No. 13-17430

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIETNAM VETERANS OF AMERICA, ET AL.,

Plaintiffs-Appellants,

vs.

CENTRAL INTELLIGENCE AGENCY, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court,
Northern District of California
D.C. No. CV-09-0037-CW
The Honorable Claudia Wilken, Judge Presiding

OPENING BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants Vietnam Veterans of America and Swords to Plowshares: Veterans Rights Organization hereby state that they are not owned by any parent corporation and no publicly traded corporation owns ten percent or more of either Plaintiff-Appellant's stock. Both organizations are not-for-profit entities.

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Over the course of several decades, the United States military experimented on its own soldiers with chemical and biological weapons agents. The Army promulgated a regulation requiring, *inter alia*, that it provide these test subject veterans with medical treatment for any health problems arising from their participation in these dangerous experiments. The Army admits it has never provided them that medical treatment. Despite finding that the regulation entitles test subject veterans to medical treatment, the district court refused to compel the Army to provide it. That decision was legal error and ignored the mandate of the Administrative Procedure Act ("APA") that a court "*shall* . . . compel agency action unlawfully withheld." Accordingly, this Court should reverse and vacate the district court's order, and remand with instructions.

I. STATEMENT OF JURISDICTION

Plaintiffs filed this action in the district court, seeking declaratory relief under 28 U.S.C. § 2201 and an order pursuant to 5 U.S.C. § 706(1) compelling agency action that had been unlawfully withheld. The district court granted the government's motion for summary judgment and refused to compel the Army to act, as Plaintiffs sought. (E.R. 12.)[1] The district court had jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 702. This Court has jurisdiction under 28 U.S.C.

[1] "E.R." refers to Appellants' Excerpts of Record; "C.R." refers to the district court record.

§ 1291. The order appealed from was filed and entered on November 19, 2013. (E.R. 7.) Plaintiffs-Appellants' notice of appeal was timely filed on November 26, 2013. Fed. R. App. P. 4(a); (E.R. 1.)

II. ISSUES PRESENTED FOR APPEAL

1. Over many decades, the Army tested chemical and biological substances on veterans during their service ("Test Subject Veterans"). The district court held that Army Regulation 70-25 ("AR 70-25") entitles those Test Subject Veterans to medical treatment for illnesses resulting from their participation in the testing programs. The Army admits it has not provided that medical treatment. Was it error for the district court to refuse to compel the Army to do so?

2. Section 706(1) of the APA provides that a court "shall . . . compel agency action unlawfully withheld." The Army has failed to provide medical treatment to the Test Subject Veterans under AR 70-25. Did the district court have the discretion under Section 706(1) not to compel the Army to act as AR 70-25 requires?

3. The district court refused to compel the Army to comply with AR 70-25 by concluding that the Test Subject Veterans had not proven they are unable to access the system of medical care administered by the Department of

Veterans Affairs ("DVA"). Was it error for the district court to place such a burden on the Test Subject Veterans?[2]

III. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellants, Plaintiffs below, first filed their complaint for declaratory and injunctive relief on January 7, 2009. After motions practice, amended, second amended, and third amended complaints were filed from 2009 through 2010. The Third Amended Complaint, filed on November 18, 2010, sought a declaration under AR 70-25 that the Department of Defense and Department of the Army ("Army") were obligated to provide veterans who participated as test subjects in chemical and biological testing programs while in service with: (1) notice of the names, doses, and health effects of the substances to which they were exposed; and (2) medical treatment for ailments arising from those exposures and from participation in the testing programs. (E.R. 591, 639-41.) Relevant to this appeal, Plaintiffs also asked the district court to compel the Army under the APA to comply with its obligations and provide that (1) notice and (2) medical treatment. (E.R. 591, 641.)

On September 30, 2012, the district court certified two classes to pursue different sets of claims. (E.R. 227.) One of those classes is included in the group

[2] Pursuant to Ninth Circuit Rule 28-2.7, pertinent sections of the APA and other relevant statutes and regulations are included in the separately bound Statutory Addendum to this brief.

of Appellants before this Court: "current or former members of the armed forces, . . . who, while serving . . . , were test subjects in any human Testing Program that was sponsored, overseen, directed, funded, and/or conducted by the Department of Defense or any branch thereof . . . between . . . approximately 1922 and the present." (E.R. 284.) The district court also granted leave to file a fourth amended complaint to make a small change not pertinent to this appeal. (E.R. 284-85.) The Fourth Amended Complaint (and operative one) was then filed on October 3, 2012. (E.R. 397.)

Plaintiffs moved for partial summary judgment on December 4, 2012. Their motion was focused on the narrow issue of the Department of Defense and Army's legal obligations under AR 70-25 and related directives. The district court was asked to rule that the Department of Defense and Army were legally required to provide the Test Subject Veterans with: (1) notice of the names, doses, and health effects of the substances to which they were exposed during the testing programs; and (2) treatment for health problems arising from their participation in those programs. (C.R. 490.) On January 4, 2013, the government opposed that motion and made a cross-motion for summary judgment on all claims, including those under the APA for notice and medical treatment. (C.R. 495.)

With respect to the APA claim for notice, the district court granted in part and denied in part both sides' motions. On July 24, 2013, the district court ordered

the Army to provide class members with "any information acquired after the last notice that may affect their well-being when that information has become available and in the future." (E.R. 225.) By "last notice," the district court was referencing some Department of Veterans Affairs ("DVA") veteran outreach efforts. (*See* E.R. 169.) The parties were ordered to submit a joint proposed injunction consistent with the terms of the ruling on notice. The district court entered that injunction against the Army on November 19, 2013. (C.R. 545.)

As to the other claims, including the APA medical treatment claim, the district court granted the government's summary judgment motion. On this appeal, Plaintiffs-Appellants seek to reverse the district court's ultimate ruling on that APA medical treatment claim.

One of the government's arguments against the medical treatment claim was that sovereign immunity had not been waived because there is an "adequate alternative remedy" in the DVA's separate health care system under which the DVA provides health care and services for veterans. (C.R. 495 at 28.) The district court initially did not reach the merits of the medical treatment claim. Rather, it accepted the government's argument and found that "sovereign immunity has not been waived with regard to this claim because Plaintiffs and the class can seek medical care through the DVA and challenge any denial of care through the statutory scheme prescribed by Congress." (E.R. 206.) The district court

concluded that the Department of Defense and Army had not waived sovereign immunity because DVA ran a system that gave the class members "an adequate remedy," thus precluding review under APA Section 704 (the exhaustion of administrative remedies provision). (E.R. 202.)

Plaintiffs sought leave, on August 5, 2013, to file a motion for reconsideration of the ruling on the medical treatment claim. The basis for the motion was that the district court's ruling conflicted with the plain language of APA Section 702 (the sovereign immunity provision), Supreme Court precedent, and one of the district court's prior orders in the case. (C.R. 538, 538-1.) Plaintiffs also argued that the ability of the Test Subject Veterans to seek care from the DVA was not relevant to the Army's failure to follow its own regulation. (*Id.*)

Rather than ruling directly on the reconsideration request, the district court amended its opinion, issuing a "Notice of Intended Amended Order, Judgment, and Injunction" on October 11, 2013, and permitting the parties to comment. (E.R. 83, 84.) This intended amended order again partly granted and partly denied Plaintiffs' partial summary judgment motion and the government's cross-motion for summary judgment. (*Id.*)

In the intended amended order, it appears the district court addressed the arguments in the proposed motion for reconsideration by simply removing the sovereign immunity discussion that was in its original order. The intended

amended order now stated that the district court "has provided judicial review of Plaintiffs' claims and found that AR 70-25 entitles them to medical care for disabilities, injuries or illnesses caused by their participation in government experiments." (E.R. 130.) But even though the district court had just determined that the Test Subject Veterans were entitled to medical treatment under an Army regulation, the court went on to say the "only remaining question is whether Plaintiffs are entitled to choose which government agency ought to provide care." (*Id.*)

The district court then refused to "enjoin the DOD or the Army to provide health care, because the DVA is required to do so." (E.R. 133.) The district court said it "will not enjoin one government agency"—i.e., the Army—"to provide health care when another agency has been congressionally mandated to do so." (E.R. 130.) But the district court cited no authority for its assertion that a "congressional[] mandate[]" to DVA prevented a court from compelling the Army (a different agency) to comply with its own regulation. The district court instead supported its refusal to compel the Army to act by simply describing the DVA's statutory charge to provide medical care generally to veterans with service-connected disabilities, and the ability of veterans to appeal denials of benefits to the Board of Veterans' Appeals. (E.R. 130-31.)

In addition, the district court found that "Plaintiffs have not provided any evidence of a material dispute of fact that class members cannot access the DVA health care system or that they are denied compensation for their service-connected injuries." (E.R. 131.) And the district court stated, "Plaintiffs have not offered any evidence to support that the duty of DOD and the Army is in fact any broader than that of the DVA." (*Id.*)

Pursuant to the October 11, 2013 Notice of Intended Amended Order, Judgment, and Injunction, Plaintiffs filed a response on October 25, 2013, arguing, *inter alia*, that: (1) the district court was required under the APA to compel the Army to act once the court found the Test Subject Veterans were entitled to medical care under the Army regulation; (2) there was no Congressional mandate to the DVA to provide medical care to the Test Subject Veterans; and (3) DVA could not fulfill an obligation that belonged to the Army under an Army regulation. (C.R. 543.) Plaintiffs also pointed to evidence in the record, even though they had no burden to produce it, that the DVA-administered system was not providing care to class members and was systematically denying testing program–related claims. (C.R. 543 at 3.)

On November 19, 2013, the district court issued its third and final order on the summary judgment motions, leaving unchanged its analysis of the APA medical treatment claim. (E.R. 12.) The Test Subject Veterans appealed on

November 26, 2013. (E.R. 1.) On December 16, 2013, this Court by order of the Clerk granted Plaintiffs-Appellants' motion to expedite the appeal and set the matter for hearing promptly after the briefing. (Ninth Circuit Case No. 13-17430, Docket No. 11.)

IV. STATEMENT OF FACTS

For decades, the Army's Chemical Warfare Service tested dangerous chemical and biological substances, including mustard agents, nerve gases, and psychoactive drugs, on its own troops. This appeal arises from the failure of the Department of Defense and Army to provide medical treatment to those veterans who were subjected to such testing while in service and now endure illnesses resulting from their participation in those testing programs. This failure has occurred in the face of AR 70-25, the regulation the Army promulgated in 1962 (and reissued repeatedly over the ensuing decades) upon recognition of the need for a governance structure to protect the participants in these dangerous programs.

For years, the use of service members as subjects in military experiments was "an integral part of U.S. chemical weapons programs, producing tens of thousands of 'soldier volunteers' experimentally exposed to a wide range of chemical agents from World War I to about 1975." (E.R. 13.) After "[f]ormal authority to recruit and use volunteer subjects in [chemical warfare] experiments was initiated in 1942 . . . over 60,000 U.S. servicemen had been used as human

subjects in this chemical defense research program" by the end of World War II. (E.R. 14.)

Little research was conducted after World War II until the mid-1950's. Then from "1955 to 1975, thousands of U.S. service members were experimentally treated with a wide range of agents, primarily at U.S. Army Laboratories at Edgewood Arsenal, Maryland." (E.R. 15.) The 250 to 400 different chemical and biological weapons agents administered during these secret testing programs included, among others, VX, mustard gas, BZ, LSD, scopolamine, thorazine, Lewisite, CX (phosgene oxime), and code-named agents, such as CAR 302,688, EA 3580, and EA 1476. (E.R. 352-53.) Human testing on soldiers was suspended in July 1976. (C.R. 495 at 2.) The testing programs ended abruptly at that time, leaving the then-current test subjects without necessary medical care and follow-up. (E.R. 572.)

Certain "memoranda and regulations were intended to govern" this dangerous human testing. (E.R. 16.) Secretary of Defense Charles Erwin Wilson in February 1953 issued a Directive to his Secretaries on "the use of human volunteers by the Department of Defense in experimental research in the fields of atomic, biological and/or chemical warfare." (*Id.*) The "Wilson Directive" stated, among other things, that "[p]roper preparation should be made and adequate facilities provided to protect the experimental subject against even remote

possibilities of injury, disability, or death." (*Id.*) It warned the military Secretaries they "will be responsible for insuring compliance with the provisions of this memorandum within their respective Services." (E.R. 17.) In June 1953, Army Memorandum CS:385 reiterated the Wilson Directive's requirements, stating that "[m]edical treatment and hospitalization will be provided for all casualties of the experimentation as required." (*Id.*)

The Army imposed a governance structure and protective measures on these potentially harmful experiments when it codified the requirements articulated in the Wilson Directive and CS:385 in Army Regulation 70-25. AR 70-25 was first promulgated in 1962 and reissued by the Army in 1974. The regulation prescribed "policies and procedures governing the use of volunteers as subjects in Department of the Army research, including research in nuclear, biological, and chemical warfare, wherein human beings are deliberately exposed to unusual or potentially hazardous conditions." AR 70-25 ¶ 1 (1974) ("These regulations are applicable worldwide, wherever volunteers are used as subjects in Department of the Army research."). The regulation defined "unusual and potentially hazardous conditions" to be "those which may be reasonably expected to involve the risk, beyond the normal call of duty, of privation, discomfort, distress, pain, damage to health, bodily harm, physical injury, or death." *Id.* ¶ 2.

AR 70-25 enumerated "[c]ertain basic principles" that "must be observed to satisfy moral, ethical, and legal concepts." AR 70-25 ¶ 4 (1962, 1974). Echoing the language of CS:385, the regulation in pertinent part mandated that: "Required medical treatment and hospitalization will be provided for all casualties." AR 70-25 ¶ 5c (1962); (E.R. 17.) AR 70-25 was then updated in 1988, 1989, and 1990. (E.R. 17-22.) After the 1988 update, the regulation stated: "Volunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research." (E.R. 21.) The Army has never provided medical treatment to the Test Subject Veterans post-service as the regulation requires. (C.R. 495 at 39 n.39 (citing C.R. 496-58).)

V. SUMMARY OF THE ARGUMENT

The district court's grant of summary judgment to the Army should be reversed. The district court erred in declining to compel the Army to provide medical treatment to the Test Subject Veterans under AR 70-25. These veterans were subjected to human testing of dangerous chemical and biological substances—including nerve gases such as sarin and VX, psychoactive drugs such as LSD and BZ, and biological agents such as tularemia—while they were in service at various military installations around the country. They are entitled to medical treatment for maladies suffered as a result of involvement in that program. And the Army is thus legally required to provide that treatment under AR 70-25,

which was promulgated in response to, and to impose governance around, these dangerous human testing programs.

The district court refused to compel the Army even though:

- It found that AR 70-25 "entitle[s]" the Test Subject Veterans "to medical care for disabilities, injuries or illnesses caused by their participation in government experiments" (E.R. 58);
- The Army admits it was not providing, is not providing, and never has provided that medical treatment to the Test Subject Veterans (E.R. 318, 576-77); and
- The APA requires that when an agency fails to fulfill a legal obligation, the court "shall . . . compel agency action unlawfully withheld."

For these reasons, the district court's judgment on the claim for medical treatment should be vacated and the case remanded with instructions to enter partial summary judgment for the Test Subject Veterans and to issue an appropriate order compelling the Army to provide treatment pursuant to the regulation.

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VI. ARGUMENT

A. Standard of Review

The district court's grant of summary judgment is reviewed *de novo*. *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001). This Court "must 'view the case from the same position as the district court' and apply the same standards" in determining whether summary judgment should have been granted. *Id.* (quoting *Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993)). Where an agency fails to act, Section 706(1) of the APA provides the standard for providing relief: "The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). When the district court's decision to deny an injunction turns on a question of law, it is reviewed *de novo*. *Gathright v. City of Portland*, 439 F.3d 573, 576 (9th Cir. 2006) (citation omitted).

B. The District Court Was Required Under the APA To Compel the Army To Provide Medical Treatment.

"Shall" means shall. If the Court agrees with that simple principle, it should reverse the district court's refusal to compel the Army to provide medical treatment to the Test Subject Veterans as its own regulation requires.

The district court correctly determined that "AR 70-25 entitles Plaintiffs to medical care for any disabilities, injuries or illnesses suffered as a result of participation in the experimentation program." (E.R. 61.) The Army also admitted in discovery and again during summary judgment briefing that it is not providing

that medical treatment to the Test Subject Veterans as AR 70-25 requires. (E.R. 318; C.R. 495 at 39 n.39.)

Even though the Army has not provided medical treatment to those entitled to it under its own regulation, and despite the APA's mandatory language, the district court refused to compel the Army to act. The court refused to "enjoin the DOD or the Army to provide health care, because the DVA is required to do so." (E.R. 61.) As explained below, the DVA's mission is not relevant to the *Army's* obligation under an *Army* regulation. And, in fact, the class of Test Subject Veterans is not coextensive with the group of veterans who are potentially eligible for DVA care if they qualify by establishing a service-connected injury. The district court's refusal to compel the Army to act is contrary to the plain meaning and purpose of the APA. This Court should therefore reverse the district court's order and remand with instructions to issue an injunction.

1. The APA Says "Shall Compel."

The district court used the wrong legal standard under the APA. Citing 5 U.S.C. § 706(1), the court stated that "[w]hen a plaintiff asserts an agency's failure to act, a court *can* grant relief by compelling 'agency action unlawfully withheld or unreasonably delayed.'" (E.R. 31 (emphasis added).) The APA, however, provides that once a court determines agency action is being unlawfully withheld, it *must* compel that agency action. *See Norton v. S. Utah Wilderness*

Alliance ("*SUWA*"), 542 U.S. 55, 62 (2004) ("The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." (citing 5 U.S.C. § 706(1))). The APA does not leave the matter to a court's discretion.

When courts construe statutes using the word "shall," the rule could not be clearer: "'Shall' means shall." *Brower*, 257 F.3d at 1068 n.10 (quoting *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 837-38 (9th Cir. 2001)); *see also Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187-88 (10th Cir. 1999) (APA's use of "shall" means courts "must compel agency action unlawfully withheld"). As this Court further explained in *Brower*, Supreme Court jurisprudence confirms that "by using 'shall' 'Congress could not have chosen stronger words to express its intent that forfeiture be mandatory.'" *Id.* (quoting *United States v. Monsanto*, 491 U.S. 600, 607 (1989)).

The APA's statutory language imposes a mandatory remedy. Indeed, this APA mandate contrasts with a court's traditional discretionary mandamus power. 28 U.S.C. § 1361. *Forest Guardians* thoroughly analyzes the issue. 174 F.3d at 1187-88. Collecting cases, the Tenth Circuit explained that "[t]he Supreme Court and this circuit have made clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command." *Id.* at 1187 (citing *Monsanto*, 491 U.S. at 607; *United States v. Myers*, 106 F.3d 936, 941 (10th Cir.) ("It is a basic canon of statutory construction that use of the word 'shall' . . .

indicates mandatory intent."), *cert. denied*, 520 U.S. 1270 (1997) (additional citation omitted)). Despite the APA's clear language, the defendant Secretary of the Interior in *Forest Guardians* insisted that the district court was not required to issue an injunction. *Id.* at 1187. The Tenth Circuit rejected the government's argument, concluding that "[t]hrough § 706 Congress has stated unequivocally that courts *must compel* agency action unlawfully withheld or unreasonably delayed." *Id.* (emphasis added). That ruling should control here. *See, e.g., Ctr. for Biological Diversity*, 254 F.3d at 837-38 (citing *Forest Guardians* for principle that "'[s]hall' means shall"); *see also Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1172 n.2 (9th Cir. 2009) (citing *SUWA* and *Forest Guardians* for principle that Section 706 "prescribes standards for judicial review and demarcates what relief a court may (or *must*) order" (emphasis added)).

2. The District Court Had No Basis To Refuse To Compel the Army.

a. The Army Admits It Has Not Provided Medical Treatment to the Test Subject Veterans.

The Army's admission that it has not provided and is not providing medical treatment pursuant to AR 70-25 establishes that it is unlawfully withholding agency action. The Army admitted that "[t]here is no genuine issue of material fact regarding whether DoD [including the Army] has provided health care to test

participants in the manner urged by Plaintiffs. . . . Accordingly, trial on this claim would be inappropriate." (C.R. 495 at 39 n.39.)

The district court's ruling that the Test Subject Veterans are entitled to medical care under AR 70-25, coupled with this Army admission, shows that the Army's failure to provide such medical treatment contravenes its own regulation and is unlawful. The APA thus mandates that an order be entered compelling the Army to act.

b. No Countervailing Considerations Weigh Against Compelling the Army To Act.

This case presents the unusual circumstances in which there is a legally enforceable entitlement obligating the Army, but the agency has no intention of fulfilling that obligation. (C.R. 495 at 36-39, 39 n.39; E.R. 576-77.) The Army has repeatedly denied that it is required to provide medical treatment to the Test Subject Veterans pursuant to AR 70-25. (C.R. 495 at 36-39; E.R. 576-77.) This is not a case of an agency delaying its performance of a legal obligation; the Army has made clear that it will not act and has no intention of doing so, absent court intervention. Accordingly, there were no countervailing considerations for the district court to weigh that might excuse the Army's failure to act.

In these narrow circumstances, the Army is simply unlawfully withholding a discrete agency action required under AR 70-25, and the district court was required to compel the Army to act pursuant to the APA. But in refusing to compel the

Army to act, the district court did not analyze the mandatory nature of the APA remedy and controlling case law, nor did it support its decision with any legal citation or articulated reasoning.

Initially, the district court accepted the government's argument that "there is no waiver of sovereign immunity . . . because there is an adequate remedy" through the DVA's health care system, and thus refused to compel the Army to act. (E.R. 202.) After Plaintiffs-Appellants sought to have that ruling reconsidered, the district court issued an intended amended order that removed any discussion of sovereign immunity. (C.R. 538; E.R. 84.) The district court kept the same conclusion; it did not, however, replace the sovereign immunity discussion with any new legal authority. (E.R. 84.) The final version of the order erroneously declines to enter an injunction by stating simply that "[t]he Court will not enjoin one government agency to provide health care when another agency has been congressionally mandated to do so." (E.R. 58 (referring to the DVA).)

C. The DVA's Existence Is Not a Reason To Refuse To Compel the Army.

1. The DVA Is Not Relevant to the Army's Obligation.

It is the *Army's* regulation from which the legal obligation to provide the Test Subject Veterans with medical treatment is derived. The Army promulgated AR 70-25 in 1962, codifying an Army obligation that "medical treatment and hospitalization *will be provided* for all casualties" of the testing program

experiments. AR 70-25 ¶ 5c (1962) (emphasis added); (E.R. 17.) The fifth (and current) version of the regulation reads that "[v]olunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research." AR 70-25 ¶ 3-1.k (1990); (E.R. 21.) Thus, pursuant to AR 70-25, the Army is legally obligated to provide medical treatment to the Test Subject Veterans. (E.R. 61.)

The *Army* has "withheld" the "agency action" necessary to comply with *its own regulation*. It is that agency action which must be compelled pursuant to the APA. The existence of another agency, and *that* agency's separate obligations, should be legally irrelevant.

The district court's unsupported refusal violates the APA's mandate and Ninth Circuit case law and is inconsistent with the APA's purpose. The APA is designed to ensure that agencies comply with their legal obligations. In this case, it is the Army's obligation to provide medical treatment to those who are found to be entitled to it under AR 70-25. That obligation to provide medical treatment is critically important to these Test Subject Veterans, who were purposefully exposed to chemical and biological weapon agents at the hands of the United States military. It is the Army's failure to follow its own regulation that is causing the Test Subject Veterans' injury. It is the Army's action that must be compelled, as mandated by the APA.

2. The DVA Has No Congressional Mandate To Provide Medical Treatment to the Test Subject Veterans.

The district court erroneously suggested its refusal to compel the Army was supported by the fact that there was already a Congressional mandate to the DVA to provide medical treatment to the Test Subject Veterans. (E.R. 58.)

But there has been no "congressional[] mandate[]" to "another agency" (i.e., the DVA) to provide medical treatment to the class of human test subjects. (*Id.*) Congress never mandated that the DVA must take care of the Test Subject Veterans. It is true that the DVA has a statutory mandate to provide a system of medical care for veterans generally, but that mandate has nothing to do with the Army's obligation to provide medical treatment to the class.

Moreover, the class of veterans theoretically eligible for DVA care and the class of Test Subject Veterans are not coextensive. Certain categories of discharge from the military impose bars to receiving DVA benefits, including medical treatment. For example, service members who are less than honorably discharged are statutorily excluded from DVA care. *See* 38 U.S.C. § 5303(a) (imposing certain bars to benefits based on discharge status); 38 C.F.R. § 3.12 (enumerating circumstances of discharge that bar DVA benefits). Even those veterans who were discharged because of behavioral problems resulting from the effects of testing program exposures would be excluded. But such Test Subject Veterans would be entitled to medical treatment from the Army for "any disabilities, injuries or

illnesses suffered as a result of participation in the experimentation program," pursuant to AR 70-25. Because AR 70-25 contains no such restrictions, the two groups do not fully coincide.

The district court stated that "Plaintiffs also speculate, 'It is possible that many class members are not even eligible for DVA medical care,' . . . but provide no evidence that there are any such class members." (E.R. 60-61.) The district court missed two issues here.

First, the class definition does not exclude human test subjects who were less than honorably discharged (and who would be, as such, ineligible for DVA care). And nothing in the text of AR 70-25 limits the Army's obligation in that way.

Second, not only is such "evidence" irrelevant, but Plaintiffs-Appellants had no burden to put forward "evidence" of whether any class members were eligible for DVA medical care. The district court certified a class for this APA medical care claim on September 30, 2012; the class definition does not exclude test subjects who were dishonorably discharged. (E.R. 227.) That should be the end of the analysis; there is no basis to impose on Plaintiffs-Appellants an obligation to gather evidence about absent class members. Indeed, once a class is certified, discovery of absent class members is sharply limited because it would undermine the efficiency of the class action process. Federal Judicial Center, Manual for Complex Litigation, Fourth, § 21.41 (2004); *see also* William B. Rubenstein,

Newberg on Class Actions § 9:11 (5th ed. 2014); 7B Wright, Miller, et al., Federal Practice and Procedure § 1796.1 (3d ed. 2004) (after certification, discovery from absent class members is not ordinarily permitted).

Finally, Congress did not mandate that the DVA must be the only agency to provide treatment to veterans for injuries resulting from service. The DVA is *not* the exclusive place where veterans must go for medical care from the government. The Army, in fact, can and does provide medical treatment to various categories of service members after they leave active military service. The Army operates its own hospitals and medical treatment facilities and also administers its own TRICARE System.[3] (E.R. 555-56.) The Army admits, for example, that "[m]ilitary retirees can qualify for *both* TRICARE and VA care." (E.R. 314; C.R. 495 at 34 n.31 (emphasis added).) Test Subject Veterans receiving medical treatment pursuant to AR 70-25 would just be another category of veterans receiving care from the Army.

[3] Various options are available for medical treatment from the Army. Depending on the plan, medical treatment "can be provided either in the direct care system, in military treatment facilities, or in what DoD calls the 'purchase care program,' which is often referred to as TRICARE." (C.R. 495 at 33 n.31; *see also* E.R. 555-56.) "TRICARE is a health benefit program for all seven uniformed services: the Army, Navy, Marine Corps, Air Force, Coast Guard, Public Health Service, and the National Oceanic and Atmospheric Administration." (E.R. 555.)

D. The District Court Improperly Imposed a Burden on the Test Subject Veterans that Does Not Exist Under the APA.

The district court stated that "Plaintiffs have not provided any evidence of a material dispute of fact that class members cannot access the DVA health care system or that they are denied compensation for their service-connected injuries." (E.R. 59.) Plaintiffs-Appellants had no such burden. In relevant part, their Motion for Partial Summary Judgment focused only on whether the Army had an obligation to provide medical treatment under AR 70-25. (C.R. 490.) And none of the government's arguments on the merits in their summary judgment motion (C.R. 495 at 28-39) shifted the burden to the class to produce evidence that Test Subject Veterans could not access DVA health care, that they were being denied compensation for service-connected injuries, or that DVA was systematically failing to offer them care.[4]

[4] Although Plaintiffs had no burden to show that DVA was systematically denying medical treatment to the Test Subject Veterans, there was substantial evidence before the district court that DVA has systematically denied testing program–related disability claims. (*See*, *e.g.*, C.R. 502 at 24-35 and 543 at 4.) For example, according to DVA's own internal reports, as of January 2010, only 2 out of 86 decisions related to the testing programs included a grant of service-connection. (E.R. 296.) Those veterans whose disability claims were denied would thus *not* be able to receive medical care from DVA for a service-connected injury, as the district court envisions. (*See* E.R. 59.) There are well-publicized reports, moreover, that the DVA's rationed system has forced veterans seeking care to endure long wait times and delays for adjudicating their service-connection claims in order for them to even qualify for DVA care. *See, e.g.*, *Waiting for Care: Examining Patient Wait Times at VA: Hearing Before the*

(Footnote continues on next page.)

More importantly, even if these DVA issues had been raised, they are irrelevant. As explained above, the only relevant question is whether the Army is "unlawfully withholding" agency action required by AR 70-25. *See* 5 U.S.C. § 706(1). In light of the Army's admission that it is not providing such treatment to those entitled to it, the answer is a simple yes. Thus, the district court "shall compel" the "unlawfully withheld" agency action. *Id.*; *Brower*, 257 F.3d at 1068 n.10; *Forest Guardians*, 174 F.3d at 1187-88. The district court should not have looked outside of the regulation itself and its promulgating agency. An alternative result would effectively undercut the APA.

VII. CONCLUSION

For all of these reasons, the district court's judgment on the medical care APA claim should be vacated and the case remanded with instructions that the

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(Footnote continued from previous page.)

H. Subcomm. on Oversight & Investigations of the H. Comm. on Veterans' Affairs, 113th Cong. (2013).

district court grant summary judgment to Plaintiffs on that claim and enter an appropriate injunction to provide the relief sought.

Dated: February 3, 2014

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CERTIFICATE OF WORD COUNT

Pursuant to Ninth Circuit Rule 32-1, counsel hereby certifies that the foregoing Opening Brief of Appellants is produced using 14-point Times New Roman font and contains approximately 6,601 words, including footnotes. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: February 3, 2014

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellants hereby state that they are unaware of any related cases pending before this Court.

Dated: February 3, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2014, I electronically filed the foregoing OPENING BRIEF, STATUTORY ADDENDUM, and EXCERPTS OF RECORD VOLS. 1, 2, and 3 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Pursuant to Ninth Circuit Rule 31-1, paper copies of the foregoing OPENING BRIEF, STATUTORY ADDENDUM, and EXCERPTS OF RECORD VOLS. 1, 2, and 3 will be submitted to the Court at the direction of the Clerk of the Court.

Dated: February 3, 2014

/s/ Eugene Illovsky
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