

United States District Court  
Northern District of California

Before The Honorable Samuel Conti, Judge

Veterans for Common Sense,	)	
et al.	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. C 07-3758 SC
	)	
R. James Nicholson, et al.	)	
	)	
Defendant.	)	
_____	)	

San Francisco, California  
Friday, December 14, 2007

Reporter's Transcript Of Proceedings

Appearances:

For Plaintiff: Morrison & Foerster  
101 Ygnacio Valley Road, Suite 450  
Walnut Creek, California 94596  
By: Gordon P. Erspamer, Esquire

For Plaintiff: Morrison & Foerster  
425 Market Street  
San Francisco, California 94105  
By: Heather A. Moser, Esquire

Reported By: Sylvia J. Russo, Pro Tem Reporter  
U.S. District Court  
For the Northern District of California

(Computerized Transcription By Eclipse)

Appearances Continued:

For Plaintiff: Disability Rights Advocates  
2001-Center Street, Third Floor  
Berkeley, California 94704-1204

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By: Sidney Wolinsky, Esquire  
Melissa Kasnitz, Esquire

For Defendant:

U.S Department of Justice  
Civil Division  
20 Massachusetts Avenue, N.W.  
Room 6114  
Washington, DC 20530

By: Daniel Bensing, Esquire  
Kyle Freeney, Esquire  
Richard Lepley, Esquire

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Friday, December 14, 2007 10:00 a.m.

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P R O C E E D I N G S

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THE CLERK: Number 6. Civil 07-3758, Veterans for

5 Common Sense, et al. versus --

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THE COURT: Does the court reporter need a rest?

7

THE COURT REPORTER: I'm okay. Thank you.

8

THE COURT: You're okay?

9 THE COURT REPORTER: Yes. Thank you, your Honor.  
10 THE CLERK: -- versus R. James Nicholson, et al.  
11 MR. ERSPAMER: Good morning, your Honor.  
12 Gordon Erspamer for the plaintiffs.  
13 MS. MOSER: Good morning, your Honor.  
14 Heather Moser for the plaintiff.  
15 MR. WOLINSKY: Good morning, your Honor.  
16 Sid Wolinsky, co-counsel for plaintiffs.  
17 MR. BENSING: Daniel Bensing with the Justice  
18 Department for the defendants. With me at counsel table are my  
19 colleagues, Kyle Freeney, and Richard Lepley.  
20 MS. KASNITZ: Melissa Kasnitz also for the  
21 plaintiffs.  
22 THE COURT: Terri, who handed this -- where did this  
23 come from?  
24 THE CLERK: Plaintiffs.  
25 MR. ERSPAMER: Those are graphs that we'd like to  
4  
1 use in the oral argument to refer to in the oral argument.  
2 THE COURT: Well, okay. All right.  
3 MR. BENSING: Your Honor, we object. We think it's  
4 an inappropriate surreply.  
5 THE COURT: I beg your pardon.  
6 MR. BENSING: We think it's an inappropriate  
7 surreply, your Honor -- the letter.  
8 THE COURT: An improper what?  
9 MR. BENSING: Surreply. It was submitted after our  
10 reply.  
11 THE COURT: Oh, yeah. Well, obviously.  
12 MR. ERSPAMER: We're talking about two different  
13 things -- I'm talking about the graphics -- is what I was

14 talking about. It's set to the statute, somewhat.

15 THE COURT: All right. Before we start I'd like to  
16 ask the plaintiff this. I've read all the documents and  
17 they're certainly voluminous. And in reviewing the law in this  
18 matter -- know that the Congress has enacted laws and it pretty  
19 well restricts the jurisdiction of this Court.

20 And also there is case law also that restricts the  
21 jurisdiction in various aspects that this Court has to do. I  
22 mean, being in sympathy with the problem is one thing, but  
23 bringing -- my having jurisdiction is something else.

24 And knowing the strictures that I'm under with  
25 reference to jurisdiction -- assuming arguendo that I have

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1 jurisdiction, what do you think I can do?

2 MR. ERSPAMER: Well, the relief that we're seeking  
3 in the complaint is solely declaratory injunctive relief, and  
4 then they'll tell you specifically.

5 THE COURT: Tell me -- you're writing the order.  
6 You're the judge --

7 MR. ERSPAMER: Yes.

8 THE COURT: -- and you're writing the order. What  
9 does it say?

10 MR. ERSPAMER: Well, there are -- the injunctive  
11 relief aspect has two parts to it. There's the health system  
12 part of it, and there's the adjudication system part of it. On  
13 the health system, the complaint clearly alleges that they're  
14 not providing the care required by the federal statute to  
15 veterans.

16 The relief we received there would be in an order  
17 enjoining the VA from refusing to treat the veterans and  
18 specifically in the context of a suicide --

19 THE COURT: Enjoining what?

20 MR. ERSPAMER: Enjoined the veterans administrator  
21 from refusing to treat veterans as required by federal statute,  
22 medical care and treatment, that's number one. Number two, on  
23 the adjudication side --

24 THE COURT: Where did the Court get jurisdiction to  
25 do that?

6

1 MR. ERSPAMER: The jurisdiction --

2 THE COURT: What was the problem? Did they have a  
3 due process problem?

4 MR. ERSPAMER: There's a due process claim in the  
5 case, and there's also a claim for the --

6 THE COURT: Where's the due process in that? I'm  
7 not arguing with you. I'm trying to find out because I'm going  
8 to have to make a decision to this thing. I want to be clear  
9 on where we're going.

10 MR. ERSPAMER: Okay. On the due process issue -- on  
11 the medical side is different from that on the adjudication  
12 side. So let me -- let me address the due process issue and  
13 the medical side. Basically, there is no procedure by which a  
14 veteran can enforce the right to health care. There's no  
15 procedure set up; there's no complaint procedure; there's  
16 nothing. There is no procedure. And so, therefore, defendants  
17 can deny health care to Iraq, Afghanistan veterans coming back  
18 with impunity. There is no procedure, and that is a violation  
19 of due process because due process requires a right to a  
20 meaningful hearing at a meaningful time with respect to your  
21 property rights, and it's very clear in the Ninth Circuit under  
22 Devine versus Cleland that veterans benefits are a property  
23 right under the due process clause.

24 So we would clearly have a -- the -- that side of  
25 the case -- the health side of it is usually very simple for

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1 due process because most cases you argue about what process is  
2 due when you have an existing procedure, and there's a system  
3 set up for health care or for adjudication. There is no  
4 system.

5 THE COURT: So you want the Court to inaugurate that  
6 whole system?

7 MR. ERSPAMER: No. Not at all.

8 THE COURT: What do you want me to do?

9 MR. ERSPAMER: We want the Court to enjoin the  
10 defendants from refusing to provide health care to veterans as  
11 required by federal statute.

12 THE COURT: All right. That's number one. What's  
13 number two?

14 MR. ERSPAMER: Okay. Number two. Well, let's shift  
15 over to the adjudication side. We have problems in this case  
16 with unconscionable delays in adjudicating claims. That is a  
17 violation of due process.

18 We have -- we have instances -- Collaro versus West  
19 which we cited in our brief. 13 years to get a case to the  
20 Court of Veterans Appeals, 13 years. People are dying. People  
21 are abandoning their claims. The family members --

22 THE COURT: -- on one individual claim.

23 MR. ERSPAMER: Pardon me?

24 THE COURT: You know, I can't deal with individual  
25 claims.

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1 MR. ERSPAMER: We don't have anything on individual  
2 claims. What we ask the Court to do --

3 THE COURT: I never said -- what you're dealing with  
4 is procedure, right?

5 MR. ERSPAMER: Yeah. We're dealing with procedure;  
6 we're dealing with systemic delay; we're dealing with not  
7 individual case delay, we're dealing with systemic delay.

8 THE COURT: We're going to get this argument all  
9 together. We will later on. So that's -- yeah, I got number  
10 one. What's number two now, in short?

11 MR. ERSPAMER: Okay. Number two is to enjoin -- to  
12 set standards in effect through an injunction which you have to  
13 handle claims within a certain period of time. The minimum  
14 time required to due process that's the -- the second thing is  
15 we have all these abhorrent administrative practices that have  
16 come into play in the VA. And we'll give you some examples.  
17 Dictating results in the cases.

18 There's one in the complaint about the total  
19 disability based upon the individual and employability. What  
20 had happened -- what happened -- well, this was investigated by  
21 the GAO.

22 They were -- well, what had happened was the central  
23 offices in Washington -- the VA decided there were too many  
24 grants on total disability, and so they sent an edict around,  
25 and they said, don't stop granting these cases, stop inferring

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1 them, stop helping the veterans on these kinds of places --  
2 cases. And the grant rate went down 97 percent overnight.  
3 What is the due process issue there?

4 The veterans were not getting a hearing on the  
5 merits in front of tribunals and the regional offices. They  
6 were rather the result of being dictated en masse with all  
7 these claims to be denied. And the same thing is happening out

8 with the PTSD cases. We want injunctive relief to stop that  
9 monkey business -- but if you -- I could have -- you could call  
10 it that to enjoin the VA from doing those types of things that  
11 violate the due process rights of the veterans.

12 We have -- we have several other parts of the case  
13 related to injunctive relief. There's the adjudication  
14 misconduct. Let me quickly explain that issue. The VA has an  
15 incentive compensation system that encourages --

16 THE COURT: I mean the thing is all I want is very  
17 shortly if I may -- for me to issue an order the VA is  
18 prohibited from using misconduct. What is that --

19 MR. ERSPAMER: Well, I'm going to explain the  
20 misconduct. It's going to be more specific than that. I am  
21 going to be very specific regarding that.

22 THE COURT: That's what I'm trying to get at.

23 MR. ERSPAMER: Here's what happened. In order to  
24 get work credits and get higher incentive compensation awards,  
25 the VA employees were taking documents out of the veterans

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1 file -- like medical reports -- putting them through the  
2 shredding machine and then remanding the case with no time  
3 expenditure -- or very minimal -- back to the regional office.  
4 They garnered the work credit. They were doing this to  
5 thousands of cases. Two of them got indicted by the federal  
6 system -- pled guilty to doing that with thousands of veterans  
7 claims file. So what can you do?

8 THE COURT: What I'm trying to do is to get in very  
9 distinct language --

10 MR. ERSPAMER: Right.

11 THE COURT: -- what kind of relief you want and --

12 MR. ERSPAMER: -- it's purely injunctive

13 and declaratory.

14 THE COURT: -- and all the examples you give me  
15 don't tell me much about the type of relief you want other  
16 than they may be the very things I have no control over at all.

17 MR. ERSPAMER: Well, I think you do have control,  
18 your Honor, because you can order them to stop doing what  
19 they're doing because it's a violation of a due process.

20 THE COURT: Is that what you're saying?

21 MR. ERSPAMER: What?

22 THE COURT: Is that what you're saying, stop  
23 shredding?

24 MR. ERSPAMER: Stop shredding documents and veterans  
25 claims file. Our information is it's still going on today --

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1 THE COURT: All I'm trying to do -- I'm trying to  
2 get in your mind -- from your mind what you think the Court  
3 should do. I'm not saying I agree with you or I disagree with  
4 you. I'm just trying to find out where we're going in this  
5 case.

6 MR. ERSPAMER: Well, let me add one thing, your  
7 Honor, because we just filed this motion a couple of days ago  
8 and you may not have seen it yet. There's a big problem with  
9 veteran suicides right now. There's an epidemic of veteran  
10 suicides. Veterans are going to clinics and hospitals and  
11 being turned away.

12 THE COURT: I read that. I read that. Now, tell  
13 me -- tell me what that final result is. What -- I'm trying  
14 to -- I want you to give me a short summary at the end. I've  
15 read about the suicides, and there's something like 200 a  
16 week --

17 MR. ERSPAMER: Right.

18 THE COURT: -- as I recall the statistics that you  
19 had.

20 MR. ERSPAMER: Yes.

21 THE COURT: I know that. But tell me what you think  
22 I should do.

23 MR. ERSPAMER: Okay. Well, with respect to the  
24 suicides, what I think that the Court can and should do, is to  
25 tell the VA that if someone comes into the VA and is

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1 threatening suicide, that you have to treat them.

2 You don't give them an appointment in March of 2008  
3 to see a doctor. You have to treat them. It's very simple,  
4 and it's required by law that they treat them. It's mandatory.  
5 And they're being turned away, and they're being told, you come  
6 back next year. And there have been quite a number of suicides  
7 exactly in that category.

8 THE COURT: Okay. What's the next one?

9 MR. ERSPAMER: Well, let me go down my list to see  
10 what I might have missed. The other part of the relief of the  
11 case relates to the -- what we call the statutory restrictions,  
12 the impediments of veterans rights.

13 We need declaratory relief that the combination of  
14 these restrictions on veterans rights -- which I can quickly  
15 rattle off for you. First of all, no discovery. And because  
16 there's no discovery, a lot of these abuses I talked about  
17 earlier cannot be discerned in an individual claim or even as a  
18 systemic matter.

19 Second, no right to subpoena witnesses. No right to  
20 call VA doctors and who treat the veterans over on the medical  
21 side of the clinics. You can't call them to testify on your  
22 behalf. You can't call the doctors on the VA adjudication side

23 to cross-examine them if they found they don't have PTSD. Rule  
24 of law, this is another big issue in the case.

25           There is -- the statute providing for the Court of

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1 Veterans Appeals has no enforcement power. The Court cannot  
2 enforce its orders in the regional offices. The chief judge,  
3 Judge Nebeker has spoken out about this -- the former chief  
4 judge of the court -- veterans court.

5           We don't have any ability to enforce any of our  
6 orders. The chief medical director tells us -- we tell him to  
7 go get a medical opinion for this veteran, he tells us -- then  
8 he doesn't do it.

9           THE COURT: All right. There are three more --  
10 three more. The next one. The next one.

11           MR. ERSPAMER: No power to issue declaratory or  
12 injunctive relief for any emergency procedures at all, nothing  
13 on the health side, no -- nothing on the adjudication side.  
14 There's also a fee -- total fee prohibition on your right to  
15 hire a lawyer at the regional office level. A veteran cannot  
16 go into his own pocket and pay an attorney anything or if he  
17 does, it's a federal penalty.

18           THE COURT: All right. There's been a lot of  
19 argument stories --

20           MR. ERSPAMER: Yeah.

21           THE COURT: Hiring a lawyer --

22           MR. ERSPAMER: Right.

23           THE COURT: No right to taking depositions.

24           MR. ERSPAMER: Right. And the last -- the last of  
25 them is the absence of a neutral decision maker anywhere in the

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1 system. The regional office level is purely VA claimant. When  
2 it goes up on appeal, it's a -- to the Board of Veterans  
3 Appeals, it's purely VA. It's a VA arm.

4 There is no place where there's a trial like  
5 procedure, an evidentiary procedure anything like -- remotely  
6 like that which you have in this courtroom which we saw many  
7 examples of in terms of your Honor's rulings this morning.  
8 There is no procedure. There's no -- there's no ability to --  
9 to really adjudicate a claim at any stage of the procedure.  
10 The Court that was created is purely a paper court. It's --  
11 reviews the record -- a paper record, and it issues a decision.

12 THE COURT: Well, tell me --

13 MR. ERSPAMER: They don't call witnesses. You can't  
14 do anything.

15 THE COURT: Tell me this, why isn't this a problem  
16 of Congress?

17 MR. ERSPAMER: Well, because it's a constitutional  
18 problem. We are alleging the violation of the due process  
19 rights of veterans. The rights cannot be circumscribed like  
20 this. This system is completely unique in the entire federal  
21 or state system.

22 There is nothing else remotely like it -- I can tell  
23 you -- the court that I've been practicing the veterans law for  
24 over 25 years. There is nothing like this system, and the  
25 rights are so circumscribed that the veteran -- right to

15

1 fundamental fairness is violated, and it creates a very high  
2 risk of erroneous depravation.

3 THE COURT: Now, is that the last one on your --

4 MR. ERSPAMER: That's the last one on the list of  
5 the procedural rights. That in a nutshell -- that's the case.

6 THE COURT: Well, let's go into -- let's go into the  
7 motions here. We have a lot of motions here. We have a lot of  
8 matters. As I understand it that the -- some of the problems  
9 -- the matters we have before the Court would be the standing  
10 issue, the sovereign immunity issue, subject matter  
11 jurisdiction, and the defendants' statements with reference to  
12 due process, allegations, and whether or not there are due  
13 process issues, so.

14 So far as the standing. Do you want to tell me  
15 about the standing?

16 MR. ERSPAMER: Yes, your Honor, that would be my  
17 colleague.

18 MS. MOSER: Good morning, your Honor, Heather Moser  
19 on behalf of the plaintiffs. The standing issue should be  
20 governing straightforward here, your Honor. Standing requires  
21 two components, as you know, constitutional and prudential and  
22 --

23 THE COURT: Look, before you start -- is there any  
24 objection to the standing issue?

25 MR. BENSING: We do object to the standing on the

16

1 current complaint, yes, your Honor.

2 THE COURT: On their what?

3 MR. BENSING: On the current version of the  
4 complaint, we believe plaintiffs did not allege standing.

5 THE COURT: Okay. Fine. I didn't want to go  
6 through the argument if you had agreed to it. Okay. Fine.  
7 Proceed.

8 MS. MOSER: I didn't think they would agree, your  
9 Honor. So I think it should be very straightforward why we  
10 have standing. Hunt versus Washington State Apple Advertising

11 Commission by the Supreme Court in 1977 set forth a three-part  
12 test that combines the constitutional and prudential  
13 requirements of standing for organizations on behalf of the  
14 members.

15           There are three elements, and we need them all here.  
16 The first is that members, otherwise, have standing in their  
17 own right. The organization itself doesn't need injury. It  
18 can purely bring it on behalf of its members. And that's set  
19 forth by the Supreme Court in the decisions in Warth v. Seldin  
20 --

21           THE COURT: Wait. Miss -- slow down.

22           MS. MOSER: Okay. I'll slow down.

23           THE COURT: We've got plenty of time, and I get paid  
24 by the year, not by the cases. So just take your time.

25           MS. MOSER: I'll be more --

17

1           THE COURT: Because she has to get everything you  
2 say down.

3           MS. MOSER: Okay. Great. So in our complaint, we  
4 set forth in Paragraphs 35 and 37 that the individual, veteran  
5 members of our organizations here, suffered injury. They  
6 suffered the denial of benefits at the adjudication side, and  
7 they suffered the delay of the denial of medicare -- medical  
8 care on the medical side.

9           We're not required to identify individuals. That's  
10 been the Government's argument that we need to have individual  
11 plaintiffs here. They are -- we're not required to do that,  
12 especially, at the pleading stage. It's been held that it's  
13 sufficient in the Lujan case, L-U-J-A-N, that we just need to  
14 allege that the individual members suffered injury which they  
15 did here.

16 And, in fact, it's particularly appropriate to have  
17 an organization, as a plaintiff, here in light of who the  
18 individuals are. They're veterans often with mental health  
19 issues. And in order to have the resources and the stamina to  
20 maintain a class would be very difficult.

21 It makes more sense on a practical level to have an  
22 organization or an organization to represent thousands of  
23 veterans without more resources in time to bring this sort of  
24 case.

25 The interests of the organization in the second

18

1 prong is that they need to be germane to the organization's  
2 purpose. What we're protecting. I don't think there's any  
3 debate as to that here. As we've alleged in the complaint, the  
4 organizations mission is to insure that veterans get medical  
5 care. And that's what we're trying to get -- insure here.

6 The third prong is also met. And it should be a lot  
7 similar than defendants make it out in their briefs. The third  
8 prong is neither the claim of service nor the relief requested  
9 requires individual participation. And the law in the Supreme  
10 Court and in the Ninth Circuit makes it very clear that where  
11 there is declaratory and injunctive relief and there's no claim  
12 for damages, there is no individual participation required.  
13 Because the injunctive relief is going to inure to all of the  
14 individual members of the organization, makes sense.

15 That's set forth in a case Warth, W-A-R-T-H, versus  
16 Seldin, S-E-L-D-I-N. And the Ninth Circuit case of Alaska Fish  
17 and Wildlife. Now, the defendant cited a few cases in their  
18 reply brief the Bano case, B-A-N-O, and the Molski case. The  
19 focus of those cases involve damages.

20 They do not involve -- injunctive relief as we have

21 here. Other veterans of organizations have been -- allow  
22 standing such as in the eastern --

23 THE COURT: Miss, if you want a record, you're going  
24 to have to go slower. The reporter's going to have trouble  
25 taking this down.

19

1 MS. MOSER: I apologize to the court reporter. The  
2 last point I'd like to make on standing, your Honor, is that  
3 there's some confusion in the briefs that the defendants have  
4 raised about the propriety of class representation by  
5 organizations.

6 And we've cited a case that makes it clear that  
7 organizations can in circumstances be appropriate class  
8 representatives. In some of the issues that they raised  
9 related to class certification are improper here. This is  
10 really about standing. And standing in class certification are  
11 two separate issues. And maybe they can take those out on  
12 class certifications, but certainly at this stage, we would  
13 submit that we need to satisfy a three-part test set forth in  
14 Hunt, and that we've done so.

15 THE COURT: Very good.

16 MR. BENSING: Your Honor, I'm standing and I will be  
17 brief. Our point is that in order to show that a particular  
18 practice of the VA has caused harm to a particular plaintiff,  
19 they must identify an individual and show that that individual  
20 has been deprived of say a veterans benefit through that  
21 practice.

22 They have not either identified an individual or  
23 added an individual plaintiff, and so they lack standing. If  
24 they did add such a plaintiff, this Court would frankly be  
25 barred from considering that under Section 511 because the

1 Court does not have jurisdiction under that statute to consider  
2 these questions.

3           The only other point I'd make about standing is a  
4 point mentioned in our reply, which is that much of plaintiffs'  
5 complaint asks incredibly that the Court order that more money  
6 be allocated to certain programs. That is a decision that  
7 Congress has to make and Congress has been making over the  
8 years.

9           But this Court, with all due respect, cannot provide  
10 redress for portions of plaintiffs' complaint where they seek  
11 more money for particular VA programs.

12           THE COURT: I think they were saying in that,  
13 though -- weren't they saying that there was money allocated  
14 that was not being used?

15           MR. BENSING: That is an issue --

16           THE COURT: I read in the papers that that's one of  
17 the things that they said.

18           MR. BENSING: That is an issue that they alleged in  
19 their preliminary injunction motion which was filed on Tuesday.  
20 We have not had a chance to respond to that. But our response  
21 will be that we are allocating and expending those funds as  
22 quickly as we can subject to the difficulty, frankly, of  
23 finding mental health specialists in certain areas of the  
24 country that we can put on staff or on contract to do certain  
25 things. But that's another motion for later. Thank you.

21

1           THE COURT: All right. And then the next one we  
2 have, sovereign immunity. Whoever -- the sovereign immunity's  
3 been waived. Who wants to talk?

4           MR. BENSING: Well, it's the Government's motion,  
Page 17

5 your Honor, so I suppose I'd like to go first.

6 THE COURT: All right.

7 MS. MOSER: I'll let him go first, your Honor.

8 MR. BENSING: Your Honor, there essentially are  
9 three points on sovereign immunity that we need to address.

10 But we need to begin with the understanding that this case  
11 arises in an area of the law where Congress has for many years  
12 provided a veterans claim procedure which is informal at the  
13 initial stage, claim and friendly at the initial stage.

14 And Congress has also for many years precluded  
15 judicial review, and beginning in 1988 with the Veterans  
16 Judicial Review Act, the VJRA has had a special court, the  
17 Court of Appeals for Veterans Claims, to consider that. So all  
18 of those as background, this is an instance where Congress has  
19 elected not to waive the Government sovereign immunity and, in  
20 fact, to have preclusion of review statutes and a specialized  
21 forum for limited review of individual cases.

22 Now, having said that, let's begin with the APA  
23 because that's the foundation. The only waiver of sovereign  
24 immunity that plaintiffs can point to challenges of VA actions  
25 is the APA. And the APA has two provisions that directly

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1 foreclose their claim.

2 First, the APA only allows district courts to review  
3 final agency action, which is defined in cases such as Norton  
4 versus Southern Utah as circumscribed discrete agency decisions,  
5 rules, orders, licenses. A denial of the benefit that would be  
6 a final agency action.

7 That's subject to review in a specialized court. A  
8 general decision not to allow full civil discovery at the  
9 opening stages of the process, that is not in any sense final

10 agency action. So plaintiff simply cannot identify the  
11 necessary final agency action to bring the APA's waiver of  
12 sovereign immunity into play.

13 THE COURT: So your objection is that they have not  
14 identified the agency action that they're complaining about?

15 MR. BENSING: That the agency action that they  
16 identify is not a final agency action that determines rights  
17 and obligations, such as denying or granting a benefit, issuing  
18 a license, publishing a regulation. Those are final agency  
19 actions. A decision, for example, not to grant  
20 subpoena authority to claimants is not a final agency action.  
21 So everything that they're complaining about is not, therefore,  
22 final agency action within the APA.

23 THE COURT: Why would they -- not to grant the  
24 subpoena -- not if they don't allow you to grant it. Why would  
25 that be a final agency action?

23

1 MR. BENSING: A decision to basically set up and  
2 structure a claim system as the VA has done that grants  
3 subpoena authority to proceeding before the Board of Veterans  
4 Appeals, which is the administrative review process, and to  
5 grant subpoena authority to certain senior officials in the VA,  
6 but not granting subpoena authority to every claims examiner  
7 and every claimant.

8 That is a broad decision on how to run a government  
9 program. It's not a decision on, yes, Mr. Jones, you get  
10 benefits, you don't get benefits. It just is not final agency  
11 action. It's an example in Norton of the statement --  
12 actually, it's in Lujan, that plaintiffs cannot use APA review  
13 to seek wholesale improvement in programs like court decree.  
14 When they want to do that, they should go to Congress or the

15 executive branch, but not to courts to ask courts to,  
16 basically, rearrange and rerun a government agency.

17           The second point I would make on the APA is the APA  
18 only allows judicial review where statutes do not specifically  
19 preclude judicial review, that's Section 701. And in this  
20 context and in this program, two specific statutes out of the  
21 1988 VJRA preclude any district court review of the types of  
22 decisions plaintiffs challenge.

23           And let me speak to those in order, and they overlap  
24 to some extent. The first and most fundamental is Section 511,  
25 which builds on approximately, at that point, 50 years of

24

1 legislative history dating back to 1933 where Congress has  
2 specifically said we want to preclude district courts  
3 second-guessing of VA determinations on benefits.

4           And the statute reads that, "All questions of law  
5 and fact necessary to a decision by the secretary under a law  
6 that affects the provision of benefits to veterans shall not be  
7 subject to district court review under a law that affects the  
8 provision of benefits." Is not read as narrowly as plaintiffs  
9 say it, that is, "only to denials of benefits." It is any  
10 decision by the secretary under any law that affects the  
11 provision of benefits. So the secretary's decision being given  
12 authority by Congress to make determinations on claims, the  
13 secretary has delegated that authority to claims examiners.  
14 Okay.

15           The secretary has not chosen to delegate that to an  
16 administrative law judge or some sort of neutral fact-finder.  
17 That's a decision under 511. That's a decision that this Court  
18 cannot review under 511. And, therefore, all the plaintiffs'  
19 challenges to how they would like to change the procedures of

20 the VA are simply precluded by 511.

21 I should stress that the one circuit court that has  
22 addressed this specific question that is a request to the  
23 district court to seek agency wide restructuring is the Beamon  
24 case. It's out of the 6th Circuit. Both parties agreed to it  
25 extensively, and it held that 511 and the APA preclude this

25

1 type of relief.

2 THE COURT: How about the 2nd Circuit case? Which  
3 is -- which is Jones versus Derwinski, seems too say that the  
4 Court has jurisdiction. The 2nd Circuit and the 6th are  
5 completely opposite, aren't they?

6 MR. BENSING: I don't think so, your Honor. I think  
7 the Beamon case is the better authority because it dealt with  
8 the type of claim presented. In Beamon, there was a challenge  
9 that there was agency wide delay and the plaintiff wanted sort  
10 of agency wide injunctive relief, and it was framed as a class  
11 action as this case is. And the Court rejected it on 511  
12 grounds and on APA grounds. And we submit that's the  
13 appropriate result here.

14 The second claims precluded in statute, your Honor,  
15 is Section 502. And that is a statute that said, "To the  
16 extent that a plaintiff challenges a rule, a rule adopted  
17 through 553 rule-making proceedings by the VA, that that  
18 decision can only be challenged in the United States Court of  
19 Appeals for the Federal Circuit."

20 And the Federal Circuit has, therefore, exclusive  
21 jurisdiction to consider such cases and to the extent that any  
22 of plaintiffs' claims implicate regulations to the VA -- and as  
23 I'll note in a minute, most of the them do -- 502 on top of 511  
24 divest this Court of jurisdiction.

25                   And I think several courts have recognized that 502

26

1 does not allow district courts to consider these kinds of  
2 questions, and we noted some of those cases in our brief.  
3 Specific regulations that address each of the claims that  
4 plaintiffs' counsel just addressed are assistance of claimants.  
5 The VA has been under a duty to assist claimants.

6                   It's a claimant friendly system, not just to  
7 adjudicate cases, but to go out and help the veteran build his  
8 case, if possible. And that regulation is 38 CFR 3.159 and  
9 3.103. Similarly the scope of agency subpoena power is set  
10 forth in 20.711 and 20.2. And, finally, the decision on what  
11 type of process to adjudicate initial claims is set forth in  
12 3.103.

13                   And I should note, your Honor, there's nothing at  
14 all unusual, as plaintiffs' counsel suggest, about this system.  
15 It is a more claim and friendly version of the Social Security  
16 disabilities system that your Honor undoubtedly sees on a  
17 regular basis. A claimant comes in and says, here's my claim  
18 form, and it's adjudicated by a government official with  
19 relatively limited rights. All right.

20                   Although, in the VA case, greater rights than  
21 otherwise. It then goes to a administrative hearing process an  
22 ALJ and Social Security, the Board of Veterans Appeals at the  
23 VA. They make a decision on the record. That's the final  
24 decision of the secretary, and from there, it goes up to  
25 judicial review to your Honor's court, and Social Security

27

1 cases, to the VJRA and veterans cases. That's why the  
2 plaintiffs' challenge that this whole procedure is

3 unconstitutional is so, frankly, absurd.

4           It is a well-established system of handling mass  
5 justice in the United States when dealing with, as the VA does,  
6 about 800,000 claims per year.

7           THE COURT: Suppose for a moment this arguendo --  
8 that this system breaks down. What is the remedy? Suppose you  
9 have a perfectly set up system of all the safeguards and what  
10 have you, but then the system doesn't seem to be working for  
11 the masses of applicants that are there. What's your comment  
12 on that?

13           MR. BENSING: This statute is set up such that  
14 really Congress has to address that question. Congress has to  
15 put more resources into the program, and they're doing that.  
16 Congress has to change the laws --

17           THE COURT: So what you're saying is the Court  
18 doesn't have any jurisdiction to --

19           MR. BENSING: The Court doesn't have any  
20 jurisdiction. And, your Honor, if you think of the remedy that  
21 the plaintiffs are seeking -- they're going to say we want a  
22 certain class of cases, PTSD disabilities, to receive special  
23 treatment. More resources into those types of cases.

24           Well, what's to keep a district judge in Chicago  
25 from saying, no. Agent Orange cases need more resources. And

28

1 then a judge in New York saying, no, ordinary trauma cases need  
2 more resources. And conflicting injunctions across the country  
3 to try and shuffle resources around. Congress specifically  
4 said we don't want that here. We want to preclude district  
5 court review. We want to have a claim and friendly informal  
6 system on the front end, and we want to have a specialized  
7 court reviewing it on the back end.

8           That's constitutional, and if the system is under  
9 strain -- and certainly there have been an increase in claims  
10 in recent years -- then the remedy is for Congress to put more  
11 resources in, not for district judges to pull it from one side  
12 to the other.

13           THE COURT:   Okay.   Thank you.

14           MR. BENSING:   Thank you, your Honor.

15           MR. ERSPAMER:   Your Honor, we really covered two  
16 topics, jurisdiction and sovereign immunity.   Which do you want  
17 to hear about first?

18           THE COURT:   He talked about sovereign immunity.

19           MR. ERSPAMER:   He talked about 511(a) too.   So  
20 we'll -- so do you want me to start with sovereign immunity?

21           THE COURT:   Well, whatever you want to do.

22           MR. ERSPAMER:   Okay.

23           THE COURT:   The order doesn't make any difference.  
24 It's what's contained.

25           MS. MOSER:   I'll address the sovereign immunity

29

1 issue, your Honor, and then defer to Mr. Erspamer for the 511  
2 issue.   So I think I can --

3           THE COURT:   What do you think of the 6th Circuit --  
4 the 6th Circuit decision?

5           MS. MOSER:   The 6th Circuit decision in Beamon on  
6 the sovereign immunity issue?   Your Honor, I think the 6th  
7 Circuit decision is wrong.

8           THE COURT:   See, the last point of that decision  
9 says this.   I just want your comment on it.

10           MS. MOSER:   Sure.

11           THE COURT:   I'm sure you don't agree with it, but  
12 this is what it says.   It says, "In conclusion, we find that

13 Congress contended to preclude district court jurisdiction over  
14 VA decisions relating to benefit claims including decisions of  
15 constitutional issues." Then it goes on.

16 MS. MOSER: Yeah.

17 MR. ERSPAMER: That's probably really my part,  
18 your Honor. Can we defer that question? I will answer it.

19 THE COURT: All right.

20 MR. ERSPAMER: I can do it now if you want.

21 THE COURT: Just do it now.

22 MR. ERSPAMER: Okay.

23 MS. MOSER: All right. Go ahead.

24 THE COURT: Because I'm caught between these various  
25 decisions and I --

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1 MR. ERSPAMER: Yeah. Beamon really, first of all,  
2 it's an aberration. It is completely inconsistent with Broudy,  
3 the language in Broudy, and that's one of the sheets that I  
4 handed up to you. It's completely inconsistent with Robison.

5 And, frankly, the reading of the statute is just  
6 wrong. In the language that you're talking about. Let's go  
7 back to Beamon. Beamon has three individual veterans claiming  
8 delay in one regional office, Cleveland. That was -- it was  
9 not a system wide claim as counsel said. They did purport to  
10 represent a class of the veterans, but they did raise issues of  
11 systemic delay at all. So it can be differentiated on that  
12 ground. Of course, it's not binding in this Court in anyway.  
13 It's the 6th Circuit. The DC Circuit -- well, Beamon  
14 construction of the statute is just simply wrong, in the text  
15 of the statute.

16 The statute is -- only refers to precluding review  
17 of individual claim decisions. It does not say anything about

18 any other kind of claim -- and, your Honor, for better than  
19 five decades, the Courts have been taking up issues that do not  
20 relate to the review of individual claims. That is the  
21 teaching of Robison. And I think the jurisdictional argument  
22 has -- the jurisdiction has to be determined with reference to  
23 38 USC 7252(a).

24           The term, decision, in the statute refers to the  
25 authority of the Court, the Veterans Court, to affirm, modify

31

1 or reverse the decision of BVA. That is the only jurisdiction  
2 that Court has. It is a Court of limited jurisdiction. So we  
3 had a situation where Congress created a Court that has very  
4 limited jurisdiction, leaving a vacuum.

5           And there's always been this vacuum. And Robison  
6 tells us you have to have a remedy for a constitutional  
7 violation because of Marbury versus Madison separation of  
8 hours. Courts like this Court have to determine the  
9 constitutionality of the federal legislation where there's been  
10 -- where there's a challenge. And what has happened is even  
11 with the change in 1988, with the Veterans Judicial Review Act,  
12 was enacted. The legislative history, which we cited this to  
13 you in the brief said, "We are preserving Robison on  
14 constitutional questions."

15           The Article 3, the jurisdiction -- the jurisdiction  
16 of Article 3 courts is proper under Robison, like Robison,  
17 Robison continues. We have several cites to that for  
18 your Honor. But the -- the getting back to Beamon, the problem  
19 with Beamon -- and there's a spot in Beamon I can refer to for  
20 the Court, where they -- it really is dicta -- dictum -- but  
21 they say that 511(a) means decisions about decisions.

22           In other words, any decision the VA makes about any

23 decision's also precluded. The statute doesn't say that. It  
24 is completely inconsistent with Broudy, the DC Circuit cases,  
25 McKelvey. There's a whole line of DC Circuit cases, completely

32

1 inconsistent. The -- the Beamon case, the 6th Circuit is out  
2 there on the fringe all alone. There's no other case like it.

3           And Congress enacting the VJRA did not intend to  
4 disturb the right of the courts like this to take up  
5 constitutional questions. And you think about it, the  
6 defendants have not articulated to this court anywhere in  
7 argument or in their briefs where this type of case, the issues  
8 I summarized when you asked me the questions in the beginning,  
9 how could those issues ever be taken up by the Veterans Court?  
10 There's no discovery. How are you going to find out about all  
11 the hanky-panky that's going on behind the scenes without  
12 discovery?

13           As an example, each one of these claims is --  
14 relates to the vacuum in the jurisdiction of the Court, the  
15 Veterans Appeals, and they refer vaguely or you can utilize the  
16 procedures provided for in the VJRA. But they never articulate  
17 any pathway for these claims to be heard by a Court.

18           And if this Court dismisses this case, there is no  
19 way that these claims will ever be adjudicated by anybody. I  
20 want to talk about delay because that is significant. There is  
21 a very significant difference between individual delay on a  
22 claim, which is Beamon, three of them, and systemic delay.  
23 There's a reference made by counsel to mass justice.

24           This complaint alleges mass injustice toward  
25 veterans. What if the system that Congress created -- and we

33

1 allege this very specifically with numbers in the complaint --

2 has broken down to such an extent that the claims are not being  
3 adjudicated in a time frame that complies with due process?

4 I personally have a claim as a Vietnam veteran,  
5 that's been pending for more than 15 years. Justice delayed is  
6 justice denied. In the meantime, what happens to the families?  
7 But the point about individual -- individual delay -- think  
8 about it -- let's take all the 600,000 veterans who are waiting  
9 to have their claims decided -- all took a writ to the Court of  
10 Veterans Appeals that say, look, you have the power to remedy  
11 agency action unlawfully delayed. Okay. Which is a principal  
12 that the Beamon court relied upon. It would change nothing,  
13 your Honor.

14 The only relief you can get is to advance your claim  
15 in line ahead of the other veterans. The problem is none of  
16 the veterans are getting their claims decided. If all 600,000  
17 went in and got relief, nothing would change. You might  
18 reshuffle the deck slightly, but you'd still have to sit  
19 backlogged with 600,000 claims.

20 And this is not a claim just about delay in the  
21 Cleveland regional office. This case is about systemic delay  
22 throughout the adjudication system. In the regional offices,  
23 they're inundated. The Board of Veterans Appeals is inundated.  
24 You don't have to rely on me for that. The chief judge of that  
25 court has said we're inundated.

34

1 The chief judge of the federal circuit, Judge  
2 Michael, has said we're inundated with claims. The system has  
3 broken down. And the same thing is occurring on the healthcare  
4 side. The veterans go in --

5 THE COURT: You're a veteran. Does it include  
6 facial claims?

7 MR. ERSPAMER: It does. It does. We do have -- I  
8 rattled off the list of the facial claims to the statute.  
9 They're clearly -- they're clearly proper. They've always been  
10 proper. There's a -- there's a kind of a messy line between  
11 facial and as applied challenges and it was all the law  
12 professors who have written for many, many years. This case  
13 does have aspects of both.

14 But in any due process case -- any case -- you look  
15 at the balancing of the equities, you look at the risk of  
16 irreparable injury, you balance the interest of the government  
17 versus the interest of the veterans in this case. That  
18 involves facts. It involves factual analysis. How does this  
19 system actually operate? What are the risks of erroneous  
20 depravation? What are the value of additional safeguards, like  
21 the right to subpoena someone?

22 One of the biggest problems here, your Honor -- this  
23 is in the complaint -- is that the VA medical side often treats  
24 the veteran for months or years before the claim is decided on  
25 the adjudication side. We have many, many examples where the

35

1 veteran has come back from Iraq or Afghanistan and has been  
2 diagnosed with full-blown PTSD by the medical side of the VA --  
3 has been treated for months or years for that PTSD.

4 The adjudicators -- he files a claim for service  
5 connection. They reject the opinion of the VA's own doctors on  
6 the medical side and deny the claim. But, your Honor, getting  
7 back to the jurisdiction, to the extent you create -- Congress  
8 creates a system like this system before the Court, the  
9 Veterans Court, and you constrict the rights and you constrict  
10 the review, and you shrink it down very, very small. That  
11 creates a very large -- a larger area of jurisdiction in the

12 Article 3 courts because somebody has to deal with these  
13 issues.

14           You can't have a system where there's no  
15 constitutional issues -- can be brought -- of the type that  
16 we're talking about. And what Beamon talks about,  
17 constitutional issues being brought and being proffered before  
18 the Court, it's talking about constitutional issues that arise  
19 in an individual veterans claim. That is the jurisdiction of  
20 the veterans court.

21           They're not talking about the types of issues we're  
22 talking about here, which are systemic issues, having to do  
23 with due process and with practices and procedures of the  
24 agency.

25           And I very much would commend to the Court to take a

36

1 look, if you haven't already, at the case in the Bowen versus  
2 New York because it's a very similar case with respect to this  
3 right called the administrative hanky-panky because -- if you  
4 read the district court opinion in that case and you read what  
5 was going on with the Social Security Administration, it has  
6 some very obvious parallels to what is going on in the Veterans  
7 Administration.

8           So there was some very obvious parallels, I was  
9 saying, between the Bowen case, the Social Security system in  
10 this case.

11           Although, the Court went off on Mandamus lines  
12 rather than ultimately on due process. And, you know, there's  
13 not only the DC Circuit cases I've mentioned, but there are  
14 many other cases that both pre and post the Veterans Judicial  
15 Review Act.

16           Say there is jurisdiction in Article 3 courts over

17 constitutional issues, and I would -- in this regard, I would  
18 mention that Vietnam Veterans of America versus McNamara, which  
19 very recently in 2003 said jurisdiction exists in Article 3  
20 courts regarding access to court claims, regarding a project  
21 Shad. And a final comment on Beamon. Beamon is -- Beamon  
22 says, basically, anything the VA does is barred. I mean, and  
23 that's the dicta. It's just wrong. It's completely  
24 inconsistent with all the other authorities.

25           Finally, the CAVC, the Veterans Court, it has

37

1 interpreted its own jurisdiction. And its interpretation of  
2 its own jurisdiction, which is this Court should defer to -- is  
3 that it only has jurisdiction over individual veterans claims,  
4 and I refer you to the Dacoron versus Brown case.

5           The Court denied a petition for a Writ of Mandamus  
6 with respect to constitutional challenges to the statute  
7 saying, "A claimant alleges only the unconstitutionality of the  
8 statute is not a claim," quote, "under a law that affects the  
9 provision of benefits by the secretary," unquote, under 511(a).  
10 But rather is a claim under the Constitution of the United  
11 States. That such is beyond the purview of Section 511. The  
12 Veterans Court is in agreement with Broudy. It's in agreement  
13 with VVA versus McNamara, the very recent case. It's in  
14 agreement with the Maroszan case, the earlier Maroszan case, we  
15 cited in our papers which proceeded the passage of the VJRA.

16           So there's a consistent body of cases before and  
17 after the passage of the VJRA that said Courts can take up this  
18 type of case. And, frankly, there would be a very serious  
19 problem under Robison if this Court could not take up this type  
20 of case because there would be a vacuum and, basically, would  
21 basically be inconsistent with the line of cases that dates

22 back to Marbury versus Madison.

23           You must have the ability of a Court -- has to pass  
24 on the constitutionality of federal statutes and the rules and  
25 practices. It is true that VA regulations, if you challenge

38

1 them directly, cannot come to a district court. That part of  
2 his argument is correct.

3           However, plaintiffs do not challenge any regulations  
4 of the VA. We challenge the statutes. And we challenge these  
5 certain procedures they're using, the practices they're using  
6 that are uniform that violate veterans rights. But we are not  
7 challenging a specific regulation. There's discussion of  
8 regulations in the complaint, particularly, with respect to  
9 PTSD. Why is that there? That is there because we need to  
10 explain why you need a lawyer at the regional office level.  
11 These regulations are very complicated. It's also there to  
12 provide context for the due process balancing that the Court  
13 would have to do.

14           So the fact that we do mention regulations does not  
15 mean we are challenging those regulations. Counsel also said  
16 that 511 bars -- that these are the words that I took down --  
17 bars anything that implicates regulations -- implicates  
18 regulations. That is just wrong.

19           It bars a direct challenge to a regulation which it  
20 has to go to the federal circuit, but it doesn't bar things  
21 that somehow and some way might relate to a regulation. And  
22 that's the same false argument that they make with respect to  
23 the statute.

24           The statute just says, "Review of decisions from the  
25 Court of the Board of the Veterans Appeals." It doesn't say

39

1 you're barred from reviewing anything, in any way, remotely  
2 relates to the veterans system of benefits. It doesn't say  
3 that. It never has.

4           And if you look at the handouts that I gave to the  
5 Court, if you look at the changes in the statute over time,  
6 they've been very, very minor, the 211, to 511, and later when  
7 the Secretary of the Department of Veterans Affairs was -- when  
8 the department was created, it changed very, very little.

9           So really I think the Court -- to some extent -- if  
10 you look at Beamon very expansively, the way that the  
11 defendants -- the defendants do, there is a conflict with all  
12 the other authority. If you read it narrowly, three veterans  
13 suing for delay under individual claims, Cleveland office.  
14 Then you can deal with it on those terms, but there isn't that  
15 kind of conflict.

16           I think I've covered what I intended to cover on the  
17 subject of jurisdiction. I'd be happy to answer any questions,  
18 your Honor.

19           But I would close just with one general comment.  
20 The question of jurisdiction, and the jurisdiction of the  
21 Court, has to be resolved with reference to what that Court  
22 does in the statute, what its role is. Its role is simply to  
23 decide whether the decision of the Board of Veterans Appeals,  
24 they can reverse it, they can approve it, or they can remand  
25 the case, and they also have Mandamus jurisdiction under the

40

1 All Writs act. That is it. That's all that Court does.

2           It doesn't issue declaratory relief, it doesn't  
3 issue injunctions, it doesn't -- it has no ability to enforce  
4 its decisions, which I mentioned earlier, which Judge Nebeker

5 has been so troubled about for all this time, your Honor.

6 There has to be a remedy for constitutional issues, and of  
7 course, we also bring up statutory issues with respect to the  
8 violations of the medical care statute which is related. But  
9 our claims, mainly, relate to the right to access to the Courts  
10 under the constitution and the due process rights of veterans.

11 Thank you. And my colleague will cover the other  
12 topic.

13 MS. MOSER: I'll briefly address sovereign immunity,  
14 your Honor. I think there are three main points. The first  
15 point is a step in the analysis that the defendant skipped, I  
16 believe. When you look at Section 702, there is a very broad  
17 waiver of sovereign immunity with respect to suits for  
18 injunctive and declaratory relief, such as our case.

19 There is some law in the Ninth Circuit that suggests  
20 that that waiver is not constrained by the other sections of  
21 the Administrative Procedure Act such as Section 704, one  
22 mentioned containing final agency action. If indeed that is  
23 the case, that 702 is not constrained by 704, then because our  
24 case is wronged for declaratory injunctive relief, there's a  
25 valid waiver, and that's the end of the story.

41

1 Let's assume for a moment that 702 -- that 704 does  
2 constrain 702 in the waiver, which relates and it only applies  
3 to our third cause of action under the medical care statute.  
4 Even if -- assuming a plan to all of our causes of action for  
5 the sake of argument, we'd still believe for two reasons: One,  
6 sovereign immunity; one, with respect to 704. I think the  
7 defendants' argument was made on something really critical in  
8 the statute. The statute defines agency action in five fifty  
9 one thirteen, to include failures to act. Their premise is

10 that there are individual benefits decisions, and those are the  
11 affirmative agency actions. That's not what we're alleging  
12 here.

13 Our complaint alleges systemic final actions in a  
14 very important way here. That there's no explanation of in the  
15 complaint. This is a pleadings motion. It's all -- it all has  
16 to be taken as true. And there's really no explanation. So  
17 I'd like to go through them very quickly. We have explained  
18 some of them.

19 One, in Paragraph 157 in our complaint, there is a  
20 very detailed explanation of the extensive delays in the system  
21 that have taken place. And as my colleague mentioned, there is  
22 one that's been pending in Collaro versus West for over 13  
23 years. In fact, the appellate process now is on governmental  
24 documents that takes more than eight years to complete for one  
25 individual claim.

42

1 There's a systemic failure to provide medical care  
2 pursuant to the statute in 38 USC 1710. Section 1705 requires  
3 that that medical care be provided in a timely basis. We've  
4 included allegations in our complaint that veterans have gone  
5 to the VA on the medical side, and they've even been delayed  
6 for appointments for months where they've been also denied  
7 care.

8 There's also a failure to spend the appropriations  
9 on medical care that we've already mentioned. That's in 206 of  
10 the complaint. That statutory we required -- we don't  
11 necessarily agree that that limitation applies to the statute  
12 at issue, but we don't need to reach that here. Even assuming  
13 it does -- we have alleged that there are appropriations that  
14 simply were not spent. But the VA did promise in advance to

15 Congress that it would spend on mental health care.

16           There are also abuses of the incentive  
17 compensational system that Mr. Erspamer mentions in the  
18 beginning of the argument. He also mentions some of the  
19 personality disorder discharges where there's a knowledge of an  
20 improper discharge that's used as a policy matter as a pretense  
21 for denying claims.

22           The defendants mentioned the Lujan case.  
23 Your Honor, I want to discuss that case because I think it's  
24 very instructive here on the point that he raised. I'd like to  
25 view that case in light of its procedural posture. That is a

43

1 case on summary judgment. That case interestingly enough  
2 survived the motion for judgment, the motion on the pleadings,  
3 and survived the subject matter jurisdiction challenge.

4           In that case the problem was the Court said that  
5 agency action must have actual or immediately threatened  
6 effects. And the declaration submitted by members of the  
7 National Wild Life Federation just said that the declarants  
8 used unspecified lands in the vicinity. They said that's not  
9 enough to have immediately threatened effects. The Court  
10 warned that even whole programs could be required to be revised  
11 by the agency in order to avoid the unlawful results that the  
12 Court discerns if that actual or immediately threatened effect  
13 was sufficient. That's at Page 894 of the opinion.

14           So I think it's not true that a systemic -- or  
15 programs who will then challenge and then proffer under 704.  
16 It's merely that you have to have actual injury, which we've  
17 clearly alleged in our complaint.

18           The second prong of 704 is that there's no other  
19 adequate remedy. It's essentially an exhaustion requirement --

20 I know we've talked a lot about that. It's acting -- your  
21 Honor, that litigants are not required to exhaust fewer or  
22 inadequate remedies. We have gone through a lot of these  
23 already in our argument. I won't belabor that here.

24 But that there's something on the medical care  
25 side -- there's some discovery, there's some declaratory

44

1 injunctive relief. The CAVC did not have authority to enforce  
2 its decisions. There are no class actions to plaintiff  
3 organizations with not withstanding.

4 And at the end of it all, the system is so  
5 impossibly backlogged. There are 600,000 regional office  
6 claims pending, over 6000 appeals in the CAVC and 40,000 of the  
7 BVA. That there's simply no way to have an adequate remedy in  
8 our court room courts over the regional office system. So I  
9 would submit, your Honor, that we've met the test on the  
10 pleadings for 704 even if 702 is constraint. That there's a  
11 second basis in 706 to compel agency action unlawfully withheld  
12 or unreasonably delayed.

13 I believe that our allegations meet both  
14 unreasonable delay and action unlawfully withheld. Again, I  
15 won't belabor the points but of -- for a reasonable delay, the  
16 delays in medical care, the medical care that's statutorily  
17 required pursuant to 1710, and there must be timely under 1705.

18 Paragraph 172 of our complaint details that veterans  
19 are going to the hospitals with long delays or they're denied  
20 care and, subsequently, committed suicide.

21 Also, that agency action is unlawfully withheld  
22 because Section 1710 requires the VA to the extent that  
23 Congress does give them money to treat mental healthcare  
24 problems -- to spend that on medical care, and they have not

25 done so with 12 million that would have been allocated in 2005,

45

1 42 million not allocated in 2006. And in 2006 another  
2 46 million that was simply returned unspent.

3           It's not that we're telling the VA how they need to  
4 spend it, whether they spent too much on this versus this.

5           THE COURT: Tell me this, your cause of action has  
6 to do with mental health problems of the -- of the members of  
7 the armed forces?

8           MS. MOSER: Yes, your Honor.

9           THE COURT: What about the other problems that are  
10 involved -- that would by order then encompass the whole  
11 procedure or would I have the authority to do that or is it  
12 just veterans that have mental disorder are entitled to these  
13 rights and nobody else is entitled to these rights? Where do  
14 we go on that one?

15           MS. MOSER: Well, your Honor, I think that we would  
16 submit that all of our claims is limited to a specific class of  
17 veterans and those with PTSD and those with certain expanding  
18 and certain problems here.

19           But I do think that the right would be applicable in  
20 so far as in our system of problems, obviously, to the extent  
21 that there are remedies here that inure to the benefit of both  
22 the immediate class contained and others to whom the same  
23 constitutional rights pertain.

24           THE COURT: Do I have jurisdiction --

25           MR. ERSPAMER: Can I interrupt, your Honor? I think

46

1 you have jurisdiction on two issues of declaratory relief with  
2 respect to the what we call the statutory defects, which  
3 applied equally to, regardless, of what type of veteran you are

4 and what type of claim you have.

5           It is true that a class -- it consists of PTSD -- a  
6 proposed class -- of PTSD traumatic brain injury of mental  
7 health issues. However, other parts of the case are more  
8 generic. And that -- it includes the statutory defects, for  
9 example, were we're seeking declaratory relief. The medical  
10 care statute, it asks for declaratory relief, also, that at  
11 least to the extent there are funding. They have to treat the  
12 veterans.

13           You can't keep turning them away and not spending --  
14 and say even though you have money to treat them. So the  
15 answer to your question is -- it does extend -- a lot of the  
16 issues in the case do extend beyond just the class of PTSD  
17 claimants and recipients.

18           MS. MOSER: Your Honor, I would just submit my  
19 argument on that ground that there is a waiver in 702 and to  
20 the extent that it's concerning by other provisions we also  
21 meet those as sovereign immunity.

22           THE COURT: Thank you.

23           MS. MOSER: Thank you.

24           MR. BENSING: Can I respond to those questions  
25 briefly, your Honor?

47

1           THE COURT: Go ahead.

2           MR. BENSING: First on the sovereign immunity  
3 question, let me address that briefly. 702's waiver does not  
4 shred and tear up the final agency action requirement. That  
5 point has been made clear in a number of Supreme Court  
6 decisions. And has been accepted by this circuit in Gallo  
7 Cattle. That's the case we cited. Plaintiffs gave you a  
8 letter yesterday citing a 1989 Ninth Circuit decision, went the

9 other way. I submit that if you look at Supreme Court  
10 decisions since that 1989 decision, you can see why it's not --  
11 not well supported. In particular Darvy versus Cisneros, a  
12 Supreme Court decision found at 509 US in 1993.

13           The Court said quote, "The elimination of the  
14 defense of sovereign immunity did not affect any other  
15 limitation on judicial review that would otherwise apply under  
16 the APA." In other words, that's plaintiffs' argument rejected  
17 by the Supreme Court.

18           The northern case also recognizes that all of the  
19 agency action requirements of the APA 702, 704, and 706 are all  
20 constrained and are all to be treated similarly. A lot of  
21 plaintiffs' argument got into constitutional questions. Do you  
22 want to hear argument on that now or did you have some other  
23 way your Honor wanted to structure this argument?

24           THE COURT: Might as well do it now.

25           MR. BENSING: All right. Then let me -- let me

48

1 speak to those questions immediately, your Honor. Plaintiffs  
2 are somewhat confused because they have conflated two types of  
3 constitutional challenges. And as applied constitutional  
4 challenge, a plaintiff saying I was deprived of due process in  
5 the handling of my claim is -- can be and is considered in this  
6 existing system, and it is reviewed by the Court of Appeals for  
7 veterans claims and the federal circuit for constitutional  
8 challenges. That right is there now and has been given by  
9 Congress. Now, a different question is presented in, I think,  
10 the Larrabee case your Honor cited, of a facial constitutional  
11 challenge.

12           THE COURT: Yes.

13           MR. BENSING: Plaintiff coming in and saying there

14 is no set of facts under which this statute is  
15 unconstitutional. That is a very, very heavy burden for the  
16 plaintiffs to carry. And it is rarely successful.

17           And, certainly, if you step back and look at this  
18 system as a whole -- look at the claim and friendly process at  
19 the front end and administrative of due process in the middle,  
20 specialized judicial review at the end -- are there no set of  
21 facts under which that justice system satisfies the Matthews  
22 versus Eldridge due process standard? I think the only answer  
23 can be, well, of course not.

24           That's been around for 50 years without significant  
25 question. And why does it duplicate the Social Security

49

1 disability system? It's the way Courts and Congress have long  
2 ago structured this sort of system to administer hundreds of  
3 thousands of claims in a fair basis.

4           Now, in this connection -- the central case that I  
5 submit the Court should look in is Walters versus National  
6 Association of Radiation Survivors, a 1985 Supreme Court  
7 decision. It evaluated this entire VA system as it was then,  
8 as it was before a right of judicial review, in the context of  
9 considering the constitutionality of the then existing \$10  
10 limit and how much you could pay attorneys for representation  
11 on a VA claim.

12           And the Court affirmed that, rather the Draconian  
13 limit, and in doing so, it said a number of things that are  
14 very critical to this case because the Court looked at the  
15 entire VA system and said, among other things, one, we owe a  
16 substantial deference to the way Congress structured this long  
17 standing system.

18           They also said, if due process does not turn on the

19 result in a particular case or the risk of there in a  
20 particular case but on the generality of cases. And so you  
21 need to look at the system as a whole. They said rational  
22 paternalism by the government in a sense of saying, we want to  
23 have a claim and friendly system.

24           We're not going to set an adversarial system like  
25 plaintiffs like. It's going to be claim and friendly. That is

50

1 an acceptable congregational way to address a problem. The  
2 Court recognized citing Judge Henry Friendly that adding  
3 lawyers in an adversary system to a mass claims procedure like  
4 this often is counterproductive.

5           And, in fact, the very delay that plaintiffs allege  
6 here is only going to get worse if you have full-fledged civil  
7 discovery in the very moment that a claim is filed. And the  
8 Court also recognized that Congress is entitled to have some  
9 flexibility and formulate in dispute resolution mechanisms --

10           THE COURT: Is there any discovery along the line or  
11 is there no discovery at all?

12           MR. BENSING: Congress has addressed this  
13 repeatedly, but most recently a couple of years ago with a new  
14 statute 5103(a) of Title 38, which directs the VA to take steps  
15 to help the claimant get information. So if the claimant says,  
16 I need these documents, the VA has to go out and get them for  
17 him if they can do so. And they have to provide information to  
18 the claimant.

19           So it's an -- it's an informal discovery approach  
20 consistent with the overall thrust of the statute, which is to  
21 have an informal claim and friendly process at the front end to  
22 help build the claim.

23           Again, if you look at plaintiffs' complaint,

24 Paragraphs 11, Paragraphs 92, they say that in many cases, in  
25 most cases, they're not satisfied with the outcome. Well,

51

1 your Honor, they can't -- that's not enough for a facial  
2 constitutional challenge.

3           The standard is very clear in the Ninth Circuit and  
4 in the Supreme Court, under no set of facts can the system be  
5 constitutional. If it's fair in some cases, that's the end of  
6 their facial challenge. And that's the only challenge that  
7 this Court has jurisdiction to continue -- to consider.  
8 Everything else challenges to the decisions of the VA itself --  
9 are foreclosed by 511 and 502.

10           Again, I've spoken to Matthews versus Eldridge, the  
11 three-part balancing test. Certainly, this system provides  
12 adequate due process, notice, opportunity to be heard. Added  
13 on to that is an administrative review process and a judicial  
14 review process.

15           Questions of sovereign immunity, of course, must be  
16 strictly construed in favor of the sovereign and so plaintiffs'  
17 construction of Section 511 or 502 is simply not appropriate.

18           And let me briefly address the Broudy case of --  
19 from the DC Circuit. As we pointed out in our reply, the  
20 problem with that case is the Court said -- we've identified in  
21 this case a decision that was never considered by the secretary  
22 because the secretary didn't note some facts that we'd hidden  
23 from them. Therefore, 511 doesn't apply and they wouldn't have  
24 taken the case.

25           Plaintiffs are saying, we've been looking at

52

1 decisions of the secretary on discovery, and on subpoena power,

2 and on the claims procedure. We don't like those decisions.

3 We want to blow through that and take that into district court

4 Broudy does not help them. Because all the decisions they

5 claim of -- they challenge have been made by the secretary.

6 There's been allusion repeatedly to the medical side

7 of the equation of the house. We would note that contrary to

8 what plaintiffs state, there is authority for those cases.

9 Eligibility determinations for medical care to be considered

10 through the same judicial review process, and hence Section 511

11 applies there as well.

12 And the statute giving the Board of Veterans Appeals

13 jurisdiction over eligibility denials, which is what plaintiffs

14 are talking about. It's 38 CFR 20.101(b). Additionally, the

15 statute that they claim is being violated on medical care,

16 which is 1710 of Title 38, does not grant a veterans a

17 statutory entitlement to a particular type of care because the

18 statute prefaces everything it says by saying that medical care

19 shall be provided, which the secretary determines to be needed.

20 So it's highly discretionary with the secretary.

21 And the secretary, of course, has many demands upon his

22 resources and only so much in appropriations and so it is just

23 not one which -- which lends itself to judicial enforcement.

24 And in any event, 511 applies in that context as well.

25 On systemic delay, let me just make the point that

53

1 the Court of Appeals for veterans claims has the same right

2 that this Court does to compel agency action unlawfully delayed

3 or denied and has exercised that on occasion. So it has

4 authority to act in cases of systemic delay. It also has

5 Mandamus authority. And while we're on the subject of that

6 court, the plaintiffs had improperly named the chief judge of

7 that court as a defendant in this action. The CAVC is not an  
8 agency suable under the APA. It is a court. The APA's  
9 definition of agency expressly excludes courts of the United  
10 States. And so, certainly, the chief judge should be -- should  
11 be excluded.

12 THE COURT: Is there a motion in that regard?

13 MR. BENSING: We addressed -- we moved to dismiss  
14 across the board, of course, and we addressed that specific  
15 issue in our reply brief. We have not moved specifically on  
16 behalf of --

17 THE COURT: I noticed it was in the papers. But I  
18 didn't notice if there was any specific motion to exclude that  
19 particular defendant.

20 MR. BENSING: And, finally, many of these issues in  
21 our papers -- let me leave with one final point. And that is,  
22 if plaintiffs are not happy with the way the system is  
23 currently working, their remedy is either to take it up with  
24 Congress, to take it up with the Secretary of Veterans Affairs  
25 or under 502 to challenge the regulations that they think are

54

1 inappropriate because they can seek judicial review in the  
2 federal circuit of those regulations on the ground that they  
3 violate due process, or anything else, and proceed in that  
4 forum.

5 But there is simply no jurisdiction in this Court  
6 for those claims, and as I said, their facial challenges simply  
7 do not survive. Thank you.

8 THE COURT: All right. Thank you.

9 MR. ERSPAMER: Your Honor, to some extent I've  
10 covered these issues. And then some of the comments made of  
11 counsel are covered --

12 THE COURT: If you have something new to add, just  
13 add it.

14 MR. ERSPAMER: I do have something --

15 THE COURT: We're not going to go over the same  
16 thing --

17 MR. ERSPAMER: No, we're not. I have a couple of  
18 new things to add. That's what I want to do.

19 THE COURT: Okay. But --

20 MR. ERSPAMER: That's fine, your Honor.

21 THE COURT: I'm focused in on what my jurisdiction  
22 is.

23 MR. ERSPAMER: Right. Well, the question of the  
24 interpretation of the NARS v. Walters case, which is something  
25 new in this argument, and I wanted to comment briefly on. I

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1 argued that case in the Supreme Court. That was my case. The  
2 Walters decision only dealt with the constitutionality of the  
3 \$10 fee limitation.

4 That was the only issue in the case. It had both  
5 the facial and it has applied challenge. The Court found that  
6 facially constitutional the \$10 charge fee limitation at that  
7 time did not involve any of that stuff -- issues that we have  
8 in this case. The results of pre-Veterans Judicial Review Act.  
9 And now we have a completely different system. And the  
10 comments were made by this plaintiff friendly system by  
11 counsel. We cited in our briefs on two decisions from the  
12 Veterans Court which said exactly the opposite -- the system  
13 has changed enormously over the last -- since judicial review  
14 came in. And it has become very adversarial.

15 And if you look, there are details in the complaint  
16 about how many claims -- appeals are being denied by -- based

17 upon veteran -- usually unrepresented veterans -- failure to  
18 follow time deadlines, jurisdictional requirements at the  
19 regional office level. So I just refer your Honor to those  
20 decisions.

21           And counsel also said -- talked about decisions of  
22 the secretary. We're trying to revisit all these decisions of  
23 the secretary about subpoenas. He rattled off with a list of  
24 other things. He's repeating the same fundamental  
25 misconstruction of the statute. 511(a) decisions refers to

56

1 decisions of the administrator on appeals from the Board of  
2 Veterans Appeals. That's it.

3           And not one word about Broudy. Now, Broudy has a  
4 very extensive analysis in this statute. It's post VJRA. It's  
5 completely inconsistent with the notion advanced by defendants  
6 that everything the VA does or thinks about is a decision.  
7 It's not. It's a very narrow interpretation of the word  
8 decision. The -- let's talk about one of the medical care  
9 statutes. He refers to a regulation, which permits the Board  
10 of Veterans Appeals to take up some medical issues. It's kind  
11 of interesting, your Honor.

12           There is nothing that they have cited and nothing  
13 has been referred to in an argument to appeal from. The Board  
14 of Veterans Appeals deals only with appeals, a VA claim  
15 decisions. There is no procedure for people that have medical  
16 care. There's nothing to appeal from.

17           And it's shown by the fact that there aren't any  
18 cases about -- at the Court about denial of medical care. And  
19 there's only a couple of times when medical care has even come  
20 up. And the questions about -- the questions were raised  
21 about -- about inability to get appointments, medical

22 appointments.

23           And the Court -- the Veterans Court said, we don't  
24 have jurisdiction over those issues. There is nothing. It's a  
25 dearth of any procedure on the medical care side. If a veteran

57

1 goes into a clinic and they tell him to go take a hike --  
2 pardon -- pardon the vernacular -- there is nothing he can do.  
3 There is no procedure. There is nothing he can do. That is  
4 why so many of these veterans are killing themselves.

5           They come in and they want medical treatment. And  
6 when they're turned away and we don't have the resources, come  
7 back -- come back next month. There's story after story in the  
8 newspapers across this country about that issue. I think I've  
9 covered my subject matter with respect to this in the new  
10 issues -- let me just look. I think there's one issue that my  
11 colleague needs to cover or two maybe.

12           MS. MOSER: There are just two brief issues,  
13 your Honor. One, they were talking about the no set of facts  
14 standard under Salerno. I believe that in our brief, that's  
15 been criticized by the Supreme Court itself in terms of facial  
16 challenges, and it's also been limited in the Ninth Circuit  
17 today in its challenges.

18           And with respect to Section 7261, which they  
19 indicate, you know, why couldn't a veteran just come in and  
20 complain of unreasonable delay and get an order under 7261?  
21 Well, in the brief, you know, we took a look for cases like  
22 that and we, basically, found one where a veteran was very old,  
23 and they expedited the appeal.

24           But, otherwise, we haven't found any, nor have the  
25 defendants cited any, where they remedy delay. It's really a

58

1 theoretical remedy and not employed in practice. And on that  
2 note, I think we'll conclude. Thank you for your time, your  
3 Honor.

4 THE COURT: Thank you. Do we have any other motions  
5 in limine?

6 MR. BENSING: Just briefly, your Honor. The BVA  
7 jurisdictional regulations that I cited is for eligibility for  
8 medical care. That is subject to review. Particular treatment  
9 questions for the availability of resources is not something  
10 that is considered. And there are several cases that we found  
11 on -- where the Court of Appeals for Veterans Claims has  
12 considered in action by the VA, and we can cite those for the  
13 record if the Court wishes. Thank you.

14 THE COURT: Are there any other motions? I think we  
15 have something coming up. There's a motion filed for a -- a  
16 motion for preliminary injunction on the 25th of January. I  
17 think that -- I might have to put that over a little bit  
18 because I think that also in conjunction with that was a motion  
19 to take depositions.

20 And I think what I'll do on that, I'm going to hold  
21 up the motion to take depositions because if I should rule that  
22 I have no jurisdiction, then that would be a waste of time,  
23 taking the depositions. If I find that I do have jurisdiction,  
24 then I'll take up the matter at that particular time.

25 And I'm going to have to go through the volume of

59

1 paper that you've submitted, and what have you. And I  
2 understand -- and I'm cognizant of the fact that you're --  
3 everybody is anxious to get this thing moving.

4 MR. BENSING: Your Honor, we had a motion to stay  
5 discovery pending a ruling on your motion to dismiss. And from

6 what I hear you say, your Honor is going to grant that.

7           THE COURT: Yeah. So that's stayed. So probably  
8 I'm going to need more time to rule upon this motion because  
9 this is probably one of the most crucial motions that I have in  
10 the case. And so I think instead of the 25th of January, I'll  
11 put it over probably till the 22nd of February. And in the  
12 meantime, I'll hopefully be able to get my order out during  
13 that period of time.

14           MR. ERSPAMER: Your Honor, with respect to that --  
15 move the hearing date -- could we get a little more time of  
16 replying, maybe an extra time that you're allotting so the  
17 change of briefing schedules --

18           THE COURT: More paper -- you know, I've got more  
19 paper than you can imagine. I mean, I can't -- It's that big,  
20 you know.

21           MR. ERSPAMER: No. I'm talking about the timing of  
22 our reply brief. Usually, you only get a week. Can we extend  
23 that to two weeks?

24           THE COURT: Wait a minute. What are we talking  
25 about? You need a --

60

1           MR. ERSPAMER: Preliminary injunctions.

2           THE COURT: On what?

3           MR. ERSPAMER: On preliminary injunctions. The  
4 opposition is -- not even come in.

5           THE COURT: Well --

6           MR. ERSPAMER: We'll do it in reply.

7           THE COURT: What we'll do is this. Depending upon  
8 the motion that -- who's filing a preliminary injunction?

9           MR. ERSPAMER: Yes.

10           THE COURT: Yeah. You filed a preliminary

11 injunction. Have you filed a reply brief yet?

12 MR. BENSING: It was only filed Tuesday, your Honor.  
13 We have not.

14 THE COURT: Okay, fine. Well, then we'll review --  
15 so then you'll have time to file a reply. Why don't we just  
16 hold up on that until I make my order on the jurisdiction.  
17 There's no use putting the parties through a lot of work.

18 MR. ERSPAMER: Your Honor, the problem is -- the  
19 reason we focus on this issue is that there are 200 suicides  
20 every week.

21 THE COURT: Oh, I understand that, but I have a  
22 crucial decision to make here, whether I have jurisdiction or  
23 not.

24 MR. ERSPAMER: I agree, your Honor.

25 THE COURT: I'm not going to spin my wheels if I

61

1 don't have jurisdiction.

2 MR. ERSPAMER: No. I agree with you.

3 THE COURT: If I have jurisdiction, I'm going to do  
4 it. So I'm not going to be in- --

5 MR. ERSPAMER: Your Honor, I'm --

6 THE COURT: -- into some fast decision. I've never  
7 done that before in my life, and I don't intend to do it now.

8 MR. ERSPAMER: I'm not saying --

9 THE COURT: And I'll let you know when I get a  
10 decision -- when I make a decision. I know no matter what I  
11 do, there are people that are going to be unhappy, the  
12 Government or your client. So the only time I was able to ever  
13 make a decision was out in the state court, and I was handling  
14 adoption, everybody was happy there. The matter's submitted.  
15 Yes.

16 MR. BENSING: Your Honor, there's another motion  
17 that's pending that I wonder if we could also put over and  
18 that's plaintiffs' motion for a protective order. And they  
19 have noticed that for January 11th. And they want to have  
20 certain rules on discovery of documents relating to plaintiffs.  
21 I submit that's really inappropriate at this time until we see  
22 a --

23 THE COURT: Well, anything that I ruled upon the  
24 motion to dismiss.

25 MR. BENSING: Okay.

62

1 THE COURT: Everything is stayed until the motion to  
2 dismiss.

3 MR. ERSPAMER: Thank you, your Honor.

4 MR. BENSING: Thank you, your Honor.

5 MS. MOSER: Thank you, your Honor.

6 (Concluded at 12:10 p.m.)

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CERTIFICATE OF REPORTER

I, Sylvia J. Russo, Pro Tem Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

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Sylvia J. Russo, Pro Tem Reporter

Saturday, December 29, 2007

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