Nos. 13-17430, 14-15108

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIETNAM VETERANS OF AMERICA, et al.,

Plaintiffs-Appellants/Cross-Appellees,

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants-Appellees/Cross-Appellants.

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

OPENING BRIEF FOR DEFENDANTS-APPELLEES/CROSS-APPELLANTS

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JURISDICTIONAL STATEMENT

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331, alleging claims under Section 706(1) of the Administrative Procedure Act. On November 19, 2013, the district court issued a final decision, ER 12-82, a final judgment, ER 7-8, and a permanent injunction, ER 9-11. Plaintiffs filed a timely notice of appeal on November 26, 2013. ER 1. Defendants filed a timely notice of cross-appeal on January 21, 2014. Supplemental Excerpts of Record ("SER") 10. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiffs are former members of the military who allege that they participated in chemical and biological testing programs conducted by the government from World War II to 1976. Plaintiffs asserted a variety of claims against the Department of Defense ("DoD"), the Department of the Army, the Department of Veterans Affairs ("VA"), the Central Intelligence Agency ("CIA"), the Department of Justice ("DOJ"), and officers of those agencies in their official capacities.

After certifying a class action, the district court granted the government's motion for summary judgment on most of plaintiffs' claims, including a claim that the Army has an independent duty (separate from the VA) to provide health care to veterans who participated in such programs. However, the court granted summary judgment for *plaintiffs* on their claim that the Army has an ongoing duty, arising solely from the 1990 version of an Army Regulation (AR 70-25), to search for additional information regarding past testing programs – including information about possible adverse health effects – and to provide any such information to former test participants. While acknowledging that it was not clear whether AR 70-25 applied to testing programs conducted many years ago, the court held that it imposed a forward-looking "duty to warn" on the Army that is sufficiently "discrete and mandatory" to be enforceable under 5 U.S.C. § 706(1). The court entered an injunction requiring the Army to file a report within 90 days describing its efforts to locate what it defined as "newly-acquired information" and its plan for transmitting such information to class

members, to commence transmitting such information within 120 days, and to continue transmitting such information indefinitely pursuant to the court's oversight.

Plaintiffs appealed the court's final decision and the government cross-appealed. These consolidated appeals present two questions:

1. Whether the district court properly granted the government's motion for summary judgment on plaintiffs' claim under 5 U.S.C. § 706(1) seeking an injunction directing the Army to provide medical care to veterans beyond statutory limits on the Army's authority to provide such care and outside the comprehensive scheme Congress established for the Department of Veterans Affairs to provide such care.

2. Whether the district court erred in granting plaintiffs' motion for summary judgment on their claim under 5 U.S.C. § 706(1) seeking additional "notice" beyond the notice the Army has already provided to former test participants where the court conceded that the regulation allegedly imposing that duty, AR 70-25, is ambiguous and the Army reasonably construes that regulation – which it is free to rescind or modify at any time – not to require notice to participants in past testing programs.

PERTINENT STATUTES AND REGULATIONS

Many of the statutes and regulations relevant to this appeal are included in the addendum to plaintiffs' opening brief. Additional excerpts of pertinent statutory and regulatory provisions are attached as an addendum to this brief.

STATEMENT OF THE CASE

A. Factual Background.

Between World War II and 1976, the military conducted tests that exposed thousands of volunteer members of the armed forces to chemical and biological agents. The purpose of these tests was to develop new weapons and protective measures against such weapons. Test participants were exposed to a broad range of substances, including caffeine, Ritalin, LSD, mustard agents, nerve agents, and lewisite. The military stopped testing live agents on human subjects in 1976.

In the four decades since testing on human subjects was terminated, the government has undertaken substantial efforts to identify, contact, study, and provide outreach to test participants where feasible and appropriate, and has followed-up with participants to assess their health over time. In 1979, the Army issued a series of memoranda providing "broad guidance" for possible outreach to test participants "[i]f there is reason to believe that any participants in such research programs face the risk of continuing injury." District Ct. Record ("CR") 496, Ex. 39 (Memorandum from Army General Counsel Jill Wine-Volner, Sept. 24, 1979).

The Army also notified Congress in 1979 that the Army Surgeon General was planning to ask the National Academy of Sciences ("NAS") "to assist in the review of available data on compounds/agents tested to determine if there may be risk of continuing injuries to individuals who may have been exposed to them." CR 496, Ex. 41. At the Army's request, the NAS sent a health survey to all locatable Cold War-era

test participants, reviewed available data to assess whether those individuals were at risk of long-term health effects, and summarized its findings in a comprehensive study released in three separate volumes in 1982, 1984 and 1985, entitled *Possible Long-Term Health Effects of Short-Term Exposure to Chemical Agents*. CR 496, Exs. 1, 6, 11. In general, the NAS concluded that there were no significant long-term health effects arising from participation in the testing programs at issue.

Following the NAS study, the government continued to conduct outreach to known test participants – efforts that were often hindered by limited or incomplete contact information. As the district court recognized, in 1990, the VA used information it had collected from DoD to contact 128 veterans who participated in World War II mustard gas testing. ER 26. The VA also asked the Institute of Medicine ("IOM") to initiate a study regarding the WWII-era test program, which culminated in a January 1993 publication entitled *Veterans At Risk: The Health Effects of Mustard Gas and Lewisite*. CR 496, Ex. 16. A primary purpose of that study was to help the VA assess the strength of correlations between exposure to these agents and the development of specific diseases for purposes of determining veterans' eligibility for medical care and service-connected disability compensation benefits.[1]

[1] Because the three-volume NAS study and the *Veterans At Risk* study conducted by the IOM are quite voluminous, we have not included those studies in the supplemental record excerpts filed on appeal. Those studies are not directly at issue in this appeal, but we would be happy to provide them if the Court so requests.

Partially in response to the *Veterans At Risk* study, DoD began its own investigation into WWII-era test programs, contracting with Battelle Memorial Institute to assist in identifying test participants. CR 496, Ex. 17, at 119. Ultimately, DoD identified 6,400 servicemembers and civilians who were exposed to mustard gas and other substances during WWII-era testing and compiled a database with 4,618 entries. ER 26. In March 2005, the VA began sending letters to every veteran in the database for whom the VA could find current contact information, which currently includes 319 WWII-era test participants. Those letters indicated, among other things, that the recipient was exposed to mustard agents or Lewisite while serving in the military; discussed compensation for full-body exposure, including presumptions of service-connection; and provided contact information for both the VA to file a claim and the DoD to obtain information about the testing. SER 13-15 (sample letter).

Supplementing its outreach efforts with respect to WWII-era test participants, DoD also renewed its efforts to identify and contact Cold War-era test participants. A major impetus for this effort was a federal statute known as the "Bob Stump Act," which required DoD to "work with veterans and veterans service organizations to identify" any projects or tests conducted by DoD (beyond a specific program outside the scope of this case) "that may have exposed members of the Armed Forces to chemical or biological agents." National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, Div. A., Title VII, Subtitle A, § 709(c), 116 Stat. 2458, 2587 (2002).

In 2004, the Government Accountability Office ("GAO") also issued a report recommending that DoD expand its search for participants in past testing programs. CR 496, Ex. 25. In response, DoD again contracted with Battelle to identify individuals who might have been exposed to chemical and biological agents and created a database of information on Cold War-era test participants. As the district court summarized, that database included "information on the substances they were exposed to, the dose and the route of administration, and where the information was available," and was provided to the VA "for use in making service-connected health care and disabilities determinations." ER 27.

In April 2005, as DoD continued to collect information and enlarge its database of Cold War-era test participants, members of the House of Representatives' Veterans' Affairs Committee requested that the VA – not DoD – provide notice to the living veterans who participated in the test programs at DoD facilities. ER 26-27. *See also* SER 35, 37. In June 2006, after DoD provided the VA with the names of several thousand Cold War-era test participants, the government began sending notice letters to each veteran in the database for whom it could locate current contact information, which presently totals approximately 3,300 individuals. ER 27. The purpose of these letters was to inform individuals about the tests and what to do if they had health concerns, and the letters included a fact sheet and a set of frequently asked questions about the tests prepared by DoD. SER 38-44 (sample letter). The letters did *not* include the names of the chemical or biological agents the recipient was

exposed to or information tailored to individual recipients because including such information would have delayed the notice letters beyond congressionally-requested deadlines and the VA "did not want to send veterans inaccurate information, alarm them or make them think they would suffer adverse effects if these were unlikely." ER 27. However, those letters provided information about obtaining a free clinical examination from the VA and provided a "1-800" number for recipients to contact DoD to obtain more information and request their test files. ER 28. The Army has received approximately 400 such requests, and DoD has fielded numerous inquiries from veterans through its 1-800 number. CR 496, Ex. 37 (call-in logs)

In addition to the notice letters, fact sheets, and Frequently Asked Questions prepared by the VA and DoD, the government continues to engage in other outreach efforts. For example, DoD maintains a public web site with links to relevant materials such as GAO reports, IOM reports, congressional testimony, and DoD briefings and reports. *See* http://mcm.fhpr.osd.mil/cb_exposures/cb_exposures_home.aspx. That web site contains frequently asked questions and provides both a phone number and an address so that veterans may verify information or obtain copies of their test files. Likewise, the VA maintains a web site with information about the WWII-era and Cold War era test programs.[2] Both DoD and the VA have also held public briefings for

[2] *See* http://www.warrelatedillness.va.gov/education/exposures/edgewood-aberdeen.asp

veterans service organizations, including one of the lead plaintiffs in this case, Vietnam Veterans of America.

B. Proceedings In This Case.

1. Initial Proceedings.

In 2009, a number of individual veterans and two veterans' organizations filed this suit against DoD, the Army, and other agencies that were allegedly involved in the testing programs. Plaintiffs asserted a variety of constitutional and statutory claims against the government, and sought to represent a class of all veterans who had been exposed to chemical and biological agents. *See* ER 579 (Plaintiffs' Third Am. Compl). In a series of rulings, the district court (Wilken, J.) granted the government's motions to dismiss many of plaintiffs' claims on threshold legal grounds. *See, e.g.,* SER 66-85 (Jan. 19, 2010 order); SER 55-65 (May 31, 2011 order).[3]

The court allowed a variety of other claims to proceed. As relevant to this appeal, the court allowed plaintiffs to proceed on two separate claims under 5 U.S.C. § 706(1): (1) that the Army had a discrete and mandatory duty under AR 70-25 to provide additional "notice" to former test participants beyond the outreach already undertaken by the Army and the VA, and (2) that the Army had a discrete and

[3] Although none of the claims dismissed by the district court in the early stages of this case is at issue on appeal, the court's early rulings contain some discussion of the legal and factual bases for plaintiffs' claims concerning medical care and notice under 5 U.S.C. § 706(1), which the district court relied upon in its later decisions addressing those claims, and we have accordingly included the court's January 19, 2010 and May 31, 2011 orders in supplemental record excerpts filed with this brief.

mandatory duty under AR 70-25 to provide medical care to former test participants beyond the care authorized by statute or available in the VA scheme.

Over the government's objections, the district court partially granted plaintiffs' motion for class certification and certified two classes in this case. ER 227. The court allowed plaintiffs to proceed as a class on a claim that the VA is an "inherently biased adjudicator" of claims for health care and benefits arising from participation in the testing programs at issue in this case. ER 284. The court also allowed plaintiffs to proceed as a class on constitutional and statutory claims against DoD and the Army premised on alleged violations of regulations governing the provision of medical care and "notice" to test participants regarding possible adverse health effects from past testing programs. *Id.* Plaintiffs then filed a Fourth Amended Complaint, ER 397-547, conforming their allegations to the claims identified in the class certification decision.

2. The July 24, 2013 Summary Judgment Ruling.

After substantial discovery, the parties filed cross-motions for summary judgment on the remaining claims in the case. On July 24, 2013, the district court issued a lengthy order granting summary judgment in the government's favor on all of plaintiffs' claims except their claim under 5 U.S.C. § 706(1) that the Army has an ongoing duty to provide additional notice to class members about their involvement in testing programs and associated risks to their health. ER 155-226.

The court did not identify any statutes that created a mandatory duty to provide notice. Instead, the court concluded that the 1990 version of AR 70-25, which

governs the use of volunteer research subjects and has an effective date of February 24, 1990, created such a duty. ER 186. The relevant section of the 1990 version of AR 70-25 (which is still in effect) 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.

AR 70-25 § 3-2.h. *See* Plaintiffs' Statutory Addendum ("Pl. Add."), at 168.

The court recognized that it was not "clear whether this ongoing duty is owed to individuals who participated in experiments before 1988 or whether it is limited only to those who might have done so after AR 70-25 was revised in 1988." ER 187. Despite this ambiguity, the court rejected the Army's reasonable construction of its own regulation, stating that plaintiffs' interpretation was "more persuasive." ER 193.

The court acknowledged that plaintiffs could not challenge the sufficiency of the Army's past notification efforts under 5 U.S.C. § 706(1), which only allows courts to compel agency action "unlawfully withheld or unreasonably delayed." The court nevertheless held that plaintiffs could proceed under Section 706(1) because they were challenging what the court characterized as the "Army's failure to act." ER 197. Thus, although the court granted summary judgment to the Army "to the extent that Plaintiffs seek to challenge its original notice efforts," it held that AR 70-25 imposes a legally binding duty on the Army, enforceable under Section 706(1), "to provide test

subjects with newly-acquired information that may affect their well-being that it has learned since its original notification [efforts in 2006]." ER 198.

The district court granted summary judgment to the government on the remainder of plaintiffs' claims. ER 198-224. With respect to the claim under Section 706(1) that the Army failed to provide required medical care to former test participants, the court held that the availability of medical care from the Veterans Health Administration, a component of the VA, was an alternate adequate remedy within the meaning of 5 U.S.C. § 704, thereby foreclosing any APA claim for medical care. ER 201-06.[4] The court stressed that plaintiffs had not provided any evidence demonstrating "that they do not have an adequate remedy to redress their injuries through the DVA health care system," ER 203, and rejected plaintiffs' contention that the scheme prescribed by Congress "to provide no-cost care to veterans for service-connected disabilities" was inadequate in certain respects, ER 204. The court also rejected plaintiffs' contention that the inability of the organizational plaintiffs to assert claims in the VA system had any bearing on this issue because it was undisputed that their members could obtain care in that system. ER 205. Thus, the district court held

[4] Having disposed of plaintiffs' medical care claim based solely on the adequacy of remedies in the VA system, the district court had no occasion to reach the government's alternate arguments for summary judgment on that claim, including the lack of any statutory authority for DoD to provide health care to veterans beyond the limited authority conferred in 10 U.S.C. § 1074, and the absence of any discrete and mandatory directive to provide such care in AR 70-25 or any other statute or regulation. *See* CR 495 (cross-motion for summary judgment), at 32-39.

that the Army was entitled to summary judgment on this claim "because Plaintiffs and the class members can seek medical care through the DVA and challenge any denial of care through the statutory scheme prescribed by Congress." ER 206.

The court also granted the government's motion for summary judgment with respect to various other claims – none of which plaintiffs have challenged on appeal. For example, the court dismissed "Plaintiffs' constitutional claims against the DoD and the Army related to notice and health care," ER 62, because plaintiffs failed to respond to the government's motion with respect to those claims, ER 206-09. The court also dismissed the "secrecy oath" claims against the CIA, DoD and the Army, finding that plaintiffs had "not produced any evidence that any secrecy oaths were administered by the CIA, or are fairly traceable to the CIA," ER 210, and that there was likewise no evidence that plaintiffs feel constrained by any purported secrecy oath in light of undisputed evidence that test participants were long ago released from any such oaths. ER 212. Finally, the district court dismissed plaintiffs' claim that the VA "is a biased adjudicator of benefits claims" arising from testing programs because it allegedly was involved in the programs at issue, ER 212-24, holding that plaintiffs had not made an adequate showing of "actual bias or a substantial appearance of bias on the part of the DVA adjudicators." ER 223.

Although the district court issued dispositive rulings on all of plaintiffs' claims in its July 24, 2013 summary judgment decision, it did not enter a final judgment or an injunction at that time. Instead, the court solicited additional briefing from the parties

on the form and scope of any injunction that should be issued with respect to the additional "notice" it found was required under AR 70-25, and issued another preliminary order on October 10, 2013, entitled "Notice of Intended Amended Order, Injunction, and Judgment." ER 83-154. That decision largely mirrored the court's July 24, 2013 summary judgment decision, with the exception of some minor changes to the court's rationale for dismissing plaintiffs' claim for health care. *See* ER 83 (identifying "proposed changes to the amended order, which appear at pp. 47-51"). In that order, the court provided one last chance for the parties to submit comments and objections to its "intended" order, which both parties did. *See* CR 542, 543.

3. The November 19, 2013 Final Decision and Injunction.

On November 19, 2013, the district court issued a final decision following the approach mapped out in its two prior orders. ER 12-82. As relevant to this appeal, the court granted summary judgment to the government on all of plaintiffs' claims, including their claim against the Army for medical care, but granted summary judgment in plaintiffs' favor on part of their "notice" claim. The court also entered a permanent injunction directing the Army to take specific actions to comply with the additional "notice" obligations the court found AR 70-25 imposed. ER 9-12.

The district court first held that AR 70-25 is a substantive rule with the "force of law." ER 33-41. The court then held that the regulation's "duty to warn" applies to participants in tests conducted before the 1990 version of AR 70-25 was adopted. The court acknowledged that nothing in AR 70-25 "clearly requires that these

provisions apply to those who became volunteers before [the regulations] were created," and that the Army interpreted that regulation to apply only to tests conducted after the effective date of the regulation. ER 44. The court declined to defer to the Army's interpretation, however, characterizing it as a "convenient litigation position." ER 46. The court ultimately concluded that plaintiffs' interpretation was "more persuasive" and that the "duty to warn" in AR 70-25 encompasses past test participants such as the plaintiffs. ER 47-51.

The court next held that the Army had failed to carry out its obligations under AR 70-25 and that this failure could be remedied under Section 706(1). The court acknowledged that plaintiffs could not challenge the adequacy of the 2005 and 2006 letters sent to test participants because this would be an impermissible challenge to "how Defendants carried out their duty, not whether they did so at all." ER 54. Nevertheless, the court held that plaintiffs could properly challenge what it characterized as "the *refusal* of the Army to carry out its ongoing duty to warn, that is after [the 2006 letters] and in the future." *Id.* (emphasis added). Asserting that there "is no material dispute of fact that the Army is not [providing notice] on an ongoing basis," the court concluded that this aspect of plaintiffs' claim was thus permissible under Section 706(1) because it was not a prohibited challenge to the sufficiency of agency action. *Id.* Thus, while granting "summary judgment in favor of the Army to the extent that Plaintiffs seek to challenge its original notice efforts," the court held that the Army has an "ongoing duty to warn." ER 54.

The district court also reaffirmed its prior decision holding that the availability of medical care to veterans in the scheme Congress established to provide such care (*i.e.,* from the VA) precluded plaintiffs from also demanding care from the Army. ER 58-62. Explaining that the relevant question was "whether Plaintiffs are entitled to choose which government agency ought to provide care," the court declared that it "will not enjoin one government agency to provide health care when another agency has been congressionally mandated to do so." ER 58. The court also reiterated its earlier conclusion that plaintiffs had not shown that medical care provided by the VA is in any way inadequate or inferior to the care provided by the Army or "shown any systematic exclusion or inadequate care of their class, or that the class is unable to address any inadequacies through the DVA system." ER 60. Thus, exercising its inherent equitable discretion, the court held that it "will not enjoin the DoD or the Army to provide health care, because the DVA is required to do so." ER 61.

Finally, the district court again dismissed the remainder of plaintiffs' claims, including their constitutional claim related to notice and health care, ER 62-65, their "secrecy oath" claims, ER 65-68, and their claims that the VA is a "biased adjudicator" of benefits claims arising from these testing programs, ER 68-80. The court thus entered a final judgment in favor of the government on all of plaintiffs' claims except their APA claim that the Army has an ongoing duty to warn class members of newly-acquired information that may affect their well-being. ER 7-8.

In addition to entering a final judgment, the court entered a permanent injunction directing the Army to provide class members with information it acquired after June 2006, the date when the VA (in conjunction with the DoD) began sending letters to Cold War-era test participants. ER 10. The injunction orders the Army to "provide each test subject with any new information it has acquired with regard to (a) The nature, duration, and purpose of the testing undergone by that particular test subject; (b) The method and means by which the testing was conducted; (c) The inconveniences and hazards reasonably to be expected by that test subject as a result of participation in the testing; and (d) The effects upon their health which may possibly come from such participation." *Id.* The injunction further requires the Army to file a report with the district court within 90 days (by February 18, 2014) describing the steps it has taken to locate such information and to commit to providing such information to class members within 120 days. ER 10-11. The report must also set forth plans and policies for "periodically collecting and transmitting" any information the Army acquires in the future and providing status reports to the court regarding these efforts. ER 11. The district court also retained jurisdiction to enforce its order.

4. Denial of Government's Stay Motions.

Plaintiffs appealed the district court's final judgment and the Army filed a cross-appeal. This Court granted plaintiffs' motion to expedite consideration of those appeals and entered a streamlined cross-appeal briefing schedule under which the final brief will be filed by April 21, 2014. The Army requested a stay pending appeal from

the district court, which was denied on February 5, 2014. In light of the looming deadlines for compliance with the court's injunction, the Army filed an emergency motion for a stay pending consideration of these expedited appeals. On February 13, 2014, this Court entered a temporary stay of the injunction pending consideration of the government's motion. On February 20, 2014, however, this Court denied that motion. The Court did not undertake any assessment of the merits of the district court's "notice" injunction, but instead held solely that the Army had not demonstrated that compliance with the injunction would cause it irreparable harm. The Court thus lifted the administrative stay, and directed the Army to comply with the first deadline in the injunction within 14 days (*i.e.*, by March 6), while maintaining the briefing schedule previously established in these consolidated appeals.

SUMMARY OF THE ARGUMENT

In the decades since the military stopped conducting tests of chemical and biological substances on human volunteers, the government has undertaken substantial efforts to determine what adverse health effects exposure to particular substances might cause, to make available all relevant information to former test participants, and to ensure that test participants receive appropriate medical care from the VA in the system Congress established to provide health care and other benefits to veterans. None of this is disputed.

Plaintiffs nevertheless insist that both past and ongoing notification and outreach efforts conducted by the Army and the VA are insufficient. It is firmly

established, however, that Section 706(1) of the APA does not allow plaintiffs to seek, or courts to compel, programmatic improvements to government programs. On the contrary, "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. Southern Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55, 64 (2004) (emphasis in the original).

The only claims still at issue in this case are claims under Section 706(1) that the Army unlawfully withheld medical care and failed to provide adequate "notice" to former test participants in ways that allegedly violate the 1990 version of a single Army regulation, AR 70-25. As explained below, those claims fail on a variety of independent grounds, but the most fundamental defect in both claims is that AR 70-25 does not establish a "discrete and mandatory" duty enforceable under Section 706(1) that compels either the provision of health care independent from the VA or the provision of "notice" to former test participants. As the district court recognized, it is not at all clear whether AR 70-25 even applies to past testing programs, ER 44, and that regulation therefore cannot properly be construed to impose a mandatory directive enforceable under the mandamus-like standards of Section 706(1). Nor is the provision of medical care or "notice" regarding possible adverse health effects a discrete undertaking that a court may properly compel under Section 706(1). On the contrary, these are complicated, programmatic endeavors suffused with discretionary scientific judgments about what type and level of medical care may be appropriate and what new information might potentially affect the well-being of test participants.

Because neither of the remaining claims in this case is cognizable under Section 706(1), no additional analysis is required for this Court to affirm the district court's dismissal of plaintiffs' claim for medical care and reverse the district court's "notice" injunction. In any event, both claims fail on a variety of independent grounds.

1. The district court properly granted summary judgment to the government on plaintiffs' claim for medical care from the Army because such care is available to veterans through the scheme Congress established (*i.e.,* from the VA), and the court concluded that it would be pointless to "enjoin one government agency to provide health care when another agency has been congressionally mandated to do so." ER 58. At a minimum, this was a permissible exercise of discretion in determining appropriate equitable relief.

Plaintiffs' sole argument on appeal is that the district court lacked discretion to decline to compel the Army to provide medical care because 5 U.S.C. § 706(1) uses the word "shall" and thereby removes the normal discretion courts have in this context. That is wrong. As both the Supreme Court and this Court have repeatedly recognized, the mere use of terms like "shall" does not strip courts of broad discretion to exercise their equitable powers sparingly. That is particularly true in the context of claims under Section 706(1), where judicial authority to compel agency action is necessarily limited given the separation of powers concerns that an expansive use of that power would implicate. In any event, AR 70-25 does not impose a "discrete and mandatory" duty to provide medical care that is enforceable under

Section 706(1), and there would be no basis to conclude that the Army violated any such a duty by coordinating with the VA to ensure that test participants receive appropriate medical care in the scheme Congress established to provide such care.

2. The district court erred in holding that AR 70-25 compels the provision of additional "notice" to class members beyond the notice the Army has already provided (in conjunction with the VA) and continues to provide through ongoing outreach efforts. As noted above, the district court conceded that it was not clear whether AR 70-25 applies to participants in testing programs prior to 1988, and that acknowledgment alone should have precluded the court from holding that the regulation imposed a mandatory duty to warn the members of the class in this case.

The Army reasonably interprets AR 70-25 not to impose a broad duty to warn all participants in past testing programs, and the district court erred in not deferring to the Army's interpretation of its own ambiguous regulation. At a minimum, the court erred in concluding that plaintiffs' interpretation of that regulation was "more persuasive," ER 50, and then transforming a contested construction of AR 70-25 into an unprecedented and expansive directive to provide additional notice to former test participants. Moreover, even if AR 70-25 did clearly apply to the testing programs at issue, that regulation does not prescribe agency action with the requisite level of specificity to be enforceable under Section 706(1). Unlike statutes or regulations dictating discrete agency conduct, such as the completion of a rulemaking by a certain date, AR 70-25 at most establishes a broad "duty to warn" of risks associated with

testing programs that may be satisfied in a variety of ways. Because the scope of any action required necessarily turns on a host of discretionary scientific and medical judgments about what new information "may affect" the well-being of former test participants, whatever duty AR 70-25 might be thought to impose is ill-suited for enforcement under Section 706(1).

As the district court recognized, Section 706(1) does not permit challenges to the *sufficiency* of government programs and actions. ER 53-54. But that is precisely what the court has allowed in this case. The district court's conclusion that the Army "failed to act" after 2006 is contrary to the undisputed factual record showing that the Army's outreach efforts are ongoing – which confirms that the court is actually assessing the adequacy of those efforts. Moreover, the district court made no finding that the Army has acquired any significant new information regarding possible effects on the health and well-being of test participants that it has not disclosed, and the court thus had no proper factual predicate for concluding that the Army failed to take any "discrete agency action" that it was required to take. *SUWA*, 542 U.S. at 64.

Finally, the nature of the injunction issued by the district court confirms that it does not simply enforce a specific directive contained in AR 70-25 but instead rests on the court's own view that the Army should be doing more to notify former test participants. Rather than directing the Army to take action specifically prescribed in AR 70-25, the court has ordered the Army to adopt policies and procedures for the collection and dissemination of additional information to test participants – conduct

that goes well beyond anything identified in AR 70-25 – and to submit its compliance plan to the court for review and approval. ER 10-11. The court has thus established a regime of ongoing judicial oversight to superintend the Army's performance of functions under a regulation that the Army should be free to rescind or modify at any time. While the injunction purports to give the Army "discretion" to develop a compliance plan and implement that plan, ER 11, the court's expansive reservation of authority to accept or reject the Army's plan (which now must be filed just a day after the government's opening brief in this appeal) and to police the Army's compliance with that plan is fundamentally incompatible with the limited authority conferred in Section 706(1) to compel agency action unlawfully withheld or unreasonably delayed. The district court's "notice" injunction should accordingly be vacated.

STANDARD OF REVIEW

Because "[a] district court's decision to grant a permanent injunction involves factual, legal, and discretionary components," this Court reviews "a decision to grant such relief under several different standards." *Momot v. Mastro*, 652 F.3d 982, 986 (9th Cir. 2011). The Court "review[s] legal conclusions underlying the decision *de novo*, factual findings for clear error, and the scope of injunctive relief for an abuse of discretion." *Id.* *See also Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir.1998).

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE GOVERNMENT ON PLAINTIFFS' CLAIM FOR MEDICAL CARE FROM THE ARMY.

The Administrative Procedure Act authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Supreme Court has stressed that this provision does not allow plaintiffs to challenge an agency's "compliance with broad statutory mandates." *SUWA*, 542 U.S. at 66. The Court explained in *SUWA* that judicial review to compel agency action is carefully circumscribed "to protect agencies from undue judicial influence with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to solve." *Id.* The Court thus held that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64 (emphasis in original).

In light of the separation of powers concerns identified in *SUWA,* this Court has frequently stressed the "limited application of § 706(1)," emphasizing that courts may only compel agency action specifically prescribed, "[e]ven if a court believes that the agency is withholding or delaying an action that the court believes it should take." *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1221 (9th Cir. 2011). As this Court recently summarized, "[w]e have no authority to compel agency action merely because the agency is not doing something we may think it should do." *Zixiang Li v. Kerry*, 710 F.3d 995, 1004 (9th Cir. 2013). Instead, the action allegedly withheld or

delayed must be both "discrete" and "'legally required' – in the sense that the agency's legal obligation is 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). Indeed, even before the Supreme Court clarified the limited nature of judicial review under Section 706(1) in *SUWA*, this Court had "refused to allow plaintiffs to evade the finality requirement [of the APA] with complaints about the sufficiency of an agency action dressed up as an agency's failure to act." *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999).

A. AR 70-25 Does Not Impose A Discrete And Mandatory Duty On The Army To Provide Medical Treatment To Former Test Participants.

Plaintiffs seek to derive from AR 70-25 an entitlement to medical treatment for veterans provided by the Army. They contend that the district court was not merely authorized but also *required* to compel the Army to provide medical treatment to all class members because that regulation imposes discrete and mandatory duties enforceable under Section 706(1). This argument fails at every turn.

AR 70-25 was first issued in 1962, and has been revised at various times since then. In that regulation, the Army sought to "prescribe policies and procedures governing the use of volunteers as subjects in Department of the Army research, including research in nuclear, biological, and chemical warfare, wherein human beings are deliberately exposed to unusual or potentially hazardous conditions." AR 70-25 (1962) § 1 (Pl. Add. 16). The 1962 and 1974 versions of that regulation outline certain

"basic principles," such as the need to obtain informed consent from prospective test participants, *id.* § 4.a, and include a provision entitled "Additional Safeguards," providing that "[a] physician approved by The Surgeon General will be responsible for the medical care of volunteers," *id.* § 5.a. That provision also states that "[r]equired medical treatment and hospitalization will be provided for all casualties." *Id.* § 5.c (Pl. Add. 19, 26). In short, 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. The 1990 version of AR 70-25 (which is currently in effect) sets out in detail the authority required to approve studies involving the actual exposure of human subjects. *See* AR 70-25, chapter 2 (Pl. Add. 156-60). Chapter 3 of that regulation then sets forth a comprehensive list of technical requirements governing research programs, including a provision stating that "volunteers are authorized all necessary medical care for injury or disease that is a proximate cause of their participation in research." AR 70-25 § 3-1.k (Pl. Add. 161). Like the provisions in earlier versions of AR 70-25, these provisions are plainly limited to medical care during the pendency of a testing program, and were never intended to confer a broad and ongoing right to medical care arising from testing programs terminated long ago.

Even assuming the limited provisions in AR 70-25 referencing medical care could plausibly be read to confer a broad right to such care beyond the pendency of a testing program, this would be inconsistent with DoD's limited statutory authority to provide health care. *See Bell v. United States*, 366 U.S. 393, 401 (1961) (holding that the right of service members to compensation and benefits is determined solely by reference to the governing statutes); *United States v. Larianoff*, 431 U.S. 864, 869 (1977). Entitlement to DoD health care is governed by 10 U.S.C. § 1074. Such care is generally limited to a "member of a uniformed service," which includes those on active duty, 10 U.S.C. § 1074(a)(2)(A), their dependents, *id.* § 1076(a), retired and medically retired service members, *id.* § 1074(b)(1), and their dependents, *id.* § 1076(b). In addition, Congress provided discretionary authority for the Secretaries of Defense and the service branches to promulgate regulations establishing eligibility for health care not otherwise created by statute, 10 U.S.C. § 1074(c)(1), which is referred to as "Secretarial Designee" authority. 32 C.F.R. § 108.3.

In the regulations promulgated pursuant to that authority, DoD stated that eligibility for health care beyond statutory entitlement "shall be used very sparingly, and only when it serves a compelling DoD mission." 32 C.F.R. § 108.4(a). As particularly relevant to this case, a provision in that regulation, entitled "Research Subject Volunteers," states that "[c]are is authorized *during the pendency of the volunteer's involvement in the research*, and may be extended further upon approval of [certain officials]." 32 C.F.R. § 108.4(i) (emphasis added). In short, the statutes and

regulations governing DoD's provision of health care confirm that AR 70-25 does not – and could not – authorize medical care beyond the pendency of a person's involvement in a testing program, much less expansively authorize care based upon participation in testing programs conducted several decades ago.

In dismissing plaintiffs' APA claim for medical care from the Army, the district court did not analyze the language of AR 70-25 or the statutes and regulations expressly limiting DoD's authority to provide such care. There was thus no proper basis for the court's statement that it had previously "found that AR 70-25 entitles [plaintiffs] to medical care for disabilities, injuries, or illnesses caused by their participation in government experiments." ER 58. At most, the court found in its January 19, 2010 order denying the government's motion to dismiss that language in the *1962* version of AR 70-25 (which has long been superseded) is not necessarily limited to medical needs during the testing programs. SER 81-82. The court made no affirmative finding that the 1990 version of AR 70-25 imposed a specific, mandatory duty on the Army to provide medical care to former test participants in perpetuity. Such a finding would not only have been flatly contrary to the limited statutory authority conferred on the Army to provide medical care but also to the court's own concession that it was not clear whether AR 70-25 applies "to individuals who participated in experiments before 1988." ER 44.

Even assuming the Army had authority to adopt a regulation conferring a broad right to health care on participants in prior testing programs – in contravention

of the express limits in 10 U.S.C. § 1074 and 32 C.F.R. § 108.4(i) – the district court had no authority to compel agency action under Section 706(1) based upon an ambiguous regulation. As the Supreme Court stressed in *SUWA,* relief under Section 706(1) is in the nature of mandamus and may only be ordered when the entitlement is clear. *SUWA*, 542 U.S. 63-64. In this case, however, the district court expressly found that entitlement was not clear. ER 44. Nor is the provision of medical care to class members the sort of "discrete" and "legally required" agency action enforceable under Section 706(1). *See Hells Canyon*, 593 F.3d 923. By its terms, AR 70-25 leaves ample discretion to the Army Surgeon General to "[d]irect medical follow-up, *when appropriate*, on research subjects to ensure that any long-range problems are detected and treated." AR 70-25 § 2.5.j (emphasis added). Moreover providing medical care is not a discrete undertaking; it would require a broad restructuring of Army programs and operations in ways that *SUWA* forecloses. *See SUWA*, 542 U.S. at 64 (holding that plaintiffs may not use Section 706(1) to seek "programmatic improvements" to agency programs); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990) (same).

In light of the numerous impediments to plaintiffs' claim for medical care identified above, the district court had ample grounds to choose from in dismissing that claim. In its initial summary judgment ruling, the court held that the availability of medical care from the VA in the scheme prescribed by Congress was an "adequate" remedy within the meaning of 5 U.S.C. § 704, thereby foreclosing an APA claim for the same relief from the Army. ER 201-06. In its final decision, however,

the court did not invoke Section 704, but instead simply exercised its discretion not to "enjoin one government agency to provide health care when another agency has been congressionally mandated to do so." ER 58. Whether viewed as a reprise of its earlier holding under Section 704 or an independent exercise of equitable discretion in awarding (or declining to award) injunctive relief, that ruling was correct.

There is no dispute in this case that Congress assigned the task of providing health care to veterans primarily to the Department of Veterans Affairs. *See* 38 U.S.C. § 7301(b) (charging the VHA with the duty to provide "a complete medical and hospital service for the medical care and treatment of veterans"). In the Veterans Judicial Review Act ("VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (1988), Congress also created an exclusive scheme for adjudicating claims by veterans for health care and benefits and reviewing benefits decisions. Under the VJRA, decisions by the VA with respect to medical care and benefits are only reviewable in the specialized scheme Congress established; all other courts are specifically precluded from reviewing such decisions. 38 U.S.C. § 511(a). Thus, as this Court recently recognized, district courts lack jurisdiction to entertain claims under 5 U.S.C. § 706(1) alleging systemic "unreasonable delay" by the VA in the adjudication of claims by veterans for monetary benefits and the provision of mental health care. *See Veterans for Common Sense v. Shinseki ("VCS")*, 678 F.3d 1013 (2012) (en banc).

The district court properly recognized that plaintiffs' claim for medical care directly from the Army is an end-run around the comprehensive scheme Congress

established to provide medical care to veterans and adjudicate claims relating to veterans' benefits. In its July 24, 2013 summary judgment ruling, the court refused to allow plaintiffs to circumvent the scheme Congress prescribed for veterans to obtain medical care, and accordingly held that the availability of medical care from the VA was an adequate remedy within the meaning of 5 U.S.C. § 704, thereby precluding an APA claim for the same care from the Army. That interlocutory ruling was correct, even if it is not technically before this Court on appeal.[5]

Section 704 limits the APA's waiver of sovereign immunity to circumstances where there is no other adequate remedy, and this Court has also recognized that an APA claim must not seek relief expressly or impliedly forbidden by another statute. *United States v. Park Place Assoc., Ltd*, 563 F.3d 907, 929 (9th Cir. 2009) (citing *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998)). Plaintiffs' claim for medical care fails both tests because an adequate remedy is available under the VA scheme and that claim seeks relief both expressly and impliedly forbidden under the scheme Congress created to provide benefits to veterans. *See VCS*, 678 F.3d at 1023 (explaining that "Congress was quite serious about limiting our jurisdiction over anything dealing with the provision of benefits to veterans").

[5] The primacy of the VA in providing medical care to veterans is yet another reason why AR 70-25 cannot properly be construed to confer a broad right to medical care beyond DoD's limited statutory authority to provide such care. It confirms that the real question in this case is not whether the Government writ large has a duty to provide medical care to veterans but *which* federal agency has the obligation (and the necessary authority) to provide care to a particular subset of veterans.

Like this Court, the D.C. Circuit recently confirmed that the existence of adequate remedies in the VA scheme precludes the assertion of an APA claim under Section 706(1). In *Vietnam Veterans of Am. v. Shinseki ("VVA")*, 599 F.3d 654 (D.C. Cir. 2010), the D.C. Circuit indicated that Section 704 would bar a Section 706(1) claim alleging unreasonable delay in the VA's adjudication of claims for benefits because the specialized scheme of review established by Congress provides an adequate, alternate remedy. *Id.* at 659-660. Although the *VVA* Court ultimately decided that case on standing grounds, *id.* at 662, its recognition that the existence of an adequate remedy within the meaning of Section 704 can properly preclude a claim under Section 706(1) amply supports the district court's initial ruling.[6]

Even apart from Section 704, the district court properly declined to compel the Army to provide duplicative medical care to former test participants outside the scheme Congress established to provide care to veterans. The court correctly concluded that it would be pointless to "enjoin one government agency to provide

[6] The D.C. Circuit concluded in *VVA* that the Section 704 inquiry was not "jurisdictional." 559 F.3d at 661. But this Court has held that this inquiry goes to the scope of the APA's waiver of sovereign immunity and is therefore jurisdictional. *See Tucson Airport Auth.*, 136 F.3d at 645; *Gallo Cattle Co. v. USDA*, 159 F.3d 1194 (9th Cir. 1998). While there is some tension in this Court's precedents as to whether Section 704 poses a jurisdictional barrier to constitutional claims, *see Gros Ventre Tribe v. United States*, 469 F.3d 801, 809 (9th Cir. 2006) (contrasting *Gallo Cattle* and *Presbyterian Church v. United States*, 870 F.2d 518 (1989)), there is no doubt that it poses an independent limitation on APA claims – the only claims at issue in this case. Thus, plaintiffs err in suggesting that the district court "removed any discussion of sovereign immunity" in its final decision because it was questionable. Pl. Br. 19.

health care when another agency has been congressionally mandated to do so." ER 58. As explained in the next section, plaintiffs have not shown that the court abused its discretion in declining to issue an injunction under these circumstances.

B. None of Plaintiffs' Arguments For Reversal Have Merit.

Plaintiffs nowhere acknowledge the Army's limited statutory authority to provide medical care or the limited authority courts have to compel agency action under Section 706(1). Nor do they offer any meaningful analysis of AR 70-25. Instead, plaintiffs argue primarily that the district court was required to compel the Army to provide medical care because Section 706(1) uses the word "shall" and that term removes any judicial discretion. Pl. Br. 15-17. They are wrong.

Flexibility and discretion have long been recognized as defining characteristics of equitable relief. *See, e.g., Hecht v. Bowles*, 321 U.S. 321, 329 (146); *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). There is no special rule divesting courts of discretion for claims under Section 706(1). On the contrary, this Court has frequently used permissive language in discussing judicial authority under Section 706(1). *See, e.g., Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (stating that court "may compel 'agency action unlawfully withheld or unreasonably delayed.'"). Indeed, in the context of a Section 706(1) claim, this Court has stressed that "a statutory violation does not always lead to the automatic issuance of an injunction." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002).

More generally, the Supreme Court has observed that "courts in virtually every English-speaking jurisdiction have held – by necessity – that *shall* means *may* in some contexts, and vice versa." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 433 n.9 (1995) (quoting B. Garner, *Dictionary of Modern Legal Usage* 939 (2d ed. 1995)). *See also Hecht*, 321 U.S. at 328 (observing that, although statute used the term "shall," this "falls short of making mandatory the issuance of an injunction merely because the Administrator asks it"); *Porter v. Warner Holding Co.*, 328 U.S. 395, 298 (1946).

Likewise, federal courts of appeals have uniformly rejected arguments that the use of the term "shall" in federal statutes providing enforcement authority imposes an inflexible mandate prohibiting the exercise of discretion. *See, e.g., Dubois v. Thomas*, 820 F.2d 943, 946-47 (8th Cir. 1987) (finding that the word "shall" in the Federal Water Pollution Control Act did not impose a mandatory duty to bring an enforcement action); *Bartholomew v. United States*, 740 F.2d 526, 531 (7th Cir. 1984) ("That the legislature may have used the word 'shall' or 'must,' rather than 'may,' in directing the discharge of a specified duty does not require the statute to be construed as mandatory rather than directory."); *Seabrook v. Costle*, 659 F.2d 1371, 1374 n.3 (5th Cir. 1981) (same). In short, the mere use of the word "shall" in Section 706(1) in no way limited the district court's discretion to take into account all relevant factors, including Congress' assignment of the primary duty to provide medical care to veterans to the VA, in declining to enjoin the Army to provide duplicative care.

In arguing that a court must issue an injunction after finding that an agency has violated a mandatory directive under Section 706(1), plaintiffs rely almost exclusively on *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999). Pl. Br. 16-17.[7] As an initial matter, *Forest Guardians* does not compel reversal of the district court's ruling with respect to plaintiffs' claim for medical care because it is a non-binding decision from a different circuit that was decided prior to the Supreme Court's seminal construction of Section 706(1) in *SUWA*. More fundamentally, even if that decision were correct and controlling, it would not require reversal of the district court's ruling in this case because it confirms that a necessary predicate to trigger the "shall" clause in Section 706(1) is a finding that the agency violated a specific, mandatory directive to take certain action. *Forest Guardians*, 174 F.3d at 1186 (holding first that the district court properly found that the Secretary of the Interior had a duty "to designate the silvery minnow's critical habitat by March 1, 1995, and that he has yet to fulfill that duty"). As explained above, the district court never made a proper determination that AR 70-25 imposes a non-discretionary duty to provide health care to former test participants, much less that the Army "failed to take a discrete action that the agency was required to take." *SUWA*, 542 U.S. at 64.

[7] Contrary to plaintiffs' suggestion (Pl. Br. 15), nothing in *SUWA* supports this argument. Although the Court quoted the language of Section 706(1) in that case, it had no occasion to decide what discretion a court might have to decline to issue an injunction under Section 706(1), because the Court held that the agency had not failed to take any "discrete agency action" that it was required to take.

In addition to their argument that "shall means shall," plaintiffs also contend that the availability of medical care from the VA "is not a reason to refuse to compel the Army." Pl. Br. 19. This argument rests on two erroneous premises: (1) that the availability of medical care from the VA is not relevant to the Army's obligations, *id.* at 19-20, and (2) that the VA system does not provide an entirely "adequate" remedy because some hypothetical and unidentified class members may not be able to obtain care in that system, *id.* at 21-24.

In declining to "enjoin one government agency to provide health care when another agency has been congressionally mandated to do so," ER 58, the district court properly viewed the availability of care in the comprehensive scheme Congress created to provide such care as an important factor guiding its discretion in awarding equitable relief. Moreover, as explained above, the court nowhere made any finding that AR 70-25 imposed a duty to provide indefinite medical care to former test participants, much less that the Army violated such a duty. In short, Instead, the district court properly recognized that the availability of medical care from the VA should inform its evaluation of whether the Army has an independent duty to provide health care to the class members in this case.

Plaintiffs' argument that the medical care available under the VA system is not really adequate, Pl. Br. 21-24, fares no better. As an initial matter, the possibility that veterans who have been less-than-honorably discharged might not be eligible for medical care in the VA system, *see* 38 U.S.C. § 5303(a), provides no basis for

concluding that the scheme established by Congress to provide benefits to veterans is inadequate on the whole. On the contrary, it would plainly frustrate Congressional intent to require the Army to provide medical care to a discrete group of veterans who participated in these testing programs to fill a supposed "gap" in the provision of medical care by the VA that Congress purposefully enacted.

Furthermore, the district court specifically found that there was no evidence "that any class members cannot access the DVA health care system or that they are denied compensation for their service-connected injuries." ER 59. In the absence of any such evidence, the court properly concluded that plaintiffs "have not shown any systematic exclusion or inadequate care of their class, or that the class is unable to address any inadequacies through the DVA system." ER 60. On appeal, as in the district court, plaintiffs do not identify any class members who have been, or might in the future be, unable to obtain medical care from the VA because they were less-than-honorably discharged, and there is no reason to believe any such individuals exist. While plaintiffs contend that they had no burden to identify class members who were less-than-honorably discharged or might otherwise be ineligible for medical care from the VA due to a failure to establish "service-connected" injuries, Pl. Br. 22, they must provide something more than sheer speculation to attack the adequacy of the VA scheme as a whole.

Even if plaintiffs could identify class members falling within these categories, that would not demonstrate any "inadequacies" in the VA scheme, but merely limits

on the availability of care prescribed by Congress. And plaintiffs misunderstand those limits in any event. Although veterans are required to show service-connection under a relaxed evidentiary burden in order to demonstrate entitlement to disability compensation, *see e.g.,* 38 U.S.C. § 5107(b); *Holton v. Shinseki*, 557 F.3d 1362, 1367 (Fed. Cir. 2009), such a showing is not necessarily required in order to receive health care from the VA. Instead, veterans seeking to enroll in the VA healthcare system are assigned one of eight priority groups, *see* 38 U.S.C. § 1705(a), and the VA manages the provision of care by adjusting, through rulemaking, the priority groups eligible to enroll. *See generally* 38 C.F.R. § 17.36. All but two sub-categories of priority group eight are currently eligible to enroll. *See* 38 C.F.R. § 17.36(b), (c)(2). In short, plaintiffs err in making the categorical assertion that "veterans whose disability claims were denied would thus *not* be able to receive medical care from the DVA for a service-connected injury." Pl. Br. 24 n.4 (emphasis in the original).[8]

In the end, plaintiffs' arguments boil down to a bald assertion that the VA scheme is inadequate because the VA "has systematically denied testing program-related disability claims." Pl. Br. 24 n.4. That is nothing more than a reprise of plaintiffs' argument that the VA is a "biased adjudicator" of benefits claims, which the

[8] Even assuming a veteran was denied medical care from the VA based upon his inability to establish service-connection under the lenient standards applicable in the VA scheme, plaintiffs provide no basis for believing such a person would be able to satisfy the more demanding causation standard in AR 70-25, which refers to "injury or disease that is the proximate result of their participation in research." Pl. Add. 161.

district court rejected on the merits. ER 68-80. Plaintiffs have not challenged that ruling and they have therefore waived any argument premised on allegedly "systemic" inadequacies in the VA scheme.[9] Plaintiffs may not make an end-run around that ruling to suggest that the district court erred in concluding that adequate medical care and other benefits are available in the VA system. The district court's dismissal of plaintiffs' claim for medical care should accordingly be affirmed.

II. THE DISTRICT COURT ERRED IN HOLDING THAT AR 70-25 COMPELS THE PROVISION OF ADDITIONAL "NOTICE" TO CLASS MEMBERS BEYOND THE NOTICE THE ARMY AND THE VA HAVE ALREADY PROVIDED AND CONTINUE TO PROVIDE.

For many of the reasons outlined above, the district court erred in holding that AR 70-25 imposes a prospective duty on the Army to locate and provide new information to former participants in chemical and biological testing programs conducted decades earlier. Like the provisions of AR 70-25 relating to medical care, the provisions relating to notice are, at best, ambiguous, and they are only intended to apply prospectively. AR 70-25 does not establish a discrete or mandatory requirement to provide notice or outreach to former test participants.

[9] While waived, plaintiffs' contention that the VA systematically denies testing program-related disability claims also lacks merit. The district court expressly rejected plaintiffs' claim of institutional bias by the VA in this context, *see* ER 73-80, and the report plaintiffs now cite to support a claim of "systemic" denials of benefits does not reflect an accurate statistical analysis of grant rates for test participants. Indeed, more accurate statistics indicate that of the 843 disability claims filed by test participants, 717 were granted and 193 were denied (several claimants claimed more than one disability). *See* SER 24. In other words, test participants were granted service connection for at least one claimed disability approximately 85% of the time, which is higher than the grant rate among veterans as a whole. SER 27-28.

> The relevant section of the 1990 version of AR 70-25 provides as follows:
>
> > 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.

AR 70-25 § 3-2.h (Pl. Add. 168). As the Army explained, that provision was only meant to apply prospectively. Indeed, its implementation requires that systems be in place at the time that research is conducted in order to comprehensively collect and maintain the necessary information to warn test participants. ER 45 (citing testimony of Army's Rule 30(b)(6) witness). There is no evidence that the Army ever intended for AR 70-25 to impose a broad duty to collect and provide information to persons who participated in tests that took place decades before that regulation was issued.

As noted, the district court acknowledged that it is not clear whether a "duty is owed to individuals who participated in experiments before 1988 or whether it is limited to only those who might have done so after AR 70-25 was revised in 1988." ER 44. The court's recognition that AR 70-25 does not impose a clear duty should have ended the inquiry. Whatever "duty to warn" the regulation might be thought to impose is not sufficiently clear to be enforceable under Section 706(1), which applies only where "the agency's 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.

The court compounded its error by substituting its own interpretation of AR 70-25 for that of the Army. The court refused to apply the established rule that an agency's reasonable interpretation of its own regulations is entitled to deference, *see Auer v. Robbins*, 519 U.S. 452 (1997), because it believed the Army's construction of AR 70-25 was a "post hoc rationalization" advanced for the first time in litigation. ER 47-48. But this Court has long recognized that this rule does not apply with the same force in cases under Section 706(1), where agencies by definition have no occasion or opportunity to interpret regulations prior to litigation. *See Independence Mining Co. v. Babbitt*, 105 F.3d 502, 511–12 (9th Cir. 1997) (explaining that *post hoc* rationalization rule does not apply in Section 706(1) cases where "there is no official statement of the agency's policy and relevant justifications"). *See also 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). Until this litigation, no court ever had occasion to construe AR 70-25, and no one – including Congress, the Army, or even plaintiffs – has previously suggested that AR 70-25 imposes expansive "notice" obligations on the Army of the sort the district court has now divined.[10]

[10] Prior to this case, the Vietnam Veterans of America advised its members that the VA, not the Army, has a duty to provide notice to test participants. In advisory notices issued in 2008, the VVA stated that "[i]t is DoD's responsibility to collect and validate chem/bio exposures to service members while on active duty and to maintain these databases. It is the responsibility of VA to inform veterans about their exposures and the benefits to which they may be entitled, and to advise these veterans of procedures to follow if they have health concerns." SER 46. *See also* SER 51.

In concluding that plaintiffs' litigation-based interpretation of AR 70-25 was "more persuasive" than the construction offered by the agency that issued and implements that regulation, ER 50, the district court reasoned that the Army's construction would render one part of the regulation superfluous. Noting that the Army suspended testing of volunteer service members in 1976, the court concluded that there would be no reason to add language to the 1990 version of AR 70-25 covering the "deliberate exposure of human subjects . . . to chemical warfare agents, or to biological warfare agents," if the regulation did not apply to test programs that ended decades earlier. ER 50. The premise of the court's reasoning is mistaken. Although the Army suspended the volunteer test programs in 1976, it continues to administer chemical and biological testing programs that involve the use of human subjects in controlled clinical trials to evaluate the safety and effectiveness of medical products designed to *protect* against chemical agents (that is defensive measures such as the anthrax vaccine). *See* SER 54; 50 U.S.C. § 1520a (permitting tests or experiments carried out for "any purpose that is directly related to protection against toxic chemicals or biological weapons and agents"). The Army's reasonable construction of AR 70-25 thus renders no part of that regulation superfluous.

Even if AR 70-25 did clearly apply to the testing programs at issue in this case, the scope of the action required under that provision is necessarily uncertain because it turns on discretionary scientific and medical judgments about what constitutes new information that "may affect" the well-being of former test participants. *Cf. In re*

Consol. U.S. Atmospheric Testing Litig., 820 F.2d 982 (9th Cir. 1987) (recognizing discretionary nature of "duty to warn" in context of FTCA claim). For example, the complicated question of what type of scientific evidence is required to trigger some form of notice, let alone what form such notice should take, requires policy judgments about whether and under what circumstances "new" information is significant enough to warrant sending new notices to veterans that may unnecessarily alarm them. *See* SER 8-9 (Decl. of Dee Dodson Morris ¶ 19). Likewise, whether the Army must actively seek out studies or scientific research concerning the various test substances, and from what sources they must search, involves a host of discretionary judgments about resource allocation and the significance of the information likely to be collected. These are not the sorts of discrete and mandatory duties properly enforceable under the mandamus-like standards of Section 706(1). The district court thus erred in issuing an injunction that is likely to embroil the court in the day-to-day minutiae and administration of Army programs, determining things like what medical journals the Army must scour for new information, how often the Army must conduct such searches, and when information of questionable relevance or value must nevertheless be provided to test participants.

Given the substantial efforts the Army has undertaken to determine what adverse health effects exposure to particular substances might cause and to make all relevant information available to former test participants, plaintiffs' claim for additional notice is necessarily a challenge to the sufficiency of the Army's notification

efforts. As noted above, this Court has held that Section 706(1) does not permit "plaintiffs to evade the [APA's final agency action] requirement with complaints about the sufficiency of an agency action dressed up as an agency's failure to act." *Ecology Ctr.*, 192 F.3d at 926. The district court properly recognized that this principle precluded plaintiffs from challenging the sufficiency of the notice provided in the 2005 and 2006 letters to testing participants. ER 54. In limiting its grant of relief to information the Army has acquired since 2006, the court purported to solely be allowing a challenge to "the Army's failure to act," *id.*, but the Army's efforts to provide appropriate notice and information to veterans did not cease in 2006. It is undisputed that both DoD and the VA *continue* to maintain public websites and telephone hotlines to provide information to World War II and Cold War-era test participants and respond as needed to requests from individual veterans seeking their test files. The district court apparently believed those efforts were inadequate, but this only confirms that plaintiffs' notice claim challenges the *sufficiency* of the Army's actions "dressed up as an agency's failure to act" in a way that is forbidden under Section 706(1).

The district court's judgment and injunction must also be reversed because the court did not make the requisite finding that the Army failed to take any "discrete agency action" that it was required to take. *SUWA*, 542 U.S. at 64. Specifically, the court did not find that the Army has acquired any significant new information regarding possible effects on the health and well-being of test participants that it has

not disclosed. Nor is there any reason to believe any such information exists, given the comprehensive studies conducted long ago on all the substances used in these testing programs. The court faulted the Army for not sending "any updated information to test subjects" and "not acknowledg[ing] any intent or duty to do so." ER 54. But it is undisputed that DoD has provided information to former test participants in the form it believes is most appropriate and continues to make relevant information available to veterans in a variety of different ways, including the operation of a public website for veterans which contains, among other things, long-term studies concerning testing program and identifies a 1-800 number allowing veterans to obtain their service member test files containing the information that DoD has about various tests. In the absence of any record evidence that the Army has acquired any new information regarding adverse health effects from any testing programs since 2006, there is simply no factual predicate for concluding that the Army failed to do something it had a "discrete and mandatory" duty to do, particularly where the district court itself recognized that *how* the Army notifies test participants is beyond the court's reach. ER 53-55.

Finally, the district court's injunction must be reversed because it imposes wide-ranging, prospective obligations and continuous judicial oversight on the Army for an indefinite future period of time. These features of the injunction are fundamentally incompatible with the limited scope of the court's authority to compel discrete agency action under Section 706(1). *See SUWA*, 542 U.S. at 66 (stating that

judicial review to compel agency action is carefully circumscribed "to protect agencies from undue judicial influence with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreement which courts lack both expertise and information to solve"). The district court not only ordered the Army to provide veterans with information currently in the agency's possession, but also directed it to adopt policies and procedures for the collection and dissemination of such information in the future.[11] ER 10-11 (directing Army to formulate a plan for gathering information and distributing it to test participants). These elements of the injunction underscore the extent to which it concerns not a discrete duty but the kind of programmatic oversight precluded under Section 706(1).

[11] The court's injunction also conflates a "duty to warn" concerning "newly acquired information that may affect [research volunteers'] well-being" with the requirements for informed consent identified in a separate part of AR 70-25. The injunction defines "Newly Acquired Information" to include (a) "[t]he nature, duration, and purpose of the testing undergone by that particular test subject;" (b) "[t]he method and means by which the testing was conducted;" (c) "[t]he inconveniences and hazards reasonably to be expected by that test subject as a result of participation in the testing;" and (d) "[t]he effects upon their health which may possibly come from such participation." ER 10 (¶ 2.a.-d). The court has taken most of the elements of its definition from the appendix to AR 70-25 entitled "Volunteer Agreement Affidavit," which governs the information that is to be provided to clinical volunteers in order to obtain informed consent prior to participation in the clinical study. *See* Pl. Add. 206-07. *See also* AR 70-25 at App. E (Pl. Add. 186-88). As a result, the court's injunction goes well beyond the scope of any "duty to warn" identified in AR 70-25 and is improper for this reason alone.

CONCLUSION

For the foregoing reasons, the district court's final judgment should be affirmed in part and reversed in part. The court's holding that plaintiffs are not entitled to an injunction directing the Army to provide independent medical care to veterans should be affirmed, but the court's holding that the Army has a duty enforceable under 5 U.S.C. § 706(1) to provide additional notice of possible adverse health effects from past testing programs should be reversed, and the court's permanent injunction directing the Army to provide such notice should be vacated.

Respectfully submitted,

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MARCH 2014

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because it contains 12,457 words, excluding exempt material, according to the count of Microsoft Word.

s/ Charles W. Scarborough
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STATEMENT OF RELATED CASES

Counsel for defendant-appellant are not aware of any related cases pending before this Court within the meaning of Ninth Circuit Rule 28-2.6.

s/ Charles W. Scarborough
Charles W. Scarborough
Counsel for Appellees/Cross-Appellants

STATUTORY ADDENDUM
PURSUANT TO CIRCUIT RULE 28-2.7

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Public Law 107–314
107th Congress

An Act

Dec. 2, 2002
[H.R. 4546]

To authorize appropriations for fiscal year 2003 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Bob Stump National Defense Authorization Act for Fiscal Year 2003.

SECTION 1. SHORT TITLE; FINDINGS.

(a) SHORT TITLE.—This Act may be cited as the "Bob Stump National Defense Authorization Act for Fiscal Year 2003".

(b) FINDINGS.—Congress makes the following findings:

(1) Representative Bob Stump of Arizona was elected to the House of Representatives in 1976 for service in the 95th Congress, after serving in the Arizona legislature for 18 years and serving as President of the Arizona State Senate from 1975 to 1976, and he has been reelected to each subsequent Congress.

(2) A World War II combat veteran, Representative Stump entered service in the United States Navy in 1943, just after his 16th birthday, and served aboard the USS LUNGA POINT and the USS TULAGI, which participated in the invasions of Luzon, Iwo Jima, and Okinawa.

(3) Representative Stump was elected to the Committee on Armed Services in 1978 and has served on nearly all of its subcommittees and panels during 25 years of distinguished service on the committee. He has served as chairman of the committee during the 107th Congress and has championed United States national security as the paramount function of the Federal Government.

(4) Also serving on the Committee on Veterans' Affairs of the House of Representatives, chairing that committee from 1995 to 2000, and serving on the Permanent Select Committee on Intelligence of the House of Representatives, including service as the ranking minority member in 1985 and 1986, Representative Stump has dedicated his entire congressional career to steadfastly supporting America's courageous men and women in uniform both on and off the battlefield.

(5) Representative Stump's tireless efforts on behalf of those in the military and veterans have been recognized with numerous awards for outstanding service from active duty and reserve military, veterans' service, military retiree, and industry organizations.

(6) During his tenure as chairman of the Committee on Armed Services of the House of Representatives, Representative Stump has—

(A) overseen the largest sustained increase to defense spending since the Reagan administration;

(B) led efforts to improve the quality of military life, including passage of the largest military pay raise since 1982;

(C) supported military retirees, including efforts to reverse concurrent receipt law and to save the Armed Forces Retirement Homes;

(D) championed military readiness by defending military access to critical training facilities such Vieques, Puerto Rico, expanding the National Training Center at Ft. Irwin, California, and working to restore balance between environmental concerns and military readiness requirements;

(E) reinvigorated efforts to defend America against ballistic missiles by supporting an increase in fiscal year 2002 of nearly 50 percent above the fiscal year 2001 level for missile defense programs; and

(F) honored America's war heroes by expanding Arlington National Cemetery, establishing a site for the Air Force Memorial, and assuring construction of the World War II Memorial.

(7) In recognition of his long record of accomplishments in enhancing the national security of the United States and his legislative victories on behalf of active duty service members, reservists, guardsmen, and veterans, it is altogether fitting and proper that this Act be named in honor of Representative Bob Stump of Arizona, as provided in subsection (a).

SEC. 2. ORGANIZATION OF ACT INTO DIVISIONS; TABLE OF CONTENTS.

(a) DIVISIONS.—This Act is organized into three divisions as follows:

(1) Division A—Department of Defense Authorizations.

(2) Division B—Military Construction Authorizations.

(3) Division C—Department of Energy National Security Authorizations and Other Authorizations.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

DIVISION A—DEPARTMENT OF DEFENSE AUTHORIZATIONS

TITLE I—PROCUREMENT

Subtitle A—Authorization of Appropriations

House of Representatives a report describing the process prescribed under paragraph (1).

(3) While prescribing the process under paragraph (1) and upon completion of the report under paragraph (2), the Secretary shall provide to the Comptroller General information that would be relevant in carrying out the study required by subsection (b).

(b) COMPTROLLER GENERAL STUDY AND REPORT.—(1) The Comptroller General shall conduct a study of the health care issues of covered beneficiaries described in subsection (a). The study shall include the following:

(A) An analysis of whether covered beneficiaries who seek services through the Department of Veterans Affairs are receiving needed health care services in a timely manner from the Department of Veterans Affairs, as compared to the timeliness of the care available to covered beneficiaries under TRICARE Prime (as set forth in access to care standards under TRICARE program policy that are applicable to the care being sought).

(B) An evaluation of the quality of care for covered beneficiaries who do not receive needed services from the Department of Veterans Affairs within a time period that is comparable to the time period provided for under such access to care standards and who then must seek alternative care under the TRICARE program.

(C) Recommendations to improve access to, and timeliness and quality of, care for covered beneficiaries described in subsection (a).

(D) An evaluation of the feasibility and advisability of making access to care standards applicable jointly under the TRICARE program and the Department of Veterans Affairs health care system.

(E) A review of the process prescribed by the Secretary of Defense under subsection (a) to determine whether the process ensures the adequacy and quality of the health care services provided to covered beneficiaries under the TRICARE program and through the Department of Veterans Affairs, together with timeliness of access to such services and patient safety.

Deadline.

(2) Not later than 60 days after the congressional committees specified in subsection (a)(2) receive the report required under that subsection, the Comptroller General shall submit to those committees a report on the study conducted under this subsection.

(c) DEFINITIONS.—In this section:

(1) The term "covered beneficiary" has the meaning provided by section 1072(5) of title 10, United States Code.

(2) The term "TRICARE program" has the meaning provided by section 1072(7) of such title.

(3) The term "TRICARE Prime" has the meaning provided by section 1097a(f) of such title.

10 USC 1074.

SEC. 709. DISCLOSURE OF INFORMATION ON PROJECT 112 TO DEPARTMENT OF VETERANS AFFAIRS.

Deadline.

(a) PLAN FOR DISCLOSURE OF INFORMATION.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall submit to Congress and the Secretary of Veterans Affairs a comprehensive plan for the review, declassification, and submittal to the Department of Veterans Affairs of all records

and information of the Department of Defense on Project 112 that are relevant to the provision of benefits by the Secretary of Veterans Affairs to members of the Armed Forces who participated in that project.

(b) PLAN REQUIREMENTS.—(1) The records and information covered by the plan under subsection (a) shall be the records and information necessary to permit the identification of members of the Armed Forces who were or may have been exposed to chemical or biological agents as a result of Project 112.

(2) The plan shall provide for completion of all activities contemplated by the plan not later than one year after the date of the enactment of this Act.

(c) IDENTIFICATION OF OTHER PROJECTS OR TESTS.—The Secretary of Defense also shall work with veterans and veterans service organizations to identify other projects or tests conducted by the Department of Defense that may have exposed members of the Armed Forces to chemical or biological agents.

(d) GAO REPORTS ON PLAN AND IMPLEMENTATION.—(1) Not later than 30 days after submission of the plan under subsection (a), the Comptroller General shall submit to Congress a report reviewing the plan. The report shall include an examination of whether adequate resources have been committed, the timeliness of the information to be released to the Department of Veterans Affairs, and the adequacy of the procedures to notify affected veterans of potential exposure. Deadline.

(2) Not later than six months after implementation of the plan begins, the Comptroller General shall submit to Congress a report evaluating the progress in the implementation of the plan. Deadline.

(e) DOD REPORTS ON IMPLEMENTATION.—(1) Not later than six months after the date of the enactment of this Act, and upon completion of all activities contemplated by the plan under subsection (a), the Secretary of Defense shall submit to Congress and the Secretary of Veterans Affairs a report on progress in the implementation of the plan. Deadline.

(2) Each report under paragraph (1) shall include, for the period covered by such report—

(A) the number of records reviewed;

(B) each test, if any, under Project 112 identified during such review;

(C) for each test so identified—

(i) the test name;

(ii) the test objective;

(iii) the chemical or biological agent or agents involved; and

(iv) the number of members of the Armed Forces, and civilian personnel, potentially effected by such test; and

(D) the extent of submittal of records and information to the Secretary of Veterans Affairs under this section.

(f) PROJECT 112.—For purposes of this section, Project 112 refers to the chemical and biological weapons vulnerability-testing program of the Department of Defense conducted by the Deseret Test Center from 1963 to 1969. The project included the Shipboard Hazard and Defense (SHAD) project of the Navy.

10 U.S.C. § 1074

Title 10. Armed Forces
Subtitle A. General Military Law
Part II. Personnel
Chapter 55. Medical and Dental Care

§ 1074. Medical and dental care for members and certain former members

(a)(1) Under joint regulations to be prescribed by the administering Secretaries, a member of a uniformed service described in paragraph (2) is entitled to medical and dental care in any facility of any uniformed service.

(2) Members of the uniformed services referred to in paragraph (1) are as follows:

(A) A member of a uniformed service on active duty.

(B) A member of a reserve component of a uniformed service who has been commissioned as an officer if--

(i) the member has requested orders to active duty for the member's initial period of active duty following the commissioning of the member as an officer;

(ii) the request for orders has been approved;

(iii) the orders are to be issued but have not been issued or the orders have been issued but the member has not entered active duty; and

(iv) the member does not have health care insurance and is not covered by any other health benefits plan.

(b)(1) Under joint regulations to be prescribed by the administering Secretaries, a member or former member of a uniformed service who is entitled to retired or retainer pay, or equivalent pay may, upon request, be given medical and dental care in any facility of any uniformed service, subject to the availability of space and facilities and the capabilities of the medical and dental staff. The administering Secretaries may, with the agreement of the Secretary of Veterans Affairs, provide care to persons covered by this subsection in facilities operated by the Secretary of Veterans Affairs and determined by him to be available for this purpose on a reimbursable basis at rates approved by the President.

(2) Paragraph (1) does not apply to a member or former member entitled to retired pay for non-regular service under chapter 1223 of this title who is under 60 years of age.

(c)(1) Funds appropriated to a military department, the Department of Homeland Security (with respect to the Coast Guard when it is not operating as a service in the Navy), or the Department of Health and Human Services (with respect to the National Oceanic and Atmospheric Administration and the Public Health Service) may be used to provide medical and dental care to persons entitled to such care by law or regulations, including the provision of such care (other than elective private treatment) in private facilities for members of the uniformed services. If a private facility or health care provider providing care under this subsection is a health care provider under the Civilian Health and Medical Program of the Uniformed Services, the Secretary of Defense, after consultation with the other administering Secretaries, may by regulation require the private facility or health care provider to provide such care in accordance with the same payment rules (subject to any modifications considered appropriate by the Secretary) as apply under that program.

(2)(A) Subject to such exceptions as the Secretary of Defense considers necessary, coverage for medical care for members of the uniformed services under this subsection, and standards with respect to timely access to such care, shall be comparable to coverage for medical care and standards for timely access to such care under the managed care option of the TRICARE program known as TRICARE Prime.

(B) The Secretary of Defense shall enter into arrangements with contractors under the TRICARE program or with other appropriate contractors for the timely and efficient processing of claims under this subsection.

(C) The Secretary of Defense shall consult with the other administering Secretaries in the administration of this paragraph.

(3)(A) A member of the uniformed services described in subparagraph (B) may not be required to receive routine primary medical care at a military medical treatment facility.

(B) A member referred to in subparagraph (A) is a member of the uniformed services on active duty who is entitled to medical care under this subsection and who--

(i) receives a duty assignment described in subparagraph (C); and

(ii) pursuant to the assignment of such duty, resides at a location that is more than 50 miles, or approximately one hour of driving time, from the nearest military medical treatment facility adequate to provide the needed care.

(C) A duty assignment referred to in subparagraph (B) means any of the following:

(i) Permanent duty as a recruiter.

(ii) Permanent duty at an educational institution to instruct, administer a program of instruction, or provide administrative services in support of a program of instruction for the Reserve Officers' Training Corps.

(iii) Permanent duty as a full-time adviser to a unit of a reserve component.

(iv) Any other permanent duty designated by the Secretary concerned for purposes of this paragraph.

(4)(A) Subject to such terms and conditions as the Secretary of Defense considers appropriate, coverage comparable to that provided by the Secretary under subsections (d) and (e) of section 1079 of this title shall be provided under this subsection to members of the uniformed services who incur a serious injury or illness on active duty as defined by regulations prescribed by the Secretary.

(B) The Secretary of Defense shall prescribe in regulations--

(i) the individuals who shall be treated as the primary caregivers of a member of the uniformed services for purposes of this paragraph; and

(ii) the definition of serious injury or illness for the purposes of this paragraph.

(d)(1) For the purposes of this chapter, a member of a reserve component of the armed forces who is issued a delayed-effective-date active-duty order, or is covered by such an order, shall be treated as being on active duty for a period of more than 30 days beginning on the later of the date that is--

(A) the date of the issuance of such order; or

(B) 180 days before the date on which the period of active duty is to commence under such order for that member.

(2) In this subsection, the term "delayed-effective-date active-duty order" means an order to active duty for a period of more than 30 days in support of a contingency operation under a provision of law referred to in section 101(a)(13)(B) of this title that provides for active-duty service to begin under such order on a date after the date of the issuance of the order.

38 U.S.C. § 1705

Title 38. Veterans' Benefits
Part II. General Benefits
Chapter 17. Hospital, Nursing Home, Domiciliary, and Medical Care

§ 1705. Management of health care: patient enrollment system

(a) In managing the provision of hospital care and medical services under section 1710(a) of this title, the Secretary, in accordance with regulations the Secretary shall prescribe, shall establish and operate a system of annual patient enrollment. The Secretary shall manage the enrollment of veterans in accordance with the following priorities, in the order listed:

(1) Veterans with service-connected disabilities rated 50 percent or greater.

(2) Veterans with service-connected disabilities rated 30 percent or 40 percent.

(3) Veterans who are former prisoners of war or who were awarded the Purple Heart, veterans who were awarded the medal of honor under section 3741, 6241, or 8741 of title 10 or section 491 of title 14, veterans with service-connected disabilities rated 10 percent or 20 percent, and veterans described in subparagraphs (B) and (C) of section 1710(a)(2) of this title.

(4) Veterans who are in receipt of increased pension based on a need of regular aid and attendance or by reason of being permanently housebound and other veterans who are catastrophically disabled.

(5) Veterans not covered by paragraphs (1) through (4) who are unable to defray the expenses of necessary care as determined under section 1722(a) of this title.

(6) All other veterans eligible for hospital care, medical services, and nursing home care under section 1710(a)(2) of this title.

(7) Veterans described in section 1710(a)(3) of this title who are eligible for treatment as a low-income family under section 3(b) of the United States Housing Act of 1937 (42 U.S.C. 1437a(b)) for the area in which such veterans reside, regardless of whether such veterans are treated as single person families under paragraph (3)(A) of such section 3(b) or as families under paragraph (3)(B) of such section 3(b).

(8) Veterans described in section 1710(a)(3) of this title who are not covered by paragraph (7).

(b) In the design of an enrollment system under subsection (a), the Secretary--

(1) shall ensure that the system will be managed in a manner to ensure that the provision of care to enrollees is timely and acceptable in quality;

(2) may establish additional priorities within each priority group specified in subsection (a), as the Secretary determines necessary; and

(3) may provide for exceptions to the specified priorities where dictated by compelling medical reasons.

(c)(1) The Secretary may not provide hospital care or medical services to a veteran under paragraph (2) or (3) of section 1710(a) of this title unless the veteran enrolls in the system of patient enrollment established by the Secretary under subsection (a).

(2) The Secretary shall provide hospital care and medical services under section 1710(a)(1) of this title, and under subparagraph (B) of section 1710(a)(2) of this title, for the 12-month period following such veteran's discharge or release from service, to any veteran referred to in such sections for a disability specified in the applicable subparagraph of such section, notwithstanding the failure of the veteran to enroll in the system of patient enrollment referred to in subsection (a) of this section.

32 C.FR. § 108.4

Title 32. National Defense
Subtitle A. Department of Defense
Chapter I. Office of the Secretary of Defense
Subchapter D. Personnel, Military and Civilian

§ 108.4 Policy.

It is DoD policy that:

(a) General Policy. The use of regulatory authority to establish DoD health care eligibility for individuals without a specific statutory entitlement or eligibility shall be used very sparingly, and only when it serves a compelling DoD mission interest. When used, it shall be on a reimbursable basis, unless non-reimbursable care is authorized by this part or reimbursement is waived by the Under Secretary of Defense (Personnel & Readiness) (USD(P&R)) or the Secretaries of the Military Departments when they are the approving authority.

(b) Foreign Military Personnel and Their Dependents.

> (1) MTF Care in the United States. Foreign military personnel in the United States under the sponsorship or invitation of the Department of Defense, and their dependents approved by the Department of Defense to accompany them, are eligible for space-available care as provided in DoD Instruction 1000.13. Consistent with 10 U.S.C. 2559, in cases in which reimbursement is required by DoD Instruction 1000.13, a RHCA may provide a waiver of reimbursement for inpatient and/or outpatient care in the United States in a military medical treatment facility for military personnel from a foreign country and their dependents, if comparable care is made available to at least a comparable number of U.S. military personnel and their dependents in that foreign country. A disparity of 25 percent or less in the number of foreign personnel and dependents above U.S. personnel and dependents shall be considered within the range of comparable numbers.
>
> (2) Non–MTF Care in the United States. Foreign military personnel in the United States under the sponsorship or invitation of the Department of Defense, and their dependents approved by the Department of Defense to accompany them, are not eligible for DoD payment for outpatient or inpatient care received from non–DoD providers, except for such personnel covered by the North Atlantic Treaty Organization Status of Forces Agreement (SOFA) or

the Partnership for Peace SOFA and authorized care under the TRICARE Standard program according to § 199.3 of title 32, Code of Federal Regulations, outpatient care may be provided as specified therein.

(c) Foreign Diplomatic or Other Senior Foreign Officials. Foreign diplomatic or other senior foreign officials and the dependents of such officials may be provided inpatient or outpatient services in MTFs only in compelling circumstances, including both medical circumstances and mission interests, and through case-by-case approval.

(1) In the United States, the approval authority is the USD(P&R). The authority to waive reimbursement for care provided in the United States, to the extent allowed by law, is the USD(P&R) or the Secretaries of the Military Departments when they are the approving authority.

(2) Requests from the State Department or other agency of the U.S. Government will be considered on a reimbursable basis.

(3) Under 10 U.S.C. 2559, reimbursement to the United States for care provided in the United States on an inpatient basis to foreign diplomatic personnel or their dependents is required.

(d) Other Foreign Nationals. Other foreign nationals (other than those described in paragraphs (b) and (c) of this section) may be designated as eligible for space-available care in MTFs only in extraordinary circumstances.

(1) The authority to waive reimbursement for care provided in the United States, to the extent allowed by law, is the USD(P&R) or the Secretaries of the Military Departments when they are the approving authority. Waiver requests will only be considered based on a direct and compelling relationship to a priority DoD mission objective.

(2) Requests from the State Department or other agency of the U.S. Government will be considered on a reimbursable basis. Such requests must be supported by the U.S. Ambassador to the country involved and the Geographical Combatant Commander for that area of responsibility and must be premised on critically important interests of the United States.

(e) Invited Persons Accompanying the Overseas Force. The Secretaries of the Military Departments and the USD(P&R) may designate as eligible for space-available care from the Military Health System outside the United States those persons invited by the Department of Defense to accompany or visit the military force in overseas

locations or invited to participate in DoD–sponsored morale, welfare, and recreation activities. This authority is limited to health care needs arising in the course of the invited activities. Separate approval is needed to continue health care initiated under this paragraph in MTFs in the United States.

(1) In the case of employees or affiliates of news organizations, all care provided under the authority of introductory paragraph (e) of this section is reimbursable. For other individuals designated as eligible under this paragraph (e), the designation may provide, to the extent allowed by law, for outpatient care on a non-reimbursable basis, and establish a case-by-case authority for waiver of reimbursement for inpatient care.

(2) This paragraph (e) does not apply to employees of the Executive Branch of the United States or personnel affiliated with contractors of the United States.

(f) U.S. Nationals Overseas. Health care for U.S. nationals overseas is not authorized, except as otherwise provided in this part.

(g) U.S. Government Civilian Employees and Contractor Personnel.

(1) Civilian employees of the Department of Defense and other government agencies, and employees of DoD contractors, and the dependents of such personnel are eligible for MTF care to the extent provided in DoD Instruction 1000.13.

(2) Occupational health care services provided to DoD employees under 5 U.S.C. 7901, authorities cited in DoD Instruction 6055.1, or under other authorities except 10 U.S.C. 1074(c) are not affected by this Instruction. The Secretaries of the Military Departments and the USD(P&R) may designate DoD civilian employees, applicants for employment, and personnel performing services for the Department of Defense under Federal contracts as eligible for occupational health care services required by the Department of Defense as a condition of employment or involvement in any particular assignment, duty, or undertaking.

(3) Any health care services provided by the Military Health System to employees of DoD non-appropriated fund instrumentalities shall be on a reimbursable basis.

(4) In the case of DoD civilian employees forward deployed in support of U.S. military personnel engaged in hostilities, eligibility for MTF care (in addition to

all eligibility for programs administered by the Department of Labor Office of Workers' Compensation Programs (OWCP)) is as follows:

(i) Consistent with Policy Guidance for Provision of Medical Care to DoD Civilian Employees Injured or Wounded While Forward Deployed in Support of Hostilities, DoD civilian employees who become ill, contract diseases, or are injured or wounded while so deployed are eligible for medical evacuation or health care treatment and services in MTFs at the same level and scope provided to military personnel, all on a non-reimbursable basis, until returned to the United States.

(ii) DoD civilian employees who, subsequent to such deployment, and have been determined to have OWCP–compensable conditions are eligible for MTF care for such conditions, all on a non-reimbursable basis.

(iii) USD(P&R) may, under compelling circumstances, approve additional eligibility for care in MTFs for other U.S. Government civilian employees who become ill or injured while so deployed, or other DoD civilian employees overseas.

(5) Contractor Personnel Authorized to Accompany U.S. Armed Forces. In the case of contractor personnel authorized to accompany U.S. Armed Forces in deployed settings under DoD Instruction 3020.41, MTF care may be provided as stated in DoD Instruction 3020.41.

(h) Emergency Health Care. The Secretaries of the Military Departments and the USD(P&R) may designate emergency patients as eligible for emergency health care from MTFs in the United States pursuant to arrangements with local health authorities or in other appropriate circumstances. Such care shall be on a reimbursable basis, unless waived by the USD(P&R) or the Secretaries of the Military Departments when they are the approving authority.

(i) Research Subject Volunteers. Research subjects are eligible for health care services from MTFs to the extent DoD Components are required by DoD Directive 3216.02 to establish procedures to protect subjects from medical expenses that are a direct result of participation in the research. Such care is on a non-reimbursable basis and limited to research injuries (unless the volunteer is otherwise an eligible health care beneficiary). Care is authorized during the pendency of the volunteer's involvement in the research, and may be extended further upon the approval of the USD(P&R).

(j) Continuity of Care Extensions of Eligibility. The Secretaries of the Military Departments and the USD(P&R) may establish temporary eligibility on a space-available basis for former members and former dependents of members of the seven Uniformed Services for a limited period of time, not to exceed 6 months, or in the case of pregnancy the completion of the pregnancy, after statutory eligibility expires when appropriate to allow completion or appropriate transition of a course of treatment begun prior to such expiration. In the case of a pregnancy covered by this paragraph, the designation of eligibility may include initial health care for the newborn infant. Care under this paragraph is authorized on a non-reimbursable basis for the former member or former dependent of member. Care under this paragraph for the newborn of those former members or former dependents is authorized but on a full reimbursable basis unless the Secretary of the Military Department elect to use Secretarial Designee status for the newborn.

(k) Members of the Armed Forces. The Secretaries of the Military Departments and the USD(P&R) may establish eligibility not specifically provided by statute for critical mission-related health care services for designated members of the Armed Forces, such as Reserve Component members not in a present duty status. This authority includes payment for health care services in private facilities to the extent authorized by 10 U.S.C. 1074(c). Care under this paragraph is non-reimbursable.

(l) Certain Senior Officials of the U.S. Government. The officials and others listed in § 108.5 of this part are designated as eligible for space-available inpatient and outpatient health care services from the Military Health System on a reimbursable basis.

(m) Nonmedical Attendants. The Secretaries of the Military Departments and the USD(P&R) may designate as eligible for space available MTF care persons designated as nonmedical attendants as defined by 37 U.S.C. 411k(b). Costs of medical care rendered are reimbursable unless reimbursement is waived by the Secretary of the Military Department concerned or USD(P&R). This authority is limited to health care needs arising while designated as a nonmedical attendant.

(n) Patient Movement. Provisions of this Instruction concerning inpatient care shall also apply to requests for patient movement through the medical evacuation system under DoD Instruction 6000.11. Aeromedical evacuation transportation assets are reserved for those individuals designated as Secretarial Designees who need transportation to attain necessary health care.

(o) Other Individuals Entitled to DoD Identification (ID) Card. Other individuals entitled to a DoD ID card under DoD Instruction 1000.13 are eligible for space-available MTF health care to the extent provided in DoD Instruction 1000.13.

(p) Reciprocity Among Military Departments. Subject to the capabilities of the professional staff, the availability of space and facilities, and any other limitation imposed by the approving authority, all Services will provide medical treatment to individuals who have been granted Secretarial designee status by any of the Secretaries of the Military Departments. Each agreement must identify the specific MTF or geographical region in which medical care is requested, requiring close coordination among service program managers.

38 C.FR. § 17.36(a) –(d)

Title 38. Pensions, Bonuses, and Veterans' Relief
Chapter I. Department of Veterans Affairs
Part 17. Medical

§ 17.36 Enrollment--provision of hospital and outpatient care to veterans.

(a) Enrollment requirement for veterans.

(1) Except as otherwise provided in § 17.37, a veteran must be enrolled in the VA healthcare system as a condition for receiving the "medical benefits package" set forth in § 17.38.

Note to paragraph (a)(1): A veteran may apply to be enrolled at any time. (See § 17.36(d)(1).)

(2) Except as provided in paragraph (a)(3) of this section, a veteran enrolled under this section and who, if required by law to do so, has agreed to make any applicable copayment is eligible for VA hospital and outpatient care as provided in the "medical benefits package" set forth in § 17.38.

Note to paragraph (a)(2): A veteran's enrollment status will be recognized throughout the United States.

(3) A veteran enrolled based on having a disorder associated with exposure to a toxic substance or radiation, for a disorder associated with service in the Southwest Asia theater of operations during the Gulf War (the period between August 2, 1990, and November 11, 1998), or any illness associated with service in combat in a war after the Gulf War or during a period of hostility after November 11, 1998, as provided in 38 U.S.C. 1710(e), is eligible for VA care provided in the "medical benefits package" set forth in § 17.38 for the disorder.

(b) Categories of veterans eligible to be enrolled. The Secretary will determine which categories of veterans are eligible to be enrolled based on the following order of priority:

(1) Veterans with a singular or combined rating of 50 percent or greater based on one or more service-connected disabilities or unemployability.

(2) Veterans with a singular or combined rating of 30 percent or 40 percent based on one or more service-connected disabilities.

(3) Veterans who are former prisoners of war; veterans awarded the Medal of Honor or Purple Heart; veterans with a singular or combined rating of 10 percent or 20 percent based on one or more service-connected disabilities; veterans who were discharged or released from active military service for a disability incurred or aggravated in the line of duty; veterans who receive disability compensation under 38 U.S.C. 1151; veterans whose entitlement to disability compensation is suspended pursuant to 38 U.S.C. 1151, but only to the extent that such veterans' continuing eligibility for that care is provided for in the judgment or settlement described in 38 U.S.C. 1151; veterans whose entitlement to disability compensation is suspended because of the receipt of military retired pay; and veterans receiving compensation at the 10 percent rating level based on multiple noncompensable service-connected disabilities that clearly interfere with normal employability.

(4) Veterans who receive increased pension based on their need for regular aid and attendance or by reason of being permanently housebound and other veterans who are determined to be catastrophically disabled by the Chief of Staff (or equivalent clinical official) at the VA facility where they were examined.

(5) Veterans not covered by paragraphs (b)(1) through (b)(4) of this section who are determined to be unable to defray the expenses of necessary care under 38 U.S.C. 1722(a).

(6) Veterans of the Mexican border period or of World War I; veterans solely seeking care for a disorder associated with exposure to a toxic substance or radiation, for a disorder associated with service in the Southwest Asia theater of operations during the Gulf War (the period between August 2, 1990, and November 11, 1998), or for any illness associated with service in combat in a war after the Gulf War or during a period of hostility after November 11, 1998, as provided and limited in 38 U.S.C. 1710(e); and veterans with 0 percent service-connected disabilities who are nevertheless compensated, including veterans receiving compensation for inactive tuberculosis.

(7) Veterans who agree to pay to the United States the applicable copayment determined under 38 U.S.C. 1710(f) and 1710(g) if their income for the previous year constitutes “low income” under the geographical income limits established by the U.S. Department of Housing and Urban Development for

the fiscal year that ended on September 30 of the previous calendar year. For purposes of this paragraph, VA will determine the income of veterans (to include the income of their spouses and dependents) using the rules in §§ 3.271, 3.272, 3.273, and 3.276. After determining the veterans' income and the number of persons in the veterans' family (including only the spouse and dependent children), VA will compare their income with the current applicable "low-income" income limit for the public housing and section 8 programs in their area that the U.S. Department of Housing and Urban Development publishes pursuant to 42 U.S.C. 1437a(b)(2). If the veteran's income is below the applicable "low-income" income limits for the area in which the veteran resides, the veteran will be considered to have "low income" for purposes of this paragraph. To avoid a hardship to a veteran, VA may use the projected income for the current year of the veteran, spouse, and dependent children if the projected income is below the "low income" income limit referenced above. This category is further prioritized into the following subcategories:

(i) Noncompensable zero percent service-connected veterans who are in an enrolled status on a specified date announced in a Federal Register document promulgated under paragraph (c) of this section and who subsequently do not request disenrollment;

(ii) Nonservice-connected veterans who are in an enrolled status on a specified date announced in a Federal Register document promulgated under paragraph (c) of this section and who subsequently do not request disenrollment;

(iii) Noncompensable zero percent service-connected veterans not included in paragraph (b)(7)(i) of this section; and

(iv) Nonservice-connected veterans not included in paragraph (b)(7)(ii) of this section.

(8) Veterans not included in priority category 4 or 7, who are eligible for care only if they agree to pay to the United States the applicable copayment determined under 38 U.S.C. 1710(f) and 1710(g). This category is further prioritized into the following subcategories:

(i) Noncompensable zero percent service-connected veterans who were in an enrolled status on January 17, 2003, or who are moved from a higher priority category or subcategory due to no longer being eligible

for inclusion in such priority category or subcategory and who subsequently do not request disenrollment;

(ii) Noncompensable zero percent service-connected veterans not included in paragraph (b)(8)(i) of this section and whose income is not greater than ten percent more than the income that would permit their enrollment in priority category 5 or priority category 7, whichever is higher;

(iii) Nonservice-connected veterans who were in an enrolled status on January 17, 2003, or who are moved from a higher priority category or subcategory due to no longer being eligible for inclusion in such priority category or subcategory and who subsequently do not request disenrollment;

(iv) Nonservice-connected veterans not included in paragraph (b)(8)(iii) of this section and whose income is not greater than ten percent more than the income that would permit their enrollment in priority category 5 or priority category 7, whichever is higher;

(v) Noncompensable zero percent service-connected veterans not included in paragraph (b)(8)(i) or paragraph (b)(8)(ii) of this section; and

(vi) Nonservice-connected veterans not included in paragraph (b)(8)(iii) or paragraph (b)(8)(iv) of this section.

(c) Federal Register notification of eligible enrollees.

(1) It is anticipated that each year the Secretary will consider whether to change the categories and subcategories of veterans eligible to be enrolled. The Secretary at any time may revise the categories or subcategories of veterans eligible to be enrolled by amending paragraph (c)(2) of this section. The preamble to a Federal Register document announcing which priority categories and subcategories are eligible to be enrolled must specify the projected number of fiscal year applicants for enrollment in each priority category, projected healthcare utilization and expenditures for veterans in each priority category, appropriated funds and other revenue projected to be available for fiscal year enrollees, and projected total expenditures for enrollees by priority category. The determination should include consideration of relevant internal and external factors, e.g., economic changes, changes in medical practices, and waiting times to obtain an appointment for care. Consistent with these criteria,

the Secretary will determine which categories of veterans are eligible to be enrolled based on the order of priority specified in paragraph (b) of this section.

(2) Unless changed by a rulemaking document in accordance with paragraph c)(1) of this section, VA will enroll the priority categories of veterans set forth in § 17.36(b) beginning June 15, 2009, except that those veterans in subcategories (v) and (vi) of priority category 8 are not eligible to be enrolled.

(d) Enrollment and disenrollment process--

(1) Application for enrollment. A veteran may apply to be enrolled in the VA healthcare system at any time. A veteran who wishes to be enrolled must apply by submitting a VA Form 10–10EZ to a VA medical facility or via an Online submission at https://www.1010ez.med.va.gov/sec/vha/1010ez/.

(2) Action on application. Upon receipt of a completed VA Form 10–10EZ, a VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will accept a veteran as an enrollee upon determining that the veteran is in a priority category eligible to be enrolled as set forth in § 17.36(c)(2). Upon determining that a veteran is not in a priority category eligible to be enrolled, the VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will inform the applicant that the applicant is ineligible to be enrolled.

(3) Placement in enrollment categories.

(i) Veterans will be placed in priority categories whether or not veterans in that category are eligible to be enrolled.

(ii) A veteran will be placed in the highest priority category or categories for which the veteran qualifies.

(iii) A veteran may be placed in only one priority category, except that a veteran placed in priority category 6 based on a specified disorder or illness will also be placed in priority category 7 or priority category 8, as applicable, if the veteran has previously agreed to pay the applicable copayment, for all matters not covered by priority category 6.

(iv) A veteran who had been enrolled based on inclusion in priority category 5 and became no longer eligible for inclusion in priority category 5 due to failure to submit to VA a current VA Form 10–10EZ will be changed automatically to enrollment based on inclusion in priority category 6 or 8 (or more than one of these categories if the previous principle applies), as applicable, and be considered continuously enrolled. To meet the criteria for priority category 5, a veteran must be eligible for priority category 5 based on the information submitted to VA in a current VA Form 10–10EZ. To be current, after VA has sent a form 10–10EZ to the veteran at the veteran's last known address, the veteran must return the completed form (including signature) to the address on the return envelope within 60 days from the date VA sent the form to the veteran.

(v) Veterans will be disenrolled, and reenrolled, in the order of the priority categories listed with veterans in priority category 1 being the last to be disenrolled and the first to be reenrolled. Similarly, within priority categories 7 and 8, veterans will be disenrolled, and reenrolled, in the order of the priority subcategories listed with veterans in subcategory (i) being the last to be disenrolled and first to be reenrolled.

(4) [Reserved by 75 FR 52628]

(5) Disenrollment. A veteran enrolled in the VA health care system under paragraph (d)(2) of this section will be disenrolled only if:

(i) The veteran submits to a VA Medical Center or to the VA Health Eligibility Center, 2957 Clairmont Road, NE., Suite 200, Atlanta, Georgia 30329–1647, a signed and dated document stating that the veteran no longer wishes to be enrolled; or

(ii) A VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, determines that the veteran is no longer in a priority category eligible to be enrolled, as set forth in § 17.36(c)(2).

(6) Notification of enrollment status. Notice of a decision by a VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, regarding enrollment status will be provided to the affected veteran by letter and will contain the reasons for the decision. The letter will include an effective date for any changes and a statement regarding appeal rights. The decision will be based on all information available to the decisionmaker, including the information contained in VA Form 10–10EZ. Title 38. Pensions, Bonuses, and Veterans' Relief

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2014, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Charles W. Scarborough
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