Nos. 13-17430, 14-15108

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIETNAM VETERANS OF AMERICA, et al.,

Plaintiff-Appellants/Cross-Appellees,

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants-Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF CALIFORNIA

DEFENDANT-APPELLEES/CROSS APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MELINDA L. HAAG
United States Attorney

MARK B. STERN
CHARLES W. SCARBOROUGH
(202) 514-1927
Attorneys, Appellate Staff
Civil Division, Room 7244
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

Regulation:

Other:

INTRODUCTION AND SUMMARY

Rejecting the Army's reasonable understanding of its own regulation, a divided panel ((Fletcher, Schroeder, JJ; Wallace, J., dissenting in part) held that Army Regulation 70-25 (AR 70-25) creates an independent duty to provide medical care to veterans who many years ago participated in chemical and biological testing programs, even though veterans are already eligible for medical care from the Department of Veterans Affairs (VA). The language on which the panel majority relied states that "[v]olunteers are authorized all medical care for injury or disease that is a proximate result of their participation in research." Consistent with controlling Department of Defense regulations, the Army reasonably interprets that language to cover the provision of care only during a volunteer's participation in testing.

The panel majority's holding that the Army is nevertheless required to provide ongoing medical care long after a veteran last participated in a testing program departs from Supreme Court and Circuit precedent in several respects.

First, the Supreme Court has made clear that courts may compel action under 5 U.S.C. § 706(1) only when an agency has failed "to take a *discrete* agency action that it is *required to take*." *Norton v. Southern Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55, 64 (2004) (emphases in the original). A duty is enforceable under Section 706(1) only if it is "so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Hells Canyon Preservation Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th

Cir. 2010). As Judge Wallace observed in dissent, AR 70-25 contains no "unequivocal command" to provide ongoing medical care to volunteer test participants. Op. 34.

Second, the panel majority erred in failing to accord any deference to the Army's interpretation of its own regulation simply because it was first advanced in this case. Contrary to the majority's approach, this Court has held that the proposition that interpretations advanced in litigation are not entitled to deference does not apply in Section 706(1) cases where agencies will typically have had no occasion to set out a formal interpretation supporting a failure to take action. *See Independence Mining Co. v. Babbitt*, 105 F.3d 502, 511-12 (9th Cir. 1997). In fact, the Army has never interpreted the language on which the panel majority relied to require care in Army facilities after a volunteer's participation in testing has ceased, as evidenced by controlling DoD regulations to the contrary and the fact that the Army has not furnished such care to former test participants over the past decades.

Third, the panel majority erred in concluding that the district court lacked discretion to deny injunctive relief requiring the Army to furnish medical care to the plaintiffs on the ground that such care is already provided by the VA. The majority declared that, because Section 706(1) uses the word "shall," it "requires a reviewing court to issue injunctive relief whenever it finds that an agency action has been unlawfully withheld." Op. at 28 (citing *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999)). However, this Court has expressly rejected the Tenth Circuit's reading of Section 706(1) and instead has adopted the approach taken by the D.C.

Circuit, holding that "a statutory violation does not always lead to the automatic issuance of an injunction" under Section 706(1). *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002).

As discussed in section II, *infra*, for similar reasons, the panel erred in holding that the Army has an ongoing duty to seek out and provide "notice" to former test participants of any new information that could potentially affect their health in addition to the extensive notice that the government has already provided.

The panel's reasoning conflicts with decisions of the Supreme Court and this Court, and threatens significant practical consequences by requiring the Army to divert substantial resources to establish new mechanisms to provide medical care outside the comprehensive scheme Congress established to provide care to veterans and new procedures to determine what additional notice (if any) should be provided to former test participants. This case should accordingly be reheard en banc.

STATEMENT

1. Between World War II and 1976, the Army conducted tests that exposed thousands of volunteer members of the armed forces to chemical and biological agents. In 2009, two veterans' groups and a number of veterans filed this class action against the Army and other agencies allegedly involved in the testing programs. As now relevant, plaintiffs seek to compel agency action under 5 U.S.C. § 706(1) that they claim is required by AR 70-25, an Army regulation first issued in its current form in 1988 and revised in 1990.

In their medical-care claim, plaintiffs contend that Section 3-1(k) of AR 70-25 requires the Army to provide former test participants with medical care for any conditions caused by their participation in the tests. That provision simply states that "[v]olunteers are authorized all medical care for injury or disease that is a proximate result of their participation in research."

In their notice claim, plaintiffs assert that Section 3-2(h) of AR 70-25 requires the Army to provide former test participants with any new information potentially relevant to their health. Section 3-2(h) provides:

> Commanders have an obligation to ensure that research volunteers are adequately informed concerning the risks involved with their participation in research, and to provide them with any newly acquired information that may affect their well-being when that information becomes available. The duty to warn exists even after the individual volunteer has completed his or her participation in research.

2. After certifying a class action, the district court (Wilken, J.) granted in part and denied in part the parties' cross-motions for summary judgment, ruling for plaintiffs on the notice claim and for the government on the medical-care claim.

The district court acknowledged that it was not clear whether AR 70-25 establishes duties "owed to individuals who participated in experiments before 1988." ER 44. Nevertheless, the court held that Section 3-2(h) requires the Army to provide former test participants with additional "notice" about the potential health effects of the tests, and further held that this duty is enforceable under Section 706(1). The district court also held that Section 3-1(k) entitles former test participants to ongoing

medical care for conditions proximately caused by their participation in testing programs. However, the court declined to order the Army to provide such care because Congress assigned the task of providing medical care to veterans to the VA. The court held that it would not "enjoin one government agency to provide health care when another agency has been congressionally mandated to do so." ER 58.

3. Both sides appealed. The panel (Fletcher, Schroeder, Wallace JJ.) ruled for plaintiffs on both claims. Judge Wallace dissented on the medical-care claim.

With regard to the notice claim, the panel rejected the government's argument that the duty in Section 3-2(h) is limited to individuals involved in tests conducted after the relevant language was added to the regulation in 1988. Op. at 16-20. The panel noted that Section 3-2(h) contains no temporal limitation and asserted that the regulatory history confirms that the notice obligation applies to former test subjects. *Id.* at 16-18. The panel declined to defer to the Army's contrary interpretation because it viewed the Army's reading as merely a "convenient litigating position." *Id.* at 19.

With respect to the medical-care claim, the panel majority held that the district court erred in relying on the availability of care from the VA to deny injunctive relief. *Id.* at 27-29. The majority reasoned that, because Section 706(1) uses the word "shall," it "requires a reviewing court to issue injunctive relief whenever it finds that an agency action has been unlawfully withheld." *Id.* at 28 (citing *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (1999)). The majority declared that the duty to provide care under Section 3-1(k) is not "excused by the availability of medical care from another

government agency, even if that care would overlap to some degree and in some manner with the care that the Army is required to provide." *Id.* at 29.

Dissenting with regard to the medical-care ruling, Judge Wallace emphasized that a duty is enforceable under Section 706(1) only if the relevant statute or regulation "contains an 'unequivocal command' about which an official has 'no discretion whatever.'" Op. 31 (quoting *SUWA*, 542 U.S. at 63). In his view, that standard requires a reviewing court to "focus exclusively on the text of the relevant statutes or regulations." *Ibid.* Judge Wallace concluded that Section 3-1(k) is not an "unequivocal command" to the Army to provide medical care to former test participants, *id.* at 34-35, and that its general "authorization" for medical care "is not discrete agency action" enforceable under Section 706(1). *Id.* at 35.

DISCUSSION

I. The Panel Erred In Holding That Plaintiffs Are Entitled To An Injunction Requiring The Army To Provide Medical Care In Addition To the Care Available From The Department Of Veterans Affairs.

The panel majority held that (1) Section 3-1(k)of AR 70-25 imposes a duty on the Army to provide medical care to plaintiffs for any conditions caused by their participation in tests many years ago; (2) the required actions are sufficiently discrete to be compelled under Section 706(1); and (3) plaintiffs are entitled to an injunction notwithstanding the availability of medical care from the VA. As explained below, the majority erred in each step of its analysis, and its ruling conflicts in several important ways with decisions by the Supreme Court, this Court, and other courts of appeals.

A. No Unequivocal Command to Provide Medical Care.

The panel majority acknowledged Supreme Court and Ninth Circuit precedent holding that a duty is enforceable under Section 706(1) only if it is "so clearly set forth that it could traditionally have been enforced through a writ of mandamus." Op. 15 (quoting *Hells Canyon*, 593 F.3d at 932); *see also SUWA*, 542 U.S. at 63-65. But the majority departed from that demanding standard in finding an obligation to provide care to plaintiffs – who are former volunteer test participants – in Section 3-1(k)'s general statement that "[v]olunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research."

The Army construes Section 3-1(k) to govern medical care only during a volunteer's participation in testing, and has never understood that provision to impose an ongoing obligation to provide medical care long after testing has been completed. Instead, veterans who are former test participants are eligible for medical care for any "service-connected" injuries or conditions through the comprehensive scheme Congress established specifically to provide care to veterans, which is administered by the VA. *See* 38 U.S.C. § 7301(b).

The panel majority rejected the Army's reading of its own regulation because the text of Section 3-1(k) does not expressly limit care to the duration of the testing program, Op. 26-27, expressing the view that the most "natural reading" of the term "authorized" in Section 3-1(k) is that test participants are legally "entitled to" medical care. Op. 25. As Judge Wallace explained in dissent, however, "regardless of how

'natural' the majority believes its reading to be, it is not the only plausible reading." *Id.* at 34. By rejecting the Army's interpretation and adopting what it regarded as the most "natural reading" of Section 3-1(k), the majority violated the fundamental rule – grounded in separation-of-powers principles – that only a "specific, unequivocal command" to act is enforceable under Section 706(1). *See SUWA*, 542 U.S. at 65.

Even the specific part of Section 3-1(k) relied on by the panel majority does nothing more than "authorize" medical care, with no specific mention of care for former test participants who have left the military. That provision does not constitute an "unequivocal command" to the Army to provide such care, much less specify the circumstances or duration for such care.

The Army's interpretation of this generally-worded provision not to require the provision of medical care to veterans long after they participated in testing programs is buttressed by the four additional paragraphs of Section 3-1(k) that focus on care *during* a testing program and prescribe the rates at which care provided in military treatment facilities will be reimbursed. For example, Section 3-1(k)(2) provides:

> Medical care costs for all [non-civilian] personnel, who under the provisions of AR 40-3 are routinely authorized care in a military [medical treatment facility,] will be waived for the volunteer while in the hospital, if the volunteer would not normally enter the hospital for treatment but is requested to do so to facilitate the research. This also applies to a volunteer's extension of time in a hospital for research when the volunteer is already in the hospital.

The recognition in the regulation that test participants will already be authorized to receive care in military facilities confirms that it applies only during testing, and

cannot be squared with a duty to provide care many years later – after a volunteer has left the Army. Moreover, the regulation's discussion of volunteers who are asked to enter or remain in the hospital "to facilitate the research" likewise demonstrates that Section 3-1(k) is focused on care during testing itself. Finally, the contrast between these relatively detailed provisions governing the provision of care during testing and the total absence of any mention, much less any detail, about how care would be provided at some later time provides further support for the view that Section 3-1(k) was not intended to govern future care.

More fundamentally, the majority's reading of Section 3-1(k) is inconsistent with statutes, regulations, and DoD instructions specifying the limited circumstances under which the Army is authorized to provide medical care. In particular, Congress provided discretionary authority for the Secretary of Defense and the service branches to promulgate regulations establishing eligibility for medical care not otherwise created by statute, *see* 10 U.S.C. § 1074(c)(1), but the controlling Defense Department regulation implementing Section 1074 explicitly allows medical care to be provided to research volunteers *only* "during the pendency of the volunteer's involvement in the research." 32 C.F.R. § 108.4(i). That regulation notes that care "*may* be extended further upon the approval of the [Under Secretary of Defense for Personnel and Readiness]," *id.* (emphasis added), but such discretionary language plainly forecloses mandamus relief to compel such care. *See also* DoD Instruction No. 6025.23 § 4(i), *available at* http://www.dtic.mil/whs/directives/corres/pdf/602523p.pdf.

In short, the majority's expansive construction of one sentence in AR 70-25 – to require the provision of medical care to individuals long after their participation in testing programs has ceased – conflicts with the limited authorization to provide care to research volunteers provided in 10 U.S.C. § 1074(c)(1), 32 C.F.R. § 108.4(i), and applicable DoD instructions. Although the government made this argument on appeal (Govt. Br. 27-28), the panel majority simply ignored it.

B. Providing Medical Care Is Not Discrete Action.

Aside from not constituting an "unequivocal command" to provide medical care for former service members whose participation in testing ended long ago, the "authorization" for medical care in Section 3-1(k) "lack[s] the specificity requisite for agency action," *SUWA*, 542 U.S. at 66, with respect to such persons. As Judge Wallace explained, Section 3-1(k) "leaves us to guess at which agency officer is obligated to provide the medical care, * * * what such medical care would consist of, or when and how long medical care must be provided." Op. 36. In the absence of specific directives on these points, the panel majority was not free to fill in the blanks and order the Army to establish a new program of medical care.

Nor could the "discrete" action requirement under 5 U.S.C. § 706(1) be satisfied by a broad injunction directing the Army to provide a new program of medical care to plaintiffs while allowing the Army some flexibility to choose the means of compliance. Indeed, the Supreme Court rejected similar attempts to evade the discrete agency action requirement in *SUWA*, explaining that Section 706(1) is

limited to discrete actions in order "to avoid judicial entanglement in abstract policy disagreements." 542 U.S. at 66. The Court warned that

> If courts were empowered to enter general orders compelling compliance with broad statutory [or regulatory] mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved -- which would 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 day-to-day agency management.

Id. at 66-67. Nowhere does the panel majority explain how the district court could enter an injunction on the medical-care claim that would avoid the kind of judicial entanglement in the day-to-day management of the Army that *SUWA* prohibits.

C. No Injunction Was Warranted Given the Availability of Medical Care from the VA.

Even if Section 3-1(k) imposed a duty enforceable under Section 706(1), the panel majority separately erred in overruling the district court's determination that it would be inappropriate to enjoin one agency to provide medical care that Congress has expressly directed another agency (the VA) to provide to veterans. The majority held that the district court lacked the discretion it would ordinarily have not to issue an injunction, *see eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006), asserting that "§ 706(1) requires a reviewing court to issue injunctive relief whenever it finds that an agency action has been unlawfully withheld." Op. 28 (citing *Forest Guardians*, 174 F.3d at 1187). That reading of Section 706(1) – which the Tenth Circuit adopted in a Section 706(1) case decided long before *SUWA* – directly conflicts with prior decisions by this Court and the D.C. Circuit.

For example, in *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166 (9th Cir. 2002), this Court stated that "a statutory violation does not always lead to the automatic issuance of an injunction" under Section 706(1), explaining that the appropriateness of an injunction instead depends on whether such relief "is necessary to effectuate the congressional purpose behind the statute" that imposed the requirement. *Id.* at 1177. In reaching that conclusion, this Court rejected the Tenth Circuit's approach in *Forest Guardians* and opted instead to adopt the more flexible approach taken by the D.C. Circuit, which has held that a court retains equitable discretion when deciding whether to issue an injunction under Section 706(1). *See In re Barr Laboratories*, 930 F.2d 72, 74 (D.C. Cir. 1991) ("Equitable relief, particularly mandamus, does not necessarily follow a finding of a violation."). *See also In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (1999). The panel majority ignored this binding Circuit precedent.

Finally, the majority failed to address the government's argument that the provision of medical care by the VA provides an adequate alternative remedy within the meaning of 5 U.S.C. § 704, which forecloses an APA claim for the same relief from the Army – an argument this Court treats as jurisdictional. *See Gallo Cattle Co. v. USDA*, 159 F.3d 1194, 1198 (9th Cir. 1998). The majority made no finding that the medical care available from the VA is not an "adequate" remedy for purposes of Section 704. Nor could it have done so, as the district court found that plaintiffs had failed to present any evidence to show that VA care was inadequate. ER 60. In declaring that the district court could "take the VA's provision of medical care into

account in formulating an injunction on remand," Op. at 29, the majority opinion can be read to envision proceedings on remand to determine whether the care provided by the VA is generally inferior to care provided by the Army. But that would be the very type of systemic evaluation of VA benefits programs that this Court recently confirmed that federal courts lack jurisdiction to undertake. *See Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (2012) (en banc).

II. The Panel Erred In Holding That Plaintiffs Are Entitled To An Injunction Requiring The Army To Provide Additional Notice To Plaintiffs Of Any Newly-Acquired Information That Could Potentially Affect Their Health Beyond The Notice Already Provided.

The panel's ruling on the notice claim was erroneous for many of the same reasons discussed above with respect to the medical-care claim. Most notably, given the conceded ambiguity on the question whether AR 70-25 even applies to testing programs terminated long before the current version of that regulation was adopted, *see* ER 44, the panel erred in holding that Section 3-2(h) imposes a clear and unequivocal duty on the Army to provide ongoing notice of newly-acquired information to former test participants that is enforceable under Section 706(1), and further erred in affirming an injunction that requires the Army to seek out such information – a duty that has no basis in the text of Section 3-2(h). The panel also erred in at least two additional ways in upholding the district court's notice injunction.

First, the panel completely ignored the notice the government has already provided – and continues to provide – to former test participants. After extensive

research concluding that, in general, there were no long term health effects from the testing programs (a scientific judgment that was never challenged), the Army worked with the VA to identify former test participants and sent letters to them in 2005 and 2006. The Army also established (and continues to maintain) public websites and telephone hotlines to provide information to test participants and provided individual test files to every test participant who so requested. Like the district court, the panel apparently believed these efforts were inadequate, but it is well-established that plaintiffs may not challenge the adequacy of agency action under Section 706(1). *See Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999) (refusing to allow "complaints about the sufficiency of agency action dressed up as an agency's failure to act"). Because the notice injunction affirmed by the panel necessarily rests on the premise that the Army's prior (and ongoing) notification efforts are inadequate, the panel's decision conflicts with binding Circuit precedent foreclosing Section 706(1) claims challenging the sufficiency of agency action.

Second, the panel erred in refusing to defer to the Army's reasonable construction of its own regulation, which is normally entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). The primary reason the panel gave for withholding *Auer* deference was that the Army had advanced its interpretation in the context of this litigation. *See* Op. 19. But the Army's practices over the past decades reflect its understanding of the notice undertaking and are fully consistent with the Army's interpretation. Moreover, this Court has held that the proposition that interpretations

of regulations advanced for the first time in litigation are not entitled to deference does not apply in Section 706(1) cases where agencies typically have no occasion to set forth written interpretations of regulations prior to litigation challenging a failure to act. *See Independence Mining Co.*, 105 F.3d at 511-12. The panel's refusal to accord any deference to the Army's construction of AR 70-25 thus conflicts with binding Circuit precedent and Supreme Court decisions recognizing similar principles. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880-81 (2011); *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2263-64 (2011).

CONCLUSION

For the foregoing reasons, this case should be reheard en banc.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney

MARK B. STERN
(202) 514-5089

/s/Charles W. Scarborough
CHARLES W. SCARBOROUGH
(202) 514-5714
Attorneys, Appellate Staff
Civil Division, Room 7244
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I hereby certify that the attached petition for rehearing is proportionately-spaced, has a typeface of 14 points or more, and contains 3,874 words, as permitted by the alternate length limitations applicable to rehearing petitions under Circuit Rules 35-4 and 40-1.

/s/ Charles W. Scarborough
CHARLES W. SCARBOROUGH

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Charles W. Scarborough
CHARLES W. SCARBOROUGH

PANEL OPINION (June 30, 2015)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIETNAM VETERANS OF AMERICA; SWORDS TO PLOWSHARES, Veterans Rights Organization; TIM MICHAEL JOSEPHS; WILLIAM BLAZINSKI; BRUCE PRICE; FRANKLIN D. ROCHELLE; LARRY MEIROW; ERIC P. MUTH; DAVID C. DUFRANE; KATHRYN MCMILLAN-FORREST, *Plaintiffs-Appellants–Cross-Appellees*, v. CENTRAL INTELLIGENCE AGENCY; JOHN BRENNAN, Director of the Central Intelligence Agency; UNITED STATES DEPARTMENT OF DEFENSE; ASHTON CARTER, Secretary of Defense; UNITED STATES DEPARTMENT OF THE ARMY; JOHN M. MCHUGH, Secretary of the Army; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF VETERAN AFFAIRS; ROBERT A. MCDONALD, Secretary of Veterans Affairs, *Defendants-Appellees–Cross-Appellants*.	Nos. 13-17430 14-15108 D.C. No. 4:09-cv-00037-CW OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
September 11, 2014—San Francisco, California

Filed June 30, 2015

Before: J. Clifford Wallace, Mary M. Schroeder,
and William A. Fletcher, Circuit Judges.

Opinion by Judge W. Fletcher;
Partial Concurrence and Partial Dissent by Judge Wallace

SUMMARY*

Veterans Affairs

The panel affirmed in part and reversed in part the district court's judgment and injunction entered in an action brought by veterans organizations, and individuals who were subjects in chemical and biological weapons experiments conducted by the United States military, seeking declaratory and injunctive relief against federal agencies.

The panel agreed with the district court that the U.S. Army had an ongoing duty under Army Regulation 70-25 to provide former test subjects with newly available information

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

relating to their health, and that this duty was judicially enforceable under § 706(1) of the Administrative Procedure Act. The panel held that the district court did not abuse its discretion in entering its injunction to enforce that duty.

The panel also agreed with the district court that the Army had an ongoing duty to provide medical care. The panel disagreed with the district court's denial of relief on the ground that the Department of Veterans Affairs provided medical care that to some degree duplicated the care the Army was obligated to provide. The panel held that the district court could not, in the absence of mootness, categorically deny injunctive relief to former volunteer subjects seeking necessary medical care because some former subjects may be entitled to receive medical care from another government agency. The panel vacated the district court's summary judgment for the government on this claim and remanded to the district court.

Judge Wallace joined the majority in affirming the district court's judgment and injunction compelling the Army to comply with Army Regulation 70-25's clear regulatory mandate, but wrote separately in concurrence because he did not join the majority's analysis of regulatory history to support its textual analysis. Judge Wallace dissented from the majority's conclusion that Army Regulation 70-25 also contained a command that the Army provide medical care to former research volunteers. He would affirm the district court's summary judgment against plaintiffs on their claims for medical care, but on the alternative ground that their claim was not judicially enforceable under § 706(1) of the Administrative Procedure Act.

COUNSEL

James Patrick Bennett, Eugene G. Illovsky, Benjamin F. Patterson (argued), and Stacey Michelle Sprenkel, Morrison & Foerster LLP, San Francisco, California, for Plaintiffs-Appellants–Cross-Appellees.

Melinda L. Haag, United States Attorney, Stuart F. Delery, Assistant Attorney General, Charles W. Scarborough (argued), Brigham John Bowen, Anthony Joseph Coppolino, and Mark B. Stern, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C., for Defendants-Appellees–Cross-Appellants.

OPINION

W. FLETCHER, Circuit Judge:

From the inception of the United States' chemical weapons program during World War I until the mid-1970s, the United States military conducted chemical and biological weapons experiments on human subjects. In these experiments, tens of thousands of members of the United States armed services were intentionally exposed to a range of chemical and biological agents.

Plaintiffs are veterans' organizations and individuals who were subjects in these experiments. They filed an individual and class action complaint seeking declaratory and injunctive relief against the Department of Defense ("DOD"), the Army, the Central Intelligence Agency ("CIA"), and the Department of Veterans Affairs ("VA"). The class comprises "[a]ll current or former members of the armed forces, who, while

serving in the armed forces, were test subjects" in these experimentation programs. Two of Plaintiffs' claims, brought under § 706(1) of the Administrative Procedure Act ("APA"), are at issue in this appeal. Plaintiffs claim, first, that the Army has unlawfully failed to notify test subjects of new medical and scientific information relating to their health as it becomes available. They claim, second, that the Army has unlawfully withheld medical care for diseases or conditions proximately caused by their exposures to chemicals during the experiments.

On cross-motions for summary judgment, the district court held that Army Regulation 70-25 ("AR 70-25") imposes on the Army an ongoing duty to notify former test subjects of relevant new health information as it becomes available. The court issued an injunction requiring the Army to comply with that duty. The court held, further, that AR 70-25 imposes on the Army an ongoing duty to provide medical care, but the court declined to compel the Army to provide such care on the ground that Plaintiffs could seek medical care from the VA.

We affirm in part and reverse in part. We agree with the district court that the Army has an ongoing duty under AR 70-25 to provide former test subjects with newly available information relating to their health, and that this duty is judicially enforceable under § 706(1). We also agree with the district court that the Army has an ongoing duty to provide medical care. However, the district court denied relief on the ground that the VA provides medical care that to some degree duplicates the care the Army is obligated to provide. We disagree with the district court that relief should have been denied on this ground.

I. Background

As relevant to this suit, beginning in 1942 the War Department (as it was then called) approved the use of human subjects in experiments to test the effects of chemical weapons. Some experiments tested the effectiveness of various chemical agents, while others tested the effectiveness of protective clothing and other defenses. By the end of World War II, more than 60,000 service members had served as subjects in the United States' chemical weapons research program.

During the World War II-era tests, "soldier volunteers" were intentionally exposed to a variety of chemical agents. According to a 1993 report by the National Academy of Sciences, they were exposed to Lewisite (an arsenic-based blister agent) and mustard gas, as well as other "gases such as phosgene (a choking agent), hydrogen cyanide and cyanogen chloride (blood poisoning agents), and chloroacetophenone (tear gas)." A 2006 VA report recounted that these subjects "were exposed commonly to acutely toxic levels . . . of agents via small drops applied to the arm or to clothing, or in gas chambers, sometimes without protective clothing." "Some experiments apparently involved less protected subjects who were reported to have experienced severe burns to the genital areas, including cases of crusted lesions to the scrotum . . . . Documented injuries among experimental subjects . . . [were] initially 'quite high'—one study of accidental injuries identified over 1,000 cases of acute mustard agent toxicity resulting in eye, ear, nose and throat symptoms . . . over a 2-year period."

In the 1950s, DOD initiated a new wave of chemical weapons research and experimentation, focused on "agents

perceived to pose greater threats than sulfur mustard or Lewisite," such as nerve agents and chemicals with "intense psychoactive properties." These experiments were conducted over the course of about twenty years, from 1955 to 1975. During the course of this research, DOD exposed about 6,700 human subjects to more than 250 different chemical and biological agents.

Beginning in the 1950s, the Army established policies and issued regulations governing the use of human subjects. On February 26, 1953, Secretary of Defense Charles Wilson sent a memorandum ("the Wilson Directive") to the Secretaries of the Army, Navy, and Air Force. The Wilson Directive set conditions for "the use of human volunteers by the Department of Defense in experimental research in the fields of atomic, biological and/or chemical warfare." It stated that "[t]he voluntary consent of the human subject is absolutely essential," and instructed that a volunteer subject "should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision" about participating.

On June 30, 1953, Brigadier General John Oakes, Secretary of the General Staff of the Army, sent a memorandum ("CS:385") to the Army's Chief Chemical Officer, the Army Surgeon General, and other top Army officials, reiterating the policies articulated in the Wilson Directive. CS:385 provided that "[a]gents used in research must have" several "limiting characteristics," including "[c]ontrollable lethality," "[n]o serious chronicity anticipated," "[e]ffective therapy available," and "[a]dequate background of animal experimentation." The memorandum provided further, that "[a]s added protection for volunteers,

[other] safeguards will be provided," including that "[a]ll apparatus and instruments necessary to deal with any emergency situations must be available," and that "[m]edical treatment and hospitalization will be provided for all casualties of the experimentation as required."

In 1962, the Army promulgated AR 70-25, a regulation prescribing policies and procedures to govern the use of volunteers in Army research involving human subjects. AR 70-25 reiterated the policies in the Wilson Directive, including the requirement of voluntary consent. The regulation provided:

> [The volunteer] will be told as much of the nature, duration, and purpose of the experiment, the method, and means by which it is to be conducted, and the inconveniences and hazards to be expected, as will not invalidate the results. He will be fully informed of the effects upon his health or person which may possibly come from his participation in the experiment.

The regulation also provided, in language similar to CS:385, that "[a]ll apparatus and instruments necessary to deal with likely emergency situations will be available," "[r]equired medical treatment and hospitalization will be provided for all casualties," and "[a] physician approved by The Surgeon General will be responsible for the medical care of volunteers." The Army reissued AR 70-25 in 1974 with the foregoing language unchanged.

In 1975, the Army ceased performing large scale experiments exposing human subjects to chemical agents. In

the late 1970s, against a backdrop of mounting public concern about the long-term effects of such experiments, Army officials exchanged a series of memoranda outlining a program for notifying past subjects about the health consequences of their participation in the experiments. On August 8, 1979, Army General Counsel Jill Wine-Volner wrote a memorandum to a number of high-level Army officials and to the Army Surgeon General. She wrote that the Secretary of the Army

> has concluded that, as a policy matter, some type of notification program is necessary. Moreover, the legal necessity for a notification program is not open to dispute. The Department of Justice has concluded that another Federal agency 'may well be held to have a legal duty to notify those . . . drug-testing subjects whose health [it] has reason to believe may still be adversely affected by their prior involvement in [the] drug-testing program.'

(Omission and alterations in original.)

On September 24, 1979, Wine-Volner wrote another memorandum, this time to the Director of the Army Staff, providing "broad guidance" about "a program to notify participants in Army drug or chemical/biological agent research programs." The memorandum provided, inter alia:

> The Army should review all research programs, regardless of whether conducted by the Army or on behalf of the Army by independent contractors, that were initiated to

> study possible military, rather than medical, applications of various drugs and chemical/biological agents. If there is reason to believe that any participants in such research programs face the risk of continuing injury, those participants should be notified of their participation and the information known today concerning the substance they received. This notification should be [e]ffected regardless of whether the individuals were fully informed volunteers at the time the research was undertaken.

On October 25, 1979, Lieutenant General John McGiffert, Director of the Army Staff, wrote a memorandum to the heads of Army staff agencies, "establish[ing] Army Staff responsibilities for review of past Army research involving possible military applications of drug or chemical/biological agents." He wrote, "The objective of this effort is to identify and notify those research participants who may face the risk of continuing injury." He continued,

> Participants in those projects who are considered by medical authority to be subject to the possible risk of a continuing injury are to be notified. In the event that long-term hazards of a substance are not known, The Surgeon General (TSG) should continue to monitor research developments, and if at some future time more information makes it necessary to take some action, TSG should recommend appropriate action, including notification.

In 1981 and 1986, the Army took two actions relevant to the notification program: it amended one record system and created another. The first system, the Research and Experimental Case Files, as amended in 1981, compiled a database about "[v]olunteers (military members, Federal civilian employees, state prisoners) who participated in Army tests of potential chemical agents and/or antidotes from the early 1950's until the program ended in 1975." *Privacy Act of 1974; Amendment to System Notice*, 46 Fed. Reg. 60,639, 60,640 (Dec. 11, 1981). The purposes of the system were "(1) to follow up on individuals who voluntarily participated in Army chemical/biological agent research projects for the purpose of assessing risks/hazards to them, and (2) for retrospective medical/scientific evaluation and future scientific and legal significance." *Id.* The second system, the Medical Research Volunteer Registry, newly created in 1986, was designed to maintain "[r]ecords of military members, civilian employees, and non-DOD civilian volunteers participating in current and future research sponsored by the U.S. Army Medical Research and Development Command." *Privacy Act of 1974; New Record System*, 51 Fed. Reg. 23,576, 23,577 (June 30, 1986). One of the stated purposes of the second system was "[t]o assure that the U.S. Army Medical Research and Development Command (USAMRDC) can contact individuals who participated in research conducted/sponsored by the Command in order to provide them with newly acquired information, which may have an impact on their health." *Id.*

In 1988, the Army reissued AR 70-25. The reissued regulation provided that the Army Surgeon General "will . . . [d]irect medical followup, when appropriate, on research subjects to ensure that any long-range problems are detected and treated." Chapter 3–1(k) ("subsection (k)") of the

reissued version provided, "Volunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research."

The reissued regulation also stated that "commanders will . . . [e]nsure that research volunteers are adequately informed concerning the risks associated with their participation, and provide them with any newly acquired information that may affect their well-being when that information becomes available." Chapter 3–2(h) ("subsection (h)") specified:

> *Duty to warn.* Commanders have an obligation to ensure that research volunteers are adequately informed concerning the risks involved with their participation in research, and to provide them with any newly acquired information that may affect their well-being when that information becomes available. The duty to warn exists even after the individual volunteer has completed his or her participation in research. To accomplish this, the MACOM [(Major Army Commands)] or agency conducting or sponsoring research must establish a system which will permit the identification of volunteers who have participated in research conducted or sponsored by that command or agency, and take actions to notify volunteers of newly acquired information.

Finally, in what the Army later conceded was a "serious" editing error, Appendix F provided that "[r]esearch involving deliberate exposure of human subjects to nuclear weapons

effect, to chemical warfare agents, or to biological warfare agents" was "exempt from this regulation."

The Army reissued AR 70-25 two years later. This 1990 revision remains in force today. This revision was, in all relevant respects but one, the same as the 1988 revision. There was, however, one important change — the correction of the erroneous exemption from coverage of human subjects who had been deliberately exposed to "nuclear weapon effect" and to chemical and biological agents. The 1990 "Summary of Change" specified, "This change is published to correct a serious error that occurred during the final editing of the current revision. In attempting to respond to guidance from the Office of The Judge Advocate General that a subparagraph be moved from the text of the regulation to appendix F, the wrong sub-paragraph was moved." Chapter 1–4(d)(4) of AR 70-25 was changed to state explicitly, "The guidance in this regulation pertains to . . . [r]esearch involving deliberate exposure of human subjects to nuclear weapons effect, to chemical warfare agents, or to biological warfare agents."

In the decades since the termination of chemical testing on human subjects, Defendants have identified, contacted, and notified some of the former subjects. For example, in 1990 DOD contacted 128 veterans who had participated in World War II mustard gas testing. In 2004, DOD identified 6,387 individuals who had been exposed to mustard gas or other agents during World War II-era experiments. Beginning in March 2005, the VA sent letters to the 319 of those individuals for whom it could find contact information.

In 2009, Plaintiffs filed suit against DOD, the Army, the CIA, the VA, and a number of individuals in their official

capacities. The complaint alleged that the Army was required, on an ongoing basis, to (1) provide notice to former test subjects about their exposures to biological and chemical agents and the currently known health effects of those agents, and (2) provide medical care to these test subjects for diseases or conditions proximately caused by their participation in military experiments.

The district court granted in part and denied in part Plaintiffs' motion for partial summary judgment, and granted in part and denied in part Defendants' cross-motion for summary judgment. The court held that the Army has an ongoing duty to notify former test subjects about newly available medical and scientific information relating to their health, and that the Army has not fully complied with that duty. The court issued an injunction requiring the Army to comply. The court also concluded that the Army has an ongoing duty to provide test subjects with medical care, but it declined to issue an injunction enforcing compliance with that duty on the ground that medical care was available from the VA.

The parties cross-appealed.

II. Standard of Review

We review a district court's summary judgment de novo. *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007). A permanent injunction "'involves factual, legal, and discretionary components,'" so we "review a decision to grant such relief under several different standards." *Momot v. Mastro*, 652 F.3d 982, 986 (9th Cir. 2011) (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)). We review legal conclusions underlying the summary judgment de novo,

factual findings for clear error, and the scope of the injunction for abuse of discretion. *Id.*

III. Discussion

Section 706(1) of the APA provides that a court "shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). A court can compel agency action under this section only if there is "a specific, unequivocal command" placed on the agency to take a "discrete agency action," and the agency has failed to take that action. *Norton v. S. Utah Wilderness Alliance* (*SUWA*), 542 U.S. 55, 63–64 (2004) (citation omitted). The agency action must be pursuant to a legal obligation "so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). Plaintiffs argue that AR 70-25 imposes unequivocal commands on the Army to provide former test subjects with current information about their health, and to provide medical care for diseases caused by the experiments. We agree.

A. Duty to Warn

We conclude that Chapter 3–2(h) of AR 70-25 ("subsection (h)"), as promulgated in 1988 and 1990, requires the Army to provide former test subjects with "newly acquired information" regarding their health as that information becomes available. We agree with the district court that this "duty to warn" applies not only to future human subjects, but also to test subjects who participated in experiments predating the regulation. We hold, further, that the district court did not abuse its discretion in issuing an injunction enforcing this duty.

1. Duty to Warn Under AR 70-25

AR 70-25 obligates the Army to warn volunteers of the risks of participating in the experiments, and to provide them with new information "that may affect their well-being" as it becomes available. Subsection (h) of AR 70-25 provides:

> *Duty to warn.* Commanders have an obligation to ensure that research volunteers are adequately informed concerning the risks involved with their participation in research, and to provide them with any newly acquired information that may affect their well-being when that information becomes available. The duty to warn exists even after the individual volunteer has completed his or her participation in research. To accomplish this, the MACOM [(Major Army Commands)] or agency conducting or sponsoring research must establish a system which will permit the identification of volunteers who have participated in research conducted or sponsored by that command or agency, and take actions to notify volunteers of newly acquired information.

Subsection (h) was added to AR 70-25 in 1988. The text makes clear that the duty to provide notice applies not only to possible future subjects but also to former subjects. There is nothing in subsection (h) that limits its application to those who volunteered in experiments after the promulgation of the regulation in 1998. Indeed, subsection (h) specifically requires Army commanders to identify the volunteers "who *have participated* in research conducted or sponsored by that

command or agency, and take actions to notify volunteers of newly acquired information." (Emphasis added.) Similarly, subsection (h) provides that "[t]he duty to warn exists even after the individual volunteer has completed his or her participation in research."

The Army's revision of AR 70-25 in 1990 makes even more compelling our reading of subsection (h). The 1990 version retains the provision of the 1988 regulation that requires notice to human subjects. But the Army made an important change in 1990 in stating explicitly that the notice requirement under AR 70-25 applies to "[r]esearch involving deliberate exposure of human subjects to nuclear weapons effect, to chemical warfare agents, or to biological warfare agents." Chapter 1–4(d)(4). The 1990 revision would have made little sense if the notice requirement applied only prospectively. The only subjects to whom Chapter 1–4(d)(4) could apply are those who had previously been part of Army experiments. As the district court stated, "Because the Army did not [in 1988 or 1990] — and does not — engage in such ongoing testing, there would have been no reason to add this language to AR 70-25 in 1990 if the regulation did not encompass those who had already become such test subjects."

Our reading of AR 70-25 is consistent with the internal agency discussions in the years leading up to the 1988 and 1990 revisions of the regulation. Army memoranda discussing proposed notification programs all recognized an obligation to warn individuals who had been subjects in past research and testing about the potential long-term health risks, as well as to provide additional information about those risks when such information became available. For example, Army General Counsel Jill Wine-Volner wrote in her August 1979 memorandum that "the legal necessity for a notification

program is not open to dispute." That led Wine-Volner to write a second memorandum in September 1979 stating that "[i]f there is reason to believe that any participants in [the biological and chemical weapons testing] programs face the risk of continuing injury, those participants should be notified of their participation and the information known today concerning the substance they received." She wrote, further, "This notification should be [e]ffected regardless of whether the individuals were fully informed volunteers at the time the research was undertaken."

Our reading is also consistent with the amending and creating of databases in 1981 and 1986. As we describe above, in 1981 the Army amended a database that included members of the military who had previously volunteered for human testing in order "to follow up on individuals who voluntarily participated in Army chemical/biological agent research projects for the purpose of assessing risks/hazards to them." *Privacy Act of 1974; Amendment to System Notice*, 46 Fed. Reg. 60,639, 60,640 (Dec. 11, 1981). Then, in 1986, the Army created a new database that included members of the military "participating in current and future research" in order to "contact individuals who participated" in such research in order to provide them with "newly acquired information, which may have an impact on their health." *Privacy Act of 1974; New Record System*, 51 Fed. Reg. 23,576, 23,577 (June 30, 1986). The Army clearly anticipated using these databases to provide ongoing medical health information to the volunteers who had participated in the Army's chemical and biological research experiments before 1988.

Despite the foregoing, Defendants contend that subsection (h) applies only to human subjects upon whom experiments

were performed after 1988. They contend that subsection (h) is ambiguous and that under *Auer v. Robbins*, 519 U.S. 452 (1997), we must defer to the interpretation that the Army has proposed during this litigation. We find no ambiguity in the text of subsection (h). But even if subsection (h) were ambiguous, *Auer* deference is inappropriate.

Under *Auer*, "[a]n administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation." *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006). *Auer* deference is not warranted in all circumstances. Deference is not warranted "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (quoting *Auer*, 519 U.S. at 462). "This might occur when . . . it appears that the interpretation is nothing more than a 'convenient litigating position,'" *id.* (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988)), or a "'*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack," *id.* (quoting *Auer*, 519 U.S. at 462) (emphasis and alteration in original).

The Army's proposed interpretation of subsection (h) is a "convenient litigating position" that does not warrant *Auer* deference. Defendants acknowledge in their briefing that no court has previously had occasion to construe the notice provision of AR 70-25, and they point to no prior interpretation of this provision by the Army, in litigation or otherwise. Indeed, according to the district court, the Army admitted that it "developed [its] interpretation only in the context of this litigation."

We do not believe that the interpretation of the notice provision of AR 70-25 that the Army now advances is the "agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462. The Army supported its interpretation of AR 70-25 by relying on the testimony of Dr. Michael Kilpatrick, Director of Strategic Communications for the Office of the Under Secretary of Defense for Health Affairs. However, we have reason to doubt Dr. Kilpatrick's analysis. As the district court observed, "Notably, the agency representative upon whose interpretation Defendants rely was mistaken about the date on which the operative parts of the regulation were amended, suggesting that he did not have a clear understanding of the context in which these changes were made."

The text of AR 70-25 requires the Army to provide ongoing notice to volunteers who "have participated" in the Army's testing programs. We conclude that this duty applies to human subjects in the pre-1990 experiments.

2. Enforceability Under § 706(1)

Even though AR 70-25 imposes a duty on the Army to provide notice to prior test subjects of information regarding their well-being, we can enforce that duty only if the text of the regulation is a "specific, unequivocal command" to take "discrete agency action." *SUWA*, 542 U.S. at 63–64 (citation omitted). The duty to warn contained in subsection (h) is such a command.

We recognize that § 706(1) poses an obstacle for parties seeking to compel agency action. In *SUWA*, the Court explained that parties are entitled to relief under § 706(1) only if the agency "failed to take a *discrete* agency action that

it is *required to take*," *id.* at 64, such as "the failure to promulgate a rule or take some decision by a statutory deadline," *id.* at 63. The plaintiff in that case, the Southern Utah Wilderness Alliance, alleged that the Bureau of Land Management ("BLM") had failed to manage wilderness study areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness," *id.* at 65 (quoting 43 U.S.C. § 1782(c)), and that BLM had failed to "manage the public lands . . . in accordance with the land use plans," *id.* at 67 (quoting 43 U.S.C. § 1732(a)). The Court held that the failures to meet these statutory obligations were "[g]eneral deficiencies in compliance" rather than failures to comply with commands to perform discrete actions. *Id.* at 66. Therefore, these obligations "lack[ed] the specificity requisite for agency action." *Id.*

"It is clear that section 706(1) applies to the situation where a federal agency refuses to act in disregard of its legal duty to act." *Equal Employment Opportunity Comm'n v. Liberty Loan Corp.*, 584 F.2d 853, 856 (8th Cir. 1978). Unlike the plaintiffs in *SUWA*, Plaintiffs have alleged both a legal duty to perform a discrete agency action and a failure to perform that action. They assert that the Army has an ongoing "duty to warn" under subsection (h) of AR 70-25 and that the Army has refused to perform that duty.

The precise efforts Defendants must take to identify human subjects in past experiments, and the precise content of the notice to those subjects who have been identified, necessarily entail some discretionary judgment. But discretion in the manner in which the Defendants' duty may be carried out does not mean that the Defendants do not have a duty to perform a "discrete action" within the meaning of § 706(a) and *SUWA*. *See SUWA*, 542 U.S. at 65 ("[W]hen an

agency is compelled by law to act . . . but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be."); *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 578 (9th Cir. 2000) ("Although the district court can compel the Department of Interior to provide drainage service as mandated by the San Luis Act, the district court cannot eliminate agency discretion as to how it satisfies the drainage requirement.").

3. The District Court's Injunction

The Army argues that the district court's injunction is improper in its scope and duration. We disagree.

Under the district court's injunction, the Army must provide

> individuals who, while serving in the armed forces, were test subjects in any testing program in which humans were exposed to a chemical or biological substance for the purpose of studying or observing the effects of such exposure (that was sponsored, overseen, directed, funded, and/or conducted by the Department of the Army) . . . with newly acquired information that may affect their well-being that it has learned since its original notification, now and in the future as it becomes available[.]

Specifically, the injunction directs the Army to provide to members of the class any information that may affect their well-being that has been acquired by the Army and/or its

agents since June 30, 2006, or will be acquired in the future. The injunction directs the Army to file with the court a report "describing the efforts it has undertaken to locate the Newly Acquired Information," "confirming whether Newly Acquired Information has been found and describing generally its nature," "explaining the plan it has in its discretion developed for transmitting Newly Acquired Information to the class members entitled to notification," "committing to transmit the Newly Acquired Information" within 120 days of the entry of the injunction, and "outlining the plan and policies it has in its discretion developed for (i) periodically collecting and transmitting Newly Acquired Information that becomes available to it after the Entry Date and (ii) providing any necessary update reports to the Court regarding such future efforts."

We hold that the injunction is appropriately tailored to direct the Army to carry out its duty to warn. In requiring the Army to tell former test subjects about "newly acquired information that may affect their well-being," the injunction merely reiterates the plain language of AR 70-25's duty to warn. As subsection (h) stated, "Commanders have an obligation to ensure that research volunteers are adequately informed concerning the risks involved with their participation in research, and to provide them with any newly acquired information that may affect their well-being when that information becomes available."

The district court did not abuse its discretion in entering this injunction. It expressly preserves the Army's ability to act "in its discretion" to develop the appropriate policies in order to carry out that duty. It does not prescribe particular policies that the Army should follow. It does not even specify the means by which the Army must give that notice.

In this respect, the injunction does not amount to programmatic oversight or "judicial entanglement in abstract policy disagreements which courts lack both expertise and information to solve." *SUWA*, 542 U.S. at 66. The injunction simply directs the Army to fulfill its duty under subsection (h).

B. Duty to Provide Medical Care

Chapter 3–1(k) of AR 70-25 ("subsection (k)") provides, "Volunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research." Plaintiffs seek an injunction that would require the Army to provide that care. The parties agree that the Army and DOD do not currently provide medical care to former test subjects "in the absence of those [individuals] being retirees of the military, medical retirees, reservists or active duty military."

We conclude that subsection (k), as promulgated in 1988 and 1990, requires the Army to provide former test subjects with medical care for any injuries or diseases that were proximately caused by Army experiments in which they participated. The fact that the VA provides medical care to some former test subjects, for reasons independent of AR 70-25, does not relieve the Army of its duty under that subsection.

1. Duty to Provide Care Under AR 70-25

The text of subsection (k) compels the conclusion that the Army must provide care to former test subjects. It provides that "[v]olunteers are authorized all necessary medical care" for any injuries or diseases that are the proximate result of

their participation in Army experiments. The key to a proper understanding of subsection (k) is the word "authorized." The natural reading of the word "authorized" is that the volunteers are entitled to receive the "necessary medical care" specified in the subsection. To take a familiar example, when a collective bargaining agreement says that an employee is authorized a certain amount of sick leave, the employee is entitled to that leave. She must show that she is actually sick — just as test subjects must show they suffer from diseases that are a proximate result of their participation in government experiments — but if she can do so, she is entitled to take time off for sick leave. The meaning of "authorized" is no different here.

The background of AR 70-25 is consistent with the natural reading of "authorized." The current version of subsection (k) was promulgated in 1988. But this was not the first time that the Army pledged to provide medical care. In the 1962 and 1974 versions of AR 70-25, the Army stated that "[a]ll apparatus and instruments necessary to deal with likely emergency situations will be available," that "[r]equired medical treatment and hospitalization will be provided for all casualties," and that "[a] physician approved by The Surgeon General [of the Army] will be responsible for the medical care of volunteers." In stating that medical treatment and hospitalization "will be provided," the Army undertook to provide that care. There is no evidence in the record that the Army intended to restrict volunteers' access to medical care when, in the 1988 version of AR 70-25, it replaced that language with subsection (k). If the Army intended to go back on its pledge to provide medical care, it would hardly have done so by providing that "volunteers are authorized" to receive medical care.

In its brief, the government accepts that subsection (k) requires the Army to provide necessary medical care for injuries or diseases that are the proximate result of volunteers' participation in Army experiments. But the Army reads a temporal limitation into the Army's obligation to provide medical care. That is, the Army believes it must provide medical care to volunteers only for the duration of their participation in experiments. If the Army is right that the conceded obligation in subsection (k) contains such a temporal limitation, Plaintiffs' claim to ongoing medical care must fail. However, if the Army is wrong on this point, it has effectively conceded that it has a duty to provide ongoing medical care to Plaintiffs.

The government argues in its brief that "the early versions of AR 70-25 make clear that the only medical care contemplated under that regulation was care during the pendency of the relevant testing program itself. Nothing in any of the later versions of AR 70-25 expands the limited scope of medical care available beyond the period that an individual is participating in a specific experiment." We do not agree. We see nothing in the text of the current version of AR 70-25, or its predecessor versions, to support a conclusion that the Army's duty to provide medical care ends as soon as the experiment ends. The Army's argument is inconsistent with the plain text of subsection (k), which states, "Volunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research." Nothing in this language states or even suggests a temporal restriction on volunteers' entitlement to receive medical care. Not only is the Army's argument inconsistent with the text, but it also makes little sense. If the Army is right, volunteers were entitled to medical care if they became sick during the actual

experiment, but not if they fell sick as a result of the experiment the day after it ended.

In sum, we agree with the government that subsection (k) requires the Army to provide medical care to all of those authorized to receive it. We simply disagree as to the period during which the care must be provided. The temporal limitation for which the government argues cannot be found in the text of subsection (k). Instead, the text compels the conclusion that the only limitation is causal. We hold, as did the district court, that "AR 70-25 entitles [Plaintiffs] to medical care for disabilities, injuries or illnesses caused by their participation in government experiments," not only during the course of the experiment but also after the experiment has ended.

2. Injunction to Provide Medical Care

Section 706(1) of the APA provides that a reviewing court "shall . . . compel agency action unlawfully withheld." The word "shall" requires a court to compel agency action when, as here, there is a "specific, unequivocal command" that the agency must act. *SUWA*, 542 U.S. at 63–64 (citation omitted). "The term 'shall' is usually regarded as making a provision mandatory, and the rules of statutory construction presume that the term is used in its ordinary sense unless there is clear evidence to the contrary." *Firebaugh Canal Co.*, 203 F.3d at 573–74; *cf. United States v. Monsanto*, 491 U.S. 600, 607 (1989) (finding that "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory" than to state that a court "shall" order forfeiture).

In *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999), the Tenth Circuit held that once a failure to act has been established under § 706(1), the reviewing court must compel the agency to act. *Id.* at 1187. The Tenth Circuit recognized that while a court generally has discretion to deny injunctive relief to remedy a statutory violation, "Congress may 'restrict[] the court's jurisdiction in equity' by making injunctive relief mandatory for a violation." *Id.* (alteration in original) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). The Tenth Circuit held that "when a statute uses the word 'shall,'" as § 706(1) does, "Congress has imposed a mandatory duty upon the subject of the command." *Id.* We agree with the Tenth Circuit that § 706(1) requires a reviewing court to issue injunctive relief whenever it finds that an agency action has been unlawfully withheld. *Id.*

The district court concluded that the Army is required under subsection (k) to provide necessary medical care on an ongoing basis, but held that an injunction was unnecessary, given the availability of medical care from the VA. The court explained that it would "not enjoin one government agency to provide health care when another agency has been congressionally mandated to do so." Notably, however, the district court did not hold that the availability of medical care from the VA rendered Plaintiffs' request for an injunction moot. Nor do Defendants argue to us that the availability of medical care from the VA renders the Plaintiffs' request moot. We can readily see why they do not make such an argument, for there is nothing in the record upon which to base a conclusion that the medical care available from the VA would be equal in scope and quality to the medical care that Plaintiffs claim is owed to them by the Army. Indeed, the government admitted in the district court that it does not provide medical care to former test subjects "in the absence

of those [former subjects] being retirees of the military, medical retirees, reservists or active duty military." In the absence of mootness, we cannot agree that the Army's duty to provide care is excused by the availability of medical care from another government agency, even if that care that would overlap to some degree and in some manner with the care that the Army is required to provide.

We hold that the district court may not, in the absence of mootness, categorically deny injunctive relief to former volunteer subjects seeking necessary medical care because some former subjects may be entitled to receive medical care from another government agency. Given the present posture of the case, however, we do not address whether and in what manner the district court might nonetheless take the VA's provision of medical care into account in formulating an injunction on remand.

Conclusion

We hold that Chapter 3–2(h) of AR 70-25 imposes a duty on the Army to provide all former test subjects with newly acquired information that may affect their well-being, and that this duty is judicially enforceable under § 706(1). We hold that the district court did not abuse its discretion in entering its injunction to enforce that duty. We hold, further, that the district court was right to find that Chapter 3–1(k) imposes a duty to provide medical care. The district court did not, however, have the power to decline to compel care on the ground that another agency was providing similar care to some former test subjects. We therefore vacate the district court's summary judgment for the government on this claim and remand to the district court.

AFFIRMED in part, **REVERSED** and **REMANDED** in part.

WALLACE, Circuit Judge, concurring in part and dissenting in part:

I agree that the text of AR 70-25 unequivocally commands the Army to provide certain newly acquired information to all former research volunteers when that information becomes available. Because the Army has "unlawfully withheld" agency action by denying that it owes this duty to certain past volunteers, I join the majority in affirming the district court's judgment and injunction compelling the Army to comply with AR 70-25's clear regulatory mandate. *See* 5 U.S.C. § 706(1). I write separately in concurrence on this point only because I do not join the majority's analysis of regulatory history to support its textual analysis.

I dissent, however, from the majority's conclusion that AR70-25 also contains a "specific, unequivocal command" that the Army provide medical care to former research volunteers. I would affirm the district court's decision to grant summary judgment against Plaintiffs on their claims for medical care, but on the alternative ground that their claim is not judicially enforceable under section 706(1) of the Administrative Procedure Act (APA).

I.

"Section 706(1) of the APA . . . serves important interests, but [it] does not give us license to 'compel agency action'

whenever the agency is withholding or delaying an action we think it should take." *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). Rather, our authority to "compel agency action" is "carefully circumscribed to situations where an agency has ignored a specific . . . command," *id.*, that is located in a federal statute or "agency regulation[] that ha[s] the force of law," *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 65 (2004). Moreover, the "purportedly withheld action must not only be 'discrete,'" *Hells Canyon*, 593 F.3d at 932, meaning that it must be a "precise, definite act," *SUWA*, 542 U.S. at 63, "but also 'legally *required*,'" 593 F.3d at 932, meaning that the text of the statute or regulation contains an "unequivocal command" about which an official has "no discretion whatever," 542 U.S. at 63 (internal quotation marks omitted), such that the duty "could traditionally have been enforced through a writ of mandamus." *Hells Canyon*, 593 F.3d at 932.

A.

Our analysis must focus exclusively on the text of the relevant statutes or regulations to determine whether this standard is satisfied. This purely textual approach, amounting to a "clear-statement rule," is not unique to the section 706(1) context. It is indispensable whenever a statute requires us to determine whether a particular text obligates agency actors to assume a specific duty or to perform a discrete act.

Like an action brought under section 706(1) of the APA, for example, a citizen suit may be brought under section 505(a)(2) of the Clean Water Act only where plaintiffs "allege[] a failure of the [EPA] Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(2). If plaintiffs are

to succeed in their citizen suit against the Administrator, we have held that "the nondiscretionary nature of the duty must be clear-cut—that is, readily ascertainable from the statute allegedly giving rise to the duty." *WildEarth Guardians v. McCarthy*, 772 F.3d 1179, 1182 (9th Cir. 2014). In other words, "[w]e must be able to identify a 'specific, unequivocal command' *from the text of the statute at issue* using traditional tools of statutory interpretation; it's not enough that such a command could be teased out 'from an amalgamation of disputed statutory provisions and legislative history coupled with the [agency's] own earlier interpretation.'" *Id.* (emphasis added), quoting *Our Children's Earth Found. v. E.P.A.*, 527 F.3d 842, 851 (9th Cir. 2008) (stating that plaintiffs must "point to a nondiscretionary duty that is readily-ascertainable and not only [] the product of a set of inferences based on the overall statutory scheme" (alteration in original) (internal quotation marks omitted)).

B.

Because our inquiry under section 706(1) is necessarily limited to whether the text of the relevant Army regulations states a specific, unequivocal command to take discrete agency action, I cannot join the majority's perusal of "internal agency discussions in the years leading up to the 1988 and 1990 revisions of [AR 70-25]," nor its discussion of the Army's creation of volunteer databases in 1981 and 1986. The majority includes these historical observations because it believes they support our reading of AR 70-25. They do, of course, but that is irrelevant. Our job is to determine only whether a statute or regulation itself objectively creates a mandatory duty. As we have previously held, it is inappropriate "for us to divine a 'specific, unequivocal

command,' from an amalgamation of disputed statutory provisions and legislative history coupled with the [agency's] own earlier interpretation." *Our Children's Earth Found.*, 527 F.3d at 851, quoting *SUWA*, 542 U.S. at 63. To be sure, the majority does not rely exclusively—or even chiefly—on non-textual sources in concluding that the Army has an unequivocal duty to warn. But by including a discussion of regulatory history and historical facts in support of its textual analysis, the majority improperly suggests that these extra-textual sources and observations have some bearing on whether we are authorized to compel unlawfully withheld agency action under section 706(1). I write separately to dispel any doubt: they do not. I thus join in the result but not that part of the majority's analysis.

II.

I dissent from the majority's conclusion that AR 70-25 creates an unequivocal duty for the Army, enforceable under section 706(1), to provide medical care to former research volunteers. As stated above, the Supreme Court's standard under section 706(1) for compelling agency action is demanding. *See SUWA*, 542 U.S. at 63. We ourselves have explained that we can compel agency action only when the legal obligation is "so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Hells Canyon*, 593 F.3d at 932.

Only two provisions of AR 70-25, as promulgated in 1988, could potentially provide the basis for a judicially enforceable duty to provide medical care. Neither does.

A.

1.

The first is Chapter 3-1(k) (subsection (k)), which provides, "Volunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research." This subsection is not an "unequivocal command" to provide medical care. That is, while the authorization in subsection (k) certainly removes a barrier to volunteers' receipt of medical care—making it clear, at least, that volunteers should not be denied medical care for lack of authorization—it does not clearly require the Army to provide medical care. This is a far cry from the typical mandatory language we usually require in section 706(1) cases. *See Rivas v. Napolitano*, 714 F.3d 1108, 1111 (9th Cir. 2013) (observing that "[t]he mandatory language used in the regulation makes the act of reconsideration non-discretionary").

The majority, of course, believes the more "natural reading" of the word "authorized" is that "the volunteers are entitled to receive the 'necessary medical care' specified in the subsection." But regardless of how "natural" the majority believes its reading to be, it is not the only plausible reading. The only thing that subsection (k) makes clear is that volunteers are authorized to receive medical care, which is one or two logical steps away from the majority's conclusion that the Army has a legal obligation to provide them with that medical care. Although it is possible to read into the text of subsection (k) the assumption that the authorization is the only thing volunteers need in order to be entitled to medical care, and the assumption that the Army has a duty to provide medical care to anyone who is entitled to it, it is also possible to read the text of subsection (k) without those assumptions.

Because the text is reasonably open to interpretation, it does not state an *unequivocal* command.

The majority derives no legitimate support for its position from examining the now-defunct 1962 and 1974 versions of AR 70-25. For the reasons stated in Part I of my separate opinion, this history is simply irrelevant to the textual analysis the Supreme Court requires us to undertake when analyzing a section 706(1) claim. *SUWA*, 542 U.S. at 63.

2.

Subsection (k)'s "authorization" for medical care, in addition to not being legally required, also is not *discrete* agency action. Discrete agency action for purposes of section 706(1) is a "precise, definite act," like the promulgating of a rule or the taking of some decision by a statutory deadline. *SUWA*, 542 U.S. at 63. The phrase "[v]olunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research," does not qualify as "the ordering of a 'precise, definite act . . . about which [an official] ha[s] no discretion whatever.'" *Id.* This is most easily demonstrated by comparing subsection (k) to subsection (h)—the "duty to warn" subsection—which does command discrete agency action.

Subsection (h) unambiguously identifies which agency or officers ("Commanders"; "MACOM") are "legally required" ("have an *obligation*"; "*must* establish") to perform a "discrete action," ("provide [volunteers] with any newly acquired information") which is described "precise[ly]" and "definite[ly]":

- *What*: "information that may affect their well-being";

- *When*: "when [it] becomes available" and "even after the individual volunteer has completed his or her participation in research";

- *To Whom*: "research volunteers"—"[t]o accomplish this, [the Army] must establish a system which will permit identification of volunteers who *have participated* in research . . . and take actions to notify volunteers of newly acquired information."

Subsection (k), in contrast, leaves us to guess at which agency officer is obligated to provide the medical care (assuming, of course, that "authorized" means "required"—it does not), what such medical care would consist of, or when and how long medical care must be provided (only during research? only in "emergency" situations? forever?). As a result, subsection (k) "lack[s] the specificity requisite for agency action." *SUWA*, 542 U.S. at 66.

B.

Only one other provision of AR 70-25 could possibly provide the basis for a judicially enforceable duty to provide medical care: Chapter 2-5(j) (subsection (j)). Subsection (j) provides, "The Surgeon General . . . will . . . [d]irect medical followup, when appropriate, on research subjects to ensure that any long-range problems are detected and treated." Subsection (j), like subsection (k), lacks the usual language of obligation. Subsection (j) contemplates action by the Army Surgeon General only "when appropriate." That grant of

discretion prevents us from concluding that this language represents a "specific, unequivocal command" directing the Surgeon General to provide medical care.

C.

For these reasons I would affirm the district court's summary judgment against Plaintiffs on their claims for medical care, but on the alternative ground that their claim is not judicially enforceable under section 706(1) of the APA.

I am not unsympathetic to the notion that those who have served our country—especially those who have risked their health and well-being in that service—should have access to appropriate medical care. However, the Supreme Court has counseled us, and we have recognized, that "[e]ven if a court believes that the agency is withholding or delaying an action the court believes it should take, the 'ability to compel agency action is carefully circumscribed to situations where an agency has ignored a specific legislative command.'" *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1221–22 (9th Cir. 2011), quoting *Hells Canyon*, 593 F.3d at 932. "As much as we as citizens are concerned with the plight of veterans seeking the prompt provision of the health care and benefits . . . as judges we may not exceed our jurisdiction." *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc). I am therefore compelled to dissent from this part of the majority opinion.