69. Veterans pursuing a SCDDC claim for PTSD have the additional burden of proving a "stressor" event during their service. RT 952:22-953:8. Evidence of a stressor is required by 38 C.F.R. § 3.304. A "stressor" is a specific event during the veteran's service that led to the development of PTSD. RT 953:2-8. This additional requirement makes SCDDC claims for PTSD unique from all other types of claims. *Id.* 952:24-953:1. As Ronald Aument, the Deputy Under Secretary for Benefits until January 3, 2008, testified, PTSD claims, because of the substantial subjectivity involved in their evaluation, are among the most complex claims that the VA is asked to adjudicate. Ex. 1257 at 5.

70. Section 3.304 also provides that "if the evidence establishes that the veteran engaged in combat

. . . and the claimed stressor is related to that combat, in the absence of clear and convincing evidence to the contrary, . . . the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor." 38 C.F.R. § 3.304(f)(1).

71. To file a SCDDC claim, a veteran must complete and submit a 23-page application on VA Form 21-526. RT 408:12-20; Ex. 1069. Veterans often make mistakes when completing this application and veterans suffering from PTSD have a particularly hard time with this. RT 39811-13.

72. Pursuant to the Veterans Claims Assistance Act ("VCAA"), 38 U.S.C. § 5103, the VA owes veterans the duty to assist them develop all evidence supporting the issues in a claim.

73. Upon receipt of a benefits claim application, a VBA employee known as a Veterans Service Representative ("VSR"), is required under the VCAA to notify the veteran regarding any further evidence the VBA requires to adjudicate the claim. 38 U.S.C. § 5103; RT 940:12-17. This notice, also known as a "duty to notify letter," must also indicate what information the veteran is expected to furnish and what evidence the VBA will seek on his behalf under the VCAA duty to assist. 38 U.S.C. § 5103; RT 940:12-17; 38 C.F.R. § 3.159(c).

74. Under the VCAA duty to assist, the VBA must seek all federal government records that may pertain to the claim. RT 940:23-941:4; 38 U.S.C. § 5103A. Typically, these will include service personnel and

medical records, but may also include other records such as VA medical records or social security records. RT 942:6-944:8. The VA must continue to seek these records until the responsible agency attests that they are no longer available. *Id.* 940:23-941:4.

75. The duty to assist also requires the VBA to undertake reasonable efforts to acquire non-federal records, typically private medical records, identified by the veteran. RT 941:5-9; 944:9-945:2. The VBA cannot initiate the search for these records without a release executed by the veteran. *Id.*

76. The duty to notify letter provides veterans with a 60-day deadline to respond with any releases and with any evidence in the veteran's possession. RT 941:19-24. Once the releases are received, the VBA is required to request the private records from their respective custodians. *Id.* 944:22-945:4. The request asks the custodian to provide the records within 60 days. *Id.* 945:3-13. If the records custodian fails to do so, the VBA sends out another request seeking a reply within 30 days. *Id.*

77. The duty to assist also includes the duty of "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A. This medical examination is known as a Compensation and Pension Examination ("C&P Exam"). RT 946:22-947:6. The purpose of the C&P Exam is to confirm that a disability exists and to assess the medical implications of that disability in

order to assist the claim adjudicator in determining the percentage the veteran will be considered disabled pursuant to the rating schedule. *Id.* 946:25-947:13. Thus, some veterans who have been treated for a disability at a VA medical facility may nonetheless be required to undergo a C&P exam. For example, a veteran may have actually been diagnosed with and treated for PTSD at a VA medical center, but because of some shortcoming in the medical records or evidence or because of some other deficiency, the veteran would still need to submit to a C&P exam if the VBA determines that one is necessary. Furthermore, a veteran may be diagnosed as not having, for example, PTSD, during a C&P Exam even after he or she was previously diagnosed as having PTSD by a treating physician at a VA medical center.

78. The VBA arranges and pays for a C&P exam. RT 951:18-952:20. The current wait time for a C&P exam is approximately 30-35 days. *Id.* 951:14-17.

79. Throughout the claims adjudication process, the evidentiary record remains open. RT 948:18-949:8. Thus, at any point, the veteran may supply new evidence. *Id.* The VACC duty to assist applies to this new evidence. *Id.* 945:3-13. In addition, the veteran may, at any time, introduce a new issue into the claim. *Id.* 949:9-950:1. For new issues, the claim development process is reinitiated so that the necessary evidence of this issue may be collected. *Id.* Between 10% and 20% of all claims have a new issue presented during the pendency of the claim. *Id.*

80. Once all the evidence has been gathered, a Rating Veterans Service Representative ("RVSR" or "rating specialist") decides whether the disability is service connected and, if it is, assigns a rating to the claim. RT 895:16-896:5; 956:19-957:9. The rating assigned to a claim is based on a sliding scale of monthly compensation ranging from $115 per month for a 10% rating to $2471 per month for a 100% rating. 38 U.S.C. § 1114. Approximately 88% of all ratings claims are at least partially granted. RT 1042:15-24.

81. Although a veteran may be represented throughout the claim adjudication process at the RO, the veteran is statutorily prohibited from compensating a lawyer to represent him at the RO level. 38 U.S.C. § 5904. Thus, veterans may be represented by attorneys acting pro bono or, more commonly, by Veteran Service Organizations ("VSOs"). RT 932:20-934:21. VSOs are organizations that work on behalf of veterans. *Id.* The VA in some cases provides VSOs with office space in the ROs, computer systems and access to VA databases. *Id.* VA, however, does not provide training to VSOs regarding how to assist veterans. *Id.* 934:4-13. In addition, all of the VSOs combined cannot meet the needs of all the veterans seeking benefits. *Id.* 514:19-515:1.

82. Veterans may appeal a rating decision by the RO by filing a Notice of Disagreement ("NOD"). RT 1008:9-24. The NOD must be filed within one year of the RO's decision. 38 U.S.C. § 7105(b)(1). The NOD is an informal paper stating that the veteran disagrees with some part of the rating decision and wishes to

appeal. RT 1008:9-24. The veteran may appeal any part of any issue in the rating decision, including the denial of an issue, the percentage of disability assigned, or the effective date. *Id.*

83. As noted above, the record remains open throughout the appeals process, thus allowing the veteran to submit additional evidence at any time. RT 176:9-20. A veteran who disagrees with the RO decision can file an appeal with the Board of Veterans Appeals ("BVA"), which decides an appeal only after the claimant has been given an opportunity for a hearing. 38 U.S.C. § 7105(a). An adverse decision by the BVA may then be appealed to the CAVC, an Article I court established by Congress with the passage of the VJRA. The CAVC has exclusive jurisdiction to review decisions of the BVA. *See* 38 U.S.C. § 7252(a). Adverse decisions from the CAVC may then be appealed to the United States Court of Appeals for the Federal Circuit, *id.* § 7292(a), and then to the Supreme Court. *Id.* § 7292(c).

84. Upon receiving an NOD, the RO sends the veteran an election letter asking the veteran to choose between two nonexclusive appeals processes: a veteran may elect *de novo* review with a Decision Review Officer ("DRO") or the veteran may request the RO to issue a Statement of the Case ("SOC"), which provides a more detailed explanation of the rationale underlying the rating decision. RT 1009:2-1014:4; 38 U.S.C. § 7105(d)(1).

85. If the veteran elects *de novo* review with a DRO, the DRO, who is a senior rating specialist, will review the file and perform any additional development, including, if necessary, meeting with the veteran and any representative the veteran may have procured. RT 896:6-12; 1011:10-20. Because the DRO review occurs post-NOD, a veteran may retain paid counsel at this stage of the proceedings. 38 U.S.C. § 5904. DROs are empowered to reverse the initial rating decision if they determine that it was not warranted. RT 1012:4-6. If the DRO resolves some but not all of the appeal, an SOC will be prepared, and the traditional appellate path is followed. *Id.* 1010:3-14; 1012:12.

86. If the veteran elects to pursue the traditional appellate path, he or she must file a VA Form 9 within 60 days of receiving the SOC, or within a year of receiving the rating decision, whichever is longer. RT 1010:3-15; 1014:5-10; 38 U.S.C. § 7105(d)(3). Once the RO receives the veteran's Form 9 substantive appeal, the RO must then certify the appeal to the BVA. 38 C.F.R. § 19.35; RT 1017:2-12. There are no statutory or regulatory time limits imposed on the VA during any step of the adjudication and appeals process for SCDDC. RT 578:22-580:21. Veterans, conversely, are constrained by various time limits and failure to meet any of these deadlines can result in forfeiture of the appeal. *Id.* 1024:17-20.

2. VBA Inventory of Claims

87. The VBA's inventory of pending rating-related claims has increased from 337,742 claims as of January 1, 2005, to 400,450 claims as of April 12, 2008. Ex. 1322.

88. On average, it takes an RO 182 days from the date a claim is filed to issue an initial decision on that claim. RT 936:8-12. As of April 12, 2008, there were 101,019 rating-related claims pending more than 180 days. Ex. 1322. VBA's strategic goal is to process all claims in 125 days. RT 936:8-15. PTSD claims take longer to adjudicate than average SCDDC claims. *Id.* 120:24-121:2; 406:21-407:16; Ex. 1264 at 160:17-21.

3. Delays in Appeals Process

89. Of the more than 830,000 ratings claims filed each year, approximately 11% result in an NOD being filed by the veteran. RT 1006:12-24. Only 4% of the total number of claims filed each year actually proceed past the NOD to a decision by the BVA. *Id.*

90. On average, as of March 2008, it was taking 261 days for an RO to mail an SOC to a veteran after receiving an NOD. Ex. 1320 at VA322-00002598. It takes a veteran 43 days, on average, to file a Form 9 substantive appeal after receiving an SOC. Ex. 1310 at VA322-00002505-06; RT 215:7-216:20. It takes 573 days, on average, for an RO to certify an appeal to the BVA after receiving a Form 9 appeal from a veteran.

Ex. 1310 at VA322-00002505-06; RT 215:7-217:2. Some veterans have had to wait more than 1,000 days for an RO to issue a certification of appeal to the BVA. Ex. 1260 at 6-7. In addition, some veterans have had to wait more than 1,000 days for an RO to even issue an SOC. *Id.* The Director of the Compensation and Pension Service within the VA, Bradley Mayes, testified at a deposition that VBA has not "made a concerted effort to figure out what's causing" these delays. *Id.* at 7.

91. The Deputy Undersecretary for Benefits for the VA, Michael Walcoff, testified that the significant delays by the ROs in issuing SOCs and certifications of appeal are attributable, in part, to the priority VA has focused on adjudicating initial claims. RT 1019:1-1020:5; 1129:20-1130:10; 1171:25-1172:18; Ex. 1258 at 12.

92. On average, it takes the BVA 336 days to issue a decision on an original appeal, as opposed to a remand, after a claim is certified to the BVA by an RO. Ex. 1310 at VA322-00002505-06.

93. Although veterans have a right to submit new evidence at any time during the appeals process, this alone does not account for the extensive delays. RT 207:25-208:3; 249:9-250:12; 364:9-23; 1019:15-20; 1129:15-1130:10; 1171:25-1172:18. When a veteran submits new evidence, the VBA issues a supplemental statement of the case ("SSOC"). *Id.* 208:4-19. Form 9 substantive appeals without an SSOC have been

pending, on average, for 320 days. *Id.* 237:4-239:16; Ex. 1320 at VA 322-00002598, 2600.

94. As part of the appeal process to the BVA, veterans have the right to a hearing before a BVA judge. 38 C.F.R. § 20.700; RT 528:23-25. At the veteran's option, the hearing may be held at the expense of the veteran in Washington D.C., or by video-conference, or at the closest RO in what is called a Travel Board hearing. 38 C.F.R. § 20.700; RT 529:1-4; 1017:16-1018:2. The Travel Board hearings typically happen only once or twice a year at each RO. RT 1018:3-16. If a veteran requests a hearing, he or she will have to wait, on average, 455 days. Ex. 1324 at VA322-00002653-54; RT 231:12-18; 581:24-582:2. Veterans who receive hearings are more likely to prevail on their appeal. Ex. 1243 at 5.

95. For veterans who pursue an appeal to completion, it takes, on average, 1,419 days to receive a BVA decision after filing an NOD. Ex. 1323 at VA322-00002552; RT 221:22-222:7. It takes approximately 4.4 years—182 days for an initial RO decision plus 1,419 days for a BVA decision—for a veteran to adjudicate a claim all the way to a BVA decision. RT 259:22-261:21. This 4.4 years excludes the time between an RO's initial decision and a veteran's NOD filing, which may be as long as one year. *Id.* 261:3-6.

96. The metric "Appeals Resolution Time" measures the average number of days, nationwide, that it takes to resolve appeals from the date an NOD is filed. RT 568:20-24. This metric, unlike the one

described in the preceding paragraph, includes claims that are resolved before the BVA issues an opinion. *Id.* 568:20-569:3. If a veteran dies before the BVA adjudicates his appeal, the appeal is considered resolved. *Id.* 1174:2-10.

97. The Appeals Resolution Time increased from 599 days in April 2005, to 671 days by the end of February 2008. RT 563:14-16; 567:17-19. During this same time period, VBA's internal goal for Appeals Resolution Time increased from 500 to 700 days. *Id.* 563:14-18; 567:13-16. The Appeals Resolution Time is expected to increase by another 100 days in fiscal year 2008. Ex. 1264 at 15-16.

98. If one excludes from the Appeals Resolution Time those claims that are resolved, for whatever reason, before the BVA issues a decision, the Appeals Resolution Time jumps to 1,419 days, or almost four and a half years. RT 573:21-574:3. At trial, James Terry, the Chairman of the BVA, was unable to explain this lengthy delay in the resolution of appeals. *Id.* 575:21-576:9.

99. The composition of the BVA is determined, in part, by statute. 38 U.S.C. § 7101. Section 7101 states that "[t]he Board shall consist of a Chairman, a Vice Chairman, and such number of members as may be found necessary in order to conduct hearings and dispose of appeals properly before the Board in a timely manner." *Id.* The statute further states that "[t]he board shall have sufficient personnel . . . to enable the Board to conduct hearings and consider and

dispose of appeals properly before the Board in a timely manner." *Id.*

100. In addition to the chairman and vice-chairman, the BVA is currently comprised of 60 judges and their respective staffs. RT 557:19-558:5. The number of judges employed by the BVA is within the discretion of the VA Secretary. *Id.* The BVA issued 40,401 decisions in fiscal year 2007. Ex. 370 at 2. 95% of these decisions dealt with SCDDC claims. *Id.* The BVA received 39,817 appeals in fiscal year 2007 and expects to receive 43,000 appeals in fiscal year 2008. *Id.*

101. On average, the BVA affirms an RO's disposition of a veteran's claim only 40% of the time. RT 1007:10-11. The BVA, on average, grants a veteran's appeal roughly 20% of the time, and the veteran's appeal is remanded by the BVA to the VBA in the remaining 40% of the cases. *Id.* 1007:2-25.

102. Of the cases certified for appeal by the ROs, between 19% and 44% were "avoidable remands." RT 559:9-560:13; 1027:9-16; Ex. 1312. An avoidable remand is defined as an appeal in which an error is made by the RO before it certifies the appeal to the BVA. *Id.* 1026:21-1027:4. Almost half of the avoidable remands that occurred between January 1, 2008, and March 31, 2008, were the result of the VBA employees violating their duty to assist veterans. *Id.* 556:2-24; 1166:14-20.

103. A survey of VBA rating specialists at ROs found that 70% of them believed that speed in

assigning ratings to claims was emphasized over accuracy. RT 161:23-163:3.

104. When the BVA remands a claim, the claim is sent either to the Appeals Management Center ("AMC"), or returned to an RO. RT 210:10-14. Once an SCDDC claim is remanded by the BVA, it takes on average 499.1 days for this claim to be granted, withdrawn, or returned to the BVA for a second time. Ex. 1243 at 13. It takes, on average, 563.9 days for PTSD claims to be granted, withdrawn, or returned to the BVA. *Id.*

105. Approximately 75% of the claims that are remanded by the BVA are subsequently appealed to the BVA a second time. RT 544:15-24. It then takes the BVA an average of 149 days to render a second decision on a claim that had already been remanded once and subsequently re-appealed to the BVA. Ex. 1310 at VA322-00002505-06; RT 215:7-217:19. The BVA Chairman Terry testified that "the entire system is hurt by remands." RT 543:20-25.

106. Between October 1, 2007, and March 31, 2008, alone, at least 1,467 veterans died during the pendency of their appeals. Ex. 1316 at VA322-00002613-24; RT 254:6-255:2. When an appellant dies, the appeal is extinguished. RT 1173:24-1174:1.

107. It is beyond doubt that disability benefits are critical to many veterans and any delay in receiving these benefits can result in substantial and severe adverse consequences, including the inability to make mortgage or car payments. RT 517:25-518:9; PIRT

324:13-325:5. Although a benefit award is generally retroactive to the date of the claim, the veteran is not entitled to interest. RT 551:7-14.

4. VA Efforts for Reducing Delay

108. In Spring of 2007, Congress authorized VBA to hire an additional 3,100 employees and provided the necessary additional appropriations. RT 918:4-21; 999:1-19. 2,700 of these new employees will be hired into the Compensation and Pension line of business. *Id.* At the time of trial, 2,100 of the 2,700 employees had already been hired. *Id.* Prior to this round of hiring, the VBA had a total of 8,000 employees. *Id.*

109. On April 16, 2008, the VBA proposed a new pilot program, in the form of a regulation, for expedited claims adjudication. Defs.' Ex. 557; 38 C.F.R. Parts 3 and 20. The two-year program would be limited to four ROs. Defs.' Ex. 557; 38 C.F.R. Parts 3 and 20. The program would ask veterans to sign a waiver upon filing a claim whereby several time limits imposed on the veteran would be shortened. Defs.' Ex. 557; 38 C.F.R. Parts 3 and 20; RT 1169:9-19. In addition, the program imposes a time limit, albeit one that is unenforceable, on the VBA during the appellate process between a veteran's Form 9 filing and an RO's certification of appeal to the BVA. RT 1167:10-1168:22. There are no consequences for the BVA if it exceeds its recommended time limit. *Id.* 1024:11-16; 1168:10-14.

110. According to Deputy Under Secretary for Benefits Walcoff's trial testimony, the VBA is also pursuing two other efforts at reducing delays in the appellate process at ROs. RT 1020:6-1021:9. The first is to establish Appeals Resource Centers dedicated solely to appellate work. *Id.* Mr. Walcoff conceded, however, that these centers are not yet in place and he has not seen a plan to create them. *Id.* 1162:7-8; 1167:6-8. The second effort at reducing delays involves emphasizing appellate performance measures in evaluations. *Id.* 1020:6-1021:9.

5. Extraordinary Awards Procedure

111. The Compensation & Pension Service ("C&P") is an organization within the VA's central office in Washington, D.C. RT 903:13-904:24. C&P is responsible for setting the policies governing adjudication of SCDDC claims. *Id.* C&P is not empowered to decide claims. Ex. 1260 at 12.

112. C&P conveys policies and procedures to ROs by publishing manuals. RT 905:22-25. C&P issues "Fast Letters" to RO directors when there are changes to a procedure within a manual. *Id.* 913:4-25. ROs are expected to abide by the terms of a Fast Letter. *Id.* 913:7-15. In Fast Letter 07-19, dated August 27, 2007, C&P outlined an "extraordinary awards" procedure for ROs to follow when dealing with claims that would result in a retroactive payment of at least eight years or a payment of more than $250,000. Ex. 375-A at 1-2; RT 1043:2-12. This procedure is not specified

in any statute or regulation. Ex. 1260 at 11-12. The procedure directs ROs to send the claims folder for all cases meeting the criteria to C&P for a concurring opinion before the benefit award is given to the veteran. Ex. 375-A at 1-2; RT 1043:2-12. Pursuant to this Fast Letter, C&P only reviews claims where the veteran was awarded retroactive benefit payments for eight years or a payment of more than $250,000. RT 1044:18-20. C&P does not review denials of such claims. *Id.* Veterans are not notified that their claims are reviewed pursuant to this procedure. *Id.* 1045:17-23.

113. C&P has reviewed approximately 800 rating decisions, most of which were reviewed because they called for benefits to be retroactively awarded for eight or more years. RT 1043:20-24. Less than 25 of the 800 rating decisions were reviewed by C&P because the proposed award was greater than $250,000. *Id.* The vast majority of those reviews resulted in a reduction of the proposed benefits. Ex. 1264 at 18.

V. CONCLUSIONS OF LAW

With the background of the foregoing findings, the Court turns to the conclusions of law and, in particular, addresses the relief sought by Plaintiffs.

A. Standing

1. Plaintiffs have demonstrated that their members have suffered injuries in fact. *Defenders of*

Wildlife, 504 U.S. at 560-61. As testified to at trial, their members have faced significant delays in receiving disability benefits and medical care from the VA. Furthermore, given the dire consequences many of these veterans face without timely receipt of benefits or prompt treatment for medical conditions, especially depression and PTSD, these injuries are anything but conjectural or hypothetical.

2. Plaintiffs have also demonstrated a causal connection between the injury and the conduct at issue. *Id.* As Defendants concede, delays in health care, especially for mental health issues, and delays in receipt of disability benefits, which are often the primary or sole source of income for a veteran, can lead to exactly the type of injuries complained of by Plaintiffs.

3. Finally, the relief sought by Plaintiffs would likely result in the amelioration of the injuries. *Id.* Defendants argue that any relief afforded by the Court would be too speculative to redress Plaintiffs' injuries. If, however, the Court were to order, for example, that the VBA adjudicate a veteran's appeal of a denial of benefits within a certain time period, Plaintiffs' injuries would be redressed. The issue, as discussed below, is whether this and the other relief sought by Plaintiffs are within the power of the Court to grant. Nonetheless, for the purpose of standing, the Court finds that Plaintiffs' individual members would have standing to sue.

4. It is clear, and Defendants do not argue otherwise, that the interests at stake are germane to the purposes of both organizations. *Friends of the Earth*, 528 U.S. at 181. Both organizations are comprised primarily of veterans and both organizations are working to decrease the wait times for, and improve the quality of, mental health care and delivery of disability benefits.

5. The participation of Plaintiffs' individual members was not required at any point throughout the duration of the trial. *Id.* For all of these reasons, the Court concludes that Plaintiffs, as organizations, have standing to bring suit on behalf of their members.

B. Waiver of Sovereign Immunity

6. To fall within the APA's waiver of sovereign immunity under 5 U.S.C. § 702, Plaintiffs must establish that they challenge final agency action for which there is no alternate adequate remedy. *Nat'l Wildlife Fed'n*, 497 U.S. at 882; 5 U.S.C. §§ 702, 704. In determining whether Plaintiffs have challenged final agency action, the Court examines each of Plaintiffs specific challenges below. In assessing whether there exists an adequate alternate forum, the Court notes that in the Motion to Dismiss Order, the Court held that the system established by Congress for adjudicating veterans' individual benefit claims does not provide an adequate alternative remedy for the limited purpose of Plaintiffs' systemic, facial constitutional

challenges. However, as discussed in detail below, even though there may not be adequate alternative remedy, Plaintiffs' challenges under the APA fail for other reasons, including failure to challenge a final agency action, failure to challenge a discrete agency action, and/or failure to challenge an action that the agency is required to take. *See Nat'l Wildlife Fed'n*, 497 U.S. at 882; *Norton*, 542 U.S. at 64. Nonetheless, in the interest of uniformity, the Court briefly revisits its discussion on adequate alternative remedy.

7. The Veterans' Judicial Review Act ("VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (1988), permits veterans to challenge VA decisions on individual benefits decisions in the CAVC. 38 U.S.C. § 7261. Pursuant to statute, the CAVC, an Article I appellate court, only has jurisdiction to affirm, reverse, or remand decisions of the BVA on individual claims for benefits. 38 U.S.C. § 7252(a). The CAVC's jurisdiction is therefore limited to the issues raised by each veteran based on the facts in his or her claim file from his or her particular case. *See*, *e.g.*, *Clearly v. Brown*, 8 Vet. App. 305, 307 (1995) (stating "[i]n order to obtain review by the Court of Veterans Appeals of a final decision of the Board of Veterans' Appeals ["BVA"], a *person* adversely affected by that *action* must file a notice of appeal with the Court") (emphasis added). Accordingly, the CAVC would not have jurisdiction over or the power to provide a remedy for the systemic challenges to the VA health system such as those brought by Plaintiffs.

8. The CAVC itself has recognized its limited remedial power, stating: "[I]t must be borne in mind that the jurisdiction of this Court is over final decisions of the BVA. . . . Nowhere has Congress given this Court either the authority or the responsibility to supervise or oversee the ongoing adjudication process which results in a BVA decision." *Clearly*, 8 Vet. App. at 308. Although the facts in *Clearly* are clearly distinguishable from those before this Court, many of Plaintiffs' challenges are aimed directly at the processes that the regional offices and the BVA use to reach decisions of individual claims. These processes, as conceded by the CAVC itself, are outside the purview of its jurisdiction.

9. In *Dacoron v. Brown*, 4 Vet. App. 115 (1993), the CAVC, then named the Court of Veterans Appeals ("CVA"), again recognized the limitation of its own remedial power. The court noted that constitutional challenges will be "presented to this Court only in the context of a proper and timely appeal taken from such decision made by the VA Secretary through the BVA." *Id.* at 119. Plaintiffs in the present case, for the reasons stated below, would be unable to bring a claim before a VA regional office, much less appeal such a claim to the BVA or CAVC. Regarding its ability to address constitutional issues through the All Writs Act, the court stated:

> Although this Court also has authority to reach constitutional issues in considering petitions for extraordinary writs under 28 U.S.C. § 1651(a), the Court may, as noted

> above, exercise such authority only when a claimant has demonstrated that he or she has no adequate alternative means of obtaining the relief sought and is clearly and indisputably entitled to such relief. *See Erspamer* [*v. Derwinski*, 1 Vet. App. 3, 7 (1990)]. Where, as here, a claimant remains free to challenge the constitutionality of a statute in the U.S. district court, she has not demonstrated that she lacks adequate alternative means of obtaining the relief sought.

Id. Thus, the very courts that were established by the VJRA recognize not only the jurisdiction of district courts for constitutional claims but, more importantly for this issue, recognize the limited jurisdiction that they themselves possess.

10. Plaintiffs, as organizations seeking to protect the interests of a broad class of veterans, would be unable to bring suit in the VA system. Organizations do not and cannot submit individual claims for benefits to the regional offices and, therefore, are precluded from ever presenting claims on appeal to the BVA, the CAVC, or the Federal Circuit. Under the position advocated by Defendants, Plaintiffs would be barred from raising these particular claims in any forum. Plaintiffs' members would be left to litigate their own individual claims while also attempting to shoehorn into their claims the challenges now asserted. The statutory framework of the VA benefits system does not provide for this and, as such, the VA benefits system is not an adequate alternate forum

for Plaintiffs' systemic and facial constitutional challenges.

C. Plaintiffs' Proposed Remedies

11. One issue that has generated some difficulty throughout this litigation has been determining exactly which practices and actions of the VA Plaintiffs challenge. For example, in their Complaint, Plaintiffs allege that "certain widespread practices and policies of the VA" are illegal. Compl. ¶ 31. Among these, Plaintiffs list protracted delays in adjudication and treatment of PTSD, premature denial of PTSD claims, and "[v]arious other illegal practices and procedures as outlined" in other parts of the 68 page Complaint. *Id.* ¶ 31a-e.

To ensure that the Court addresses the specific relief sought by Plaintiffs, the Court will use Plaintiffs' Proposed Conclusions of Law as well as the Proposed Order submitted with Plaintiffs' Post-Trial Briefing as a template to address Plaintiffs' claims and remedies.

1. Mental Health Care

12. Section 1710 states, in part, that the Secretary "shall furnish hospital care and medical services which the Secretary determines to be needed to any veteran for a service-connected disability. . . ." 38 U.S.C. § 1710(a)(1). It further states, *inter alia*:

> [A] veteran who served on active duty in a theater of combat operations . . . after

> November 11, 1998, is eligible for hospital care, medical services and nursing home care . . . notwithstanding that there is insufficient medical evidence to conclude that such condition is attributable to such service.

38 U.S.C. § 1710(e)(1)(D). Section 1710(e)(3)(C)(i) provides a five-year period for this medical care. For reasons discussed at length in the Motion to Dismiss Order, the Court found that this language created an entitlement to health care for veterans for five years after separation from active duty. *See* Mot. to Dismiss Order at 35-38. The Court need not repeat this discussion, as even with this finding, the remedies proposed by Plaintiffs are beyond the power of this Court.

13. Plaintiffs, in their Proposed Order, state the following:

> Defendants' failure to provide timely and effective health care to veterans with PTSD, and related or co-occurring conditions such as depression or traumatic brain injury, and/or veterans exhibiting suicidal intentions or symptoms, constitutes a statutory violation of 38 U.S.C. §§ 1705 and 1710, and that failure constitutes agency action unreasonably delayed under 5 U.S.C. § 706(1).

Proposed Order ¶ 5.

14. Although the provision of care is mandatory, it is beyond the power of this Court to determine when and how such care shall be provided. Were it to

do so, the Court would have to substitute its own definitions of both "timely" and "effective," something prohibited by both the APA and by §§ 1705 and 1710 themselves.

a. Timely and Effective Mental Health Care

15. Section 706(1) of the APA permits federal courts to order agencies to act only where the agency fails to "take a *discrete* agency action that it is *required to take*." *Norton*, 542 U.S. at 64 (emphasis in original). "Thus, when an agency is compelled by law to act . . . , but the manner of its action is left to the agency's discretion, a court . . . has no power to specify what the action must be." *Id.* at 65. Furthermore, "[g]eneral deficiencies in compliance . . . lack the specificity requisite for agency action." *Id.* at 66.

16. As became obvious from the parties' own mental health experts, what constitutes "timely" and "effective" health care is an issue that lacks consensus even among those who are experts in the mental health field. Thus, for example, at trial there was strong disagreement as to what constitutes appropriate or adequate care for diagnosis and treatment of veterans with PTSD, depression, and/or suicidal ideation. *See*, *e.g.*, Findings of Fact ¶¶ 58, 59, *supra.* These disagreements alone, even if the Court had the power to step in, would make it exceedingly difficult to fashion a plan and order the VA to implement a prescribed course of mental health care.

17. The Court is prohibited from even reaching that issue, however, as "[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with . . . congressional directives is not contemplated by the APA." *Norton*, 542 U.S. at 66. For these reasons, Plaintiffs' claim that the VA is not providing timely or effective mental health care is plainly precluded by the APA. Any order by this Court relating to the sufficiency and timeliness of mental health care would effectively draw this Court into the position of overseeing various aspects of the VA, something the Supreme Court has expressly prohibited. The Supreme Court has stated:

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would necessarily mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into the day-to-day agency management.

Norton, 542 U.S. at 67.

18. Finally, Plaintiffs' claim that the VA is failing to provide any mental health care is not supported by the evidence presented at trial. Even had Plaintiffs' made this showing, however, the APA would likely have prevented review in this Court, as the APA does not allow "plaintiffs to evade the finality requirement

with complaints about the sufficiency of an agency action dressed up as an agency's failure to act." *Ecology Ctr.*, 192 F.3d at 926 (internal quotation marks omitted).

19. In addition, § 1710 commits decisions about the provision of medical care to the Secretary's discretion. 38 U.S.C. § 1710. As noted above, the Court would have no manner in which to determine what type of mental health care is required. *See Webster v. Doe*, 486 U.S. 592, 600 (1988) (stating "under § 701(a)(2) [of the APA], even when Congress has not affirmatively precluded judicial oversight, review is not to be had if the statute is drawn so a court would have no meaningful standard against which to judge the agency's exercise in discretion") (internal quotation marks omitted). Section 1705 also dictates that the Secretary "ensure that the system will be managed in a manner to ensure that the provision of care to enrollees is timely and acceptable in quality." 38 U.S.C. § 1705. As such, the design and implementation of a health care enrollment system is delegated to the Secretary of the VA, leaving courts with no meaningful standards against which to judge the agency's exercise in discretion. Plaintiffs' challenge to the timeliness and effectiveness of the VA's delivery of mental health care is thus also barred by §§ 1705 and 1710.

b. Delay in Mental Health Care and Due Process

20. The *TRAC* factors provide the framework for a court to determine whether agency action has been unreasonably delayed. *See* Section III.D.1., *supra*. Before the Court can even reach the *TRAC* factors and the issue of unreasonable delays in the provision of mental health care, however, there must be a showing that there are in fact system-wide delays in providing this care. The evidence presented at trial falls short of this. For example, the Court received evidence that the majority of veterans of Iraq and Afghanistan are being seen at clinics offering mental health services within 30 days. Findings of Fact ¶ 40. Although the evidence clearly did not prove that every veteran always gets immediate mental health care, it by no means follows that there is a system-wide crisis in which health care is not being provided within a reasonable time.[4]

c. Clinical Appeals Process

21. Plaintiffs, in their Proposed Order, assert the following:

> [T]he VA's process for resolving clinical disputes about health care treatment violates

[4] Plaintiffs, perhaps realizing this, did not include in their Proposed Order any language relating to Due Process violations and delays in mental health care. *See* Proposed Order ¶¶ 4-6.

> the Due Process Clause in that it does not apply to refusals to provide care. . . .

Proposed Order ¶ 6. As noted in the Findings of Fact, a veteran may appeal a clinical medical decision, but if, for example, a veteran is told to return at a later date solely on the basis that there are no available appointments, he or she has no way of appealing this decision. If, however, a veteran is told to come back later because a VA employee has indicated that the veteran's health will not be adversely affected by coming at a later time, then the veteran can appeal this clinical diagnosis.

22. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 335. In evaluating whether a procedure satisfies Due Process, courts balance (1) the private interest, (2) the risk of erroneous deprivation and the likely value, if any, of extra safeguards, and (3) the government's interest, especially the burden any additional safeguards would impose. *Id.* at 332.

23. Without question, the private interest of veterans in receiving health care is high. The risk of erroneous deprivation, however, is less so. The Court heard testimony during the trial that veterans who present at a VA medical facility with emergency mental health issues are seen immediately. This is not to say that every time a veteran presents with a mental health emergency, he or she is guaranteed immediate treatment. Nonetheless, Plaintiffs did not

prove a systemic denial or unreasonable delay in mental health care. In addition, a veteran who is told to come back at a later time because his or her health is such that immediate treatment is not required may appeal this clinical decision. Finally, additional safeguards at this level would impose burdens on the VA. *See Parham v. J.R.*, 442 U.S. 584, 605 (1979) (stating that the government "has a genuine interest in allocating priority to the diagnosis and treatment of patients . . . rather than to time-consuming procedural minuets").

24. Plaintiffs' Proposed Order also states that the clinical appeals process violates Due Process because "there is no opportunity for any hearing by a neutral decision-maker, the process is unduly complicated and lengthy, and there is no provision for any expedited process that would apply in an emergency situation such as a threatened suicide." Proposed Order ¶ 6. "Procedural due process requires adequate notice and an opportunity to be heard." *Kirk*, 927 F.2d at 1107.

25. The process for clinical appeals involves consultation with the treating physician, access to patient advocates, and the opportunity to appeal a medical decision to both the facility and VISN level. Findings of Fact ¶ 52. Moreover, due process does not "always require an adversarial hearing," nor does it require an "independent decision maker come from outside the hospital administration." *Hickey*, 722 F.2d at 549. The process afforded veterans seeking to appeal their medical decisions strikes the Court as an appropriate

balance between safeguarding the veteran's interest in medical treatment and permitting medical treatment without overly burdensome procedural protections. In addition, the Court is mindful of the Supreme Court's admonition that "[t]he mode and procedure of medical diagnostic procedures is not the business of judges." *Parham*, 442 U.S. at 607-08. For these reasons, the Court cannot conclude that the VA clinical appeals process violates Due Process.

2. Mental Health Strategic Plan

26. Plaintiffs ask the Court to order the VA, within 150 days, to fully implement the MHSP. Proposed Order ¶ 12. Plaintiffs concede that the MHSP is a good plan. Thus, rather than attacking the MHSP itself, Plaintiffs instead attack the VA's slow progress and/or failure in implementing the MHSP.

27. Such an attack relies on § 706 of the APA, which provides that a "reviewing court shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(a). "Review of an agency's failure to act has been referred to as an exception to the final agency action requirement." *Ctr. for Biological Diversity*, 218 F. Supp. 2d at 1157. "Courts have permitted jurisdiction under the limited exception to the finality doctrine only when there has been a genuine failure to act." *Ecology Ctr.*, 192 F.3d at 926. The Ninth Circuit "has refused to allow plaintiffs to evade the finality requirement with complaints about the sufficiency of an agency action dressed up as an

agency's failure to act." *Id.* (internal quotation marks omitted). Plaintiffs' challenge to the manner and speed with which the MHSP has been implemented is foreclosed by this caselaw.

28. Furthermore, waiver of sovereign immunity under § 706 of the APA requires a challenge to "a discrete agency action that [the agency] is required to take." *Norton*, 542 U.S. at 64. The MHSP falls outside of this definition. The MHSP consists of 265 recommendations. Findings of Fact ¶ 27. Whether a plan with this many recommendations can be characterized as "discrete agency action" is dubious. More problematic, however, is the fact that the actions and strategies outlined in the MHSP are recommendations, and, accordingly, are not actions the VA "is required to take."

29. Finally, as Plaintiffs concede, the MHSP was developed as a five year plan and is currently only in the fourth year of implementation. It would be anomalous for the Court to find that the MHSP were a final agency action or that the VA has failed or delayed to implement the MHSP, when the action is ongoing and is not even expected to conclude until late next year. For these reasons, Plaintiffs' request that the Court order the VA to implement the MHSP within 150 days is barred by sovereign immunity.

3. Feeley Memorandum

30. Plaintiffs' request that the Court order the VA to fully implement the Feeley Memo within 150

days is equally problematic under the APA's requirements for waiver of sovereign immunity. Although the Feeley Memo, and its call for 24-hour mental health triage and 14-day follow-up mental health care is much more akin to a discrete agency action than the MHSP, it nonetheless is not an action that the VA is required to take. Instead, the Feeley Memo contains "initiatives" created by the Secretary that were designed to "enhance the capacity of mental health services, and facilitate access to high quality services." Findings of Fact ¶ 34. "The limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law." *Norton*, 542 U.S. at 65. Moreover, "[g]eneral deficiencies in compliance, unlike [a] failure to issue a ruling . . . , lack the specificity requisite for agency action." *Id.* at 66. For these reasons, Plaintiffs' request that the Court order the VA to fully implement and monitor the Feeley Memo initiatives is barred by sovereign immunity.

4. Delays in Adjudication of SCDDC Benefits

31. Plaintiffs assert that the delays in adjudicating SCDDC benefit claims are excessive and unreasonable and therefore violate the rights of veterans under the APA and the Due Process Clause.

32. It takes the VBA, on average, 183 days to adjudicate a claim filed by a veteran. Findings of Fact ¶ 67. Of the more than 830,000 ratings claims

filed each year, approximately 11% result in an NOD being filed by the veteran. *Id.* ¶ 89. Only 4% of the total number of claims filed each year actually proceed past the NOD to a decision by the BVA. *Id.* For veterans who pursue an appeal to completion, it takes, on average, 1,419 days to receive a BVA decision after filing an NOD. *Id.* ¶ 95. Although these delays in benefits claims adjudications, especially for appeals, are substantial, the existing statutory framework and caselaw prevent this Court from taking remedial action. This conclusion is reinforced by the fact that only 4% of the total claims each year are appealed and pursued to a decision by the BVA.

33. As noted above, 38 U.S.C. § 511 prevents the Court from reviewing delays in individual veterans' cases. The issue, however, of whether a veteran's benefit claim adjudication has been substantially delayed will often hinge on specific facts of that veteran's claim. For example, a veteran who raises seven or eight issues in his or her claim will likely face a more protracted delay than a veteran who raises only one or two issues. Thus, although the determination of whether the delay is unreasonable may depend on the facts of each particular claim, *Crosby v. Soc. Sec. Admin.*, 796 F.2d 576, 580 (1st Cir. 1986), § 511 prevents this Court from undertaking such a review.

34. Furthermore, were the Court to implement the injunctive relief requested by Plaintiffs and order that the VA shorten the average wait times, such an order would invariably implicate VA regulations. For

example, 38 C.F.R. § 3.159(b)(1) requires the VA to notify claimants once the VA has received most or all of a claim application; 38 C.F.R. § 3.159(c) requires the VA to assist the veteran in obtaining medical records; 38 C.F.R. § 3.103(c) provides the time limit for filing a Notice of Disagreement; 38 C.F.R. § 3.109(a) provides that a veteran's claim is treated as abandoned if evidence is not submitted within one year; and 38 C.F.R. §§ 20.200-20.202 set forth the procedural requirements to pursue an appeal. 38 U.S.C. § 502 permits litigation of challenges to VA regulations only in the Federal Circuit. *See Preminger*, 422 F.3d at 821 (stating "Congress has explicitly provided for judicial review of direct challenges to VA rules and regulations only in the Federal Circuit"). Plaintiffs argue that even though various regulations are implicated in the relief they seek, § 502 does not strip the jurisdiction of this Court because Plaintiffs do not directly challenge the regulations. An order expediting claims adjudications, however, would force the VA to alter or repeal some of these regulations. Although the Court does not suggest that VA regulations alone are responsible for the substantial delays, an injunction requiring expedited claims processing would necessarily challenge some of these regulations, and any such challenge is reviewable only in the Federal Circuit.

35. Plaintiffs also argue they are entitled to relief under the APA for the delays in claims adjudications. In assessing whether agency action has been unreasonably delayed pursuant to § 706 of the APA,

courts look to the *TRAC* factors.[5] *See* III.D.1., *supra.* Although the delays faced by veterans, especially during the appeals process, are significant, the *TRAC* factors militate against a finding of unreasonableness. The first and second factors, dealing with the "rule of reason" and any Congressional timetable or indication of the speed with which the agency should act, favor neither a finding of reasonableness nor unreasonableness. Various statutes admonish the VA to adjudicate benefits claims and appeals in a timely manner. *See*, *e.g.*, 38 U.S.C. § 7101 (statutory duty to hire sufficient personnel to process appeals at the BVA in a timely manner); 38 U.S.C. § 5109B (statutory duty to resolve remands in expeditious manner). These statutes, rather than providing meaningful signposts for what constitutes a reasonable time, however, instead beg the question. This conclusion is reinforced by the fact that Congress specifically did not include any fixed time limits for the adjudication of veterans benefits claims, an act of which it is perfectly capable and which would definitively and immediately remedy the delays. *Cf. Heckler v. Day*, 467 U.S. 104, 117-18 (1984) (stating "[i]n light of Congress' continuing concern that mandatory deadlines would subordinate quality to timeliness, and its recent efforts to ensure the quality of agency determinations, it hardly could have been contemplated that courts should have

[5] It is uncontested the adjudication of benefits claims is a discrete agency action that the VA is required to take. *Norton*, 542 U.S. at 64; 5 U.S.C. § 706.

authority to impose the very deadlines it repeatedly has rejected").[6]

36. The third *TRAC* factor favors a finding of unreasonableness. Delays affecting human health and welfare are less tolerable than those in the sphere of economic regulation and no one can dispute that the health and welfare of veterans is at stake. For this same reason the fifth factor favors relief, as the nature and extent of the interests prejudiced by the delay could not be any more serious. The sixth factor, in which a court need not find impropriety in order to find the agency action was unreasonably delayed, also favors relief. Although the VA's track record, especially in the area of delays, is troubling, the Court has found no impropriety.

37. These factors, however, cannot overcome the fourth factor, which states that "the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority." *Indep. Mining Co.*, 105 F.3d at 507 n.7. The Court heard testimony that the current delays in the claims appeals process are, in part, the result of the VA's decision to emphasize initial claim adjudication at the

[6] Legislation was introduced, and rejected, during the 102st [sic] and 102nd Congresses that would have required the VA to pay interim benefits if disability and dependency claims that were not decided within 180 days. *See* Veterans' Claims Administrative Equity Act of 1990, H.R. 5793, 101st Cong. (1990); Veterans' Claims Administrative Equity Act of 1991, H.R. 141, 102nd Cong. (1991).

expense of appeals. Findings of Fact ¶ 91. Clearly this does not fully explain the significant delays. One of the most common reasons for a claim to be remanded to an RO is the VA's failure to meet its duty to assist veterans. This is proof that internal, avoidable forces within the VA are also creating these delays. Nonetheless, given the substantial number of claims and appeals received each year by the VA, and the fact that only 11% of veterans file Notices of Disagreement after their claims are adjudicated at the RO level and only 4% of the total claims are actually pursued to a decision by the BVA, the Court finds that the fourth *TRAC* factor outweighs the others. An order by this Court requiring the VA to decrease its appeals times would necessarily impact those seeking initial benefits, as resources would be diverted from the RO level to the appellate level. As discussed elsewhere in this Order, claims adjudications at the RO level already face delays. The relief Plaintiffs seek would, in effect, divert resources from the RO level, where 88% of veterans finalize their receipt of benefits, so that the 4% to 11% of veterans who pursue appeals would face lessened delays. Given that almost 90% of veterans depend solely on the RO adjudication process for their benefits, the Court is wary of granting relief that would jeopardize the already taxed ROs. For these reasons, the *TRAC* factors do not favor a finding that the delays in the VA claims adjudication system are unreasonable. This conclusion is consistent with the Supreme Court's warning to district courts that the "prospect of pervasive oversight by federal courts over the manner and pace of agency

compliance with . . . congressional directives is not contemplated by the APA." *Norton*, 542 U.S. at 66.

38. Plaintiffs also assert that the "[d]elays and waiting times for applicants and recipients filing SCDDC claims or appeals are so lengthy as to constitute an unconstitutional deprivation of property under the Due Process Clause." Proposed Order ¶ 7. Recipients of statutorily-entitled compensation have a property interest under the Due Process Clause in the continued receipt of such compensation. *Mathews*, 424 U.S. at 332; *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970). More importantly for present purposes, "[t]he Ninth Circuit has long held that applicants have a property interest protectible under the Due Process Clause where the regulations establishing entitlement to the benefits are . . . mandatory in nature." *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998).

39. Claimants who satisfy the statutory criteria for eligibility are entitled as a matter of law to SCDDC benefits. Based on the statutory framework, many veterans have a protected property interest as applicants for and recipients of SCDDC benefits.

40. "[T]here is no talismanic number of years or months, after which due process is automatically violated." *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990). "In determining when due process is no longer due process because past due, the influence of other significant circumstances is not to be ignored." *Wright v. Califano*, 587 F.2d 345, 354 (7th Cir. 1978). "Delay

is a factor but not the only factor." *Id.* Although the delays in claims adjudication are significant, the Court, in light of many of the factors creating these delays, cannot conclude that the due process rights of veterans are being violated. The court's discussion in *Wright* of delays in the Social Security Administration context is illuminating. The court stated:

> In view of the reasons for delay, nationwide in scope, not individualized, and the nature of particular benefits, a judicial fiat cannot help the SSA or claimants. Although judicial intervention may be required at some point, the solution must come from the SSA itself with the assistance of Congress. To impose on the SSA the crash review program sought by plaintiffs could be expected to result in a deterioration of the quality of the review, and possibly more injustice to claimants than justice.

Wright, 587 F.2d at 356. The Court finds this reasoning applicable to the present case. *See also Fed'l Trade Comm'n v. Weingarten*, 336 F.2d 687, 692 (5th Cir. 1964) (holding that "it would be the extremely rare case where a Court would be justified in holding . . . that the passage of time and nothing more presents an occasion for the peremptory intervention of an outside Court in the conduct of an agency's adjudicative proceedings").

5. Claims Adjudication Process

41. Plaintiffs assert that the claims adjudication process violates the due process rights of veterans, stating:

> Given the adversarial and complicated nature of the VA claims processes, the unavailability or lack of utilization of basic procedural protections, such as a right to a pre-decisional hearing and the right to discovery, both alone and in combination with the inability to retain paid counsel at the Regional Office level, constitute an independent violation of the Due Process Clause.

Proposed Order ¶ 8.

42. VA regulations state:

> Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government.

38 C.F.R. § 3.103. In addition, 38 U.S.C. § 5904(c) prohibits paid counsel at the RO level. Once the veteran files a notice of disagreement with an RO decision, the veteran may then retain paid counsel.

42. To begin, the Court notes that in the Motion to Dismiss Order, the Court cited a case from the Federal Circuit in support of the proposition that the claims adjudication system, although designed to be non-adversarial, had shifted towards an adversarial system. *See* Mot. to Dismiss Order at 32 (stating "[t]he Federal Circuit, which has exclusive appellate jurisdiction under the VJRA, has recognized [a] de-facto shift towards an adversarial system") (citing *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc)). In *Bailey*, the court stated:

> Since the Veterans' Judicial Review Act . . . , it appears the system has changed from a nonadversarial, ex parte, paternalistic system for adjudicating veterans' claims, to one in which veterans . . . must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review.

Bailey, 160 F.3d at 1365 (internal citations and quotation marks omitted). Based on this assessment, this Court permitted Plaintiffs' due process challenge to the VA claims adjudication system to proceed, noting, "[i]f the VA claims adjudication process were truly non-adversarial, then Plaintiffs' due process claim would be on shaky ground." Mot. to Dismiss Order at 32.

43. Four years after *Bailey*, the Federal Circuit clarified its holding, stating that the "veterans' benefits system remains a non-adversarial system when cases are pending before the Veterans' Administration,"

while the "Court of Appeals for Veterans Claims' proceedings are not non-adversarial." *Forshey v. Principi*, 284 F.3d 1335, 1355 (Fed. Cir. 2002) (en banc) (superceded by statute on other grounds by Pub. L. No. 107-330, § 402(a), 116 Stat. 2820, 2832 (2002)). Thus, according to the Federal Circuit, the process at the RO level remains non-adversarial.

44. Nonetheless, Plaintiffs challenge the absence of trial-like proceedings and assert that the current system violates veterans' due process rights. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 335. In evaluating whether a procedure satisfies Due Process, courts balance (1) the private interest, (2) the risk of erroneous deprivation and the probable value, if any, of extra safeguards, and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or procedural requirement would entail. *Id.* Although "[p]rocedural due process requires adequate notice and an opportunity to be heard," *Kirk*, 927 F.2d at 1107, it does not "always require an adversarial hearing." *Hickey*, 722 F.2d at 549. "The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982).

45. Under the *Mathews* factors, the current system for adjudicating veterans' SCDDC claims satisfies

due process. It is without doubt that veterans and their families have a compelling interest in receiving disability benefits and that the consequences of erroneous deprivation can be devastating. In looking at the totality of SCDDC claims, however, the risk of erroneous deprivation is relatively small. 11% of veterans file Notices of Disagreement upon adjudication of their claims by ROs. Only 4% proceed past the NOD to a decision by the BVA. Thus, while the avoidable remand rates at the VA are extraordinarily high,[7] only 4% of veterans who file benefits claims are affected. Plaintiffs here "confront the constitutional hurdle posed by the principle enunciated in cases such as *Mathews* to the effect that a process must be judged by the generality of cases to which it applies, and therefore, process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985).

46. Moreover, although the additional safeguards Plaintiffs seek would likely reduce the number of avoidable remands and erroneous deprivations, the fiscal and administrative burdens of these additional procedural requirements are significant. Plaintiffs seek, in essence, to transform the claims adjudication

[7] The avoidable remand rate measures remands from the BVA to the ROs where the RO made an error in the initial adjudication of the claim. The current rate is between 19% and 44%. Findings of Fact ¶ 102.

process at the RO level from an ostensibly non-adversarial proceeding into one in which the full panoply of trial procedures that protects civil litigants is available to veterans. For example, Plaintiffs seek the general right of discovery, including the power to subpoena witnesses and documents, the ability to examine and cross-examine witnesses, the ability to pay an attorney, and the right to a hearing.[8] Implementation and maintenance of such a system would be costly in terms of the resources and manpower that the VA would need to commit to the RO proceedings.

47. The Supreme Court addressed a similar challenge to the VA benefits adjudication process in *Walters*, 473 U.S. at 307. There, the plaintiffs challenged the statutory fee limitation on attorneys during VA benefits proceedings. *Id.* at 307. The Court, after noting that "the [benefit adjudication] process here is not designed to operate adversarially," *id.* at 330, held that, "[e]specially in light of the Government interests at stake," the limit on attorneys fees did not violate the Due Process Clause. *Id.* at 334. In so doing, the Court noted the high showing necessary to "warrant upsetting Congress' judgment that this is the manner in which it wishes claims for veterans' benefits adjudicated." *Id.* Although it might seem anomalous, as one witness candidly suggested at

[8] The Court notes that veterans currently have the right to a hearing before an RO. 38 C.F.R. § 3.103(c) ("Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim . . . ").

trial, that criminal defendants and undocumented immigrants are permitted to pay attorneys at their initial proceedings while veterans are prohibited from doing the same, Congress has nonetheless seen fit to establish such a system and this Court, so long as the system does not violate the Constitution, is powerless to alter it. *See also Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, (1978) (stating:

> Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.)

48. For these reasons, the Court finds that the SCDDC benefits adjudication process does not violate the Due Process Clause.

6. Right of Access the Courts

49. Plaintiffs assert that the lack of adequate procedural protections for veterans in the SCDDC claims process deprives claimants of meaningful access to the courts and of their right to redress grievances in violation of the First Amendment and the Due Process Clause. Plaintiffs argue that the cumulative

effect of foreclosing the opportunity to subpoena witnesses and records, disallowing payment of counsel, and requiring veterans to rely on non-neutral VBA service representatives denies veterans any meaningful opportunity to litigate their appeals at the CAVC and the Federal Circuit.

50. A forward-looking denial of access claim requires "an arguable underlying claim and present foreclosure of a meaningful opportunity to pursue that claim." *Broudy*, 460 F.3d at 121 (relying on *Lewis v. Casey*, 518 U.S. 343, 353 (1996), and *Christopher v. Harbury*, 536 U.S. 403, 415).

51. Plaintiffs' claim is foreclosed by *Walters*, 473 U.S. at 305, and by this Court's finding that the SCDDC benefits adjudication process does not violate the Due Process Clause.

52. In the present case, as in *Walters*, "the asserted First Amendment interest is primarily the individual interest in best prosecuting a claim. . . ." *Walters*, 473 U.S. at 335. The Court in *Walters*, however, rejected the notion that there was a meaningful distinction between the plaintiffs' due process claims and their First Amendment claim, stating, "appellees' First Amendment arguments, at base, are really inseparable from their due process claims." *Id.* Accordingly, the appellees' "First Amendment claim ha[d] no independent significance" from the due process claims. *Id.* The same analysis is directly applicable to the present action. For these reasons, Plaintiffs' right of access claim is without merit.

7. Extraordinary Awards Procedure

53. Plaintiffs assert that the informal adoption of the Extraordinary Awards Procedure ("EAP") by C&P, as described in the Findings of Fact ¶¶ 111-13, *supra*, deprives veterans with claims that would result in a retroactive payment of at least eight years of benefits or a payment of more than $250,000 of their property interest in the receipt of SCDDC benefits under the Due Process Clause.[9]

54. A brief review of the EAP: C&P is an organization within the VA's central office in Washington, D.C., that is responsible for setting the policies governing adjudication of SCDDC claims. Although C&P is not empowered to decide claims, it does convey policies and procedures to ROs by publishing manuals. When there are changes to a procedure within a manual, C&P issues "Fast Letters" to RO directors. In Fast Letter 07-19, dated August 27, 2007, C&P outlined the EAP. This procedure is not specified in any statute or regulation. The procedure directs ROs to send the claims folders for all cases meeting the criteria[10] to C&P for a concurring opinion before the benefit award is given to the veteran. C&P reviews only the granting of such claims by ROs, not denials,

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[9] A similar challenge to the EAP is now pending in the Federal Circuit. *See Military Order of the Purple Heart v. Sec'y of Veterans Affairs*, Docket No. 2008-7076 (Fed. Cir.).

[10] Claims that would result in a retroactive payment of at least eight years of benefits or a payment of more than $250,000 are reviewed by C&P.

and veterans are not notified that their claims are reviewed pursuant to this procedure. C&P has reviewed approximately 800 rating decisions and almost all of these reviews resulted in a reduction of the proposed benefits.[11]

55. The Secretary of the VA may delegate the "authority to act and to render decisions, with respect to all laws administered by the Department, to such officers and employees as the Secretary may find necessary." 38 U.S.C. § 512(a). In addition, the "Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including . . . the manner and form of adjudications and awards." 38 U.S.C. § 501(a). In delegating authority for benefits adjudication, the following regulation was promulgated:

> Authority is delegated to the Under Secretary for Benefits and to supervisory or adjudicative personnel within the jurisdiction of the Veterans Benefits Administration designated by the Under Secretary to make findings and decisions under the applicable laws . . . as to entitlement of claimants to benefits under all laws administered by the [VA] governing the payment of monetary benefits to

[11] These facts are taken from the Findings of Fact, ¶¶ 111-13, *supra*.

> veterans and their dependents, within the jurisdiction of [C&P].

38 C.F.R. § 3.100.

56. As a threshold matter, Defendants argue that Plaintiffs have failed to demonstrate that any of their members have been affected or will be affected by the EAP. As Defendants concede, however, a veteran whose benefit award is reviewed by C&P is never told of this review process. Thus, for example, a veteran's benefit may initially be set at $275,000 by the RO. Because the award is greater than $250,000, however, the EAP is triggered and, before the veteran is notified of this award, his claim folder is sent to C&P. Hypothetically, C&P might then reduce the award to less than $250,000. The veteran would subsequently be granted the benefit without ever knowing that his award had been reduced by C&P, or even that the benefit award had initially qualified for EAP. As veterans have no way of knowing whether their benefits were affected by the EAP, Plaintiffs have no way of demonstrating that any of their members were adversely affected. For present purposes, the Court is confident that Plaintiffs have standing to pursue this claim, which the Court discusses in the following Conclusion of Law, ¶ 57.

57. Plaintiffs argue that, in essence, the EAP is an extra-judicial process that the VA has added to the benefits adjudication system in an effort to strip veterans of benefits that have already been determined by the RO. As the above-cited statutory language

indicates, Congress provided the Secretary of the VA with wide discretion in determining how benefits are to be determined. *See* 38 U.S.C. § 512(a). Against this backdrop, the Court is forced to conclude that the EAP is an internal management directive that merely establishes the procedures by which a certain class of benefits claims is reviewed. The EAP is essentially an auditing mechanism implemented by the VA to ensure that these types of awards are accurately adjudicated. Such a procedure does not offend due process.

VI. POST-TRIAL HEARING

On June 10, 2008, after the close of evidence, the Court held a hearing regarding newly discovered evidence. Docket Nos. 236, 237. The evidence was an email sent by the PTSD Program Coordinator of the Central Texas Veterans Health Care system, Dr. Norma Perez, to her colleagues. Plaintiffs apparently were provided the email by a Washington D.C.-based non-profit organization, which had procured the email through a Freedom of Information Act ("FOIA") request.[12] *See* Pls.' Letter to Court, Docket No. 231.

At the hearing, the Court permitted the email to be entered into evidence and hereby designates the email Plaintiffs' Trial Exhibit 1347. In addition, Plaintiffs requested that the Court enter into evidence the

[12] It is unclear to the Court why this email was not produced by Defendants prior to the trial.

transcript from a June 4, 2008, hearing held by the Senate Committee on Veterans Affairs. This hearing had been convened by the Senate Committee to address the above-described email. At the Senate hearing, testimony was received from Dr. Norma Perez, Dr. Michael Kussman, Under Secretary for Health, Dr. Katz, Deputy Chief of Patient Care Services Office of Mental Health for the VA, and Admiral Patrick Dunne, Acting Under Secretary for Benefits. The Court entered the transcript for this hearing into evidence and hereby designates it Plaintiffs' Trial Exhibit 1348.

The email at issue contains the subject "Suggestion," and states:

> Given that we are having more and more compensation[-]seeking veterans, I'd like to suggest that you refrain from giving a diagnosis of PTSD straight out. Consider a diagnosis of Adjustment Disorder, R/O [Rule Out] PTSD.
>
> Additionally, we really don't or [sic] have time to do the extensive testing that should be done to determine PTSD.
>
> Also, there have been some incidence [sic] where the veteran has a C&P is not given a diagnosis of PTSD, then the veteran comes here and we give the diagnosis, and the veteran appeals his case based on our assessment.

> This is just a suggestion for the reasons listed above.

Ex. 1347.

At the hearing, Plaintiffs argued that the email was compelling evidence of the VA's failure and/or refusal to properly diagnose and treat PTSD. In addition, Plaintiffs argued that without further discovery, it would be impossible to know for sure whether similar directives or "suggestions" were being followed at other medical centers. According to Plaintiffs, this email could likely lead to further evidence of a systemic denial of PTSD care to veterans.

The Court denied Plaintiffs' request to reopen discovery, noting that the evidentiary record was closed except for the limited purpose of admitting the email at issue and the Senate testimony transcript and evaluating the import of their contents.

Dr. Perez is one minor supervisor in a bureaucracy of 230,000 employees. At the time of the email, Dr. Perez had less than a year in her position at the VA and the email she sent had limited distribution. Although the message Dr. Perez's email conveys is troubling, the Court concludes that the email is not enough to alter the fact that Plaintiffs have failed to demonstrate systemic denials of health care and benefits and that, absent proof of systemic problems, the Court is unable to grant the relief requested by Plaintiffs.

VII. CONCLUSION

The remedies sought by Plaintiffs are beyond the power of this Court and would call for a complete overhaul of the VA system, something clearly outside of this Court's jurisdiction. For the reasons stated above, the Court DENIES Plaintiffs' request for a permanent injunction and GRANTS judgment in favor of Defendants.

IT IS SO ORDERED.

Dated: June 25, 2008

/s/ Samuel Conti
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA.

VETERANS FOR COMMON SENSE, a District of Columbia Nonprofit Organization; and VETERANS UNITED FOR TRUTH, INC., a California Nonprofit Organization, representing their members and a class of all veterans similarly situated, Plaintiffs, v. R. JAMES NICHOLSON, Secretary of Department of Veterans Affairs; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; JAMES P. TERRY, Chairman, Board of Veterans Appeals; DANIEL L. COOPER, Under Secretary, Veterans Benefits Administration; BRADLEY G. MAYES, Director, Compensation and Pension Service; DR. MICHAEL J. KUSSMAN, Under Secretary, Veterans Health Administration; PRITZ K. NAVARA, Veterans Service Center Manager, Oakland	No. C-07-3758 SC ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND GRANTING PLAINTIFFS' ADMINISTRATIVE MOTION TO FILE VETERAN AND FAMILY MEMBER PERSONAL IDENTIFYING INFORMATION UNDER SEAL (Filed Jan. 10, 2008)

Regional Office, Department of Veterans Affairs; UNITED STATES OF AMERICA; ALBERTO GONZALES, Attorney General of the United States; and WILLIAM P GREENE, JR., Chief Judge of the United States Court of Appeals for Veterans Claims,

Defendants.

I. INTRODUCTION

This matter comes before the Court on the Motion to Dismiss filed by the defendants James Nicholson *et al.* ("Defendants"). *See* Docket No. 19. The plaintiffs Veterans for Common Sense and Veterans United for Truth, Inc. ("Plaintiffs"), filed an Opposition and Defendants submitted a Reply.[1] *See* Docket Nos. 36, 55. Also before the Court is Defendants' Motion for Protective Order to Stay Discovery ("Motion for Protective Order"). *See* Docket No. 39. Plaintiffs submitted an Opposition and Defendants filed a Reply. *See* Docket Nos. 46, 62. The Court held a hearing on the above motions on December 14, 2007.

[1] The Court reminds both parties that the Civil Local Rules are not optional. In particular, the Court directs both parties to familiarize themselves with Rule 7-4(b). Plaintiffs have filed an Opposition in violation of this Rule. Defendants, not to be outdone, have filed a Reply that is also in violation of this Rule. If this pattern continues the Court will strike all material exceeding the page limits set out in Rule 7-4(b).

Finally, Plaintiffs have filed an Administrative Motion to File Veteran and Family Member Personal Identifying Information Under Seal ("Motion to File Under Seal"). *See* Docket No. 68.

After considering the parties' papers and oral arguments, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion to Dismiss. Defendants' Motion For Protective Order to Stay Discovery, which was granted during the December 14 hearing, is now moot, as Defendants only sought to stay discovery pending this Court's decision on Defendants' Motion to Dismiss. Finally, Plaintiffs' Motion to File Under Seal is GRANTED.

II. BACKGROUND

Plaintiffs are non-profit organizations that represent the interests of veterans of the Iraq, Afghanistan and earlier conflicts who have sought medical treatment or filed disability claims based on Post-Traumatic Stress Disorder ("PTSD"). Plaintiffs filed a Complaint for injunctive and declaratory relief that broadly challenges the benefits adjudications programs of the United States Department of Veterans Affairs ("VA").

Veterans seeking benefits for service-connected disability or death must file a claim in one of 58 regional VA offices. The proceedings at the regional offices are ostensibly designed to be non-adversarial. For example, veterans are prohibited from paying an attorney for assistance at this initial stage, *see* 38

U.S.C. § 5904(c)(1); discovery tools are limited or nonexistent, *see id.* § 5103A; and veterans are generally prevented from compelling the attendance of witnesses to support their claims, *see id.* § 5711.

A veteran who disagrees with the regional office decision can file an appeal with the Board of Veterans Appeals ("BVA"), which decides an appeal only after the claimant has been given an opportunity for a hearing. *See id.* § 7105(a). An adverse decision by the BVA may then be appealed to the United States Court of Appeals for Veteran Claims ("CAVC"), an Article I court established by Congress with the passage of the Veterans' Judicial Review Act ("VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (1988). The CAVC has exclusive jurisdiction to review decisions of the BVA. *See* 38 U.S.C. § 7252(a). Adverse decisions from the CAVC may then be appealed to the United States Court of Appeals for the Federal Circuit, *see id.* § 7292(a), and then to the Supreme Court. *Id.* § 7292(c).

Plaintiffs have filed four causes of action seeking declaratory and injunctive relief challenging the constitutionality of various provisions of the VJRA as well as seeking enforcement of several preexisting statutes. Specifically, Plaintiffs seek declaratory relief for: (1) denial of due process in violation of the Fifth Amendment of the United States Constitution; (2) denial of access to the courts in violation of the First and Fifth Amendments; (3) violation of 38 U.S.C. § 1710(e)(1)(D) pertaining to medical care for returning veterans; and (4) violation of Section 504 of the Rehabilitation Act. Plaintiffs also seek injunctive

relief. Defendants, in seeking dismissal of Plaintiffs' Complaint, raise numerous issues. The Court addresses each in turn.

III. STANDING

Defendants argue that Plaintiffs lack standing because they have failed to identify individual members of Plaintiffs' organizations who have suffered an alleged injury, and, even if such members had been identified, their participation in the action would be required.

> An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000).

Plaintiffs have alleged that their organizations are comprised of veterans, including many who have claims pending before the VA or the BVA, who receive VA benefits that have been threatened with reduction by the VA, or who suffer from PTSD. Compl. ¶¶ 35-38. Such allegations are sufficient, at this stage, to satisfy the Court that Plaintiffs' members would "otherwise have standing to sue in their own right." *Friends of the Earth,* 528 U.S. at 181. In addition,

Plaintiffs argue that they themselves are harmed by Defendants' alleged violations because Plaintiffs are forced to spend their resources in attempting to secure benefits for their members. *See Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982) (stating that an allegation of a "consequent drain on the organization's resources" is sufficient to satisfy the standing requirement of a "concrete and demonstrable injury . . . "); *see also Warth v. Seldin,* 422 U.S. 490, 515 (1975) (holding that "[t]here is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy").

Defendants also argue that resolution of the present action requires the participation of Plaintiffs' members, thereby depriving Plaintiffs of organizational standing. In particular, Defendants assert that individual participation of Plaintiffs' members would be necessary to determine whether any of the alleged violations caused actual harm and whether the relief sought would redress this harm.

To satisfy this standing requirement, the following is required:

> The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of

> the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Warth, 422 U.S. at 511. Given the nature of Plaintiffs' claims, especially in regard to the allegations of systemic legal violations, the Court, at this stage, is not convinced that the individual participation of each injured party will be indispensable to the present action. Plaintiffs' due process claim will depend largely on the claims adjudication procedures enacted under the VJRA, and not necessarily on individual veteran's claims. The same is true regarding Plaintiffs' access to the courts claim. Plaintiffs' claim for denial of statutorily-mandated health care can satisfy this standing requirement if, for example, Plaintiffs demonstrate that the current system under the VJRA leads to system-wide denials of this health care or if the VA fails to recognize and treat PTSD within this two-year period. Nonetheless, it is worth emphasizing that should Plaintiffs' claims eventually require the participation of individual members, such claims will be barred for lack of standing.[2]

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[2] As discussed below, such claims would also be precluded by 38 U.S.C. § 511(a), which bars judicial review in district courts of the VA Secretary's decisions on individual benefits claims.

Finally, Defendants argue that Plaintiffs have failed to meet the requirements for prudential standing and should instead seek redress in the representative branches of government. "In addition to the immutable requirements of Article III [standing] the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." *Bennet v. Spear,* 520 U.S. 154, 162 (1997) (internal quotation marks omitted). Defendants essentially assert that because Plaintiffs direct their claims against the VA, Plaintiffs impermissibly seek to compel this Court to usurp the role of the political branches and "shape the institutions of government in such fashion as to comply with the law and constitution." *Lewis v. Casey,* 518 U.S. 343, 349 (1996). In support of this, Defendants argue that "absent from the complaint is a claim of injury to any individual from these challenged matters." Mot. to Dismiss at 5. As noted above, however, the Court disagrees with this characterization of Plaintiffs' claims. To the contrary, the Complaint alleges that thousands of veterans, if not more, are suffering grievous injuries as the result of their inability to procure desperately-needed and obviously-deserved health care. The issue, as detailed below, is whether it is within this Court's power to remedy the current situation. For the reasons stated above, the Court finds that Plaintiffs have satisfied the requirements for standing.

IV. SOVEREIGN IMMUNITY

Defendants assert that Plaintiffs' claims are barred by sovereign immunity. Both parties agree that the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, is the relevant statute for determining whether a valid waiver of sovereign immunity exists. Section 702 of the APA states, in part:

> An action in a court of the United States seeking relief other than monetary damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States. . . .

5 U.S.C. § 702. *See also Gallo Cattle Co. v. Dep't of Agric.,* 159 F.3d 1194, (9th Cir. 1998) (stating that the APA "does provide a waiver of sovereign immunity in suits seeking judicial review of a federal agency action under [28 U.S.C.] § 1331").

Although the APA provides a valid waiver, there is conflicting Ninth Circuit authority for whether this waiver is limited by Section 704. Section 704 states, in part, that only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review."[3] 5 U.S.C. § 704.

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[3] Neither party argues that the agency action in question is made reviewable by any statute.

In *The Presbyterian Church v. United States,* 870 F.2d 518 (9th Cir. 1989), the court stated that section 702 of the APA "waives sovereign immunity in all actions seeking relief from official misconduct except for money damages." *Id.* at 525. The court further stated: "Nothing in the language of the [1976] amendment [to § 702] suggests that the waiver of sovereign immunity is limited to claims challenging conduct falling in the narrow definition of 'agency action.'"[4] *Id.*

In *Gallo Cattle,* however, the court held that section 704 does in fact restrict the APA's waiver of sovereign immunity. The court stated:

> [T]he APA's waiver of sovereign immunity contains several limitations. Of relevance here is § 704, which provides that only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review.". . . . [Thus, the agency action here] is only reviewable if it constitutes "final agency action" for which there is no other remedy in a court.

159 F.3d at 1198.

The Ninth Circuit recently recognized this internal division, stating, "[w]e see no way to distinguish

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[4] Agency action is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. . . ." 5 U.S.C. § 551(13).

The Presbyterian Church from *Gallo Cattle." Gros Ventre Tribe v. United States,* 469 F.3d 801, 809 (9th Cir. 2006). The court explained:

> Under *The Presbyterian Church,* § 702's waiver is not conditioned on the APA's "agency action" requirement. Therefore, it follows that § 702's waiver cannot then be conditioned on the APA's "final agency action" requirement. . . . But that is directly contrary to the holding in *Gallo Cattle* where we stated that "the APA's waiver of sovereign immunity contains several limitations," including § 704's final agency action requirement.

Id. (citing *Gallo Cattle,* 159 F.3d at 1198). The court in *Gros Ventre Tribe* nonetheless left the intra-circuit conflict unresolved, stating that because of the circumstances of the case, "we need not make a sua sponte en banc call to resolve this conflict. . . ." *Id.* at 809.

Since *The Presbyterian Church* was decided, the Supreme Court has weighed in on the question of whether sovereign immunity is limited by § 704. In *Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990), the Court made clear that the waiver of sovereign immunity under § 702 is in fact constrained by the provisions contained in § 704. The Court stated:

> [T]he person claiming a right to sue [under § 702] must identify some "agency action" that affects him in the specified fashion. . . .

> When . . . review is sought not pursuant to specific authorization in the substantive statute, but only under the general provisions of the APA, the "agency action" in question must be "final agency action."

Id. at 882. Accordingly, waiver of sovereign immunity under § 702 of the APA is limited by § 704.

Defendants assert that Plaintiffs have failed to challenge a final agency action and that, even if Plaintiffs were able to identify some final agency action, waiver of sovereign immunity is nonetheless precluded because Plaintiffs cannot demonstrate, as they must, that "there is no other adequate remedy in a court. . . ." 5 U.S.C. § 704. The Court addresses each argument in turn.

As a preliminary matter, "[t]he burden is on the party seeking review under § 702 to set forth specific facts (even though they may be controverted by the Government) showing that he has satisfied its terms." *Lujan,* 497 U.S. at 884. The Court is mindful that *Lujan* was decided at the summary judgment stage. *See id.* Before this Court is Defendants' Rule 12(b)(6) motion to dismiss; as such, Plaintiffs' burden is less than that faced by the plaintiffs in *Lujan* and the Court "presumes that [Plaintiffs'] general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 889.

A. Final Agency Action

Defendants, in arguing that Plaintiffs fail to challenge any final agency actions, state: "Rather than challenging any particular agency action, plaintiffs seek an extraordinarily broad injunction from this Court that plaintiffs claim would deal with alleged shortfalls" and deficiencies in the VA health care system. Mot. at 7. In *Lujan,* the Supreme Court stated:

> [R]espondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm.

Lujan, 497 U.S. at 891.

Although the Court rejected the notion that the request for a broad injunction, in and of itself, is an indication of an absence of final agency action, the Court also expressed its disapproval of court-initiated systemic change:

> Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect. . . . Such an intervention may ultimately have the effect of requiring a

> regulation, a series of regulations, or even a whole program to be revised by the agency in order to avoid the unlawful result that the court discerns. But it is assuredly not as swift or as immediately far-reaching a corrective process as those interested in systemic improvement would desire. Until confided to us, however, more sweeping actions are for the other branches.

Id. (internal quotation marks omitted).

In the present case, Plaintiffs have sufficiently articulated various actions and delays by Defendants that qualify as "final agency actions." "Agency action" is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. . . ." 5 U.S.C. § 551(13). The APA defines "agency rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551(4). An agency action is "final" under the APA where two conditions are met: (1) the action "mark[s] the consummation of the agency's decisionmaking process . . .—it must not be of a merely tentative or interlocutory nature," *Bennet v. Spear,* 520 U.S. 154, 178 (1997) (internal citations and quotation marks omitted); and (2) the action is one "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (internal citations and quotation marks omitted).

Contrary to Defendants' assertion, the fact that Plaintiffs do not challenge any agency action with respect to individual benefits claims does not, in and of itself, necessarily indicate that Plaintiffs have failed to challenge any final agency decision. Plaintiffs' Complaint challenges various aspects of the VJRA. Many of these aspects are rightfully considered final agency action as they constitute the VA's denial of relief of health care and benefits. For example, Plaintiffs challenge certain restrictions placed by the VJRA on veteran's procedural rights in securing benefits and the summary and allegedly premature denial of PTSD claims, both of which result in allegedly unlawful denial of benefits. *See* Compl. ¶¶ 30, 31. These policies and procedures fall within the broad statutory definition of "final agency action."

Plaintiffs also challenge the failure by the VA to make timely decisions on benefits claims and provide timely medical care to veterans returning from war. *See* Compl. ¶¶ 31a, 145-68, 184-200. This challenge also falls within the definition of "final agency action." As the APA states, a court reviewing claims against an agency "shall compel agency action unlawfully withheld or unreasonably delayed. . . ." 5 U.S.C. § 706(1). *See also Ecology Ctr., Inc. v. U.S. Forest Serv.,* 192 F.3d 922, 926 (9th Cir. 1999) (stating that courts "have permitted jurisdiction under the limited exception to the finality doctrine [of § 706(1)] only when there has been a genuine failure to act"). Unlike the plaintiff in *Ecology Center,* the Plaintiffs in the present case have in fact "pleaded a genuine § 706(1)

claim." *Id.* Plaintiffs have alleged that the VA is failing to provide health care to veterans returning from Iraq and Afghanistan for a statutorily-mandated term of two years. *See* Compl. §§ 91-92, 265-66. This failure to act is a properly pleaded § 706(1) claim. Plaintiffs have also alleged systemic, unreasonable delays by the VA in providing health care. These allegations of unreasonable delay also bring Plaintiffs' claims within the exception provided for in § 706(1). For these reasons, the Court finds that Plaintiffs have sufficiently alleged various challenges to "final agency actions."

The Court notes, however, that Plaintiffs are forced to tread a fine line. Although Plaintiffs must challenge some "agency action" for a valid waiver of sovereign immunity under the APA, Plaintiffs are nonetheless precluded from challenging any regulations promulgated by the Secretary of the VA. *See* 38 U.S.C. § 502 (stating that judicial review of VA regulations "may be sought only in the United States Court of Appeals for the Federal Circuit").[5] At this stage Defendants have not established that the combination of this APA requirement with the preclusive effect of § 502 bars this Court from hearing Plaintiffs' claims. Plaintiffs must nonetheless be mindful of this legal Scylla and Charybdis that Congress has seen fit to impose.

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[5] The Court addresses § 502's preclusive effect on judicial review in further detail below.

B. Alternate Adequate Remedy

In addition to final agency action, § 704 also requires that "there is no other adequate remedy in a court" for there to be a valid waiver of sovereign immunity under the APA. 5 U.S.C. § 704. Defendants assert that the system for adjudicating veterans' claims, as established by the VJRA, provides the opportunity for an alternate adequate remedy.

The system established by Congress for adjudicating veterans' individual benefit claims does not provide an adequate alternative remedy for Plaintiffs' claims for several reasons. The CAVC, an Article I appellate court, only has jurisdiction to affirm, reverse, or remand decisions of the BVA on individual claims for benefits. *See* 38 U.S.C. § 7252(a). The CAVC's jurisdiction is therefore limited to the issues raised by each veteran based on the facts in his or her claim file from his or her particular case. *See, e.g., Clearly v. Brown,* 8 Vet. App. 305, 307 (1995) (stating "[i]n order to obtain review by the Court of Veterans Appeals of a final decision of the Board of Veterans' Appeals, a *person* adversely affected by that *action* must file a notice of appeal with the Court") (emphasis added). Accordingly, the CAVC would not have jurisdiction over or the power to provide a remedy for the systemic, constitutional challenges to the VA health system such as those currently alleged by Plaintiffs.

The CAVC itself has recognized its limited remedial power, stating: "[I]t must be borne in mind that

the jurisdiction of this Court is over final decisions of the BVA. . . . Nowhere has Congress given this Court either the authority or the responsibility to supervise or oversee the ongoing adjudication process which results in a BVA decision." *Clearly,* 8 Vet. App. at 308. Although the facts in *Clearly* are clearly distinguishable from those currently before this Court, many of Plaintiffs' challenges are aimed directly at the processes that the regional offices and the BVA use to reach decisions of individual claims. *See, e.g.,* Compl. ¶¶ 30, 31, 227-34. These processes, as conceded by the CAVC itself, are outside the purview of its jurisdiction. It is thus impossible for this Court to understand how the VA system can be considered an adequate alternate forum when that forum cannot entertain the type of claims raised by Plaintiffs in the present action.

Finally, Plaintiffs, as organizations seeking to protect the interests of a broad class of veterans, would be unable to bring suit in the VA system. Organizations do not and cannot submit individual claims for benefits to the regional offices and, therefore, are precluded from ever presenting claims on appeal to the BVA, the CAVC, or the Federal Circuit. Under the position advocated by Defendants, Plaintiffs would be barred from raising these particular claims in any forum. Plaintiffs' members would be left to litigate their own individual claims while also attempting to shoehorn into their claims the challenges now asserted by Plaintiffs. The statutory framework of the VA benefits system does not provide

for this and, as such, the VA benefits system is not an adequate alternate forum.

Defendants cite to a Sixth Circuit case in support of their argument in favor of sovereign immunity. In *Beamon v. Brown,* 125 F.3d 965, 970 (6th Cir. 1997), the court upheld a district court's finding that the system of judicial review established by the VJRA for the adjudication of claims regarding veterans benefits provided the plaintiffs with an alternate adequate remedy. Accordingly, there was no valid waiver of sovereign immunity under the APA. *Id.*

The three plaintiffs in *Beamon* were veterans who had applied for benefits from the VA and had experienced delays in receiving final decisions. *Id.* at 966. The plaintiffs, who sought to represent a class of similarly situated veterans, challenged the manner in which the VA processed claims for veterans benefits. *Id.* Specifically, the plaintiffs alleged, inter alia, that "the VA's procedures for processing claims cause[d] unreasonable delays, thereby violating their rights under the Administrative Procedure Act . . . and under the Due Process Clause of the Fifth Amendment. . . ." *Id.* Much like Plaintiffs in the present case, the plaintiffs in *Beamon* sought the following relief:

> [A] declaratory judgment finding the VA to be in violation of the law; injunctive relief compelling the VA to develop and implement standards and procedures for the timely handling of claims filed with the Cleveland Regional Office of the VA or with the Board

> of Veterans' Appeals ("BVA"); and injunctive relief ordering the VA to develop and implement standards and procedures for the timely handling of claims remanded from the BVA to the Cleveland Regional Office.

Id. In addition, the *Beamon* plaintiffs claimed that "their action in the District Court challenged only the procedures that the VA employs, not any of its substantive decisions." *Id.*

Underpinning the court's decision in *Beamon* was the conclusion that the system established by the VJRA contained "two sources of power with which it can remedy claims of unreasonable administrative delay or inaction." *Id.* The first source is the All Writs Act, which empowers "[t]he Supreme Court and all other courts established by Act of Congress to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The second source is 38 U.S.C. § 7261(a)(2), which provides that "the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall . . . compel action of the Secretary unlawfully withheld or unreasonably delayed."

Although the plaintiffs in *Beamon* acknowledged that these two sources of power do provide "adequate remedies for individuals claiming VA inaction or unreasonably delayed benefits decisions," *Beamon,* 125 F.3d at 968, they argued that the Court of Veterans

Appeals ("CVA"),[6] did "not have the power to conduct discovery, issue declaratory judgments, certify class actions, or issue injunctive relief that would address constitutional deficiencies in the VA's procedures." *Id.* Relying on the All Writs Act and § 7621(a)(2), the Sixth Circuit disagreed with the plaintiffs' contentions and stated: "[T]here is no reason to believe that [the VJRA] system cannot provide for the adequate adjudication of [the plaintiffs'] challenges to the process by which the VA decides its benefits decisions." *Id.*

With all due respect to the Sixth Circuit, this Court is convinced that the VJRA system is not an adequate alternative. First, as noted above, Plaintiffs in the present case have no way of even entering the adjudication system established by the VJRA; Plaintiffs are organizations, not individual veterans seeking individual benefits.

Second, the jurisdiction of the CAVC is statutorily limited to the "power to affirm, modify, or reverse a decision of the Board [of Appeals] or to remand the matter, as appropriate." 38 U.S.C. § 7252(a). Thus, the CAVC is limited in its jurisdiction to reviewing decisions on individual claims. The CAVC may not review broad challenges to the statutory framework

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[6] The CVA was the predecessor to the CAVC. *See* 38 U.S.C. § 7261(a)(2), 1998 Amendment, substituting "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals." The statutory language of § 7252 was not altered.

unless such a challenge is grounded in the claim of a veteran seeking his or her individual benefits. Such is not the case here.

Finally, as noted above, the CAVC itself has recognized the limitations of its power to review the processes used by the BVA to reach decisions on individual claims. In *Dacoran v. Brown,* 4 Vet. App. 115 (1993), for example, the CVA denied a widow's petition for a writ of mandamus with respect to her constitutional challenges to the 1945 Recruitment Act. The court noted that constitutional challenges will be "presented to this Court only in the context of a proper and timely appeal taken from such decision made by the VA Secretary through the BVA." *Id.* at 119. As noted above, Plaintiffs in the present case would be unable to bring a claim before a VA regional office, much less appeal such a claim to the BVA or CAVC. Regarding its ability to address constitutional issues through the All Writs Act, the court stated:

> Although this Court also has authority to reach constitutional issues in considering petitions for extraordinary writs under 28 U.S.C. § 1651(a), the Court may, as noted above, exercise such authority only when a claimant has demonstrated that he or she has no adequate alternative means of obtaining the relief sought and is clearly and indisputably entitled to such relief. *See Erspamer [v. Derwinski,* 1 Vet. App. 3, 7 (1990)]. Where, as here, a claimant remains free to challenge the constitutionality of a statute in the U.S. district court, she has not demonstrated that

> she lacks adequate alternative means of obtaining the relief sought.

Id. Thus, the very courts that were established by the VJRA recognize not only the jurisdiction of district courts for constitutional claims but, more importantly for this issue, recognize the limited jurisdiction that they themselves possess. Accordingly, the Court finds that the VA claims adjudication system is not an adequate alternative forum for Plaintiffs' claims. The Court therefore finds, at this stage of the proceedings, that Plaintiffs have satisfied the requirements for a valid waiver of sovereign immunity under the APA.

V. SUBJECT MATTER JURISDICTION

Defendants argue that even if Plaintiffs have satisfied the requirements for standing and waiver of sovereign immunity, 38 U.S.C. § 511 nonetheless strips this Court of any jurisdiction to hear Plaintiffs' claims. Section 511 states, in part:

> The Secretary [of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

38 U.S.C. § 511(a). Defendants read the statute broadly and argue that it precludes this Court from hearing any type of case involving any aspect of veterans benefits except, arguably, facial constitutional challenges to veterans benefits legislation. Plaintiffs read § 511 narrowly and argue that it only precludes district courts from reviewing the Secretary's determinations on individual benefits determinations, and not from considering broad constitutional challenges to the VA system.

As a threshold matter it is clear that § 511 does not strip this Court of the ability to hear facial constitutional challenges to the VA benefits system. *See, e.g., Larabee v. Derwinski,* 968 F.2d 1497, 1501 (2nd Cir. 1992) (stating "district courts continue to have jurisdiction to hear facial challenges of legislation affecting veterans' benefits") (internal quotation marks and emphasis omitted); *Broudy v. Mather,* 460 F.3d 106, 114 (D.C. Cir. 2006) (stating "district courts have jurisdiction to consider questions arising under laws that affect the provision of benefits as long as the Secretary has not actually decided them in the course of a benefits proceeding"). Even the Sixth Circuit, while articulating a broad preclusive effect on judicial review of veterans benefits claims, nonetheless acknowledged that facial challenges are permitted in district courts. *See Beamon,* 125 F.3d at 972-73 (stating "district court jurisdiction over facial challenges to acts of Congress survived the statutory revisions that established the CVA"). To this Court's knowledge, only one court has suggested that § 511

precludes district courts from reviewing even facial challenges. *See Hall v. U.S. Dept. of Veterans Affairs,* 85 F.3d 532 (11th Cir. 1996). Given that *Hall* involved a constitutional challenge to a VA regulation, rather than an Act of Congress, any suggestion that facial attacks against statutes are precluded is dicta. More importantly, the reasoning behind this suggestion is not convincing. Thus, the Court is persuaded that facial constitutional attacks are permitted. Defendants themselves concede as much, stating: "The only category of cases that has arguably been excepted from the preclusive effect of the current section 511 is facial constitutional challenges to veterans' benefits." Mot. to Dismiss at 13. (Defendants also concede that at least some of Plaintiffs' claims may be so characterized: "plaintiffs' claims include facial challenges to the VJRA and other statutes that established the VA's informal claims adjudication process." Reply at 5.)[7]

Although the Ninth Circuit has not squarely addressed the scope of § 511's preclusive effect on judicial review, other Circuits have. In support of their argument that § 511 strips district courts of jurisdiction over all other challenges to the VA health benefits system, Defendants rely heavily on the Sixth Circuit's decision in *Beamon,* 125 F.3d at 965. In *Beamon,* the plaintiffs challenged the manner in which the VA processed claims for veterans benefits.

[7] Whether Plaintiffs have in fact stated a claim for a facial constitutional challenge is discussed below.

Id. Specifically, Plaintiffs alleged, inter alia, that "the VA's procedures for processing claims cause[d] unreasonable delays, thereby violating their rights under the Administrative Procedure Act . . . and under the Due Process Clause of the Fifth Amendment. . . ." *Id.*

In addition to finding no waiver of sovereign immunity, the Sixth Circuit also held that the "VJRA explicitly granted comprehensive and exclusive jurisdiction to the CVA and the Federal Circuit over claims seeking review of VA decisions that *relate* to benefits decisions under § 511(a)." *Id.* at 971 (emphasis added). Thus, according to the court, district courts could not hear "constitutional issues and allegations that a VA decision has been unreasonably delayed." *Id.*

The court in *Beamon* was particularly wary of permitting judicial review in a district court over claims that necessitated review of VA decisions on individual benefits claims. The court stated:

> Plaintiffs in this case allege that VA procedures cause unreasonable delays in benefits decisions. To adjudicate this claim, the District Court would need to review individual claims for veterans benefits, the manner in which they were processed, and the decisions rendered by the regional office of the VA and the BVA. This type of review falls within the exclusive jurisdiction of the CVA as defined by [38 U.S.C.] § 7261(a).

Id. at 970-71.

Defendants in the present action argue that Plaintiffs' claims would require the same manner of review of individual claims that was required in *Beamon* and that such review is clearly prohibited by § 511. A close reading of *Beamon,* however, indicates that the court's concern sprang primarily from the lack of specificity of the plaintiffs' claims. The court stated:

> [P]laintiffs here point to no specific procedures that violate their constitutional rights. Plaintiffs' bare allegations that VA procedures allow unreasonable delays appear closer to challenges to individual benefit decisions than a constitutional challenge to specific procedures.

Id. at 973 n. 5.

In contrast, Plaintiffs in the present action enumerate specific procedures that allegedly violate the constitutional rights of veterans. For example, Plaintiffs challenge certain restrictions placed by the VA on the procedural rights of veterans in securing benefits, including the absence of trial-like procedures at the regional office stage and the absence of a class action procedure; they challenge the summary and allegedly premature denial of PTSD claims; and they challenge the VA's incentive compensation program. *See* Compl. ¶¶ 30, 31, 227-34. Whether these allegations actually state a claim for a constitutional violation is discussed more fully below. In considering the preclusive effect on jurisdiction of § 511 and in distinguishing *Beamon,* however, this

difference is worth noting. Unlike the situation in *Beamon,* this Court will not be forced to comb through the adjudication process of individual claims in search of some constitutional violation that causes delays. To the contrary, Plaintiffs have attacked specific procedures as violating the rights of veterans. At this stage of the proceedings, the Court cannot conclude that it will necessarily be forced to examine individual claims in order to entertain all of Plaintiffs' challenges.

The court in *Beamon* also relied on the history of veterans' benefits legislation in reaching its "conclusion that Congress intended to vest the CVA with exclusive jurisdiction over constitutional challenges to VA decisions." *Id.* at 971. Defendants and Plaintiffs contest this history and thus a brief examination is in order. Until 1973, 38 U.S.C. § 211, which is now § 511, barred judicial review of any decision of the Secretary of the VA "on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans. . . ." Recognizing the constitutional danger of precluding all judicial review of constitutional claims, the Supreme Court, in *Johnson v. Robison,* 415 U.S. 361 (1974), held that § 211(a) precluded review of decisions made by the VA Administrator but did not preclude district court jurisdiction over constitutional challenges to acts of Congress relating to veterans benefits. In 1988, the Supreme Court further limited the preclusive effect of § 211 by permitting district court review of whether a VA regulation violated a statute, the Rehabilitation Act,

that did not directly relate to veterans benefits. *See Traynor v. Turnage,* 485 U.S. 535 (1988).

Soon after *Traynor* was decided, Congress passed the VJRA. Under the VJRA the CVA was established, thereby providing veterans with an avenue for review that was previously unavailable. The VJRA also provided that appeals could be taken from the CVA to the Federal Circuit and, from there, to the Supreme Court. The actual language of § 211 changed only slightly. *Compare* 38 U.S.C. § 211(a) (1979) *with* 38 U.S.C. § 211(a) (1988).[8] The parties' dispute regarding the significance of the VJRA thus hinges on its legislative history and the subsequent interpretation of § 511 by other courts.

Defendants, citing various records from Congress, argue that the legislative history of the VJRA clearly evinces Congressional intent to preclude judicial review in district court of all challenges to the VA system. *See* Mot. to Dismiss at 10-11. Plaintiffs counter with their own citations to the legislative history that demonstrate Congressional intent to preserve judicial review in district courts of constitutional challenges to the VA that do not involve review of VA decisions of individual benefits. *See* Opp'n at 13-14. Suffice to say that the Congressional record provides less than a clear indication of Congress's intent with regards to the VJRA's effect on judicial

[8] Section 211(a) was renumbered as section 511(a) in 1991. *See Bates v. Nicholson,* 398 F.3d 1355, 1364 n.7 (Fed. Cir. 2005).

review. Far more helpful are the decisions by other courts that have addressed this issue.

In *Beamon,* 125 F.3d at 970, the court read the preclusive effect of § 511 broadly. Although the court stated that facial constitutional challenges were still permitted in district courts, it held that where plaintiffs challenge the constitutionality of the procedures used by the VA to adjudicate benefits claims, § 511 precludes review in district court.

Conversely, in *Broudy,* 460 F.3d at 114, the D.C. Circuit interpreted the preclusive effect of § 511 more narrowly. The court stated:

> In the defendants' view, § 511(a) prevents a district court from exercising jurisdiction over any case that would require it to decide a question of law or fact that arises under a law that affects the provision of benefits. . . . This argument misreads the statute. Section 511(a) does not give the VA *exclusive* jurisdiction to construe laws affecting the provision of veterans benefits or to consider all issues that might somehow touch upon whether someone receives veterans benefits. Rather, it simply gives the VA authority to consider such questions when making a decision about benefits . . . and, more importantly for the question of our jurisdiction, prevents district courts from reviewing the Secretary's decision once made. . . .

Id. at 112 (internal quotation marks and citations omitted, emphasis in original).

Although this interpretation of § 511 is clearly more broad than that of the Sixth Circuit in *Beamon, Broudy* does not provide Plaintiffs in the present case with the full support they claim. Specifically, the court in *Broudy* was careful to note that "district courts have jurisdiction to consider questions arising under laws that affect the provision of benefits as long as the Secretary has not actually decided them in the course of a benefits proceeding." *Id.* at 114.

Defendants argue that the targets of the plaintiffs' challenges in *Broudy* involved issues that had never been decided by the VA, while the Plaintiffs in the present case attack various policies and procedures that have been specifically decided and adopted by the VA. Thus, according to Defendants, *Broudy* is inapplicable. This argument, however, ignores the above cited language "in the course of a benefits proceeding." *Id.* Many of Plaintiffs' challenges attack the structure of the VJRA, including VA decisions that were not made in the course of a benefits proceeding, but instead were made at a broad, system-wide level. Thus, where Plaintiffs challenge VA decisions that were made outside the course of a benefits proceeding, such claims survive the preclusive effect of § 511.

Defendants' argument that § 511(a) precludes all challenges to the VA has also been rejected by the Federal Circuit. In *Bates v. Nicholson,* 398 F.3d 1355, 1365 (Fed. Cir. 2005), the court stated: "Section 511(a) does not apply to every challenge to an action by the

VA. As we have held, it only applies where there has been a 'decision' by the Secretary."

Both the existing case-law and the language of § 511 are clear that facial constitutional challenges may be brought in district courts. Plaintiffs' facial challenges are thus properly before this Court.[9] Plaintiffs also argue that as-applied challenges are not necessarily precluded. The Court disagrees. By its language, § 511 precludes review in a district court of any decision by the Secretary involving individual benefits. An as-applied challenge would require this Court to review a decision by the Secretary involving an individual claim. *See, e.g., Roulette v. City of Seattle,* 97 F.3d 300, 312 (9th Cir. 1996) (stating "[i]n an as-applied challenge, there is a narrow focus on the particular plaintiff's behavior and whether the statute is constitutional as applied to her").

Finally, it is important to recognize the CAVC's understanding of the scope of § 511. This is especially true in light of Defendants' argument that the CAVC and the other forums for adjudicating veterans claims, as established under the VJRA, have exclusive jurisdiction over Plaintiffs' claims. In *Dacoran,* 4 Vet. App. at 118, the CVA held that federal district courts provided an alternative forum to the VA system to litigate constitutional challenges. The court stated:

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[9] The Court examines Plaintiffs' claims below to determine which may be classified as a facial challenge.

> A claim which alleges only the unconstitutionality of a statute is not a claim "under a law that affects the provision of benefits by the Secretary" under § 511(a), but rather is a claim under the Constitution of the United States. As such, it is beyond the purview of section 511(a). Nothing in title 38 prohibits a constitutional challenge to any of the provisions of that title from being litigated in U.S. district court.

Id. at 118-19. This language, in conjunction with the reasons stated above, makes clear that § 511 does not preclude review of all of Plaintiffs' claims in this Court.

Defendants also argue that 38 U.S.C. § 502 bars district court review of Plaintiffs' claims challenging VA regulations. *See Chinnock v. Turnage,* 995 F.2d 889, 893 (9th Cir. 1993) (stating "[u]nder 38 U.S.C. § 502, VA rulemaking is subject to judicial review only in the Federal Circuit"). Plaintiffs, however, explicitly state in their Complaint that they are not attacking the constitutionality of any VA regulation but instead are attacking various aspects of the VJRA, which is an act of Congress. *See Disabled Am. Veterans v. Dept. of Veterans Affairs,* 962 F.2d 136, 140 (2nd Cir. 1992) (stating "it is well established . . . that the Article III district courts have power to rule on the constitutionality of acts of Congress"). So long as Plaintiffs limit their challenges to Acts of Congress and certain actions and failures to act by the VA, as discussed in section IV. A, *supra,* and refrain from challenging any

VA regulations, § 502 will not preclude judicial review in this Court.

VI. CONSTITUTIONAL CLAIMS

Defendants argue that even if the Court has jurisdiction to hear Plaintiffs' constitutional claims, these claims nonetheless fail to state a claim as facial constitutional challenges. A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss tests the sufficiency of the complaint. Dismissal pursuant to Rule 12(b)(6) is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Levine v. Diamanthuset, Inc.,* 950 F.2d 1478, 1482 (9th Cir. 1991) (citing *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)). In reviewing the motion, a court must assume all factual allegations made by the nonmoving party to be true and construe them in the light most favorable to the nonmoving party. *North Star Int'l v. Ariz. Corp. Comm'n,* 720 F.2d 578, 590 (9th Cir. 1993).

Contrary to any suggestions by Plaintiffs, facial challenges are still governed by the standard articulated in *United States v. Salerno,* 481 U.S. 739 (1987). In *Salerno*, the Court stated that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 745. The Ninth Circuit has recently affirmed *Salerno* as the

controlling standard. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.,* 498 F.3d 1031, 1049 (9th Cir. 2007).

Plaintiffs assert two constitutional claims: the first is that the claims adjudication process, as established by the VJRA, is unconstitutional because it denies due process to veterans seeking health benefits. The second is that the VJRA denies veterans access to the courts. The Court addresses each in turn.

A. Due Process

Defendants assert that Plaintiffs' due process claim should be dismissed because Plaintiffs have failed to allege a due process violation and because the VA claims adjudication process is, in fact, constitutional. In particular, Defendants assert that the non-adversarial adjudication system at the regional office level satisfies the due process requirements of notice and the opportunity to be heard.

The Supreme Court has provided the following guidelines for due process analysis:

> [T]he identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any,

> of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). "Procedural due process requires adequate notice and an opportunity to be heard." *Kirk v. U.S. I.N.S.,* 927 F.2d 1106, 1107 (9th Cir. 1991)

If the VA claims adjudication system were truly non-adversarial, then Plaintiffs' due process claim would be on shaky ground. And although the system was clearly intended to be non-adversarial, Plaintiffs have alleged that this is no longer the case. The Federal Circuit, which has exclusive appellate jurisdiction under the VJRA, has recognized this de-facto shift towards an adversarial system. *See, e.g., Bailey v. West,* 160 F.3d 1360, 1365 (Fed. Cir. 1998) (en banc) (stating "[s]ince the Veterans' Judicial Review Act . . . , it appears the system has changed from a non-adversarial, ex parte, paternalistic system for adjudicating veterans' claims, to one in which veterans . . . must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review") (internal citations and quotation marks omitted).

Although it is clearly not in this Court's power to rewrite a statute that provides for a non-adversarial adjudication process at the regional office level, it is within the Court's power to insist that veterans be

granted a level of due process that is commensurate with the adjudication procedures with which they are confronted. *See Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 320 (1985) (stating "'due process' is a flexible concept—that the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur"). Defendants' insistence that "plaintiffs cannot seriously dispute that the initial, regional office step of the claims process is not, in any sense, adversarial," is undermined by the Federal Circuit's contrary conclusion cited above. At this stage of the proceedings, and without further factual development, the Court cannot conclude that Plaintiffs have not stated a valid claim for due process violations. In addition, Defendants' blanket assertion that the VA system provides adequate due process is premature and insufficient to support a motion to dismiss.

Finally, it is worth emphasizing that to state a valid facial constitutional challenge, a plaintiff need not establish that the entire statute is unconstitutional. *See Engine Mfrs. Ass'n,* 498 F.3d at 1049 (9th Cir. 2007) (stating "*Salerno* does not require a plaintiff to show that every provision within a particular multifaceted enactment is invalid"). The Court is satisfied that Plaintiffs' have, at this stage, sufficiently alleged due process violations within the VJRA. For example, Plaintiffs' claim that veterans are systematically denied statutorily mandated health

care within two years after returning from wars and lack any recourse for obtaining this entitlement states a valid due process violation. The Court notes that Plaintiffs do not assert that any particular veteran is entitled to benefits or medical care; rather, Plaintiffs seek to ensure that veterans are afforded fair procedures for obtaining this care.

Finally, Defendants' argument that any examination of Plaintiffs' due process claims will involve a review of individual benefits decisions, and therefore be precluded by § 511, is unpersuasive. The Supreme Court has made clear that due process analysis does not depend on individual cases. The Court has stated:

> In applying this [the *Matthews,* 424 U.S. at 335] test we must keep in mind . . . the fact that the very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases. . . ."

Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 3210 (1985) (citing *Matthews,* 424 U.S. at 344).

For the reasons stated above, Defendants' Motion to Dismiss Plaintiffs' First Claim for Relief is DENIED.

B. Right of Access

Plaintiffs allege that the VJRA deprives veterans of meaningful access to the courts in violation of the First and Fifth Amendments to the United States Constitution. "'Two categories' of 'denial of access' cases emerge from the case law of the Supreme Court and the Courts of Appeals." *Broudy,* 460 F.3d at 117 (citing *Christopher v. Harbury,* 536 U.S. 403, 413 (2002)). One is "forward-looking claims," *Harbury,* 536 U.S. at 414 n.11, and the other is "backward-looking claims." *Id.* at 414. Although neither party addresses which type of claim Plaintiffs assert, it appears that Plaintiffs bring a forward-looking claim. To present such a claim, a plaintiff must allege an "arguable underlying claim and present foreclosure of a meaningful opportunity to pursue that claim." *Broudy,* 460 F.3d at 121 (relying on *Lewis v. Casey,* 518 U.S. 343, 353 (1996), and *Harbury,* 536 U.S. at 415)).

Defendants' primary argument in favor of dismissal is that the claim is derivative of Plaintiffs' due process claim and, because the due process claim should be dismissed, so too should Plaintiffs' right of access claim. As noted above, the Court not only has jurisdiction over Plaintiffs' due process claim but Plaintiffs have stated a valid cause of action for due process violations. Thus, Plaintiffs have alleged an "arguable underlying claim," *Broudy,* 460 F.3d at 121, and therefore have stated a valid claim for a violation of the right to access courts.

Defendants also argue that the Supreme Court's ruling in *Walters* forecloses Plaintiffs' right of access claim. Such a question, however, goes to the merits of Plaintiffs' claim and need not be decided at this stage. Defendants' Motion to Dismiss Plaintiffs' Second Claim for Relief is therefore DENIED.

VII. STATUTORY CLAIMS

A. Medical Care Under 38 U.S.C. § 1710(e)(1)(D)

Plaintiffs' third cause of action seeks declaratory relief for violations of 38 U.S.C. § 1710(e)(1)(D). Plaintiffs allege that the VA "violated a clear statutory mandate under 38 U.S.C. § 1710 to provide two years of medical care to returning veterans." Opp'n at 23.

Section 1710 states, in relevant part:

> [A] veteran who served on active duty in a theater of combat operations . . . after November 11, 1998, *is eligible* for hospital care, medical services and nursing home care . . . notwithstanding that there is insufficient medical evidence to conclude that such condition is attributable to such service.

38 U.S.C. § 1710(e)(1)(D) (emphasis added). Section 1710(e)(3)(C) provides the two-year period for medical care, "beginning on the date of the veteran's discharge or release from active military, naval, or air service. . . ." *Id.* § 1710(e)(3)(C).

Defendants argue that the entitlement to medical care is tempered by another subsection of § 1710, which states that the VA's obligation to provide care "shall be effective in any fiscal year only to the extent and in the amount provided in advance in appropriations Acts for such purposes." *Id.* § 1710(a)(4). There is no indication, however, that subsection (a)(4) is intended to apply to subsection (e)(1)(D). Subsection (a)(4) states, in its entirety:

> The requirement in paragraphs (1) and (2) [of section (a)] that the Secretary furnish hospital care and medical services, the requirement in section 1710A (a) of this title that the Secretary provide nursing home care, the requirement in section 1710B of this title that the Secretary provide a program of extended care services, and the requirement in section 1745 of this title to provide nursing home care and prescription medicines to veterans with service-connected disabilities in State homes shall be effective in any fiscal year only to the extent and in the amount provided in advance in appropriations Acts for such purposes.

Id. § 1710(a)(4). Nothing in this language indicates that the mandatory entitlement to health care for two years, as provided in § 1710(e)(1)(D), is limited by this subsection. This reading is reinforced by the fact that those sections that were intended to be limited by § 1710(a)(4) were specifically listed. The Court is therefore convinced that § 1710(e)(1)(D) provides a mandatory entitlement to health care for veterans for

two years upon leaving the service. Contrary to Defendants' assertion, § 1710(a)(4) does in fact create a property interest protected by the Due Process Clause.

Defendants also argue that this Court is prohibited from reviewing this claim because it requires the examination of individual benefits decisions to determine whether there has been improper delay or denial. Such an argument would be correct if Plaintiffs were individual veterans challenging a decision made by the Secretary that affected their benefits. *See* 38 U.S.C. § 511. That is not the case, however. First, Plaintiffs have alleged that some veterans are being totally denied this statutory entitlement. At the very least, this states a claim for denial of due process. *Cf. Devine v. Cleland,* 616 F.2d 1080, 1086 (9th Cir. 1980) (stating that where a veteran "has a statutory entitlement to receipt of an educational assistance allowance," "[s]uch a statutory entitlement does constitute a 'property right' protected by the Due Process Clause").

Second, Plaintiffs' claim that veterans are being denied this medical care does not necessarily implicate "decisions" by the VA Secretary. Such denials may instead merely demonstrate the abdication of the VA to provide services that it must. As the D.C. Circuit has stated, "§ 511(a) prevents district courts from hearing a particular question only when the Secretary has actually decided the question. . . . Where there has been no such decision, § 511(a) is no

bar." *Broudy,* 460 F.3d at 114 (internal quotation marks, citations and alterations omitted).

For these reasons, Defendants' Motion to Dismiss Plaintiffs' Third Claim for Relief is DENIED.

B. Rehabilitation Act

Plaintiffs' fourth cause of action seeks relief from violations of section 504 of the Rehabilitation Act, codified at 29 U.S.C. § 794(a). Section 504 states, in part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794.

In *Traynor,* 485 U.S. at 544, the Supreme Court stated that "the question whether a Veterans' Administration regulation violates the Rehabilitation Act is not foreclosed from judicial review by § 211(a)." Soon after *Traynor* was decided, Congress overhauled section 211 in the VJRA, and, for the first time, provided for judicial review of veterans' benefits determinations in the Federal Circuit. The parties dispute whether the VJRA effectively overruled *Traynor.*

The few courts that have been faced with this question have concluded that *Traynor* was in fact overruled by the VJRA. In *Larabee,* the Second Circuit stated:

> By providing judicial review in the Federal Circuit, Congress intended to obviate the Supreme Court's reluctance to construe the statute [§ 211] as barring judicial review of substantial statutory and constitutional claims, *see Traynor* . . . , while maintaining uniformity by establishing an exclusive mechanism for appellate review of decisions of the Secretary.

968 F.2d at 1501 (internal citations omitted). The Sixth Circuit in *Beamon,* 125 F.3d at 972, reached the same conclusion.

Plaintiffs, citing no conflicting authority, instead argue that the VJRA merely narrowed the scope of the *Traynor* holding and precluded judicial review of individual benefits decisions. As such, Plaintiffs urge that the VJRA did not affect a district court's ability to apply a civil rights statute, such as the Rehabilitation Act, to the VA. Plaintiffs argue that the concern driving the *Traynor* decision is actually of no concern here. The Court in *Traynor* stated:

> It cannot be assumed that the availability of the federal courts to decide whether there is some fundamental inconsistency between the Veterans' Administration's construction of veterans' benefits statutes and the admonitions of the Rehabilitation Act will enmesh

> the courts in the technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions . . . .

485 U.S. at 1379-80.

Plaintiffs' argument, however, is undercut by several factors. First, as the other courts to consider this issue have held, Congress, in passing the VJRA, explicitly provided the availability of federal court review by creating review of veterans' benefits decisions in the Federal Circuit. The VJRA, therefore, was a response to the Supreme Court's rejection of a system with no federal court review.

Second, Plaintiffs' Rehabilitation Act claim is, ultimately, a request for this Court to rewrite VA "policies, procedures, and practices [in order] to accommodate veterans with PTSD who are unable to comply with the agency's arbitrary and complex administrative hurdles . . . ." Opp'n at 24. This requires precisely the type of "technical and complex determinations and applications of Veterans' Administration policy" that the *Traynor* Court warned against. *Traynor,* 485 U.S. at 1379-80. Contrary to Plaintiffs' assertions, this Court cannot possibly assess whether the current system employed by the VA discriminates against veterans with PTSD without delving into a review of VA regulations and individual benefit decisions of veterans with PTSD. Such a review is clearly foreclosed by both *Traynor* and by § 511.

Finally, Plaintiffs' Rehabilitation Act claim challenges numerous VA regulations. As already discussed,

challenges to such regulations, as mandated by Congress, are reviewable only in the Federal Circuit. *See* 38 U.S.C. § 502 (stating that an action by the VA Secretary "may be sought only in the United States Court of Appeals for the Federal Circuit").

For the reasons stated above, Defendants' Motion to Dismiss Plaintiffs' Fourth Claim for Relief is GRANTED.

VIII. JURISDICTION OVER U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Defendants in their Reply brief raise, for the first time, the issue of whether this Court has jurisdiction over the CAVC. Specifically, Defendants argue that the APA does not provide a waiver of sovereign immunity for suits against the courts of the United States. *See* 5 U.S.C. § 551(1)(B). Defendants claim that even though the CAVC is an Article I court, it is nevertheless independent from the VA, and is therefore insulated from any waiver of sovereign immunity under the APA. As this issue was raised for the first time in Defendants' Reply, and as Plaintiffs have not had the opportunity to respond, the Court declines to address it at this time. Instead, Defendants may file a motion to dismiss the CAVC.

IX. CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss is DENIED with respect to Plaintiffs'

First, Second and Third Claims and GRANTED with respect to Plaintiffs' Fourth Claim. At oral argument on December 14, the Court granted Defendants' Motion for Protective Order to Stay Discovery pending the Court's ruling on Defendants' Motion to Dismiss. The Protective Order is now moot and Plaintiffs may proceed with discovery. Plaintiffs' Administrative Motion to File Veteran and Family Member Personal Identifying Information Under Seal is hearby GRANTED.

Plaintiffs' Motion for Preliminary Injunction, Docket No. 88, filed on December 12, 2007, was also stayed pending the issuance of this Order. Defendants have not yet filed an Opposition and the Court therefore sets the following briefing schedule: Defendants' Opposition shall be electronically filed no later than 12:00 p.m. on Wednesday, January 30. Plaintiffs' Reply shall be filed by 12:00 p.m. on Wednesday, February 6, and the hearing for the Preliminary Injunction is scheduled for Friday, February 22, at 10:00 a.m. in Courtroom # 1 on the 17th Floor.

IT IS SO ORDERED.

Dated: January 10, 2008

/s/ Samuel Conti
UNITED STATES
DISTRICT JUDGE

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VETERANS FOR COMMON SENSE, a District of Columbia nonprofit organization; VETERANS UNITED FOR TRUTH, INC., a California nonprofit organization, representing their members and a class of all veterans similarly situated,

Plaintiffs-Appellants,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; JAMES P. TERRY, Chairman, Board of Veterans' Appeals; MICHAEL WALCOFF, Acting Under Secretary, Veterans Benefits Administration; BRADLEY G. MAYES, Director, Compensation and Pension Service; ROBERT A. PETZEL, M.D., Under Secretary, Veterans Health Administration; PRITZ K. NAVARA, Veterans Service Center Manager, Oakland Regional Office, Department of Veterans Affairs; UNITED STATES OF AMERICA,

Defendants-Appellees.

No. 08-16728

D.C. No. 3:07-cv-03758-SC

ORDER

Filed November 16, 2011

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

Judge W. Fletcher did not participate in the deliberations or vote in this case.

APPENDIX F

TITLE 38—VETERANS' BENEFITS

PART I—GENERAL PROVISIONS

CHAPTER 5—AUTHORITY AND DUTIES OF THE SECRETARY

SUBCHAPTER I—GENERAL AUTHORITIES

§ 511. Decisions of the Secretary; finality

(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subsection (a) does not apply to—

(1) matters subject to section 502 of this title;

(2) matters covered by sections 1975 and 1984 of this title;

(3) matters arising under chapter 37 of this title; and

(4) matters covered by chapter 72 of this title.

PART V—BOARDS, ADMINISTRATIONS, AND SERVICES

CHAPTER 71—BOARD OF VETERANS' APPEALS

§ 7104. Jurisdiction of the Board

(a) All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

(b) Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.

(c) The Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.

(d) Each decision of the Board shall include—

(1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record; and

(2) an order granting appropriate relief or denying relief.

(e)(1) After reaching a decision on a case, the Board shall promptly mail a copy of its written decision to the claimant at the last known address of the claimant.

(2) If the claimant has an authorized representative, the Board shall—

(A) mail a copy of its written decision to the authorized representative at the last known address of the authorized representative; or

(B) send a copy of its written decision to the authorized representative by any means reasonably likely to provide the authorized representative with a copy of the decision within the same time a copy would be expected to reach the authorized representative if sent by first-class mail.

CHAPTER 72—UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

SUBCHAPTER I—ORGANIZATION AND JURISDICTION

§ 7252. Jurisdiction; finality of decisions

(a) The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

(b) Review in the Court shall be on the record of proceedings before the Secretary and the Board. The

extent of the review shall be limited to the scope provided in section 7261 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.

(c) Decisions by the Court are subject to review as provided in section 7292 of this title.

SUBCHAPTER II—PROCEDURE

§ 7261. Scope of review

(a) In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—

(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—

(1) take due account of the Secretary's application of section 5107(b) of this title; and

(2) take due account of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.

(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the Court shall review only questions raised as to compliance with and the validity of the regulation.

SUBCHAPTER III—
MISCELLANEOUS PROVISIONS

§ 7292. Review by United States Court of Appeals for the Federal Circuit

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

(b)(1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines

that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.

(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Appeals for Veterans Claims.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret

constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case:

(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter, as appropriate.

(2) Rules for review of decisions of the Court of Appeals for Veterans Claims shall be those prescribed by the Supreme Court under section 2072 of title 28.