

No. 08-16728

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VETERANS FOR COMMON SENSE, and
VETERANS UNITED FOR TRUTH, et al.,
Plaintiffs-Appellants,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs, et al.,
Defendants-Appellees.

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

BRIEF FOR THE APPELLEES

MICHAEL F. HERTZ
Acting Assistant Attorney General

JOSEPH P. RUSSONIELLO
United States Attorney

WILLIAM KANTER
(202) 514-4575
CHARLES W. SCARBOROUGH
(202) 514-4027
*Attorneys, Appellate Staff
Civil Division, Room 7244
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001*

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTIONAL STATEMENT.	1
STATEMENT OF THE ISSUES.	2
STATEMENT OF THE CASE.	2
STATEMENT OF FACTS.	4
A. Regulatory Background.	4
1. Health Care.	5
2. Service-Connected Death and Disability Benefits.	6
B. Proceedings Below.	10
1. Plaintiffs’ Allegations.	10
2. The District Court’s Initial Decision ...	11
C. The District Court’s Final Decision.	12
1. Findings of Fact.	13
2. Conclusions of Law.	17
SUMMARY OF ARGUMENT.	22
STANDARD OF REVIEW.	26
ARGUMENT.	26

I.	THE DISTRICT COURT PROPERLY HELD THAT IT LACKED AUTHORITY TO COMPEL WHOLESALE REFORM OF VA’S PROGRAMS FOR PROVIDING HEALTH CARE TO VETERANS.	26
A.	Limitations On Judicial Review Under the APA.	26
B.	The District Court Correctly Held That Decisions Regarding Health Care Are Committed To VA’s Discretion And That VA Had Not Failed To Take Any Discrete Action That It Was Required To Take.	29
II.	THE DISTRICT COURT CORRECTLY HELD THAT IT LACKED JURISDICTION TO COMPEL WHOLESALE REFORM OF VA’S POLICIES AND PROGRAMS FOR ADJUDICATING BENEFITS CLAIMS BY VETERANS.	37
A.	Limitations On Review Of Decisions Affecting Veterans’ Benefits.	37
B.	The District Court Correctly Held That It Lacked Jurisdiction Over Plaintiffs’ Claims Of Delay In The Adjudication Of Veterans’ Benefits Claims And That Relief Was Not Warranted Under <i>TRAC</i> In Any Event.	39
III.	THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO ORDER VA TO PRODUCE ADDITIONAL “SUICIDE INCIDENT BRIEFS” OR TO PRODUCE STATISTICS REFLECTING AVERAGE PTSD CLAIMS PROCESSING TIMES.	53

CONCLUSION. 56

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

STATEMENT OF RELATED CASES

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Cases:

Bates v. Nicholson, 398 F.3d 1355 (Fed. Cir. 2005)
 (Section 511). 10, 38, 41

Beamon v. Brown, 125 F.3d 965 (6th Cir. 1997). 38, 41, 45

Broudy v. Mather, 460 F.3d 106 (D.C. Cir. 2006). 41

California v. United States, 104 F.3d 1086 (9th Cir. 1997). 28

Childress v. Darby Lumber, Inc., 357 F.3d 1000
 (9th Cir. 2004). 26

Chinnock v. Turnage, 995 F.2d 889 (9th Cir. 1993)
 (Section 502). 10, 39

Crosby v. Soc. Sec. Admin., 796 F.2d 576, 580 (1st Cir. 1986). 42

In re: Core Communications, Inc., 531 F.3d 849
 (D.C. Cir. 2008). 43

Danjaq LLC v. Sony Corp., 263 F.3d 942 (9th Cir. 2001). 54

Ecology Center, Inc. v. Forest Service, 192 F.3d 922
 (9th Cir. 1999). 28, 31

<i>Forshey v. Principi</i> , 284 F.3d 1335 (Fed. Cir. 2002).	50, 51
<i>Hall v. U.S. Dep't of Veterans Affairs</i> , 85 F.3d 532 (11th Cir. 1996).	38, 42
<i>Hallett v. Morgan</i> , 296 F.3d 732 (9th Cir. 2002).	53, 55
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985).	28
<i>Heckler v. Day</i> , 467 U.S. 104 (1984).	20, 28, 46, 48, 49
<i>Hicks v. Veterans Admin.</i> , 961 F.2d 1367 (8th Cir. 1992).	38
<i>Independence Mining Co. v. Babbitt</i> , 105 F.3d 502 (9th Cir. 1997).	34
<i>Johnson v. Robison</i> , 415 U.S. 361 (1974).	38
<i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993).	28
<i>Lujan v. National Wildlife Federation</i> , 497 U.S. 871 (1990).	27
<i>Marozsan v. United States</i> , 90 F.3d 1284 (7th Cir. 1996).	52
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).	35, 36
<i>Norton v. Southern Utah Wilderness Alliance</i> , 542 U.S. 55 (2004).	4, 17, 18, 27, 30, 45
<i>Parham v. J.R.</i> , 442 U.S. 584 (1979).	36
<i>Preminger v. Peake</i> , 536 F.3d 1000 (9th Cir. 2008).	26
<i>Preminger v. Principi</i> , 422 F.3d 815 (9th Cir. 2005).	39, 43
<i>Price v. United States</i> , 228 F.3d 420 (D.C. Cir. 2001).	38

<i>Rattlesnake Coalition v. EPA</i> , 509 F.3d 1095 (9th Cir. 2007).....	27
<i>Telecomm. Research & Action Ctr. v. FCC</i> , 750 F.2d 70 (D.C. Cir. 1984).....	18, 33-34, 46, 48
<i>Transgo, Inc. v. Ajac Transmission Parts Corp.</i> , 768 F.2d 1001 (9th Cir. 1985).	26
<i>Traynor v. Turnage</i> , 485 U.S. 535 (1988).	37, 38
<i>Walters v. Nat'l Ass'n of Radiation Survivors</i> , 473 U.S. 305 (1985).	7, 8, 21, 50
<i>Wright v. Califano</i> , 587 F.2d 345 (7th Cir. 1978)..	21, 49

Statutes:

Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).	37
Veterans Benefits Improvement Act of 2008, Pub. L. 110-389, 122 Stat. 4145 (2008)..	47
5 U.S.C. 701(a).	28
5 U.S.C. 702	26
5 U.S.C. 704	27, 45
5 U.S.C. 706(1).	27, 32, 43
28 U.S.C. 1291	1
28 U.S.C. 1331.	1
38 U.S.C. 211.. . . .	37, 38
38 U.S.C. 502.. . . .	10, 20, 24, 37, 38, 40, 43, 44
38 U.S.C. 511.. . . .	4, 9, 10, 19, 24, 33, 37, 39-42, 44, 45, 49
38 U.S.C. 512(a).	52

38 U.S.C. 1110	6
38 U.S.C. 1310	6
38 U.S.C. 1705.	17
38 U.S.C. 1710.	17, 18
38 U.S.C. 1710(a)(1).....	5, 6, 22
38 U.S.C. 1710(e)(1)(D).....	11
38 U.S.C. 5103.	7
38 U.S.C. 5103A.	7, 9, 15
38 U.S.C. 5107(b).....	8, 51
38 U.S.C. 5904	8
38 U.S.C. 5904(c)	9
38 U.S.C. 7105(a).	9
38 U.S.C. 7105(b)(1).....	8
38 U.S.C. 7107(b).....	8
38 U.S.C. 7252(a)	9
38 U.S.C. 7261(a)(1).....	9, 44
38 U.S.C. 7292(a)	9
38 U.S.C. 7292(c)	9
38 U.S.C. 7292(d)(1)	9, 44
38 U.S.C. 7332	53

Regulations:

38 C.F.R. 19.35.	9
38 C.F.R. 19.37.	9
38 C.F.R. 3.304(f).....	7

Rules:

Fed. R. App. P. 4(a)(1)(B)..... 1

Fed. R. Evid. 407..... 47

Legislative Materials:

H.R. Rep. No. 963, 100th Cong., 1st Sess. (1988),
reprinted in 1988 U.S.C.C.A.N. 5782. 7, 38, 42

H.R. Rep. No. 100-963, 1988 U.S.C.C.A.N. 5803..... 42

*U.S. Dep’t of Veterans Affairs Suicide Hotline:
Hearing Before the H.R. Subcomm. on Health of
the Comm. on Veterans’ Affairs,
110th Cong., 2d Sess. (Sept. 16, 2008)*..... 6

*Implementing the Wounded Warrior Provisions of the
National Defense Authorization Act for
Fiscal Year 2008: Hearing Before the H.R.
Comm. on Veterans’ Affairs,
110th Cong., 2d Sess. (June 11, 2008)*..... 6

*The Truth About Veterans’ Suicides: Hearing
Before the H.R. Comm. on Veterans Affairs,
110th Cong., 2d Sess. (May 6, 2008)*..... 6

Miscellaneous:

<http://www.va.gov/oca/testimony.asp>..... 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-16728

VETERANS FOR COMMON SENSE, and
VETERANS UNITED FOR TRUTH, et al.,
Plaintiffs-Appellants,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs, et al.,
Defendants-Appellees.

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

BRIEF FOR THE APPELLEES

JURISDICTIONAL STATEMENT

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. 1331. The court issued a final decision and entered judgment in favor of the Department of Veterans Affairs ("VA") on June 25, 2008. Excerpts of Record ("ER") at 11-94. Plaintiffs filed a notice of appeal on July 25, 2008, which was within the time period prescribed under Fed. R. App. P. 4(a)(1)(B). ER 1. This Court has appellate jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that it lacked authority to compel wholesale reform of VA's policies and programs for providing medical care to veterans because decisions regarding such care are committed to the discretion of VA and, in the alternative, plaintiffs failed to show that VA unreasonably delayed taking any discrete action that the agency was required to take.

2. Whether the district court correctly held that it lacked authority to compel wholesale reform of VA's policies and programs for providing disability benefits to veterans because Congress has broadly divested district courts of jurisdiction to review VA regulations and "decisions affecting benefits" and has also consistently refused to impose any mandatory deadlines for adjudicating benefits claims.

3. Whether the district court abused its discretion by declining to compel the production of additional "suicide incident briefs" beyond those already produced or by declining to compel VA to compile new statistics regarding the average time for processing benefits claims involving veterans with PTSD.

STATEMENT OF THE CASE

Plaintiffs, two veterans advocacy organizations, filed suit against VA challenging the agency's administration of monetary benefits and medical care for veterans on a system-wide basis. Plaintiffs sought broad declaratory and injunctive relief under the Administrative Procedure Act and the Due Process Clause of the

Constitution based upon allegedly unreasonable delays in providing mental health care for veterans afflicted with Post-Traumatic Stress Disorder (“PTSD”) and in adjudicating veterans’ claims for service-connected death and disability benefits.

VA moved to dismiss plaintiffs’ claims on the grounds that Congress committed decisions regarding the timing and type of medical care for veterans exclusively to the discretion of VA, and Congress broadly divested district courts of jurisdiction to review decisions by VA affecting benefits. In a preliminary ruling, the district court denied that motion. While recognizing that suits seeking “wholesale reform” of agency programs are prohibited under the APA and that Congress has imposed specific limitations on judicial review of VA decisions affecting benefits, the court concluded that at least some of plaintiffs’ claims were actionable at the pleading stage. Accordingly, the court held a four-day evidentiary hearing on plaintiffs’ motion for a preliminary injunction and then, combining the preliminary injunction with the merits, held an additional seven-day trial on the merits of plaintiffs’ requests for injunctive and declaratory relief.

Following the trial, the district court issued a final decision and judgment in favor of VA. The court first held that it lacked authority to compel wholesale reform of VA’s policies and programs for administering medical care or providing benefits to veterans. The court stressed that “Congress has specifically precluded district courts from reviewing veterans’ benefits decisions and has entrusted decisions

regarding veterans' medical care to the discretion of the VA Secretary.” ER 13.

After making over 100 detailed factual findings, the court held that Congress committed decisions regarding the timing and adequacy of medical care for veterans solely to the discretion of VA and that plaintiffs had not shown any systemic delays or failures by VA to take discrete and required action within the meaning of *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). ER 65-74. In addition, the court held that it had no jurisdiction to review claims of unreasonable delay in the adjudication of benefits claims, *see* 38 U.S.C. 511(a), and stressed that delays in the adjudication of *appeals* from the denial of benefits claims affected only a very small percentage of veterans and were neither “unreasonable” under the APA nor a violation of due process under the Constitution. ER 74-80.

STATEMENT OF FACTS

A. Regulatory Background.

Congress delegated broad authority to the Department of Veterans Affairs to provide appropriate medical care and allocate monetary benefits to the men and women who have served in this country's armed forces. The Veterans Health Administration (“VHA”) is responsible for determining what medical care is necessary for veterans, while the Veterans Benefits Administration (“VBA”) is responsible for administering programs providing monetary benefits to veterans and their families as the result of service-connected death or disability.

Congress closely monitors VA's performance of these critical duties, and holds hearings and passes legislation deemed necessary to ensure the fulfillment of these obligations. As explained more fully below, Congress has repeatedly declined to impose deadlines or other mandatory directives with respect to VA's administration of health care or monetary benefits, and it has sharply limited judicial review of VA's decision-making in these areas.

1. Health Care

Congress directed the Secretary of VA to “furnish hospital care and medical services which the Secretary determines to be needed to any veteran for a service-connected disability.” 38 U.S.C. 1710(a)(1). In fulfilling this directive, VA has established one of the largest health care systems in the world – which is divided into 21 geographical areas called Veteran's Integrated Service Networks (“VISNs”). ER 27 (F/F 6). Under this system, veterans seeking medical care may obtain treatment or counseling at one of 153 medical centers (hospitals) or at one of 800 community-based outpatient clinics (“CBOCs”) located throughout the United States. *Id.* Every veteran who enrolls in VHA is screened for mental health issues and specifically evaluated for Post Traumatic Stress Disorder (“PTSD”) and suicide risk in their initial primary care visit. ER 45 (F/F 56). In addition, veterans who present at any time for the evaluation of mental health or addiction disorders are screened for suicide risk. *Id.* (F/F 57). Veterans may appeal clinical medical decisions regarding

the need for immediate access to health care, ER 41-42 (F/F 52), and VA has established a “Patient Advocate” program designed to assist veterans with such appeals or any other issues they have with VHA. ER 42 (F/F 53).

Congress has not provided for judicial review of the type or quality of care “which the Secretary determines to be needed.” 38 U.S.C. 1710(a)(1). Instead, Congress closely monitors VHA’s provision of health care to veterans through oversight hearings and investigations. *See, e.g., U.S. Dep’t of Veterans Affairs Suicide Hotline: Hearing Before the H.R. Subcomm. on Health of the Comm. on Veterans’ Affairs*, 110th Cong., 2d Sess. (Sept. 16, 2008); *Implementing the Wounded Warrior Provisions of the National Defense Authorization Act for Fiscal Year 2008: Hearing Before the H.R. Comm. on Veterans’ Affairs*, 110th Cong., 2d Sess. (June 11, 2008); *The Truth About Veterans’ Suicides: Hearing Before the H.R. Comm. on Veterans Affairs*, 110th Cong., 2d Sess. (May 6, 2008).¹

2. Service-Connected Death and Disability Benefits

Congress also created a comprehensive scheme for providing monetary benefits to veterans. *See* 38 U.S.C. 1110 (disability compensation); 38 U.S.C. 1310 (dependency and indemnity compensation for service-connected death). Congress

¹ These hearings represent only a small sample of the ongoing congressional oversight of VA’s provision of medical care to veterans. Additional testimony by VA officials before Congress is collected at <http://www.va.gov/oca/testimony.asp>

closely monitors VA's performance of this function as well. H.R. Rep. No. 963, 100th Cong., 1st Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5807 (noting that "VA operates in the context of continuous Congressional oversight").

Veterans seeking compensation based on service-connected death or disability ("SCDDC") may file claims at any one of 57 VA regional offices ("ROs"). ER 45 (F/F 63). A veteran may seek benefits for more than one injury, and each separate injury is considered an "issue" in the claim. ER 45 (F/F 64). Such claims require three elements: (1) eligible service, (2) a currently diagnosed disability, and (3) a nexus between the disability and the service. ER 46 (F/F 68). A veteran pursuing a claim based on PTSD must also show a "stressor" event that occurred during service, 38 C.F.R. 3.304(f), which adds to the complexity and time required to adjudicate the claim. ER 46 (F/F 69).

The process for adjudicating rating claims is informal and non-adversarial. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). Pursuant to the Veterans Claims Assistance Act, 38 U.S.C. 5103, VA has a duty to assist a veteran in developing all evidence to support the issues in a claim. ER 47 (F/F 72). For example, VBA must seek all government records that may pertain to the claim, 38 U.S.C. 5103A, notify the veteran of additional evidence the agency will require to adjudicate that claim, ER 47 (F/F 73), and arrange for and provide a medical examination when necessary, ER 48 (F/F 77). At the RO level, veterans may obtain

pro bono legal representation from various Veterans Service Organizations. ER 50 (F/F 81). However, veterans may not compensate an attorney to represent them prior to the first RO decision. 38 U.S.C. 5904. *See also Walters*, 473 U.S. at 323-24 (upholding \$10 cap on attorney’s fees at the RO level because “Congress desired that the proceedings be as informal and nonadversarial as possible”).

Once all relevant evidence has been gathered, a Rating Veterans Service Representative (“rating specialist”) determines whether the disability is service-connected, and, if so, assigns the percent disability rating according to the rating schedule. ER 49-50 (F/F 80). When a claim is rated, the veteran receives the benefit of several burden-of-proof rules. Most notably, where there is a balance of positive and negative evidence on a material issue, the issue is resolved in favor of the veteran. 38 U.S. 5107(b). VBA’s manuals reiterate that, where the evidence is in equipoise, the benefit of the doubt is to be given to the veteran, and the philosophy instilled in rating specialists is “Grant if you can, Deny if you must.” ER 467.

A veteran dissatisfied with a rating decision may appeal that decision either within VBA or directly to the Board of Veterans’ Appeals (“Board”). In order to appeal, a veteran must file a Notice of Disagreement (“NOD”) – an informal document stating that he disagrees with some part of the rating decision – within one year from the date of the decision. ER 50 (F/F 82); 38 U.S.C. 7105(b)(1). Upon receiving a NOD, VA sends a letter to the veteran providing 60 days to elect one of

two non-exclusive paths on appeal: (1) a traditional appeal straight to the Board, or (2) *de novo* review by a Decision Review Officer (“DRO”). ER 51 (F/F 84).²

Once an appeal has been received, VBA certifies it to the Board. 38 C.F.R. 19.35. The Board decides an appeal only after a veteran has been given an opportunity for a hearing. 38 U.S.C. 7105(a). An adverse decision by the Board may be appealed to the United States Court of Appeals for Veterans Claims (“CAVC”), a judicial body wholly independent of VA, which has authority to review all legal issues, including constitutional claims, *id.* at 7261(a)(1), and has exclusive jurisdiction to review Board decisions, *id.* at 7252(a). Decisions by the CAVC may be appealed to the United States Court of Appeals for the Federal Circuit, *id.* at 7292(a), and then to the Supreme Court, *id.* at 7292(c). In reviewing CAVC decisions, the Federal Circuit has authority to “decide all relevant questions of law, including interpreting constitutional and statutory provisions.” *Id.* at 7292(d)(1).

In providing a path for judicial review of VA decisions affecting benefits through the CAVC and to the Federal Circuit, Congress divested all other courts of jurisdiction to review such decisions. 38 U.S.C. 511(a). Likewise, Congress

² A veteran may submit additional evidence at any time in this process, 38 C.F.R. 19.37; 20.800, and VA’s duty to assist applies to any new evidence submitted at this stage, 38 U.S.C. 5103A. A veteran may also be represented by a paid attorney at any time after filing a NOD. 38 U.S.C. 5904(c).

specified that challenges to VA regulations may only proceed in the Federal Circuit. 38 U.S.C. 502. The combined effect of Sections 502 and 511 is to channel judicial review of virtually all actions by VA related to benefits exclusively to the Federal Circuit. *See Bates v. Nicholson*, 398 F.3d 1355, 1364 (Fed. Cir. 2005) (Section 511); *Chinnock v. Turnage*, 995 F.2d 889, 893 (9th Cir. 1993) (Section 502).

B. Proceedings Below.

1. Plaintiffs' Allegations

Veterans for Common Sense and Veterans for Truth, two advocacy groups, filed a complaint challenging VA's provision of health care and its adjudication of SCDDC claims on a system-wide basis. ER 243-315. Among other things, plaintiffs alleged that "[t]he system for deciding VA claims has largely collapsed," and that "delays have become an insurmountable barrier preventing many veterans from obtaining health care and benefits." ER 245. Plaintiffs also alleged that the systems for providing health care and benefits to veterans are overloaded, that VA does not process claims for benefits or care in a fair or timely manner, and that there are structural defects in the system. ER 246 (asserting that "the archaic systems are structurally unsuitable for dealing with Post-Traumatic Stress Disorder").

Plaintiffs sought broad declaratory and injunctive relief against VA based upon alleged deficiencies in both the underlying statutes and the policies and procedures VA uses to provide health care and adjudicate benefits claims. ER 306 (claiming

relief based on “Statutory Defects” and “Challenged VA Practices”). Specifically, plaintiffs asserted four claims: (1) denial of due process in violation of the Fifth Amendment; (2) denial of meaningful access to the courts in violation of the First and Fifth Amendments; (3) violations of the duty to provide medical care set forth in 38 U.S.C. 1710(e)(1)(D), and (4) violations of Section 504 of the Rehabilitation Act. ER 306-07. In a fifth claim plaintiffs sought injunctive relief based upon allegedly systemic failures by VA in providing timely medical treatment and adjudicating SCDDC claims. ER 308-09.

2. The District Court’s Initial Decision

On January 10, 2008, the district court largely denied VA’s motion to dismiss plaintiffs’ claims. ER 201-42. The court acknowledged limitations on judicial review under the APA, including the requirement of “final agency action,” ER 211-14, the requirement that there be no other “adequate remedy in a court,” ER 214-220, and prohibitions on suits seeking “wholesale improvement” of agency programs, ER 211-12. The court also recognized that specific statutory provisions divest all courts but the Federal Circuit of jurisdiction to review VA regulations and decisions by VA affecting veterans’ benefits. ER 220-30. Nevertheless, the court concluded that it had limited authority to adjudicate the claims in this case “[s]o long as Plaintiffs limit their challenges to Acts of Congress and certain actions and failures to act by the VA * * * and refrain from challenging any VA regulations.” ER 230. In so doing,

however, the court cautioned that “Plaintiffs must nonetheless be mindful of this legal Scylla and Charybdis that Congress has seen fit to impose.” ER 214.³

After denying VA’s motion to dismiss, the district court held a four-day evidentiary hearing on plaintiffs’ motion for a preliminary injunction. The court consolidated the preliminary injunction proceedings with the merits, ordered expedited discovery (with the consent of both parties), and then held a seven-day trial on the merits of plaintiffs’ claims relating to VA’s allegedly systemic delays in the provision of health care and monetary benefits.

C. The District Court’s Final Decision.

On June 25, 2008, the district court issued a final decision and judgment in favor of VA. ER 11-94. Explaining that “[t]he remedies to the problems, deficiencies, delays and inadequacies complained of are not within the jurisdiction of this Court,” ER 12-13, the court held that it lacked authority to compel wholesale reform of VA’s policies and programs for administering medical care or providing monetary benefits to veterans. As the court summarized, “Congress has specifically precluded district courts from reviewing veterans’ benefits decisions and has

³ As a threshold matter, the court also held that the two organizational plaintiffs had standing to sue based upon alleged harms to their members from VA’s actions, ER 204-07, notwithstanding the court’s recognition that individual members of these organizations would plainly be barred from bringing actions in district court challenging specific denials of benefits. ER 224-25.

entrusted decisions regarding veterans' medical care to the discretion of the VA Secretary." ER 13. The court also concluded that there were no "systemic violations system-wide that would compel district court intervention." *Id.* To support these conclusions, the district court made over 100 factual findings, ER 25-60, and also issued comprehensive conclusions of law, ER 60-92.

1. Findings of Fact

a. With regard to the provision of health care, the court found that VA has devoted considerable resources to improving the timely diagnosis and treatment of mental health conditions. For example, the court found that VHA has steadily increased spending on mental health care in the last few years, ER 31 (noting increase from \$2.4 billion in 2006 to projections of \$3.5 billion in 2008), and has hired more than 3,800 new mental health staff, leaving only 500-600 mental health staff positions unfilled, out of a total of 16,500. *Id.* (F/F 22). The court also found that, in July 2004, VHA developed and began implementing the Mental Health Strategic Plan ("MHSP") – consisting of over 265 recommendations designed to serve as a road map for improved mental health care treatment – and specifically noted plaintiffs' concession "that the MHSP is a good plan." ER 21 (F/F 27).

While recognizing that various government reports have criticized VHA for failing to implement certain initiatives outlined in the MHSP quickly enough, *see* ER

33-34 (F/F 31) (citing May 10, 2007 OIG Report),⁴ the court found that VHA has implemented critical elements of the MHSP. Among other things, the court found that every VHA medical center now has a Suicide Prevention Coordinator, ER 40 (F/F 48), and that VHA established a national Suicide Prevention Hotline in 2007, which received 26,000 calls between July 2007 and January 2008. ER 41 (F/F 51).

The district court also made findings regarding the procedures available to veterans for obtaining mental health treatment. The court found that “a veteran may appeal a clinical determination by a nurse or a doctor but a veteran may not appeal the decision of an appointment scheduler.” ER 41-42 (F/F 52). As a practical matter, the court explained, this means that any veteran who believes that he or she has an immediate need for treatment, and “is told by a nurse or doctor that it is ok for him to wait” for an appointment, may appeal that decision. ER 42 (F/F 52).

Finally, the court made findings regarding VHA’s suicide prevention screening programs. The court found that every veteran who enrolls in VHA is screened for mental health issues and specifically evaluated for PTSD and suicide risk in their initial primary care visit. ER 45 (F/F 56). The court also found that “all veterans who present at any time for the evaluation of mental health and/or addiction disorders are

⁴ The court also cited a 2005 report by the GAO which criticized VHA’s overall progress in implementing earlier recommendations designed to improve treatment for PTSD. ER 28 (F/F). However, the court noted that even the GAO report recognized VHA as “a world leader in PTSD treatment.” *Id.*

screened for suicide risk.” *Id.* (F/F 57). The court noted, however, that the parties’ expert witnesses, Dr. Maris and Dr. Berman, vehemently disagreed on the adequacy of such screening. ER 44 (F/F 58, 59).

b. The district court also made extensive findings with regard to VA’s practices and procedures for adjudicating SCDDC claims. Noting that VA has an affirmative duty to assist veterans in developing the evidence needed to support their claims, ER 47 (F/F 72), the court found that VBA must seek all government records that may pertain to the claim, ER 47 (F/F 74) (citing 38 U.S.C. 5103A), notify the veteran of any additional evidence the agency will require to adjudicate that claim, *id.* (F/F 73), and make reasonable efforts to acquire non-federal records to support the claim, ER 48 (F/F 75). However, the court recognized that the evidence-gathering rules have the potential to delay the adjudication of claims. For example, the court found that the “duty to notify letter provides veterans with a 60-day deadline to respond with any releases and with any evidence in the veteran’s possession,” that additional time is required for VBA to request private records from record custodians, and that record custodians have 60 days to respond to such requests, followed by another 30 days if they initially fail to reply. ER 48 (F/F 76).

The court found that, on average, it takes about 182 days from the date a SCDDC claim is filed for an RO to issue an initial decision, but that “PTSD claims take longer to adjudicate than average SCDDC claims.” ER 52 (F/F 88). The court

also found that approximately 88% of all ratings claims are at least partially granted. ER 49-50 (F/F 80). Of the 830,000 claims filed each year, the court found that only 11% of all ratings decisions are appealed, and that only 4% of the total claims filed proceed to a decision by the Board. ER 52 (F/F 89),

With regard to the limited subset of SCDDC claims that are appealed, the district court found that delays were more substantial. Among other things, the court found that it takes 573 days on average for an RO to certify an appeal to the Board, ER 53 (F/F 90), and that it takes an average of 1,419 days to receive a Board decision after filing an appeal, ER 54 (F/F 95). The court also found that the Board affirms RO decisions only 40% of the time. ER 56 (F/F 56).

The court found that VBA is taking concrete steps to reduce delays in the adjudication of SCDDC claims. For example, the court found that, in 2007, Congress authorized VBA to hire an additional 3,100 employees, that “2,700 of these new employees will be hired into the Compensation and Pension line of business,” and that 2,100 of these employees had already been hired, resulting in an increase of over 25% in the VBA’s total staff. ER 58 (F/F 108). The court also found that VBA had implemented a pilot program under which veterans could voluntarily agree to shorten certain time limits and VBA would then have to certify appeals to the Board within a specific time frame. *Id.* (F/F 109). Finally, the court found that VBA was pursuing two other efforts to reduce delays in the appellate process: (1) the creation of

“Appeals Resource Centers dedicated solely to appellate work,” and (2) “emphasizing appellate performance measures in evaluations.” ER 58-59 (F/F 110).

2. Conclusions of Law.

After reviewing its factual findings and examining the specific relief requested in this case, the district court held that “[t]he remedies sought by Plaintiffs are beyond the power of this Court and would call for a complete overhaul of the VA system, something clearly outside of this Court’s jurisdiction.” ER 93.

a. The court first found that 38 U.S.C. 1710(e)(1)(D) “created an entitlement to health care for veterans for five years after separation from active duty.” ER 66. However, the court held that it lacked authority “to determine when and how such care shall be provided,” because in order to make such a determination “the Court would have to substitute its own definitions of both ‘timely’ and ‘effective,’ something prohibited by both the APA and by §§ 1705 and 1710 themselves.” *Id.*⁵

To support this conclusion, the court relied heavily on *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (“*SUWA*”), for the proposition that federal courts may “order agencies to act only where the agency failed to ‘take a *discrete* agency action that it is *required to take.*’” ER 67 (quoting *SUWA*, 542 U.S. at 64)

⁵ Prior to reaching this issue, the court also held that plaintiffs had standing to bring suit on behalf of their members, ER 61, and that their suit could proceed under the APA because the “VA benefits system is not an adequate alternate forum for Plaintiffs’ systemic and facial constitutional challenges.” ER 65.

(emphases in the original). This exacting standard was not satisfied, the court explained, because “what constitutes ‘timely’ and ‘effective health care is an issue that lacks consensus even among those who are experts in the mental health field.” *Id.* The court noted that such disagreements alone “would make it exceedingly difficult to fashion a plan and order the VA to implement a prescribed course of mental health care.” *Id.* However, the court explained that it could not even reach this issue because “[a]ny order by this Court relating to the sufficiency and timeliness of mental health care would effectively draw this Court into the position of overseeing various aspects of the VA, something the Supreme Court has expressly prohibited.” ER 68 (citing *SUWA*, 542 U.S. at 67).

Moreover, the court stressed that 38 U.S.C. 1710 “commits decisions about the provision of medical care to the Secretary’s discretion.” ER 68. Because the court “would have no manner in which to determine what type of mental health care is required,” *id.*, it held that “the design and implementation of a health care enrollment system is delegated to the Secretary of the VA, leaving courts with no meaningful standards against which to judge the agency’s exercise of its discretion.” ER 69.

The court also held that plaintiffs had not demonstrated “unreasonable delay” in the provision of mental health care that violated either constitutional due process standards or APA standards under *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (“*TRAC*”). ER 69-72. While acknowledging that “the

evidence clearly did not prove that every veteran always gets immediate mental health care,” the court explained that “it by no means follows that there is a system-wide crisis in which health care is not being provided with a reasonable time.” ER 69-70.

Finally, the court rejected plaintiffs’ request “to order the VA, within 150 days, to fully implement the MHSP.” ER 72. Reiterating its earlier statements that courts may only compel *discrete* action that an agency is *required* to take, the court expressed skepticism that a plan with 265 recommendations could ever be deemed “discrete” and held that the recommendations in the MHSP were not actions VA was required to take. ER 73. Moreover, “because the MHSP was developed as a five year plan and is currently only in the fourth year of implementation,” the court concluded that it would be “anomalous” to hold that this plan was final agency action or “that the VA has failed or delayed to implement the MHSP, when the action is ongoing and is not even expected to conclude until late next year.” ER 73. The court further held that the request for an order directing “VA to fully implement the Feeley Memo within 150 days is equally problematic,” because the “initiatives” outlined in that memo were not actions that VA was required to take. ER 73-74.

b. The court also held that it lacked authority to order VA to shorten average wait times in its adjudication of SCDDC claims. First, the court explained, 38 U.S.C. 511 bars the sort of case-specific inquiry into decisions “affecting benefits” that would be necessary to determine whether delay is unreasonable in any given case,

and thus to determine whether average delays in VA's adjudication of claims overall are unreasonable. ER 75. Second, the court noted, any order directing VA to shorten wait times would force VA to alter or repeal some of its regulations (which do not impose time limits), and thus would be foreclosed by 38 U.S.C. 502, which permits challenges to VA regulations only in the Federal Circuit. ER 75-76.

In addition, the court concluded that, “[a]lthough the delays faced by veterans, especially during the appeals process, are significant, the *TRAC* factors militate against a finding of unreasonableness.” ER 76. Most notably, the court found that Congress’ decision not to “include any fixed time limits for the adjudication of veterans benefits claims” strongly suggests that courts should not impose deadlines where Congress has deliberately chosen not to do so. ER 77 (citing *Heckler v. Day*, 467 U.S. 104, 117-18 (1984)). And, while acknowledging that some of the other *TRAC* factors favored relief, ER 78, the court concluded that these factors did not outweigh the critical consideration of whether expediting delayed action would divert resources from competing priorities within the agency. *Id.* On that point, the court found that “[t]he relief Plaintiffs seek would, in effect, divert resources from the RO level, where 88% of veterans finalize their receipt of benefits, so that the 4% to 11% of veterans who pursue appeals would face lessened delays.” ER 79.

Having concluded that “the *TRAC* factors do not favor a finding that the delays in VA claims adjudication process are unreasonable,” the court next examined

whether those delays “are so lengthy as to constitute an unconstitutional deprivation of property under the Due Process Clause.” ER 79. Noting that due process is a flexible requirement under which delay is merely one factor, the court held that, “in light of many of the factors creating these delays,” it could not “conclude that the due process rights of veterans are being violated.” ER 80. In so doing, the court stressed that courts rarely, if ever, intervene in adjudication processes committed by Congress to federal agencies in order to expedite those proceedings. ER 80 (citing *Wright v. Califano*, 587 F.2d 345 (7th Cir. 1978)).

Finally, the court rejected plaintiffs’ contention that the VA benefits process violates due process because it does not provide sufficient procedural protections. ER 81-86. Relying heavily upon *Walters*, the court found that the absence of discovery, paid counsel, and “trial-like” hearings at the RO level did not violate due process. ER 83-86. Moreover, given the inherent tension between requests for greater procedural protections and requests for more expedited resolution of claims, the court concluded that such a diversion of resources might not be justified in light of the relatively low number of veterans who file appeals (11%) and the even lower number who pursue appeals to a decision by the Board (4%). ER 84.⁶

⁶ The court also rejected plaintiffs’ due process challenge to the Extraordinary Awards Procedure, a system under which VBA essentially audits very large SCDDC claims that would result in retroactive payments of more than eight years or more than \$250,000. ER 87-90.

SUMMARY OF ARGUMENT

The Department of Veterans Affairs is fully committed to the task of providing our nation's veterans with first-rate health care and adjudicating SCDDC claims in a timely and accurate fashion. While ongoing wars in both Afghanistan and Iraq have contributed to an increase in the incidence of PTSD and an elevated rate of suicide among veterans, VA has worked closely with Congress to obtain the necessary funding and make the necessary changes to meet these challenges. Congress monitors these issues closely, and long ago enacted significant limitations on the jurisdiction of the federal courts to second-guess VA's performance of these critical functions. In light of these limits, the district court properly recognized that it lacked the authority to compel programmatic changes in the timing and manner by which VA provides medical care and other benefits to veterans. And, despite plaintiffs' strongly-held belief that VA's programs for providing health care and benefits are dysfunctional, the court correctly concluded that the evidence at trial did not support a finding of unreasonable delay or any other violation of veterans' due process rights.

1. Recognizing significant limitations on judicial review of agency action "unreasonably delayed" under the APA, the district court held that it could not order wholesale reform of VA's provision of mental health care to veterans. The court found that Congress committed decisions with respect to health care exclusively to the discretion of VA, *see* 38 U.S.C. 1710(a)(1), and held that it thus had no concrete

standard by which to judge the adequacy and timing of mental health treatment provided to veterans. Moreover, the court concluded that VA had not failed to take any discrete action that the agency was required to take.

Plaintiffs do not dispute that courts lack authority to compel programmatic changes to agency programs. Nor do they identify any meaningful standards to review the adequacy or timing of health care provided by VA. Instead, plaintiffs argue primarily that the district court should have ordered VA to implement all remaining recommendations in the MHSP on an expedited basis. As the court explained, however, judicial intervention to compel expedited implementation of the MHSP was not warranted because that plan was not discrete action that the agency was required to take. To the contrary, the MHSP was a road map for action created by VA itself and was in the fourth year of a five-year implementation period at the time of trial. Moreover, given pervasive Congressional oversight of issues relating to mental health care for veterans, and the absence of statutes subjecting VA's provision of health care to judicial review, the district court correctly held that it could not intervene to compel "better" or "more timely" mental health care.

In the alternative, the court also concluded that plaintiffs failed to show "unreasonable delay" by VA within the meaning of the APA or the Due Process Clause. While plaintiffs contend that the evidence compelled the entry of injunctive relief, the court found that plaintiffs had not demonstrated systemic delays in the

provision of health care given evidence “that veterans who present at a VA medical facility with emergency medical issues are seen immediately.” ER 71. Likewise, given the undisputed procedures available to veterans to challenge decisions denying emergency medical treatment, the court correctly concluded that the absence of other mechanisms to challenge delays in treatment did not violate due process.

2. The district court also properly held that it lacked jurisdiction to review plaintiffs’ claims of unreasonable delay in the adjudication of SCDDC claims because 38 U.S.C. 511(a) precludes review of individual benefits decisions and, *a fortiori*, precludes review of “systemic” claims challenging the manner and pace by which VA process *all* benefits claims. The court further held that 38 U.S.C. 502 precludes review of challenges to VA regulations – which would be implicated by any order requiring VA to shorten average wait times for benefits claims.

Plaintiffs contend that the resolution of their claims of systemic delays in the adjudication of benefits would not require review of individual benefits decisions by VA. But it is well-established that the question whether delay is “reasonable” depends upon a case-specific inquiry of the sort that Section 511 precludes. Likewise, although plaintiffs argue that they are not directly challenging any VA regulations within the meaning of Section 502, the imposition of time limits by a district court would plainly alter a host of regulations allowing VA to perform various

actions without specific deadlines. Accordingly, the district court properly concluded that it lacked jurisdiction to adjudicate plaintiffs' claims of systemic delay.

Independent from its jurisdictional ruling – which is sufficient, by itself, to affirm the judgment below with respect to benefits – the court correctly recognized that the imposition of time limits where Congress has deliberately (and repeatedly) chosen not to impose deadlines would be improper. The court thus rejected plaintiffs' arguments that VA's processing of SCDDC claims was unreasonably delayed under *TRAC* or violated due process. Although plaintiffs disagree with the court's balancing of various factors under *TRAC* and under the due process framework, they do not identify any errors in the court's analysis.

3. Finally, the district court did not abuse its discretion by refusing to order VA to produce additional "suicide incident briefs" beyond those already produced, or to produce average PTSD claims-processing times. Even assuming the court erred in concluding that the burdens of production (including delays in the scheduled trial) outweighed the very low probative value of such evidence, plaintiffs suffered no prejudice from these rulings because their expert was allowed to offer conclusions based on the limited subset of "suicide incident briefs" produced, and the district court itself found that PTSD claims typically take longer to adjudicate because they are more complex than other SCDDC claims. ER 46.

STANDARD OF REVIEW

“The grant or denial of injunctive relief rests with the sound discretion of the trial court and requires a clear abuse of discretion for a modification or reversal.”

Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1021 (9th Cir. 1985).

Although conclusions of law underlying a district court’s denial of injunctive relief are reviewed *de novo*, its findings of fact are reviewed for clear error. *Preminger v.*

Peake, 536 F.3d 1000, 1007 n.7 (9th Cir. 2008). The court’s discovery rulings and its

trial management decisions are reviewed solely for abuse of discretion. *Childress v.*

Darby Lumber, Inc., 357 F.3d 1000, 1009 (9th Cir. 2004).

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT IT LACKED AUTHORITY TO COMPEL WHOLESALE REFORM OF VA’S PROGRAMS FOR PROVIDING HEALTH CARE TO VETERANS.

A. Limitations On Judicial Review Under the APA.

The APA permits judicial review of actions by federal agencies subject to several significant limitations. The APA waives the Government’s sovereign immunity and authorizes suit by “[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute.” 5 U.S.C. 702. However, the action being challenged must generally be “final,” and the court may order relief only where “there

is no other adequate remedy in court.” 5 U.S.C. 704. *See, e.g., Rattlesnake Coalition v. EPA*, 509 F.3d 1095, 1103 (9th Cir. 2007).

The APA also provides relief for an agency’s persistent failure to act in the face of a legal duty to do so, by permitting courts to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. 706(1). However, the Supreme Court has consistently held that this authority is confined to cases “where a plaintiff asserts that an agency failed to take a *discrete* action that it is *required* to take.” *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in the original). As the Court explained, the rationale for this limitation is grounded in separation-of-powers concerns because:

If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

SUWA, 542 U.S. at 67. *See also Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990) (holding that plaintiffs “cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made”).

Even before the Supreme Court’s decision in *SUWA*, this Court recognized the danger in construing Section 706(1) too broadly to permit APA suits challenging the

administration of agency programs divorced from discrete agency action. Thus, in *Ecology Center, Inc. v. Forest Service*, 192 F.3d 922 (9th Cir. 1999), this Court stressed that it has consistently “refused to allow plaintiffs to evade the finality requirement with complaints about the sufficiency of an agency action ‘dressed up as an agency’s failure to act.’” *Id.* at 926 (citation omitted). As this Court explained, “[c]ourts have permitted jurisdiction under the limited exception to the finality doctrine only when there has been a genuine failure to act.” *Id.*

Finally, no judicial review is available under the APA where the “agency action is committed to agency discretion by law.” 5 U.S.C. 701(a). *See also California v. United States*, 104 F.3d 1086, 1093-94 (9th Cir. 1997). Applying this exception, courts have long recognized a presumption against judicial review of decisions by agencies not to undertake investigations or enforcement actions, *Heckler v. Chaney*, 470 U.S. 821, 838 (1985), or decisions requiring a “complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise.” *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993). Similar considerations regarding the relative institutional competence of Congress and the courts have led the Supreme Court to hold that courts may not impose deadlines for an agency’s performance of certain functions where Congress was aware of delays but itself declined to impose such deadlines. *Heckler v. Day*, 467 U.S. 104 (1984).

B. The District Court Correctly Held That Decisions Regarding Health Care Are Committed To VA's Discretion And That VA Had Not Failed To Take Any Discrete Action That It Was Required To Take.

The district court recognized that VHA has made substantial progress in improving its delivery of mental health care to veterans. For example, the court found that VHA has steadily increased spending on mental health care in the last few years, ER 31, and that VHA has implemented many of the elements of the MHSP, including improvements such as the placement of a Suicide Prevention Coordinator at every VHA medical center, ER 40, and the creation of a national Suicide Prevention Hotline, ER 41. Plaintiffs do not challenge any of these findings as clearly erroneous. To the contrary, plaintiffs concede that VHA has implemented approximately “80% of the 265 initiatives in the MHSP.” Pl. Br. 25. Nevertheless, focusing on “the remaining 20%” of the recommendations in the MHSP, *id.*, plaintiffs contend that VHA has not acted quickly enough to improve the timing and quality of mental health care provided to veterans.

The district court properly held that decisions regarding the appropriate type and timing of health care are committed solely to the discretion of VA, and that no meaningful standards are available for courts to second-guess VA's provision of care in specific cases or, *a fortiori*, on a system-wide basis. ER 68-69. The court also correctly concluded that VA has not “unreasonably delayed” or failed to take any

discrete actions with respect to health care that the agency was required to take. ER 67. As the court summarized, “[a]ny order by this Court relating to the sufficiency and timeliness of mental health care would effectively draw this Court into the position of overseeing various aspects of the VA, something the Supreme Court has expressly prohibited.” ER 68 (citing *SUWA*, 542 U.S. at 67). Nothing in plaintiffs’ voluminous brief on appeal calls this key legal conclusion into question.

1. Plaintiffs do not seriously dispute that Congress committed decisions as to when or how much health care is appropriate exclusively to VA, or that courts generally lack authority to compel “wholesale improvement” of agency programs. Instead, plaintiffs seek to evade these fundamental limitations on judicial review of agency action by arguing that they “did not propose their own mental health plan, but rather sought to compel VA to implement its own plan.” Pl. Br. 25. But plaintiffs’ suit seeking programmatic reforms in the way VA provides health care to veterans, *see* ER 97-98 (proposed injunctive relief); ER 308-10 (relief sought in complaint), cannot meaningfully be distinguished from the suit seeking to compel the Bureau of Land Management to adhere to its land management plan that the Supreme Court decisively rejected in *SUWA*. 542 U.S. at 64-67.

Recognizing that *SUWA* poses a virtually insurmountable obstacle to any suit seeking reform of VA’s mental health care treatment programs, plaintiffs attempt to distinguish that decision on the ground that VA has committed itself to the

implementation of the MHSP far more than the BLM committed itself to the implementation of the interim land use program at issue in *SUWA*. Pl. Br. 26. But an agency's commitment to a general plan – particularly a plan consisting of 265 recommendations to be phased in over a five-year period – does not convert that plan from a broad road map for change to a set of mandatory requirements enforceable on the timetable and in the manner a court (and plaintiffs) believe is appropriate. To the contrary, as this Court recognized in refusing to permit a suit challenging the Forest Service's management of a national forest “dressed up as an agency's failure to act,” holding an agency liable for the failure to comply with its own plans “would discourage the Forest Service from producing ambitious forest plans.” *Ecology Ctr.*, 192 F.3d at 926. So, too, holding VA liable for the failure to comply with each and every recommendation contained in the MHSP would discourage the formulation of comprehensive and ambitious plans.

Moreover, judicial intervention to compel expedited implementation of the MHSP would be especially inappropriate where it is undisputed that the agency has made substantial progress – implementing roughly 80% of the recommendations in that plan – and “the action is ongoing and is not even expected to conclude until late next year.” ER 62. Such intervention is also unwarranted given the extensive attention VA's provision of mental health care has received in Congress.

Plaintiffs nowhere acknowledge that the MHSP was in the fourth year of a five year implementation plan at the time of the trial below. Nor do they offer any meaningful standards by which a court could assess the pace or adequacy of VA's ongoing efforts to implement the MHSP. Instead, they simply assert that the district court should have compelled VA to implement that plan more quickly because a contrary result "would eviscerate judicial review of agency inaction." Pl. Br. 31. As noted, however, judicial review of agency inaction is limited to circumstances where the agency has failed to take discrete action that is required, and implementation of each and every recommendation in the MHSP was plainly *not* required. Thus, the district court properly held that it lacked authority not only to order broad changes of its own creation to VA's programs for providing health care to veterans – a proposition plaintiffs apparently do not dispute – but to order VA to implement recommendations in the MHSP on the plaintiffs' preferred timetable.

2. Notwithstanding clear limits on judicial authority to compel agency action "unreasonably delayed" under 5 U.S.C. 706(1), plaintiffs contend that an injunction was mandatory in this case because "the district court held the *TRAC* factors favor such relief." Pl. Br. 32. This argument is both factually and legally wrong.

As a factual matter, the district court nowhere found that the *TRAC* factors favor relief. To the contrary, after stating that there must be a showing of "system-wide delays" in the provision of mental health care in order to even reach the *TRAC*

factors, the court found that the “evidence presented at trial falls far short of this.” ER 69. Thus, the court did not perform a *TRAC* analysis of delays relating to mental health care, and plaintiffs’ contention that the court found relief warranted under *TRAC*, *see* Pl. Br. 32, 34, is simply wrong.

Plaintiffs contend that the court’s findings compel the conclusion that relief was warranted under *TRAC*. But plaintiffs’ recitation of evidence showing that there are many veterans on waiting lists for mental health services, *see* Pl. Br. 34, does not demonstrate that there are system-wide delays warranting relief under *TRAC*. Particularly in light of evidence showing “that veterans who present at a VA medical facility with emergency mental health issues are seen immediately,” ER 71, the district court properly concluded that there was no “system-wide crisis in which health care is not being provided.” ER 69.⁷

Moreover, even if the court had found relief was warranted under *TRAC* – which it did not – an injunction would not have been mandatory, as plaintiffs contend. Pl. Br. 33-34. On the contrary, the same decision plaintiffs cite for a

⁷ Plaintiffs also criticize the court for “adopting an undefined ‘systemic’ threshold” in assessing delays. Pl. Br. 39, 67-69. But such a standard was necessary given the general nature of plaintiffs’ claims – which asserted “systemic” delays in the provision of health care because challenges to the medical care or other benefits provided in *specific* cases would be barred. *See* 38 U.S.C. 511(a). In short, plaintiffs cannot now criticize the district court for using a “systemic” standard to assess delay when the generality of their own claims compelled this approach.

recitation of the *TRAC* factors, *Independence Mining Co. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997), *see* Pl. Br. 33, makes clear that relief for agency action unreasonably delayed under *TRAC* remains discretionary at all times, “even if all elements are satisfied.” *Id.* at 505. Because the district court here made no findings that relief was warranted under *TRAC* – instead finding that the evidence of systemic delays was inadequate, ER 69 – the court acted well within its discretion in denying injunctive relief. *See Independence Mining*, 105 F.3d at 512 (affirming court’s refusal to compel BLM to expedite processing of mineral patent applications).

3. Apart from their arguments that VA unreasonably delayed in providing mental health care to veterans, plaintiffs also contend that the lack of procedural mechanisms to challenge delays in the provision of such care violates due process. Pl. Br. 35. The district court properly rejected this argument as well.

Plaintiffs’ contention that VA’s procedures for providing health care to veterans violate due process is based exclusively upon the district court’s finding that a veteran can appeal a clinical determination by a nurse or a doctor finding that immediate treatment is unnecessary, but he *cannot* appeal a non-clinical, scheduling decision made by an administrator. ER 41-42 (F/F 52). But this finding does not support plaintiffs’ argument that there are no procedures available for a veteran “to seek an earlier appointment based on emergency circumstances.” Pl. Br. 36. On the contrary, the court’s findings make clear that a veteran who believes he or she needs

“emergency” medical treatment can always appeal a decision that such treatment is unnecessary because such a decision is, by definition, clinical. *See also* ER 1148-49 (explaining that a veteran who expressed suicidal intentions “would be evaluated by a nurse and then would be seen in the emergency department by a physician”).⁸

The district court understood the distinction between procedures to appeal clinical determinations and procedures to appeal non-clinical decisions, and held that this distinction does not violate due process. ER 70-71. Citing the familiar due process balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court recognized that the “interest of veterans in receiving health care is high,” but stated that “the risk of erroneous deprivation * * * is less so.” ER 70-71. Specifically, the court noted testimony that “veterans who present at a VA medical facility with emergency health issues are seen immediately,” and stressed that “a veteran who is told to come back at a later time because his or health is such that immediate treatment is not required may appeal this clinical decision.” ER 71.

The court also rejected plaintiffs’ argument that the clinical appeals process does not satisfy due process because it does not provide for a hearing before a neutral decision-maker and because it is “unduly complicated and lengthy.” *Id.* Citing the

⁸ Plaintiffs have not argued that VA’s procedures for challenging *clinical* determinations that immediate treatment is unnecessary violate due process, and they have thus waived any such argument on appeal.

Supreme Court’s recognition that the government has a significant interest in focusing on the treatment of patients rather than on “time-consuming procedural minutiae,” *Parham v. J.R.*, 442 U.S. 584, 605 (1979), the court concluded that VA’s procedures strike “an appropriate balance between safeguarding the veteran’s interest in medical treatment and permitting medical treatment without overly burdensome procedural protections.” ER 72.

Plaintiffs criticize the district court for performing what they characterize as a “cursory *Mathews* balancing test,” Pl. Br. 36-37, but they do not identify any legal error in the court’s analysis. Instead, they simply suggest that the court failed to give sufficient weight to veterans’ interests in receiving health care, *see* Pl. Br. 38, and contend that the “burdens associated with providing veterans additional safeguards would be minimal,” because “VA already has in place a procedure that allows veterans to challenge clinical determinations,” *id.* at 40. As noted, however, the existence of a process to challenge clinical determinations – which is unchallenged – was a cornerstone for the district court’s decision because that process plainly allows veterans in need of emergency medical treatment to challenge a denial of immediate treatment. In light of this safeguard, the district court properly recognized that due process did not require the imposition of additional procedural protections, particularly where the supposed benefits of more formalized procedures “may well be more illusory than real.” *Parham*, 442 U.S. at 609.

II. THE DISTRICT COURT CORRECTLY HELD THAT IT LACKED JURISDICTION TO COMPEL WHOLESALE REFORM OF VA’S POLICIES AND PROGRAMS FOR ADJUDICATING BENEFITS CLAIMS BY VETERANS.

A. Limitations On Review Of Decisions Affecting Veterans’ Benefits

Aside from general limitations on judicial review of agency action under the APA, Congress has also imposed specific limitations on judicial review of VA rules and decisions affecting the provision of veterans’ benefits. Most notably, Congress broadly divested all federal courts but the United States Court of Appeals for Veterans Claims (“CAVC”) and the United States Court of Appeals for the Federal Circuit of jurisdiction to review any “questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans.” 38 U.S.C. 511(a). Congress also divested courts of jurisdiction to review challenges to VA rules and regulations. 38 U.S.C. 502.

Congress enacted Section 502 and Section 511 as part of the Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (“VJRA”). The VJRA was the product of Congressional dissatisfaction with judicial decisions, culminating in *Traynor v. Turnage*, 485 U.S. 535 (1988), that found ways to circumvent limitations on judicial review contained in an earlier statute, 38 U.S.C. 211 (1988). As the legislative history of the VJRA makes clear, Congress was concerned that “the Court’s opinion in *Traynor* would inevitably lead to increased involvement of the

judiciary in technical VA decision-making.” H.R. Rep. No. 963, 100th Cong., 1st Sess., at 21 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5803. Consequently, Congress tightened Section 211's preclusion of review, stressing that “[t]he effect of this change is to broaden the scope of section 211.” *Id.* at 27.⁹

The combination of Section 511 and Section 502 channels judicial review of virtually all actions by VA related to the provision of veterans’ benefits exclusively to the CAVC and the Federal Circuit. As numerous courts have recognized, Section 511 broadly divests courts of jurisdiction over claims relating to VA’s provision of benefits, even if the claims attack agency procedures rather than specific VA benefits determinations and even if the claims raise constitutional issues. *See Bates v. Nicholson*, 398 F.3d 1355, 1364 (Fed. Cir. 2005); *Price v. United States*, 228 F.3d 420, 422 (D.C. Cir. 2001); *Beamon v. Brown*, 125 F.3d 965, 972 (6th Cir. 1997); *Hall v. U.S. Dep’t of Veterans Affairs*, 85 F.3d 532, 535 (11th Cir. 1996); *Hicks v. Veterans Admin.*, 961 F.2d 1367, 1368 (8th Cir. 1992). Likewise, this Court has repeatedly held that Section 502 divests courts of jurisdiction to entertain facial

⁹ In *Traynor*, the Supreme Court held that 38 U.S.C. 211 did not preclude a district court from entertaining a challenge to VA regulations; however, the Court affirmed that Section 211 prohibited review of specific VA decisions made in administering a statute providing benefits for veterans. *Id.* at 543-44. In so doing, the Court in *Traynor* extended an earlier decision holding that Section 211 did not divest district courts of jurisdiction to hear challenges to the constitutionality of *statutes* relating to veterans’ benefits. *See Johnson v. Robison*, 415 U.S. 361 (1974).

challenges to VA regulations, while allowing “as-applied” challenges. *Preminger v. Principi*, 422 F.3d 815, 821 (9th Cir. 2005); *Chinnock*, 995 F.2d at 893.

B. The District Court Correctly Held That It Lacked Jurisdiction Over Plaintiffs’ Claims Of Delay In The Adjudication Of Veterans’ Benefits Claims And That Relief Was Not Warranted Under *TRAC* In Any Event.

The district court recognized that VA has made substantial progress in reducing delays in the adjudication of SCDDC claims. Among other things, the court found that VBA has hired over 3,000 new employees to help process claims, ER 58 (F/F 108), and that it has implemented a pilot program under which shortened appellate time limits apply to both veterans and the agency, *id.* (F/F 109). Plaintiffs do not challenge any of these findings. Instead, they argue that the court made four legal errors by: (1) holding that Section 511 and Section 502 of the VJRA divested the court of jurisdiction over their claims of systemic delays in the adjudication of benefits claims, Pl. Br. 40-49, (2) holding that relief was not warranted under *TRAC* based upon such delays, *id.* at 49-55, (3) failing to conduct a proper due process analysis of delays, *id.* at 56-62, and (4) rejecting certain challenges to the adequacy of procedures at the RO level, *id.* at 62-66. None of these arguments has any merit.

The district court properly held that it lacked jurisdiction to review plaintiffs’ claims of unreasonable delay in the adjudication of SCDDC claims because 38 U.S.C. 511(a) precludes review of individual benefits decisions and, *a fortiori*, precludes

review of systemic claims seeking to challenge the manner and pace by which VA processes *all* benefits claims. ER 75. As the court recognized, the assessment of whether delay is reasonable depends upon a case-specific inquiry, but “§ 511 prevents this Court from undertaking such a review.” *Id.* Moreover, the court properly held that any order directing VA to shorten average wait times would force VA to alter or repeal some of its regulations (which do not impose time limits), and thus would be foreclosed by 38 U.S.C. 502, which permits challenges to VA regulations only in the Federal Circuit. ER 75-76. Finally, the court correctly recognized that the imposition of time limits where Congress has deliberately (and repeatedly) chosen not to impose deadlines would be improper even absent limitations on the court’s jurisdiction. Nothing in plaintiffs’ brief calls these conclusions into doubt.

1. Plaintiffs first contend that the district court erred in holding that Sections 511 and 502 barred jurisdiction over their claims because they are not challenging individual benefits decisions by VA, Pl. Br. 41, and they are not directly challenging VA regulations, *id.* at 48. But plaintiffs cannot circumvent these jurisdictional barriers by stating their claims at such a high level of generality that they appear not to implicate any “decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans,” 38 U.S.C. 511(a), or any VA regulations, 38 U.S.C. 502. As the district court recognized, plaintiffs’ systemic challenge to VA’s provision of benefits ultimately seeks review of *every* decision by VA related to

benefits and *all* VA’s regulations that have any impact on the timeliness of the claims-adjudication process. Thus, the court correctly concluded that litigating those claims would involve precisely the sort of judicial intrusion into VA’s administration of veterans’ benefits that the VJRA sought to prohibit. ER 75-76. *See also Bates*, 398 F.3d at 1364; *Beamon*, 125 F.3d at 972.¹⁰

Plaintiffs assert that their “claims regarding average delays do not involve ‘questions of law or fact necessary to a decision’ about providing benefits to an individual veteran.” Pl. Br. 42 (quoting *Bates*, 398 F.3d at 1365). But a claim that the average delay in processing SCDDC claims is unreasonably long is, at bottom, a claim that delays are unacceptable in *every* case, or at least a majority of cases. Such a claim implicates myriad decisions made by VA under laws “affecting the provision of benefits to veterans,” 38 U.S.C. 511(a), including what records are necessary to adjudicate a claim, whether a medical examination is necessary, whether new issues are presented on the face of the claim, what resources to devote to issuing a decision, and what resources to devote to preparing a SOC and certifying a case for appeal to

¹⁰ Plaintiffs’ reliance on *Broudy v. Mather*, 460 F.3d 106 (D.C. Cir. 2006), *see* Pl. Br. 42, is misplaced for the same reason. Although the D.C. Circuit held in *Broudy* that Section 511 did not bar claims alleging that VA and DoD covered up the extent of veterans’ exposure to atomic radiation, it did so because the alleged cover-up prevented veterans from bringing claims for benefits in the first place, and thus prevented the VA from *actually deciding* any issues related to those claims. *Id.* at 114. Here, by contrast, there is no question that VA is actually deciding benefits claims; it is simply doing so at a pace that plaintiffs believe is too slow.

the Board. Under the plain language of Section 511(a), plaintiffs' claim of unreasonable delay in VA's "average" processing of benefits claims is thus barred just as surely as a claim of unreasonable delay in an individual case.¹¹

Although plaintiffs contend that "forays into individual decisions were not required to resolve Veterans' challenges to delays across the adjudication system," Pl. Br. 46, that is precisely what would be required to determine whether delays are unreasonable. *See Crosby v. Soc. Sec. Admin.*, 796 F.2d 576, 580 (1st Cir. 1986) (explaining that question whether delay is "reasonable" depends on case-specific circumstances). Without examining factors contributing to delay in individual cases – which is foreclosed by 38 U.S.C. 511(a) – the district court could not make a finding of "unreasonable delay" based upon average appeal processing times by VA, the Board, and the CAVC any more than a court could find "unreasonable delay" based upon average appeal processing times by this Court. In short, whether a delay is "reasonable" depends upon too many case-specific factors to be determined across-the-board based upon averages.

¹¹ Contrary to plaintiffs' argument, Congress did not intend for the VJRA to preserve constitutional claims challenging VA actions "that are broader in scope than one individual veteran's benefits determination." Pl. Br. 44. In enacting the VJRA, Congress noted that courts retain jurisdiction to rule on the constitutionality of VA *statutes* relating to benefits, but it stressed that Section 511(a) was designed to reverse a growing trend in which "the courts will eventually feel free to review any challenge to the Administrator involving questions of law." H.R. Rep. No. 100-963, 1988 U.S.C.C.A.N. at 5803. *See also Hall*, 85 F.3d at 534 (distinguishing between challenges to the constitutionality of statutes and challenges to VA actions).

Plaintiffs cite no decision holding that “average delays” in a claims-adjudication system are “unreasonable,” and we know of no such decision. On the contrary, the vast majority of “unreasonable delay” cases under 5 U.S.C. 706(1) involve rulemaking or other discrete actions by agencies, not systemic delays or other deficiencies in the administration of agency programs. *See e.g., In re: Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008) (granting writ of mandamus compelling FCC to promulgate rule). No court has permitted claims seeking to compel other courts – here, the CAVC and the Federal Circuit – to act more quickly.

Plaintiffs’ contention that their “aggregate delay” claims do not implicate VA regulations within the meaning of 38 U.S.C. 502, Pl. Br. 48-49, is similarly flawed. Because VA’s existing regulations “do not set time limits for VA action in the adjudication process,” plaintiffs contend that the district court erred in concluding that an injunction requiring expedited claims processing would “force VA to alter or repeal some of these regulations.” Pl. Br. 49 (quoting ER 76). But the imposition of mandatory time limits would plainly alter – if not overrule – a host of regulations permitting VA to perform various actions without specific time constraints. In short, plaintiffs’ request for the district court to insert time limits into existing VA rules is a “facial” challenge to VA regulations within even the narrowest construction of Section 502. *See Preminger*, 422 F.3d at 821.

In the end, plaintiffs’ contention that the district court erred in concluding that it lacked jurisdiction over their claims boils down to a policy argument that “the district court’s holding would deny federal courts any jurisdiction to remedy unconstitutional or APA delay in VA’s adjudication system.” Pl. Br. 47. But the court’s ruling does no such thing. By holding that Sections 502 and 511(a) limit its jurisdiction, the court did not foreclose all judicial review; it merely recognized that Congress has directed all claims challenging VA’s provision of veterans’ benefits to a different forum: a specialized scheme involving review by the CAVC, which has authority to review all legal issues including constitutional claims, 38 U.S.C. 7261(a)(1), and review by the Federal Circuit, which has authority to “decide all relevant questions of law, including interpreting constitutional and statutory provisions, *id.* at 7292(d)(1).

Plaintiffs contend that the scheme Congress adopted is inadequate because they believe a “systemic approach” is necessary “to remedy the backlog of hundreds of thousands of claims.” Pl. Br. 47. This argument is doubly flawed. It misapprehends the relief that could potentially be granted in the Federal Circuit, and improperly assumes that courts may supplement the scheme prescribed by Congress based solely on assertions by plaintiffs that the scheme Congress established does not provide the kind of relief they would prefer (*e.g.*, “systemic” relief for all veterans).

As noted, the CAVC and the Federal Circuit have authority to adjudicate constitutional claims and award injunctive relief, and an injunction ordering VA to change certain practices in a specific benefits case would presumably cause VA to make modifications across-the-board in order to comply. Accordingly, some courts have held that the relief available in the CAVC and the Federal Circuit is an “adequate remedy” under 5 U.S.C. 704, precluding claims under the APA challenging VA’s administration of benefits. *See Beamon*, 125 F.3d at 967-70. But Congress did not rely solely on general limits on judicial review under the APA; it enacted specific provisions divesting all courts but the CAVC and the Federal Circuit of jurisdiction to review decisions by VA “under a law that affects the provision of benefits to veterans.” 38 U.S.C. 511(a). Particularly where Congress so closely monitors VA’s administration of benefits, a court may not override Congress’s decision to limit judicial review of VA decisions relating to benefits to a specific scheme.¹²

2. Apart from the jurisdictional barriers to plaintiffs’ claims relating to delays in the provision of veterans’ benefits – which provide an adequate basis, standing

¹² Plaintiffs’ argument that the district court had the power to grant injunctive and declaratory relief, Pl. Br. 66-77, misses the mark for the same reason: it rests on the mistaken premise that the practical effect of the court’s ruling was “to improperly immunize VA from judicial scrutiny.” *Id.* at 72. This argument is flawed not only because it is well-settled that not everything an agency does is subject to judicial review, *see SUWA*, 542 U.S. at 64-67, but also because Congress itself oversees VA’s activities in this area, and Congress established a specialized scheme of judicial review in the CAVC and the Federal Circuit.

alone, for affirming the dismissal of those claims – the district court also held that delays in VA’s processing of SCDDC claims were not unreasonable under *TRAC*. ER 76-79. In so doing, the court relied heavily on Congress’s decision not to “include any fixed time limits for the adjudication of veterans benefits claims,” citing *Heckler v. Day*, 467 U.S. 104 (1984) for the proposition that courts should not impose deadlines where Congress has deliberately chosen not to do so. ER 77.

Plaintiffs do not dispute that Congress has repeatedly declined to impose time limits on VA’s processing of benefits claims. Nevertheless, they contend that the district court should have imposed its own deadlines based upon a “rule of reason” analysis of expectations by Congress and VA itself. *See* Pl. Br. 50-51. But plaintiffs cite no evidence from which a court could properly have divined expectations by Congress or VA that benefits claims should be resolved by specific deadlines. While plaintiffs point to statutes requiring hearings “in a timely manner” and mandating “expeditious treatment” of claims remanded by the Board, *see* Pl. Br. 51, these general admonitions provide no basis for the imposition of specific time limits. Likewise, although plaintiffs cite testimony by a VA official that 125 days is a “realistic” time frame for processing claims at the RO level, *id.* (citing ER 468), that figure was a long-range goal predicated upon increases in resources and staff. In any event, plaintiffs do not identify any VA expectations with respect to the resolution of appeals – where plaintiffs contend the most serious delays occur.

Plaintiffs also contend that a limited VA “pilot program” for the expedited resolution of claims demonstrates VA expectations that claims can be processed more expeditiously. Pl. Br. 51 (citing ER 58). But that program actually cuts in the opposite direction – showing VA’s recognition that greater expedition is possible only in a limited subset of cases where veterans also agree “to sign a waiver upon filing a claim whereby several time limits imposed on the veteran would be shortened.” ER 56. Moreover, plaintiffs’ attempt to use an innovative new program by VA seeking to shorten the wait time for the adjudication of benefits claims as evidence of “unreasonable delay” violates the spirit, if not the letter, of Fed. R. Evid. 407, prohibiting the use of “subsequent remedial measures” to prove liability.

Similarly, Congress’s recent enactment of a pilot program requiring the expedited adjudication of a small subset of “fully-developed” SCDDC claims (*i.e.*, those where no additional information is needed) to be tested in 10 of VA’s 58 regional offices, *see* Veterans Benefits Improvement Act of 2008, Pub. L. 110-389, 122 Stat. 4145 (Oct. 10, 2008), confirms Congress’s ongoing awareness of this issue and its consistent refusal to impose time limits. *See id.* at 221(c)(4) (explaining that program is an effort “to assess the feasibility and advisability” of expedited deadlines). In sum, these pilot programs testing new methods to reduce delays in the benefits process – which focus on a narrow and easily resolved subset of claims – confirm that

it would be improper for a court to impose its own deadlines applicable to all claims. *Heckler*, 467 U.S. at 117.

In addition to the absence of Congressional deadlines, the district court also concluded that a balancing of the *TRAC* factors did not favor relief in this case because the imposition of mandatory deadlines “would, in effect, divert resources from the RO level, where 88% of veterans finalize their receipt of benefits, so that the 4% to 11% of veterans who pursue appeals would face lessened delays.” ER 79. Plaintiffs criticize the court’s analysis as “simplistic,” Pl. Br. 52, arguing that VA failed to demonstrate that a shifted focus towards decreased appellate resolution times would result in a diversion of resources from the RO level, *id.* at 53. But the very testimony plaintiffs cite refers to a “rebalancing” of priorities, *id.* (quoting ER 483), and thus supports the district court’s well-founded concerns about resource diversion, particularly where “almost 90% of veterans depend solely on the RO adjudication process for their benefits.” ER 79.¹³ In sum, plaintiffs have not identified any errors in the court’s application of the *TRAC* factors to this case.

¹³ Plaintiffs also suggest that the court’s focus on the small number of claims appealed (11%), and the even smaller number pursued to a decision by the Board (4%), “obfuscates the core problem” because more veterans would appeal if the process was shorter. Pl. Br. 54. But plaintiffs provide no evidence to support the implausible assertion that veterans unsatisfied with rulings at the RO level do *not* pursue meritorious appeals based on the anticipated length of the appellate process.

3. Apart from their *TRAC* claims, plaintiffs also contend that the district court failed to conduct an adequate due process analysis of delays in the benefits process. Pl. Br. 56-62. As noted above, however, the court could not examine delays in specific cases – the type of “case-by-case approach required in due process cases,” Pl. Br. 62 (citations omitted) – because review of individual benefits decisions is barred under 38 U.S.C. 511(a). Thus, the brevity of the court’s due process analysis reflects the generality of plaintiffs’ claims, not any error by the court.

In any event, the court conducted a proper (albeit brief) due process analysis, holding that average delays in the adjudication of benefits did not violate due process. ER 80. Citing *Wright v. Califano*, 587 F.2d 345 (7th Cir. 1978), the court stressed that courts rarely, if ever, intervene in adjudication processes Congress has committed to federal agencies, and declined to order the VA to process benefits claims more quickly based upon the average delays shown in this case. ER 80. Plaintiffs criticize the court’s reliance on *Wright* and attempt to distinguish that decision on a variety of grounds. Pl. Br. 60-61. But the court did not cite *Wright* for its factual similarities to this case, but instead relied upon it for the proposition – echoed in countless other cases, including *SUWA* and *Heckler v. Day* – that judicial intervention to compel faster adjudication of benefits claims by an agency is almost never warranted. On that point, plaintiffs offer no response, and they have thus failed to demonstrate any error in the court’s assessment of their due process claim.

4. Plaintiffs also contend that the district court erred in rejecting challenges to the adequacy of procedural protections at the RO level. Pl. Br. 62-66. Ignoring the inherent tension between arguments that delays are unreasonably long and arguments that more procedures must be added to protect veterans, plaintiffs suggest that the very safeguards designed to protect veterans at the RO level (*e.g.*, the duty to assist in gathering medical records, and the non-adversarial nature of this process) place veterans in a “procedural straightjacket,” Pl. Br. 63, and deprive them of due process.

As the district court recognized, the Supreme Court’s decision in *Walters* largely forecloses these arguments. In that case, the Court upheld a \$10 limit on attorney’s fees in veterans’ benefits cases, stressing that invalidation of that limit would “seriously frustrate” Congressional intent to ensure not only that attorneys would not siphon off a share of veterans’ benefits but also “that the proceedings be as informal and nonadversarial as possible.” *Walters*, 473 U.S. at 323-24. The district court properly relied upon *Walters* in holding that the absence of discovery, paid counsel, and “trial-like” hearings at the RO level did not violate due process. ER 83-86. And, the court correctly noted that the Federal Circuit has recently confirmed that the veterans benefit process remains “non-adversarial.” ER 82 (citing *Forshey v. Principi*, 284 F.3d 1335, 1355 (Fed. Cir. 2002)).

On appeal, plaintiffs do not directly challenge the district court’s finding that the benefits process remains non-adversarial. Instead, they insinuate that the process

has become adversarial because many of the “avoidable” remands from the Board involve violations of the statutory “duty to assist” – which was a key part of the court’s finding that RO proceedings are non-adversarial. Pl. Br. 64 (citing ER 47). But this evidence suggests only that the Board vigilantly enforces the “duty to assist,” not that proceedings at the RO level are adversarial. It cannot override the Federal Circuit’s determination – which plaintiffs ignore – that proceedings at the RO-level remain non-adversarial. *Forshey*, 284 F.3d at 1355.

Likewise, plaintiffs’ assertion that “RO-level adjudicators are incentivized to deny claims,” Pl. Br. 64 n.21, is both incorrect and insufficient to establish that the benefits process is adversarial, much less that it violates due process. Notably, plaintiffs provide no support for their claim that adjudicators’ compensation is linked to the denial of claims “to save the agency money through such mechanisms as quotas and links to incentive compensation,” *id.*, and none exists.¹⁴ To the contrary, the evidence showed that VA’s overall philosophy – which is conveyed to rating

¹⁴ The sole evidence plaintiffs cite to support this argument is a single e-mail in which a low-level VA official suggested that diagnoses of PTSD should not be given as freely. Pl. Br. 64 n.21 (citing ER 371). But this e-mail relates solely to medical treatment for PTSD, and has nothing to do with benefits or incentive compensation for benefits adjudicators. Moreover, after examining this e-mail in a special post-trial hearing, the district court found that it was sent by a “minor supervisor in a bureaucracy of 230,000 employees,” that the e-mail “had limited distribution,” and that it was not evidence of any VA effort to reduce the number of PTSD diagnoses for veterans. ER 92. For these same reasons, the e-mail is certainly not evidence of any VA policy encouraging the denial of claims for benefits.

specialists – is “Grant if you can, Deny if you must.” ER 467. *See also* 38 U.S.C. 5107(b) (establishing presumption that claim should be granted where the evidence is evenly balanced). Although plaintiffs may believe VA is denying meritorious claims, it is well-established “the Due Process Clause is not a guarantee against incorrect results.” *Marozsan v. United States*, 90 F.3d 1284, 1289 (7th Cir. 1996).

Finally, plaintiffs attack VA’s use of the Extraordinary Awards Procedure to audit very large SCDDC claims that would result in retroactive payments of more than eight years or more than \$250,000. Pl. Br. 63. Because that procedure “is not specified in any statute or regulation,” and veterans are not notified when it is used, plaintiffs contend that it violates due process. *Id.* As the district court correctly found, however, VA has broad authority to adopt procedures relating to benefits, ER 90 (citing 38 U.S.C. 512(a)), and the EAP is essentially an “auditing mechanism implemented by VA to ensure that [certain] types of awards are accurately adjudicated,” *id.* Thus, the court properly rejected plaintiffs’ due process claim challenging the adequacy of procedural protections at the RO level.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO ORDER VA TO PRODUCE ADDITIONAL “SUICIDE INCIDENT BRIEFS” OR TO PRODUCE STATISTICS REFLECTING AVERAGE PTSD CLAIMS PROCESSING TIMES.

After a preliminary injunction hearing, a trial on the merits and countless discovery and evidentiary rulings, plaintiffs challenge only two discovery rulings on appeal. Pl. Br. 77-83. They contend that the district court erred (1) by refusing to compel the production of additional “suicide incident briefs” beyond those already produced, and (2) by refusing to compel the production of average PTSD claims processing times. However, plaintiffs have not shown that the court abused its discretion in denying discovery on either of these issues, much less made the required “showing that the denial of discovery result[ed] in actual and substantial prejudice to the complaining litigant.” *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002).

1. “Suicide incident briefs” are reports prepared by VA following the suicide or attempted suicide of a veteran under VA’s care. As VA explained in a letter to the district court opposing plaintiffs’ request to compel the production of additional “suicide incident briefs,” these reports frequently contain confidential information relating to substance abuse and other personal issues that is protected by statute, *see* 38 U.S.C. 7332, and would require redaction. *See* Letter from Richard G. Lepley to Honorable Samuel Conti, Apr. 11, 2008, at 2 (attached hereto). Accurate redaction of the 15,000 pages of material requested by plaintiffs would be both burdensome to VA

and necessitate a delay of the trial (then scheduled to begin within a week), which would not be warranted given the limited probative value of these reports as redacted.

Id. In light of these considerations, the court declined to compel the production of additional suicide incident briefs that would potentially compromise veterans' privacy rights and would, after required redactions were made, prove very little. ER 141-44.

While conceding that VA produced some suicide incident briefs, plaintiffs argue that the court abused its discretion by refusing to compel the production of additional briefs. Pl. Br. 78. However, the court acted well within its discretion in concluding that the probative value of additional reports was outweighed by competing considerations such as the potential for inadvertent disclosures of sensitive information, the burdens on VA to redact and produce 15,000 pages of reports, and delays to the impending trial.¹⁵

More fundamentally, plaintiffs have not shown that they were prejudiced by the court's decision not to compel the production of additional suicide incident briefs. As plaintiffs acknowledge, their expert, Ronald Maris, reviewed the briefs produced and

¹⁵ In response to these considerations, plaintiffs assert that they requested a continuance of the trial, see Pl. Br. 79 (citing ER 123-25), but the transcript pages they cite contain no such request. Instead, plaintiffs' counsel simply speculates that production of these materials "might entail pushing the trial a very short period." ER 125. That is not sufficient to preserve an objection to discovery or scheduling matters, and even if plaintiffs *had* formally moved for a continuance, they have not shown the requisite prejudice from the denial of such a motion. *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961 (9th Cir. 2001).

had no difficulty drawing conclusions from these materials. Pl. Br. 79 (stating that Maris “reviewed the subset of incident briefs and reached several troubling conclusions”). *See also* ER 2582-83 (summary of conclusions based on review of briefs). Because Mr. Maris was allowed to state conclusions based on his review of this material, ER 643-44, plaintiffs suffered no prejudice from the court’s ruling. *See Hallett*, 296 F.3d at 751 (affirming denial of discovery on ground that plaintiffs suffered no prejudice).

2. Plaintiffs also contend that the district court abused its discretion by denying “critical discovery regarding PTSD claim processing times.” Pl. Br. 80. This argument is equally meritless. As VA explained in its discovery responses, statistics regarding average processing times for PTSD claims from receipt of a claim to a RO decision are not available because VA does not track claims in precisely the manner requested by plaintiffs. ER 520. Nonetheless, VA produced claims-processing data for PTSD claims for each of the four other periods requested by plaintiffs. *Id.*

The district court understood that it would have been pointless to compel VA to compile a new set of statistics relating solely to PTSD claims in the form requested by plaintiffs. Even if the average time for processing PTSD claims were longer than the average for processing SCDDC claims overall, this would prove nothing. The court found that PTSD claims are typically more complex than other types of benefit claims and normally take longer to process. ER 46 (F/F 69). Plaintiffs do not dispute this.

Thus, even assuming the district court had compelled VA to compile new statistics reflecting average processing times for PTSD claims at the RO level, and even assuming these statistics had demonstrated somewhat longer processing times for such claims, this would not have been evidence of unreasonable delay. Instead, it would merely have confirmed the unexceptional point that a more complex subset of benefits claims takes longer, on average, to decide. In short, plaintiffs have not shown any error – much less prejudice – from the denial of discovery on this issue.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General

JOSEPH P. RUSSONIELLO
United States Attorney

WILLIAM KANTER
(202) 514-4575
CHARLES W. SCARBOROUGH
(202) 514-4027
Attorneys, Appellate Staff
Civil Division, Room 7244
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

MARCH 2009

CERTIFICATE OF COMPLIANCE WITH FED R. APP. P. 32

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief is proportionally-spaced, has a typeface of 14 points or more, and contains 13,955 words, as counted by Corel WordPerfect 12.

/s/Charles W. Scarborough
Charles W. Scarborough
Attorney for Appellees

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the undersigned counsel for Appellees states that he is unaware of any related cases currently pending in this Court.

/s/Charles W. Scarborough
Charles W. Scarborough
Attorney for Appellees

CERTIFICATE OF SERVICE

I certify that on this 31st day of March 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that attorneys for all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Charles W. Scarborough
Charles W. Scarborough
Attorney for Appellees

A D D E N D U M

Letter from Richard G. Lepley to Honorable Samuel Conti (Apr. 11, 2008)



U.S. Department of Justice

Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044

Richard G. Lepley
Assistant Director

Tel: (202) 514-3492
Fax: (202) 616-8187

April 11, 2008

BY: E-filing

Honorable Samuel Conti
United States District Court, Northern District
450 Golden Gate Avenue
Courtroom 1, 17th Floor
San Francisco, CA 94102

RE: Veterans for Common Sense v. Peake (N.D. Cal. No. C-07-3758)

Dear Judge Conti:

Plaintiffs seek both reconsideration of the Court's ruling that defendants need not produce suicide issue briefs, which are short descriptions about individual suicides or suicide attempts, and additional discovery of root cause analyses performed by VA. The Court was given sample issue briefs to examine at the April 7 hearing after which it concluded that they did not need to be produced because they concern individual cases. See Transcript of April 7 Hearing at 39:5-43:3. (William Feeley draft deposition transcript excerpts attached as Exhibit A.) Because these documents do not discuss aggregated suicide data nor shed light on VA's policies or practices, and if ordered to be produced after redaction would significantly delay the trial, plaintiffs request for reconsideration should be denied. With respect to the root cause analyses plaintiffs now seek, they may not be produced as a matter of law.

First, plaintiffs assert that they need these suicide issue briefs to establish that the rate of suicide for veterans is "substantially disproportionate to suicide rates among non-veterans." Plaintiffs' proffer establishes the irrelevance of these documents. Even if the suicide incident briefs could establish this fact (and they cannot as explained below), plaintiffs would come no closer to showing that VA has a policy or practice of turning away veterans. This case is not about whether suicide among veterans is a serious concern (just as it is in the population at large); that is undisputed. It is about whether VA's response to veteran suicides violates a statutory mandate.

Second, plaintiffs' contention that the deposition testimony of William Feeley proves the documents' probative value is similarly flawed. Although defendants note that Mr. Feeley testified that suicide issue briefs may contain "recurring themes," they fail to note that the recurring themes he later enumerated had nothing to do with VA's policies or practices of

providing care. Rather, as Mr. Feeley testified, the “themes” that could be gleaned from the accounts of suicide in these briefs were gun ownership, the use of alcohol, and the use of drugs, depression, and PTSD, see Transcript at 163:8-164:10; 167:13-168:19. Plaintiffs also fail to acknowledge that Mr. Feeley testified that the majority of suicides described in these issue briefs could not have prevented. Id. at 329:23-330:2.

Third, the fact that many of these suicide issue briefs discuss veterans’ abuse of alcohol or drugs raises serious legal issues for their review and disclosure. As defendants explained to the Court at the April 7 hearing, a large proportion of the suicide issue briefs are protected from disclosure by 38 U.S.C. § 7332 because they identify individual veterans as having been diagnosed with or treated for substance abuse disorders. Section 7332 provides that a court may order the release of such information only after weighing specific factors on a case by case basis. 38 U.S.C. § 7332(b)(2)(D). Therefore, the Court cannot issue the kind of blanket order sought by plaintiffs for the release of all suicide issue briefs. Indeed, the regulations implementing § 7332 require that, prior to a court order, notice and an opportunity to be heard must be given to each veteran whose records are sought and to each relevant medical facility. 38 C.F.R. § 1.493. Plaintiffs again simply ignore this requirement.

Fourth, any attempt to extrapolate broad statistical principles from these brief narratives of tragic events would fall far short of meeting the admissibility requirements of Rule 702. Although suicide issue briefs could be released if *all* information that might be used to identify a veteran were redacted, this would strip them of what little useful information they might have because defendants would need to redact dates, locations, identifying information like ages and military service, as well as specific details about a veteran’s treatment that might be used to identify the veteran with reference to other publically available information. See 38 C.F.R. § 1.461(a)(i). Because only a fraction of the briefs would contain substantive information that could be provided to plaintiffs even after time-consuming redaction, neither plaintiffs nor epidemiological experts would be able to draw meaningful conclusions about the data in the aggregate.

Fifth, plaintiffs’ proposal would require a significant delay in the resolution of this action. At the recent hearing, defendants advised the Court that redaction of the over 15,000 pages of such documents, (many of which are iterations of the same issue brief) would pose a substantial burden on VA, especially given the exacting care necessary to ensure that § 7332 – which imposes criminal penalties for violations – is strictly complied with. See 38 C.F.R. § 1.463. This burden is greatly disproportionate to the probative value of issue briefs containing significant redactions. Moreover, none of the documents could be released prior to painstaking review and redaction of sensitive information – a task that could not be completed in weeks, much less the several days that plaintiffs propose.

Finally, plaintiffs raise for the first time the issue of “root cause analysis.” Plaintiffs have merged the categories of “issue briefs” and “root cause analyses,” which are not the same. An issue brief is an internal administrative document, and does not constitute a confidential quality assurance record. A root cause analysis is a quality assurance record, *i.e.*, the activity that generated the record was conducted by VA specifically to improve the quality of health care, the

activity which generated the document was previously designated in writing as a quality assurance activity which could produce confidential documents, and the document identifies patients or health care professionals. VA is prohibited from releasing root cause analyses by 38 U.S.C. § 5705, which protects quality assurance documents. See also 38 U.S.C. § 17.501. *Utterback v. United States*, (W.D.Ky. 1987) (motion to compel denied for VA quality assurance documents).^{2/} Congress has afforded to these documents strong protection to ensure that investigations into medical incidents can be conducted with absolute candor. Each root cause analysis is initiated with a memorandum by VA setting forth the confidential and protected nature of the findings. A copy of one of these initiating memoranda can be provided to the Court under seal if it would be of assistance. Although Congress provided limited circumstances under which these documents can be disclosed, a court order is not one of them. See 38 U.S.C. § 5705(b)(1). Moreover, as with the issue briefs, root cause analyses involve clinical events rather than aggregate data or policies.

The documents plaintiffs seek are not probative of the claims alleged by plaintiffs and are protected from disclosure by law. Even for the subset of documents for which redaction would be possible, the value of the information that could be released is far outweighed by the burden the redaction effort would impose, and it would require a significant delay in the resolution of this proceeding. For these reasons, defendants request that the Court deny plaintiffs' latest request for reconsideration of its recent ruling on the scope of document production, and decline to expand the scope of discovery to cover root cause analyses.

Sincerely,



Richard G. Lepley

^{2/} The decision cites 38 U.S.C. § 3305, which was later renumbered as 38 U.S.C. § 5705. Pub. L. 102-40, § 402(b)(1), 105 Stat 187, 238-39 (1991).