Appeal No. 13-17430

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIETNAM VETERANS OF AMERICA, et al.,

Plaintiffs-Appellants,

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
Northern District of California
The Honorable Claudia Wilken
District Court Case No. 4:09-cv-00037-CW

APPELLANTS' MOTION TO EXPEDITE APPEAL

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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.

INTRODUCTION

By this motion, Plaintiffs-Appellants 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, and Kathryn McMillan-Forrest (collectively, "Plaintiffs") respectfully request an order expediting this appeal and scheduling oral argument as soon as practicable in any division of the Ninth Circuit. An expedited schedule is necessary in this case to avoid irreparable harm to thousands of elderly veteran class members—many of whom are well into their seventies—who are being unlawfully denied medical treatment by Defendant-Appellee the U.S. Department of the Army ("the Army"). A proposed schedule is attached below.

Plaintiffs first filed suit for injunctive and declaratory relief in January 2009 against various Defendants, including the Army, the Department of Defense, and the Central Intelligence Agency. On September 30, 2012, the district court issued an order certifying a class of test subject veterans; the class includes veterans who were tested decades ago—many during the 1950s. Plaintiffs sought injunctive and declaratory relief for themselves and for the class of veterans who were subjected to chemical and biological testing in secret programs at the Edgewood Arsenal and other facilities while they were in service. The government exposed these service members to dangerous chemical and biological weapons agents, such as sarin, VX,

LSD, BZ, mustard gas, Tularemia, and Q-Fever. Many of these veterans suffer serious health problems today. Yet, the Army has failed to provide these test subjects with medical treatment, despite its own regulation's requirement to do so. It is undisputed that the Army is not providing such treatment.

Among other things, Plaintiffs sought a declaration that the test subject veterans were entitled to be provided with (1) notice of medical and other information related to their exposures and (2) medical treatment for ailments arising from participation in the testing programs, under the pertinent Army regulation. Plaintiffs asked the district court to enjoin the government under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, to comply with its duties under the Army regulation.

Plaintiffs filed a motion for partial summary judgment and the government made a cross-motion for summary judgment. On November 19, 2013, the district court granted in part Plaintiffs' motion for partial summary judgment, requiring that the Army provide class members with medical information that it has acquired since 2006 relating to the testing. The district court entered its corresponding injunction on November 19, 2013. As for Plaintiffs' claim for medical treatment, the court granted Defendants' summary judgment motion. Although the district court found that Army Regulation 70-25 "entitles Plaintiffs to medical care for any disabilities, injuries or illnesses suffered as a result of participation in the

experimentation program," it refused to enjoin the Army to provide such medical treatment under that Army regulation. *Vietnam Veterans of Am. v. CIA*, No. C 09-0037 CW, 2013 U.S. Dist. LEXIS 164699, at *73 (N.D. Cal. Nov. 19, 2013). The district court entered its judgment on November 19, 2013. Plaintiffs filed a timely notice of appeal on November 26, 2013.

ARGUMENT

An expedited appeal is necessary in this case to avoid irreparable harm to thousands of elderly veteran class members who have been wrongfully denied medical treatment by the Army. Many of these veterans were subjected to chemical and biological agents testing in the 1950s.

Ninth Circuit Rule 27-12 provides that "[m]otions to expedite briefing and hearing . . . will be granted upon a showing of good cause." 9th Cir. R. 27-12. The Rule advises that: "'Good cause' includes, but is not limited to, situations in which . . . in the absence of expedited treatment, irreparable harm may occur . . . ." *Id.*; *see also* Fed. R. App. P. 2 ("On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs . . . ."); 28 U.S.C. § 1657(a) ("Notwithstanding any other provision of law, each court of the United States shall . . . expedite the consideration of any action . . . if good cause therefor is shown.").

Furthermore, Ninth Circuit Rule 34-3 automatically expedites the hearing date in all actions for injunctive relief, further underscoring the particular importance of expediting appeals when more than just money is at stake. *See* 9th Cir. R. 34-3. Because Plaintiffs' appeal involves injunctive relief, they are entitled to expedited consideration under Ninth Circuit Rule 34-3.[1]

This Court has found good cause to expedite appeals in a variety of cases involving significant issues of health and welfare, where urgent action was needed to avoid irreparable harm to the parties. *See, e.g., Flagstaff Med. Ctr., Inc. v. Sullivan*, 962 F.2d 879, 884 (9th Cir. 1992) (expediting appeal by indigent patients denied medical care due to challenged regulations of government agency). This Court has recognized irreparable harm in cases involving delays and denials of medical treatment and the increased pain, medical complications, and even death that may result. *See Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004); *see also Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004).

Good cause exists to expedite the appeal in this case. The stakes for this long-ignored class of veterans, who were exposed to chemical and biological agents during secret military experiments, are great. They face the irreparable harm of deteriorating health. Many of them are quite elderly.

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[1] On December 9, 2013, Plaintiffs notified the Court Clerk of their request for priority scheduling of oral argument pursuant to Rule 34-3.

The district court has ruled that the test subject veterans *are entitled* to medical treatment under Army Regulation AR 70-25. *Vietnam Veterans*, 2013 U.S. Dist. LEXIS 164699, at *73. This right to medical treatment is obviously of fundamental importance to the class members, and it is undisputed that the Army is not providing that treatment. But despite class members' entitlement to medical treatment from the Army, the district court refused to enjoin the Army to provide it—erroneously pointing to the existence of the Department of Veterans Affairs ("DVA") and its separate statutory mission to provide medical care to veterans who qualify. *Id.* Plaintiffs will argue on this appeal that the existence of the DVA is irrelevant to this issue of whether the Army should be enjoined to comply with an Army regulation.[2]

An expedited appeal is necessary to prevent continued irreparable harm. Many class members have undoubtedly died over the preceding decades, during

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[2] Aside from the fact that the DVA system's existence is irrelevant, some class members may not even be eligible for DVA medical care, depending upon their category of discharge. *See* 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12. Also, the DVA system delivers rationed care, as perhaps best publicly reflected in reports of long wait times and delays in adjudicating veterans' claims of service-connection in order to qualify for DVA care. *See, e.g., Waiting for Care: Examining Patient Wait Times at VA: Hearing Before the H. Subcomm. on Oversight & Investigations of the H. Comm. on Veterans' Affairs*, 113th Cong. (2013). AR 70-25 by contrast has no rationing component. There was evidence before the district court, moreover, about the DVA system's treatment of test subject veterans' claims: e.g., that as of January 2010, only two of the 86 decisions included a grant of service-connection.

which these ghastly experiments were only beginning to come to light. As more time passes, more of these elderly test subject veterans will pass away without receiving the medical treatment the Army owes them. By contrast, the government will suffer no prejudice as a result of expediting this appeal.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court expedite this appeal and schedule oral argument as soon as practicable. The Court has already set a briefing schedule for this appeal (Docket No. 1-1), to which Plaintiffs seek a relatively small adjustment. A proposed schedule is included below.

PROPOSED BRIEFING SCHEDULE AND ARGUMENT DATE

Pursuant to Ninth Circuit Rule 27-12, Plaintiffs seek a slight acceleration of the current briefing schedule and also request that oral argument (if one is granted) be scheduled promptly after all briefs are submitted or as soon thereafter as the Court finds convenient. To facilitate expedited treatment, Plaintiffs are amenable to oral argument at any Ninth Circuit courthouse.

The below chart's first two columns indicate (1) the proposed expedited date and (2) the date currently set:

Mon., Feb. 3, 2014	Mon., Mar. 6, 2014	Appellants' opening brief and excerpts of record shall be filed and served pursuant to FRAP 32 & 9th Cir. R. 32-1.
Wed., Mar. 5, 2014	Mon., Apr. 7, 2014	Appellees' answering brief and excerpts of record shall be filed and served pursuant to FRAP 32 & 9th Cir. R. 32-1.
Wed., Mar. 19, 2014	Within 14 days of service of Appellees' answering brief (Mon., Apr. 21, 2014)	Appellants' optional reply brief shall be filed and served pursuant to FRAP 32 & 9th Cir. R. 32-1.
_____, 2014		Oral argument on appeal

STATUS OF TRANSCRIPT PREPARATION

Plaintiffs filed a Transcript Designation and Ordering Form in the district court on December 4, 2013. All of the transcripts on the Designation and Ordering Form were previously ordered during the course of the case, and all are e-filed on the district court's docket.

POSITION OF OPPOSING COUNSEL

Pursuant to Ninth Circuit Rule 27-12, Plaintiffs have determined the position of opposing counsel on this Motion to Expedite. Defendants have declined to stipulate to a motion to expedite these appeals.

Dated: December 10, 2013

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By: /s/ Eugene Illovsky
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellants' Motion to Expedite Appeal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 10, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Robin Sexton
Robin Sexton