UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VETERANS FOR COMMON SENSE, a District of Columbia Nonprofit Organization; and VETERANS UNITED FOR TRUTH, INC., a California Nonprofit Organization, representing their members and a class of all veterans similarly situated, Plaintiffs, v. R. JAMES NICHOLSON, Secretary of Department of Veterans Affairs; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; JAMES P. TERRY, Chairman, Board of Veterans Appeals; DANIEL L. COOPER, Under Secretary, Veterans Benefits Administration; BRADLEY G. MAYES, Director, Compensation and Pension Service; DR. MICHAEL J. KUSSMAN, Under Secretary, Veterans Health Administration; PRITZ K. NAVARA, Veterans Service Center Manager, Oakland Regional Office, Department of Veterans Affairs; UNITED STATES OF AMERICA; ALBERTO GONZALES, Attorney General of the United States; and WILLIAM P GREENE, JR., Chief Judge of the United States Court of Appeals for Veterans Claims, Defendants.	No. C-07-3758 SC ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND GRANTING PLAINTIFFS' ADMINISTRATIVE MOTION TO FILE VETERAN AND FAMILY MEMBER PERSONAL IDENTIFYING INFORMATION UNDER SEAL

I. INTRODUCTION

This matter comes before the Court on the Motion to Dismiss filed by the defendants James Nicholson et al. ("Defendants").

See Docket No. 19. The plaintiffs Veterans for Common Sense and Veterans United for Truth, Inc. ("Plaintiffs"), filed an Opposition and Defendants submitted a Reply.[1] See Docket Nos. 36, 55. Also before the Court is Defendants' Motion for Protective Order to Stay Discovery ("Motion for Protective Order"). See Docket No. 39. Plaintiffs submitted an Opposition and Defendants filed a Reply. See Docket Nos. 46, 62. The Court held a hearing on the above motions on December 14, 2007. Finally, Plaintiffs have filed an Administrative Motion to File Veteran and Family Member Personal Identifying Information Under Seal ("Motion to File Under Seal"). See Docket No. 68.

After considering the parties' papers and oral arguments, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion to Dismiss. Defendants' Motion For Protective Order to Stay Discovery, which was granted during the December 14 hearing, is now moot, as Defendants only sought to stay discovery pending this Court's decision on Defendants' Motion to Dismiss. Finally, Plaintiffs' Motion to File Under Seal is GRANTED.

II. BACKGROUND

Plaintiffs are non-profit organizations that represent the interests of veterans of the Iraq, Afghanistan and earlier

[1] The Court reminds both parties that the Civil Local Rules are not optional. In particular, the Court directs both parties to familiarize themselves with Rule 7-4(b). Plaintiffs have filed an Opposition in violation of this Rule. Defendants, not to be outdone, have filed a Reply that is also in violation of this Rule. If this pattern continues the Court will strike all material exceeding the page limits set out in Rule 7-4(b).

conflicts who have sought medical treatment or filed disability claims based on Post-Traumatic Stress Disorder ("PTSD"). Plaintiffs filed a Complaint for injunctive and declaratory relief that broadly challenges the benefits adjudications programs of the United States Department of Veterans Affairs ("VA").

Veterans seeking benefits for service-connected disability or death must file a claim in one of 58 regional VA offices. The proceedings at the regional offices are ostensibly designed to be non-adversarial. For example, veterans are prohibited from paying an attorney for assistance at this initial stage, see 38 U.S.C. § 5904(c)(1); discovery tools are limited or nonexistent, see id. § 5103A; and veterans are generally prevented from compelling the attendance of witnesses to support their claims, see id. § 5711.

A veteran who disagrees with the regional office decision can file an appeal with the Board of Veterans Appeals ("BVA"), which decides an appeal only after the claimant has been given an opportunity for a hearing. See id. § 7105(a). An adverse decision by the BVA may then be appealed to the United States Court of Appeals for Veteran Claims ("CAVC"), an Article I court established by Congress with the passage of the Veterans' Judicial Review Act ("VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (1988). The CAVC has exclusive jurisdiction to review decisions of the BVA. See 38 U.S.C. § 7252(a). Adverse decisions from the CAVC may then be appealed to the United States Court of Appeals for the Federal Circuit, see id. § 7292(a), and then to the Supreme Court. Id. § 7292(c).

Plaintiffs have filed four causes of action seeking

declaratory and injunctive relief challenging the constitutionality of various provisions of the VJRA as well as seeking enforcement of several preexisting statutes. Specifically, Plaintiffs seek declaratory relief for: (1) denial of due process in violation of the Fifth Amendment of the United States Constitution; (2) denial of access to the courts in violation of the First and Fifth Amendments; (3) violation of 38 U.S.C. § 1710(e)(1)(D) pertaining to medical care for returning veterans; and (4) violation of Section 504 of the Rehabilitation Act. Plaintiffs also seek injunctive relief. Defendants, in seeking dismissal of Plaintiffs' Complaint, raise numerous issues. The Court addresses each in turn.

III. STANDING

Defendants argue that Plaintiffs lack standing because they have failed to identify individual members of Plaintiffs' organizations who have suffered an alleged injury, and, even if such members had been identified, their participation in the action would be required.

> An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000).

Plaintiffs have alleged that their organizations are

comprised of veterans, including many who have claims pending before the VA or the BVA, who receive VA benefits that have been threatened with reduction by the VA, or who suffer from PTSD. Compl. ¶¶ 35-38. Such allegations are sufficient, at this stage, to satisfy the Court that Plaintiffs' members would "otherwise have standing to sue in their own right." Friends of the Earth, 528 U.S. at 181. In addition, Plaintiffs argue that they themselves are harmed by Defendants' alleged violations because Plaintiffs are forced to spend their resources in attempting to secure benefits for their members. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (stating that an allegation of a "consequent drain on the organization's resources" is sufficient to satisfy the standing requirement of a "concrete and demonstrable injury . . ."); see also Warth v. Seldin, 422 U.S. 490, 515 (1975) (holding that "[t]here is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy").

Defendants also argue that resolution of the present action requires the participation of Plaintiffs' members, thereby depriving Plaintiffs of organizational standing. In particular, Defendants assert that individual participation of Plaintiffs' members would be necessary to determine whether any of the alleged violations caused actual harm and whether the relief sought would redress this harm.

To satisfy this standing requirement, the following is required:

> The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Warth, 422 U.S. at 511. Given the nature of Plaintiffs' claims, especially in regard to the allegations of systemic legal violations, the Court, at this stage, is not convinced that the individual participation of each injured party will be indispensable to the present action. Plaintiffs' due process claim will depend largely on the claims adjudication procedures enacted under the VJRA, and not necessarily on individual veteran's claims. The same is true regarding Plaintiffs' access to the courts claim. Plaintiffs' claim for denial of statutorily-mandated health care can satisfy this standing requirement if, for example, Plaintiffs demonstrate that the current system under the VJRA leads to system-wide denials of this health care or if the VA fails to recognize and treat PTSD within this two-year period. Nonetheless, it is worth emphasizing that should Plaintiffs' claims eventually require the participation of individual members,

such claims will be barred for lack of standing.[2]

Finally, Defendants argue that Plaintiffs have failed to meet the requirements for prudential standing and should instead seek redress in the representative branches of government. "In addition to the immutable requirements of Article III [standing], the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." Bennet v. Spear, 520 U.S. 154, 162 (1997) (internal quotation marks omitted). Defendants essentially assert that because Plaintiffs direct their claims against the VA, Plaintiffs impermissibly seek to compel this Court to usurp the role of the political branches and "shape the institutions of government in such fashion as to comply with the law and constitution." Lewis v. Casey, 518 U.S. 343, 349 (1996). In support of this, Defendants argue that "absent from the complaint is a claim of injury to any individual from these challenged matters." Mot. to Dismiss at 5. As noted above, however, the Court disagrees with this characterization of Plaintiffs' claims. To the contrary, the Complaint alleges that thousands of veterans, if not more, are suffering grievous injuries as the result of their inability to procure desperately-needed and obviously-deserved health care. The issue, as detailed below, is whether it is within this Court's power to remedy the current situation. For the reasons stated above, the Court finds that Plaintiffs have satisfied the requirements for standing.

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[2] As discussed below, such claims would also be precluded by 38 U.S.C. § 511(a), which bars judicial review in district courts of the VA Secretary's decisions on individual benefits claims.

IV. SOVEREIGN IMMUNITY

Defendants assert that Plaintiffs' claims are barred by sovereign immunity. Both parties agree that the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, is the relevant statute for determining whether a valid waiver of sovereign immunity exists. Section 702 of the APA states, in part:

> An action in a court of the United States seeking relief other than monetary damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . .

5 U.S.C. § 702. See also Gallo Cattle Co. v. Dep't of Agric., 159 F.3d 1194, (9th Cir. 1998) (stating that the APA "does provide a waiver of sovereign immunity in suits seeking judicial review of a federal agency action under [28 U.S.C.] § 1331").

Although the APA provides a valid waiver, there is conflicting Ninth Circuit authority for whether this waiver is limited by Section 704. Section 704 states, in part, that only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review."[3] 5 U.S.C. § 704.

In The Presbyterian Church v. United States, 870 F.2d 518 (9th Cir. 1989), the court stated that section 702 of the APA "waives sovereign immunity in all actions seeking relief from

[3] Neither party argues that the agency action in question is made reviewable by any statute.

official misconduct except for money damages." Id. at 525. The court further stated: "Nothing in the language of the [1976] amendment [to § 702] suggests that the waiver of sovereign immunity is limited to claims challenging conduct falling in the narrow definition of 'agency action.'"[4] Id.

In Gallo Cattle, however, the court held that section 704 does in fact restrict the APA's waiver of sovereign immunity. The court stated:

> [T]he APA's waiver of sovereign immunity contains several limitations. Of relevance here is § 704, which provides that only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review." . . . . [Thus, the agency action here] is only reviewable if it constitutes "final agency action" for which there is no other remedy in a court.

159 F.3d at 1198.

The Ninth Circuit recently recognized this internal division, stating, "[w]e see no way to distinguish The Presbyterian Church from Gallo Cattle." Gros Ventre Tribe v. United States, 469 F.3d 801, 809 (9th Cir. 2006). The court explained:

> Under The Presbyterian Church, § 702's waiver is not conditioned on the APA's "agency action" requirement. Therefore, it follows that § 702's waiver cannot then be conditioned on the APA's "final agency action" requirement. . . . But that is directly contrary to the holding in Gallo Cattle where we stated that "the

[4] Agency action is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . ." 5 U.S.C. § 551(13).

> APA's waiver of sovereign immunity contains several limitations," including § 704's final agency action requirement.

Id. (citing Gallo Cattle, 159 F.3d at 1198). The court in Gros Ventre Tribe nonetheless left the intra-circuit conflict unresolved, stating that because of the circumstances of the case, "we need not make a sua sponte en banc call to resolve this conflict . . . ." Id. at 809.

Since The Presbyterian Church was decided, the Supreme Court has weighed in on the question of whether sovereign immunity is limited by § 704. In Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), the Court made clear that the waiver of sovereign immunity under § 702 is in fact constrained by the provisions contained in § 704. The Court stated:

> [T]he person claiming a right to sue [under § 702] must identify some "agency action" that affects him in the specified fashion . . . . When . . . review is sought not pursuant to specific authorization in the substantive statute, but only under the general provisions of the APA, the "agency action" in question must be "final agency action."

Id. at 882. Accordingly, waiver of sovereign immunity under § 702 of the APA is limited by § 704.

Defendants assert that Plaintiffs have failed to challenge a final agency action and that, even if Plaintiffs were able to identify some final agency action, waiver of sovereign immunity is nonetheless precluded because Plaintiffs cannot demonstrate, as they must, that "there is no other adequate remedy in a court . . . ." 5 U.S.C. § 704. The Court addresses each argument in turn.

As a preliminary matter, "[t]he burden is on the party

seeking review under § 702 to set forth specific facts (even though they may be controverted by the Government) showing that he has satisfied its terms." Lujan, 497 U.S. at 884. The Court is mindful that Lujan was decided at the summary judgment stage. See id. Before this Court is Defendants' Rule 12(b)(6) motion to dismiss; as such, Plaintiffs' burden is less than that faced by the plaintiffs in Lujan and the Court "presumes that [Plaintiffs'] general allegations embrace those specific facts that are necessary to support the claim." Id. at 889.

A. Final Agency Action

Defendants, in arguing that Plaintiffs fail to challenge any final agency actions, state: "Rather than challenging any particular agency action, plaintiffs seek an extraordinarily broad injunction from this Court that plaintiffs claim would deal with alleged shortfalls" and deficiencies in the VA health care system. Mot. at 7. In Lujan, the Supreme Court stated:

> [R]espondent 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. Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm.

Lujan, 497 U.S. at 891.

Although the Court rejected the notion that the request for a broad injunction, in and of itself, is an indication of an absence of final agency action, the Court also expressed its disapproval of court-initiated systemic change:

> Except where Congress explicitly provides

> for our correction of the administrative process at a higher level of generality, we intervene in the administration of laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect. . . . Such an intervention may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole program to be revised by the agency in order to avoid the unlawful result that the court discerns. But it is assuredly not as swift or as immediately far-reaching a corrective process as those interested in systemic improvement would desire. Until confided to us, however, more sweeping actions are for the other branches.

Id. (internal quotation marks omitted).

In the present case, Plaintiffs have sufficiently articulated various actions and delays by Defendants that qualify as "final agency actions." "Agency action" is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . ." 5 U.S.C. § 551(13). The APA defines "agency rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4). An agency action is "final" under the APA where two conditions are met: (1) the action "mark[s] the consummation of the agency's decisionmaking process . . .--it must not be of a merely tentative or interlocutory nature," Bennet v. Spear, 520 U.S. 154, 178 (1997) (internal citations and quotation marks omitted); and (2) the action is one "by which rights or obligations have been determined, or from which legal consequences will flow." Id. (internal citations and

quotation marks omitted).

Contrary to Defendants' assertion, the fact that Plaintiffs do not challenge any agency action with respect to individual benefits claims does not, in and of itself, necessarily indicate that Plaintiffs have failed to challenge any final agency decision. Plaintiffs' Complaint challenges various aspects of the VJRA. Many of these aspects are rightfully considered final agency action as they constitute the VA's denial of relief of health care and benefits. For example, Plaintiffs challenge certain restrictions placed by the VJRA on veteran's procedural rights in securing benefits and the summary and allegedly premature denial of PTSD claims, both of which result in allegedly unlawful denial of benefits. See Compl. ¶¶ 30, 31. These policies and procedures fall within the broad statutory definition of "final agency action."

Plaintiffs also challenge the failure by the VA to make timely decisions on benefits claims and provide timely medical care to veterans returning from war. See Compl. ¶¶ 31a, 145-68, 184-200. This challenge also falls within the definition of "final agency action." As the APA states, a court reviewing claims against an agency "shall compel agency action unlawfully withheld or unreasonably delayed . . . ." 5 U.S.C. § 706(1). See also Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999) (stating that courts "have permitted jurisdiction under the limited exception to the finality doctrine [of § 706(1)] only when there has been a genuine failure to act"). Unlike the plaintiff in Ecology Center, the Plaintiffs in the present case

have in fact "pleaded a genuine § 706(1) claim." Id. Plaintiffs have alleged that the VA is failing to provide health care to veterans returning from Iraq and Afghanistan for a statutorily-mandated term of two years. See Compl. §§ 91-92, 265-66. This failure to act is a properly pleaded § 706(1) claim. Plaintiffs have also alleged systemic, unreasonable delays by the VA in providing health care. These allegations of unreasonable delay also bring Plaintiffs' claims within the exception provided for in § 706(1). For these reasons, the Court finds that Plaintiffs have sufficiently alleged various challenges to "final agency actions."

The Court notes, however, that Plaintiffs are forced to tread a fine line. Although Plaintiffs must challenge some "agency action" for a valid waiver of sovereign immunity under the APA, Plaintiffs are nonetheless precluded from challenging any regulations promulgated by the Secretary of the VA. See 38 U.S.C. § 502 (stating that judicial review of VA regulations "may be sought only in the United States Court of Appeals for the Federal Circuit").[5] At this stage Defendants have not established that the combination of this APA requirement with the preclusive effect of § 502 bars this Court from hearing Plaintiffs' claims. Plaintiffs must nonetheless be mindful of this legal Scylla and Charybdis that Congress has seen fit to impose.

B. Alternate Adequate Remedy

In addition to final agency action, § 704 also requires that "there is no other adequate remedy in a court" for there to be a

[5] The Court addresses § 502's preclusive effect on judicial review in further detail below.

valid waiver of sovereign immunity under the APA. 5 U.S.C. § 704. Defendants assert that the system for adjudicating veterans' claims, as established by the VJRA, provides the opportunity for an alternate adequate remedy.

The system established by Congress for adjudicating veterans' individual benefit claims does not provide an adequate alternative remedy for Plaintiffs' claims for several reasons. The CAVC, an Article I appellate court, only has jurisdiction to affirm, reverse, or remand decisions of the BVA on individual claims for benefits. See 38 U.S.C. § 7252(a). The CAVC's jurisdiction is therefore limited to the issues raised by each veteran based on the facts in his or her claim file from his or her particular case. See, e.g., Clearly v. Brown, 8 Vet. App. 305, 307 (1995) (stating "[i]n order to obtain review by the Court of Veterans Appeals of a final decision of the Board of Veterans' Appeals, a person adversely affected by that action must file a notice of appeal with the Court") (emphasis added). Accordingly, the CAVC would not have jurisdiction over or the power to provide a remedy for the systemic, constitutional challenges to the VA health system such as those currently alleged by Plaintiffs.

The CAVC itself has recognized its limited remedial power, stating: "[I]t must be borne in mind that the jurisdiction of this Court is over final decisions of the BVA. . . . Nowhere has Congress given this Court either the authority or the responsibility to supervise or oversee the ongoing adjudication process which results in a BVA decision." Clearly, 8 Vet. App. at 308. Although the facts in Clearly are clearly distinguishable

from those currently before this Court, many of Plaintiffs' challenges are aimed directly at the processes that the regional offices and the BVA use to reach decisions of individual claims. See, e.g., Compl. ¶¶ 30, 31, 227-34. These processes, as conceded by the CAVC itself, are outside the purview of its jurisdiction. It is thus impossible for this Court to understand how the VA system can be considered an adequate alternate forum when that forum cannot entertain the type of claims raised by Plaintiffs in the present action.

Finally, Plaintiffs, as organizations seeking to protect the interests of a broad class of veterans, would be unable to bring suit in the VA system. Organizations do not and cannot submit individual claims for benefits to the regional offices and, therefore, are precluded from ever presenting claims on appeal to the BVA, the CAVC, or the Federal Circuit. Under the position advocated by Defendants, Plaintiffs would be barred from raising these particular claims in any forum. Plaintiffs' members would be left to litigate their own individual claims while also attempting to shoehorn into their claims the challenges now asserted by Plaintiffs. The statutory framework of the VA benefits system does not provide for this and, as such, the VA benefits system is not an adequate alternate forum.

Defendants cite to a Sixth Circuit case in support of their argument in favor of sovereign immunity. In Beamon v. Brown, 125 F.3d 965, 970 (6th Cir. 1997), the court upheld a district court's finding that the system of judicial review established by the VJRA for the adjudication of claims regarding veterans benefits

provided the plaintiffs with an alternate adequate remedy. Accordingly, there was no valid waiver of sovereign immunity under the APA. Id.

The three plaintiffs in Beamon were veterans who had applied for benefits from the VA and had experienced delays in receiving final decisions. Id. at 966. The plaintiffs, who sought to represent a class of similarly situated veterans, challenged the manner in which the VA processed claims for veterans benefits. Id. Specifically, the plaintiffs alleged, inter alia, that "the VA's procedures for processing claims cause[d] unreasonable delays, thereby violating their rights under the Administrative Procedure Act . . . and under the Due Process Clause of the Fifth Amendment . . . ." Id. Much like Plaintiffs in the present case, the plaintiffs in Beamon sought the following relief:

> [A] declaratory judgment finding the VA to be in violation of the law; injunctive relief compelling the VA to develop and implement standards and procedures for the timely handling of claims filed with the Cleveland Regional Office of the VA or with the Board of Veterans' Appeals ("BVA"); and injunctive relief ordering the VA to develop and implement standards and procedures for the timely handling of claims remanded from the BVA to the Cleveland Regional Office.

Id. In addition, the Beamon plaintiffs claimed that "their action in the District Court challenged only the procedures that the VA employs, not any of its substantive decisions." Id.

Underpinning the court's decision in Beamon was the conclusion that the system established by the VJRA contained "two sources of power with which it can remedy claims of unreasonable

administrative delay or inaction." Id. The first source is the All Writs Act, which empowers "[t]he Supreme Court and all other courts established by Act of Congress to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The second source is 38 U.S.C. § 7261(a)(2), which provides that "the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall . . . compel action of the Secretary unlawfully withheld or unreasonably delayed."

Although the plaintiffs in Beamon acknowledged that these two sources of power do provide "adequate remedies for individuals claiming VA inaction or unreasonably delayed benefits decisions," Beamon, 125 F.3d at 968, they argued that the Court of Veterans Appeals ("CVA"),[6] did "not have the power to conduct discovery, issue declaratory judgments, certify class actions, or issue injunctive relief that would address constitutional deficiencies in the VA's procedures." Id. Relying on the All Writs Act and § 7621(a)(2), the Sixth Circuit disagreed with the plaintiffs' contentions and stated: "[T]here is no reason to believe that [the VJRA] system cannot provide for the adequate adjudication of [the plaintiffs'] challenges to the process by which the VA decides its benefits decisions." Id.

With all due respect to the Sixth Circuit, this Court is convinced that the VJRA system is not an adequate alternative.

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[6] The CVA was the predecessor to the CAVC. See 38 U.S.C. § 7261(a)(2), 1998 Amendment, substituting "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals." The statutory language of § 7252 was not altered.

First, as noted above, Plaintiffs in the present case have no way of even entering the adjudication system established by the VJRA; Plaintiffs are organizations, not individual veterans seeking individual benefits.

Second, the jurisdiction of the CAVC is statutorily limited to the "power to affirm, modify, or reverse a decision of the Board [of Appeals] or to remand the matter, as appropriate." 38 U.S.C. § 7252(a). Thus, the CAVC is limited in its jurisdiction to reviewing decisions on individual claims. The CAVC may not review broad challenges to the statutory framework unless such a challenge is grounded in the claim of a veteran seeking his or her individual benefits. Such is not the case here.

Finally, as noted above, the CAVC itself has recognized the limitations of its power to review the processes used by the BVA to reach decisions on individual claims. In Dacoran v. Brown, 4 Vet. App. 115 (1993), for example, the CVA denied a widow's petition for a writ of mandamus with respect to her constitutional challenges to the 1945 Recruitment Act. The court noted that constitutional challenges will be "presented to this Court only in the context of a proper and timely appeal taken from such decision made by the VA Secretary through the BVA." Id. at 119. As noted above, Plaintiffs in the present case would be unable to bring a claim before a VA regional office, much less appeal such a claim to the BVA or CAVC. Regarding its ability to address constitutional issues through the All Writs Act, the court stated:

> Although this Court also has authority to reach constitutional issues in considering petitions for extraordinary

> writs under 28 U.S.C. § 1651(a), the Court may, as noted above, exercise such authority only when a claimant has demonstrated that he or she has no adequate alternative means of obtaining the relief sought and is clearly and indisputably entitled to such relief. See Erspamer [v. Derwinski, 1 Vet. App. 3, 7 (1990)]. Where, as here, a claimant remains free to challenge the constitutionality of a statute in the U.S. district court, she has not demonstrated that she lacks adequate alternative means of obtaining the relief sought.

Id. Thus, the very courts that were established by the VJRA recognize not only the jurisdiction of district courts for constitutional claims but, more importantly for this issue, recognize the limited jurisdiction that they themselves possess. Accordingly, the Court finds that the VA claims adjudication system is not an adequate alternative forum for Plaintiffs' claims. The Court therefore finds, at this stage of the proceedings, that Plaintiffs have satisfied the requirements for a valid waiver of sovereign immunity under the APA.

V. SUBJECT MATTER JURISDICTION

Defendants argue that even if Plaintiffs have satisfied the requirements for standing and waiver of sovereign immunity, 38 U.S.C. § 511 nonetheless strips this Court of any jurisdiction to hear Plaintiffs' claims. Section 511 states, in part:

> The Secretary [of Veterans Affairs] shall decide all 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 or the dependents or survivors of veterans. Subject to subsection (b), the decision

> of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

38 U.S.C. § 511(a). Defendants read the statute broadly and argue that it precludes this Court from hearing any type of case involving any aspect of veterans benefits except, arguably, facial constitutional challenges to veterans benefits legislation. Plaintiffs read § 511 narrowly and argue that it only precludes district courts from reviewing the Secretary's determinations on individual benefits determinations, and not from considering broad constitutional challenges to the VA system.

As a threshold matter it is clear that § 511 does not strip this Court of the ability to hear facial constitutional challenges to the VA benefits system. See, e.g., Larabee v. Derwinski, 968 F.2d 1497, 1501 (2nd Cir. 1992) (stating "district courts continue to have jurisdiction to hear facial challenges of legislation affecting veterans' benefits") (internal quotation marks and emphasis omitted); Broudy v. Mather, 460 F.3d 106, 114 (D.C. Cir. 2006) (stating "district courts have jurisdiction to consider questions arising under laws that affect the provision of benefits as long as the Secretary has not actually decided them in the course of a benefits proceeding"). Even the Sixth Circuit, while articulating a broad preclusive effect on judicial review of veterans benefits claims, nonetheless acknowledged that facial challenges are permitted in district courts. See Beamon, 125 F.3d at 972-73 (stating "district court jurisdiction over facial challenges to acts of Congress survived the statutory revisions

that established the CVA"). To this Court's knowledge, only one court has suggested that § 511 precludes district courts from reviewing even facial challenges. See Hall v. U.S. Dept. of Veterans Affairs, 85 F.3d 532 (11th Cir. 1996). Given that Hall involved a constitutional challenge to a VA regulation, rather than an Act of Congress, any suggestion that facial attacks against statutes are precluded is dicta. More importantly, the reasoning behind this suggestion is not convincing. Thus, the Court is persuaded that facial constitutional attacks are permitted. Defendants themselves concede as much, stating: "The only category of cases that has arguably been excepted from the preclusive effect of the current section 511 is facial constitutional challenges to veterans' benefits." Mot. to Dismiss at 13. (Defendants also concede that at least some of Plaintiffs' claims may be so characterized: "plaintiffs' claims include facial challenges to the VJRA and other statutes that established the VA's informal claims adjudication process." Reply at 5.)[7]

Although the Ninth Circuit has not squarely addressed the scope of § 511's preclusive effect on judicial review, other Circuits have. In support of their argument that § 511 strips district courts of jurisdiction over all other challenges to the VA health benefits system, Defendants rely heavily on the Sixth Circuit's decision in Beamon, 125 F.3d at 965. In Beamon, the plaintiffs challenged the manner in which the VA processed claims for veterans benefits. Id. Specifically, Plaintiffs alleged,

[7] Whether Plaintiffs have in fact stated a claim for a facial constitutional challenge is discussed below.

inter alia, that "the VA's procedures for processing claims cause[d] unreasonable delays, thereby violating their rights under the Administrative Procedure Act . . . and under the Due Process Clause of the Fifth Amendment . . . ." Id.

In addition to finding no waiver of sovereign immunity, the Sixth Circuit also held that the "VJRA explicitly granted comprehensive and exclusive jurisdiction to the CVA and the Federal Circuit over claims seeking review of VA decisions that relate to benefits decisions under § 511(a)." Id. at 971 (emphasis added). Thus, according to the court, district courts could not hear "constitutional issues and allegations that a VA decision has been unreasonably delayed." Id.

The court in Beamon was particularly wary of permitting judicial review in a district court over claims that necessitated review of VA decisions on individual benefits claims. The court stated:

> Plaintiffs in this case allege that VA procedures cause unreasonable delays in benefits decisions. To adjudicate this claim, the District Court would need to review individual claims for veterans benefits, the manner in which they were processed, and the decisions rendered by the regional office of the VA and the BVA. This type of review falls within the exclusive jurisdiction of the CVA as defined by [38 U.S.C.] § 7261(a).

Id. at 970-71.

Defendants in the present action argue that Plaintiffs' claims would require the same manner of review of individual claims that was required in Beamon and that such review is clearly prohibited by § 511. A close reading of Beamon, however,

indicates that the court's concern sprang primarily from the lack of specificity of the plaintiffs' claims. The court stated:

> [P]laintiffs here point to no specific procedures that violate their constitutional rights. Plaintiffs' bare allegations that VA procedures allow unreasonable delays appear closer to challenges to individual benefit decisions than a constitutional challenge to specific procedures.

Id. at 973 n. 5.

In contrast, Plaintiffs in the present action enumerate specific procedures that allegedly violate the constitutional rights of veterans. For example, Plaintiffs challenge certain restrictions placed by the VA on the procedural rights of veterans in securing benefits, including the absence of trial-like procedures at the regional office stage and the absence of a class action procedure; they challenge the summary and allegedly premature denial of PTSD claims; and they challenge the VA's incentive compensation program. See Compl. ¶¶ 30, 31, 227-34. Whether these allegations actually state a claim for a constitutional violation is discussed more fully below. In considering the preclusive effect on jurisdiction of § 511 and in distinguishing Beamon, however, this difference is worth noting. Unlike the situation in Beamon, this Court will not be forced to comb through the adjudication process of individual claims in search of some constitutional violation that causes delays. To the contrary, Plaintiffs have attacked specific procedures as violating the rights of veterans. At this stage of the proceedings, the Court cannot conclude that it will necessarily be

forced to examine individual claims in order to entertain all of Plaintiffs' challenges.

The court in Beamon also relied on the history of veterans' benefits legislation in reaching its "conclusion that Congress intended to vest the CVA with exclusive jurisdiction over constitutional challenges to VA decisions." Id. at 971. Defendants and Plaintiffs contest this history and thus a brief examination is in order. Until 1973, 38 U.S.C. § 211, which is now § 511, barred judicial review of any decision of the Secretary of the VA "on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . ." Recognizing the constitutional danger of precluding all judicial review of constitutional claims, the Supreme Court, in Johnson v. Robison, 415 U.S. 361 (1974), held that § 211(a) precluded review of decisions made by the VA Administrator but did not preclude district court jurisdiction over constitutional challenges to acts of Congress relating to veterans benefits. In 1988, the Supreme Court further limited the preclusive effect of § 211 by permitting district court review of whether a VA regulation violated a statute, the Rehabilitation Act, that did not directly relate to veterans benefits. See Traynor v. Turnage, 485 U.S. 535 (1988).

Soon after Traynor was decided, Congress passed the VJRA. Under the VJRA the CVA was established, thereby providing veterans with an avenue for review that was previously unavailable. The VJRA also provided that appeals could be taken from the CVA to the Federal Circuit and, from there, to the Supreme Court. The actual

language of § 211 changed only slightly. Compare 38 U.S.C. § 211(a) (1979) with 38 U.S.C. § 211(a) (1988).[8] The parties' dispute regarding the significance of the VJRA thus hinges on its legislative history and the subsequent interpretation of § 511 by other courts.

Defendants, citing various records from Congress, argue that the legislative history of the VJRA clearly evinces Congressional intent to preclude judicial review in district court of all challenges to the VA system. See Mot. to Dismiss at 10-11. Plaintiffs counter with their own citations to the legislative history that demonstrate Congressional intent to preserve judicial review in district courts of constitutional challenges to the VA that do not involve review of VA decisions of individual benefits. See Opp'n at 13-14. Suffice to say that the Congressional record provides less than a clear indication of Congress's intent with regards to the VJRA's effect on judicial review. Far more helpful are the decisions by other courts that have addressed this issue.

In Beamon, 125 F.3d at 970, the court read the preclusive effect of § 511 broadly. Although the court stated that facial constitutional challenges were still permitted in district courts, it held that where plaintiffs challenge the constitutionality of the procedures used by the VA to adjudicate benefits claims, § 511 precludes review in district court.

Conversely, in Broudy, 460 F.3d at 114, the D.C. Circuit interpreted the preclusive effect of § 511 more narrowly. The

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[8] Section 211(a) was renumbered as section 511(a) in 1991. See Bates v. Nicholson, 398 F.3d 1355, 1364 n.7 (Fed. Cir. 2005).

court stated:

> In the defendants' view, § 511(a) prevents a district court from exercising jurisdiction over any case that would require it to decide a question of law or fact that arises under a law that affects the provision of benefits. . . . This argument misreads the statute. Section 511(a) does not give the VA exclusive jurisdiction to construe laws affecting the provision of veterans benefits or to consider all issues that might somehow touch upon whether someone receives veterans benefits. Rather, it simply gives the VA authority to consider such questions when making a decision about benefits . . . and, more importantly for the question of our jurisdiction, prevents district courts from reviewing the Secretary's decision once made . . . .

Id. at 112 (internal quotation marks and citations omitted, emphasis in original).

Although this interpretation of § 511 is clearly more broad than that of the Sixth Circuit in Beamon, Broudy does not provide Plaintiffs in the present case with the full support they claim. Specifically, the court in Broudy was careful to note that "district courts have jurisdiction to consider questions arising under laws that affect the provision of benefits as long as the Secretary has not actually decided them in the course of a benefits proceeding." Id. at 114.

Defendants argue that the targets of the plaintiffs' challenges in Broudy involved issues that had never been decided by the VA, while the Plaintiffs in the present case attack various policies and procedures that have been specifically decided and adopted by the VA. Thus, according to Defendants, Broudy is

inapplicable. This argument, however, ignores the above cited language "in the course of a benefits proceeding." Id. Many of Plaintiffs' challenges attack the structure of the VJRA, including VA decisions that were not made in the course of a benefits proceeding, but instead were made at a broad, system-wide level. Thus, where Plaintiffs challenge VA decisions that were made outside the course of a benefits proceeding, such claims survive the preclusive effect of § 511.

Defendants' argument that § 511(a) precludes all challenges to the VA has also been rejected by the Federal Circuit. In Bates v. Nicholson, 398 F.3d 1355, 1365 (Fed. Cir. 2005), the court stated: "Section 511(a) does not apply to every challenge to an action by the VA. As we have held, it only applies where there has been a 'decision' by the Secretary."

Both the existing case-law and the language of § 511 are clear that facial constitutional challenges may be brought in district courts. Plaintiffs' facial challenges are thus properly before this Court.[9] Plaintiffs also argue that as-applied challenges are not necessarily precluded. The Court disagrees. By its language, § 511 precludes review in a district court of any decision by the Secretary involving individual benefits. An as-applied challenge would require this Court to review a decision by the Secretary involving an individual claim. See, e.g., Roulette v. City of Seattle, 97 F.3d 300, 312 (9th Cir. 1996) (stating "[i]n an as-applied challenge, there is a narrow focus on the

[9] The Court examines Plaintiffs' claims below to determine which may be classified as a facial challenge.

particular plaintiff's behavior and whether the statute is constitutional as applied to her").

Finally, it is important to recognize the CAVC's understanding of the scope of § 511. This is especially true in light of Defendants' argument that the CAVC and the other forums for adjudicating veterans claims, as established under the VJRA, have exclusive jurisdiction over Plaintiffs' claims. In Dacoran, 4 Vet. App. at 118, the CVA held that federal district courts provided an alternative forum to the VA system to litigate constitutional challenges. The court stated:

> A claim which alleges only the unconstitutionality of a statute is not a claim "under a law that affects the provision of benefits by the Secretary" under § 511(a), but rather is a claim under the Constitution of the United States. As such, it is beyond the purview of section 511(a). Nothing in title 38 prohibits a constitutional challenge to any of the provisions of that title from being litigated in U.S. district court.

Id. at 118-19. This language, in conjunction with the reasons stated above, makes clear that § 511 does not preclude review of all of Plaintiffs' claims in this Court.

Defendants also argue that 38 U.S.C. § 502 bars district court review of Plaintiffs' claims challenging VA regulations. See Chinnock v. Turnage, 995 F.2d 889, 893 (9th Cir. 1993) (stating "[u]nder 38 U.S.C. § 502, VA rulemaking is subject to judicial review only in the Federal Circuit"). Plaintiffs, however, explicitly state in their Complaint that they are not attacking the constitutionality of any VA regulation but instead

are attacking various aspects of the VJRA, which is an act of Congress. See Disabled Am. Veterans v. Dept. of Veterans Affairs, 962 F.2d 136, 140 (2nd Cir. 1992) (stating "it is well established . . . that the Article III district courts have power to rule on the constitutionality of acts of Congress"). So long as Plaintiffs limit their challenges to Acts of Congress and certain actions and failures to act by the VA, as discussed in section IV. A, supra, and refrain from challenging any VA regulations, § 502 will not preclude judicial review in this Court.

VI. CONSTITUTIONAL CLAIMS

Defendants argue that even if the Court has jurisdiction to hear Plaintiffs' constitutional claims, these claims nonetheless fail to state a claim as facial constitutional challenges. A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss tests the sufficiency of the complaint. Dismissal pursuant to Rule 12(b)(6) is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991) (citing Conley v. Gibson, 355 U.S. 41, 45–46 (1957)). In reviewing the motion, a court must assume all factual allegations made by the nonmoving party to be true and construe them in the light most favorable to the nonmoving party. North Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 590 (9th Cir. 1993).

Contrary to any suggestions by Plaintiffs, facial challenges are still governed by the standard articulated in United States v.

Salerno, 481 U.S. 739 (1987). In Salerno, the Court stated that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." Id. at 745. The Ninth Circuit has recently affirmed Salerno as the controlling standard. See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1049 (9th Cir. 2007).

Plaintiffs assert two constitutional claims: the first is that the claims adjudication process, as established by the VJRA, is unconstitutional because it denies due process to veterans seeking health benefits. The second is that the VJRA denies veterans access to the courts. The Court addresses each in turn.

A. Due Process

Defendants assert that Plaintiffs' due process claim should be dismissed because Plaintiffs have failed to allege a due process violation and because the VA claims adjudication process is, in fact, constitutional. In particular, Defendants assert that the non-adversarial adjudication system at the regional office level satisfies the due process requirements of notice and the opportunity to be heard.

The Supreme Court has provided the following guidelines for due process analysis:

> [T]he identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the

> procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). "Procedural due process requires adequate notice and an opportunity to be heard." Kirk v. U.S. I.N.S., 927 F.2d 1106, 1107 (9th Cir. 1991)

If the VA claims adjudication system were truly non-adversarial, then Plaintiffs' due process claim would be on shaky ground. And although the system was clearly intended to be non-adversarial, Plaintiffs have alleged that this is no longer the case. The Federal Circuit, which has exclusive appellate jurisdiction under the VJRA, has recognized this de-facto shift towards an adversarial system. See, e.g., Bailey v. West, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (en banc) (stating "[s]ince the Veterans' Judicial Review Act . . ., it appears the system has changed from a nonadversarial, ex parte, paternalistic system for adjudicating veterans' claims, to one in which veterans . . . must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review") (internal citations and quotation marks omitted).

Although it is clearly not in this Court's power to rewrite a statute that provides for a non-adversarial adjudication process at the regional office level, it is within the Court's power to insist that veterans be granted a level of due process that is

commensurate with the adjudication procedures with which they are confronted. See Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 320 (1985) (stating "'due process' is a flexible concept--that the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur"). Defendants' insistence that "plaintiffs cannot seriously dispute that the initial, regional office step of the claims process is not, in any sense, adversarial," is undermined by the Federal Circuit's contrary conclusion cited above. At this stage of the proceedings, and without further factual development, the Court cannot conclude that Plaintiffs have not stated a valid claim for due process violations. In addition, Defendants' blanket assertion that the VA system provides adequate due process is premature and insufficient to support a motion to dismiss.

Finally, it is worth emphasizing that to state a valid facial constitutional challenge, a plaintiff need not establish that the entire statute is unconstitutional. See Engine Mfrs. Ass'n, 498 F.3d at 1049 (9th Cir. 2007) (stating "Salerno does not require a plaintiff to show that every provision within a particular multifaceted enactment is invalid"). The Court is satisfied that Plaintiffs' have, at this stage, sufficiently alleged due process violations within the VJRA. For example, Plaintiffs' claim that veterans are systematically denied statutorily mandated health care within two years after returning from wars and lack any recourse for obtaining this entitlement states a valid due process

violation. The Court notes that Plaintiffs do not assert that any particular veteran is entitled to benefits or medical care; rather, Plaintiffs seek to ensure that veterans are afforded fair procedures for obtaining this care.

Finally, Defendants' argument that any examination of Plaintiffs' due process claims will involve a review of individual benefits decisions, and therefore be precluded by § 511, is unpersuasive. The Supreme Court has made clear that due process analysis does not depend on individual cases. The Court has stated:

> In applying this [the Matthews, 424 U.S. at 335] test we must keep in mind . . . the fact that the very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases . . . ."

Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 321 (1985) (citing Matthews, 424 U.S. at 344).

For the reasons stated above, Defendants' Motion to Dismiss Plaintiffs' First Claim for Relief is DENIED.

B. Right of Access

Plaintiffs allege that the VJRA deprives veterans of meaningful access to the courts in violation of the First and Fifth Amendments to the United States Constitution. "'Two categories' of 'denial of access' cases emerge from the case law of the Supreme Court and the Courts of Appeals." Broudy, 460 F.3d at 117 (citing Christopher v. Harbury, 536 U.S. 403, 413 (2002)).

One is "forward-looking claims," Harbury, 536 U.S. at 414 n.11, and the other is "backward-looking claims." Id. at 414. Although neither party addresses which type of claim Plaintiffs assert, it appears that Plaintiffs bring a forward-looking claim. To present such a claim, a plaintiff must allege an "arguable underlying claim and present foreclosure of a meaningful opportunity to pursue that claim." Broudy, 460 F.3d at 121 (relying on Lewis v. Casey, 518 U.S. 343, 353 (1996), and Harbury, 536 U.S. at 415)).

Defendants' primary argument in favor of dismissal is that the claim is derivative of Plaintiffs' due process claim and, because the due process claim should be dismissed, so too should Plaintiffs' right of access claim. As noted above, the Court not only has jurisdiction over Plaintiffs' due process claim but Plaintiffs have stated a valid cause of action for due process violations. Thus, Plaintiffs have alleged an "arguable underlying claim," Broudy, 460 F.3d at 121, and therefore have stated a valid claim for a violation of the right to access courts.

Defendants also argue that the Supreme Court's ruling in Walters forecloses Plaintiffs' right of access claim. Such a question, however, goes to the merits of Plaintiffs' claim and need not be decided at this stage. Defendants' Motion to Dismiss Plaintiffs' Second Claim for Relief is therefore DENIED.

VII. STATUTORY CLAIMS

A. Medical Care Under 38 U.S.C. § 1710(e)(1)(D)

Plaintiffs' third cause of action seeks declaratory relief for violations of 38 U.S.C. § 1710(e)(1)(D). Plaintiffs allege

that the VA "violated a clear statutory mandate under 38 U.S.C. § 1710 to provide two years of medical care to returning veterans." Opp'n at 23.

Section 1710 states, in relevant part:

> [A] veteran who served on active duty in a theater of combat operations . . . after November 11, 1998, is eligible for hospital care, medical services and nursing home care . . . notwithstanding that there is insufficient medical evidence to conclude that such condition is attributable to such service.

38 U.S.C. § 1710(e)(1)(D) (emphasis added). Section 1710(e)(3)(C) provides the two-year period for medical care, "beginning on the date of the veteran's discharge or release from active military, naval, or air service . . . ." Id. § 1710(e)(3)(C).

Defendants argue that the entitlement to medical care is tempered by another subsection of § 1710, which states that the VA's obligation to provide care "shall be effective in any fiscal year only to the extent and in the amount provided in advance in appropriations Acts for such purposes." Id. § 1710(a)(4). There is no indication, however, that subsection (a)(4) is intended to apply to subsection (e)(1)(D). Subsection (a)(4)states, in its entirety:

> The requirement in paragraphs (1) and (2) [of section (a)] that the Secretary furnish hospital care and medical services, the requirement in section 1710A(a) of this title that the Secretary provide nursing home care, the requirement in section 1710B of this title that the Secretary provide a program of extended care services, and the requirement in section 1745 of this title to provide nursing home care and

> prescription medicines to veterans with service-connected disabilities in State homes shall be effective in any fiscal year only to the extent and in the amount provided in advance in appropriations Acts for such purposes.

Id. § 1710(a)(4). Nothing in this language indicates that the mandatory entitlement to health care for two years, as provided in § 1710(e)(1)(D), is limited by this subsection. This reading is reinforced by the fact that those sections that were intended to be limited by § 1710(a)(4) were specifically listed. The Court is therefore convinced that § 1710(e)(1)(D) provides a mandatory entitlement to health care for veterans for two years upon leaving the service. Contrary to Defendants' assertion, § 1710(a)(4) does in fact create a property interest protected by the Due Process Clause.

Defendants also argue that this Court is prohibited from reviewing this claim because it requires the examination of individual benefits decisions to determine whether there has been improper delay or denial. Such an argument would be correct if Plaintiffs were individual veterans challenging a decision made by the Secretary that affected their benefits. See 38 U.S.C. § 511. That is not the case, however. First, Plaintiffs have alleged that some veterans are being totally denied this statutory entitlement. At the very least, this states a claim for denial of due process. Cf. Devine v. Cleland, 616 F.2d 1080, 1086 (9th Cir. 1980) (stating that where a veteran "has a statutory entitlement to receipt of an educational assistance allowance," "[s]uch a statutory entitlement does constitute a 'property right' protected

by the Due Process Clause").

Second, Plaintiffs' claim that veterans are being denied this medical care does not necessarily implicate "decisions" by the VA Secretary. Such denials may instead merely demonstrate the abdication of the VA to provide services that it must. As the D.C. Circuit has stated, "§ 511(a) prevents district courts from hearing a particular question only when the Secretary has actually decided the question. . . . Where there has been no such decision, § 511(a) is no bar." Broudy, 460 F.3d at 114 (internal quotation marks, citations and alterations omitted).

For these reasons, Defendants' Motion to Dismiss Plaintiffs' Third Claim for Relief is DENIED.

B. Rehabilitation Act

Plaintiffs' fourth cause of action seeks relief from violations of section 504 of the Rehabilitation Act, codified at 29 U.S.C. § 794(a). Section 504 states, in part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794.

In Traynor, 485 U.S. at 544, the Supreme Court stated that "the question whether a Veterans' Administration regulation violates the Rehabilitation Act is not foreclosed from judicial review by § 211(a)." Soon after Traynor was decided, Congress overhauled section 211 in the VJRA, and, for the first time,

provided for judicial review of veterans' benefits determinations in the Federal Circuit. The parties dispute whether the VJRA effectively overruled Traynor.

The few courts that have been faced with this question have concluded that Traynor was in fact overruled by the VJRA. In Larabee, the Second Circuit stated:

> By providing judicial review in the Federal Circuit, Congress intended to obviate the Supreme Court's reluctance to construe the statute [§ 211] as barring judicial review of substantial statutory and constitutional claims, see Traynor . . ., while maintaining uniformity by establishing an exclusive mechanism for appellate review of decisions of the Secretary.

968 F.2d at 1501 (internal citations omitted). The Sixth Circuit in Beamon, 125 F.3d at 972, reached the same conclusion.

Plaintiffs, citing no conflicting authority, instead argue that the VJRA merely narrowed the scope of the Traynor holding and precluded judicial review of individual benefits decisions. As such, Plaintiffs urge that the VJRA did not affect a district court's ability to apply a civil rights statute, such as the Rehabilitation Act, to the VA. Plaintiffs argue that the concern driving the Traynor decision is actually of no concern here. The Court in Traynor stated:

> It cannot be assumed that the availability of the federal courts to decide whether there is some fundamental inconsistency between the Veterans' Administration's construction of veterans' benefits statutes and the admonitions of the Rehabilitation Act will enmesh the courts in the technical and complex determinations and

> applications of Veterans' Administration policy connected with veterans' benefits decisions . . . .

485 U.S. at 1379-80.

Plaintiffs' argument, however, is undercut by several factors. First, as the other courts to consider this issue have held, Congress, in passing the VJRA, explicitly provided the availability of federal court review by creating review of veterans' benefits decisions in the Federal Circuit. The VJRA, therefore, was a response to the Supreme Court's rejection of a system with no federal court review.

Second, Plaintiffs' Rehabilitation Act claim is, ultimately, a request for this Court to rewrite VA "policies, procedures, and practices [in order] to accommodate veterans with PTSD who are unable to comply with the agency's arbitrary and complex administrative hurdles . . . ." Opp'n at 24. This requires precisely the type of "technical and complex determinations and applications of Veterans' Administration policy" that the Traynor Court warned against. Traynor, 485 U.S. at 1379-80. Contrary to Plaintiffs' assertions, this Court cannot possibly assess whether the current system employed by the VA discriminates against veterans with PTSD without delving into a review of VA regulations and individual benefit decisions of veterans with PTSD. Such a review is clearly foreclosed by both Traynor and by § 511.

Finally, Plaintiffs' Rehabilitation Act claim challenges numerous VA regulations. As already discussed, challenges to such regulations, as mandated by Congress, are reviewable only in the Federal Circuit. See 38 U.S.C. § 502 (stating that an action by

the VA Secretary "may be sought only in the United States Court of Appeals for the Federal Circuit").

For the reasons stated above, Defendants' Motion to Dismiss Plaintiffs' Fourth Claim for Relief is GRANTED.

VIII. JURISDICTION OVER U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Defendants in their Reply brief raise, for the first time, the issue of whether this Court has jurisdiction over the CAVC. Specifically, Defendants argue that the APA does not provide a waiver of sovereign immunity for suits against the courts of the United States. See 5 U.S.C. § 551(1)(B). Defendants claim that even though the CAVC is an Article I court, it is nevertheless independent from the VA, and is therefore insulated from any waiver of sovereign immunity under the APA. As this issue was raised for the first time in Defendants' Reply, and as Plaintiffs have not had the opportunity to respond, the Court declines to address it at this time. Instead, Defendants may file a motion to dismiss the CAVC.

IX. CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss is DENIED with respect to Plaintiffs' First, Second and Third Claims and GRANTED with respect to Plaintiffs' Fourth Claim. At oral argument on December 14, the Court granted Defendants' Motion for Protective Order to Stay Discovery pending the Court's ruling on Defendants' Motion to Dismiss. The Protective Order is now moot and Plaintiffs may proceed with discovery. Plaintiffs'

Administrative Motion to File Veteran and Family Member Personal Identifying Information Under Seal is hearby GRANTED.

Plaintiffs' Motion for Preliminary Injunction, Docket No. 88, filed on December 12, 2007, was also stayed pending the issuance of this Order. Defendants have not yet filed an Opposition and the Court therefore sets the following briefing schedule: Defendants' Opposition shall be electronically filed no later than 12:00 p.m. on Wednesday, January 30. Plaintiffs' Reply shall be filed by 12:00 p.m. on Wednesday, February 6, and the hearing for the Preliminary Injunction is scheduled for Friday, February 22, at 10:00 a.m. in Courtroom # 1 on the 17th Floor.

IT IS SO ORDERED.

Dated: January 10, 2008

UNITED STATES DISTRICT JUDGE