

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

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VIETNAM VETERANS OF AMERICA, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 08-1934 (RBW)
)	
JAMES B. PEAKE, M.D., in his official capacity as)	
Secretary of the Department of Veterans Affairs,)	
)	
Defendant.)	
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**MEMORANDUM SUPPORTING DEFENDANT’S MOTION TO DISMISS AND
OPPOSITION TO PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION**

Dated: December 4, 2008

Respectfully submitted,

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Plaintiffs, two advocacy organizations, brought this case to compel the Department of Veterans Affairs (VA) to more rapidly adjudicate veterans' claims for disability benefits. Plaintiffs' Complaint reflects their apparent frustration with the political processes that have led to the disability claims procedures that they challenge, procedures that are laden with due-process protections for veterans that may contribute to the very delays of which plaintiffs complain but which their Complaint and motion fail to even mention. Plaintiffs' public policy grievances may or may not be well-taken, but that is a question for the representative branches of government, not this Court.

Plaintiffs' Complaint should be dismissed for four reasons. First they lack standing to bring these claims. They neither allege organizational harm, nor assert any of the harm to their members, presumably to avoid a statutory bar to their case that would flow from such an allegation, see 38 U.S.C. § 511 (depriving district courts of jurisdiction to review individual claims adjudications rendered by the Secretary). Second, plaintiffs' claims are not reviewable under the terms of the Administrative Procedure Act (APA). The APA permits actions against the government only for challenges to discrete and final agency action for which there is no adequate alternative remedy. Plaintiffs' claims fail all three of these requirements. Third, this Court simply lacks jurisdiction to hear this challenge because Congress has channeled judicial review of individual claims like those presented here to the Court of Appeals for Veterans Claims (CAVC), the Federal Circuit, and the Supreme Court. See 38 U.S.C. §§ 7252(a), 7292(a). Lastly, a similar jurisdictional provision channels review of challenges to VA regulations, including those concerning claims processing that are impliedly questioned here, to the Federal Circuit. 38 U.S.C. § 502.

Were the Court not to dismiss this case, plaintiffs' motion for a preliminary injunction should still be denied. A preliminary injunction is an extraordinary remedy, American Coastal Line Joint Venture v. United States Lines, Inc., 580 F. Supp. 932, 935 (D.D.C. 1983), one made even more extraordinary here. On June 25, 2008, after a nearly three-week trial, Judge Samuel Conti of the United States District Court for the Northern District of California, issued an opinion that denied the very claims that plaintiffs press here. See Veterans for Common Sense v. Peake, 563 F.Supp.2d 1049 (N.D. Cal. 2008) (VCS). Though that case included a challenge to the VA's medical treatment of veterans with mental disabilities, the two

issues presented on this motion for a preliminary injunction – the timeliness of VA disability benefits decisions under the APA and under the Fifth Amendment’s Due Process Clause – were squarely presented to and rejected by Judge Conti. Plaintiffs here implicitly confirm the near total similarity between these two cases by citing to Judge Conti’s opinion 40 times in their motion for a preliminary injunction. Apparently dissatisfied with the result reached by Judge Conti, and able to elude the bar of res judicata as they were not parties there, plaintiffs now ask this Court to issue a preliminary injunction here to substitute for the permanent injunction that Judge Conti refused to issue there. And they are doing so not by providing the Court with any additional or different information – the four declarations that they have submitted to support their motion provide few if any facts to support their claims of delay – but by relying entirely on the trial record before Judge Conti. In other words, plaintiffs here effectively ask this Court to reverse Judge Conti. Under this circumstance, the issuance of a preliminary injunction would be truly extraordinary.

But more fundamentally plaintiffs cannot satisfy any of the four elements required to justify a preliminary injunction. First, they cannot demonstrate any likelihood of success on the merits. The arguments supporting dismissal of the Complaint fully dispose of this element. Even if they did not, plaintiffs cannot satisfy the test for undue delay necessary to establish a violation of the APA. Nor, aside from their failure to establish undue delay on their APA claim, may they successfully do so as a matter of constitutional law. Further, the interim benefits at the heart of plaintiffs’ prayer for relief are barred by the Appropriations Clause. Second, plaintiffs overstate the irreparable harm to their members if an injunction fails to issue. The priority treatment afforded claims from returning combat veterans and those most in need (aged, terminally ill, homeless) and the five years of free medical care currently available to returning combat veterans greatly attenuate the very harms of which plaintiffs complain. Third, plaintiffs vastly understate the harm to the government from the reordering of agency assets and priorities that would presumably have to occur were the Court to enjoin the defendant. Some of those priorities that would have to be set aside are creatures of congressional mandates enacted to help the very veterans in

whose interest this case was supposedly brought. And lastly, the public interest, properly understood, fully supports the denial of an injunction here.

BACKGROUND

Rating Claims

The Veterans Benefits Administration (VBA), a component of the VA, administers benefit programs for veterans. Ex. 1, Decl. of Diana M. Rubens ¶ 4. This case concerns certain claims for compensation benefits administered by VBA's Compensation and Pension Service (C&P) known as ratings claims. Id.¹ Veterans may file a rating claim at any of the 57 VA Regional Offices (ROs) throughout the country. Id. The majority of rating claims seek compensation for a disability arising as a result of an injury or disease allegedly incurred in service. Id. ¶ 5. Rating claims require three elements: (1) eligible service, (2) a currently diagnosed disability, and (3) a nexus between the service and the disability ("service connection"). 38 C.F.R. § 3.303. Need is not a factor. Id. A rating claim may seek compensation for more than one condition. See, e.g., 38 C.F.R. §§ 3.323, 3.324. Each separate condition is considered an "issue" in the claim. Rubens Decl. ¶ 5. A claim remains open until all issues have been resolved. Id. For example, if a claim contains eight issues and the VBA has enough information to adjudicate seven of them, it may do so and the veteran, if any of the issues are granted, will begin to receive disability benefits immediately. The claim, however, would remain open until the VBA completed developing and adjudicating the remaining issue.

If a rating claim is granted, the VBA issues a rating decision and notice informing the veteran of (1) the percent he is considered disabled according to the statutory rating schedule and (2) the effective date of the award, which is the date from which a veteran is entitled to compensation. Rubens Decl. ¶ 7. In most cases this is the date that the veteran filed the claim. See 38 U.S.C. § 5110; 38 C.F.R. § 3.400. If a claim is denied, VBA informs the veteran of the reasons for denial. 38 U.S.C. § 5104(b).

¹ In addition to ratings claims, C&P also administers non-rating claims, claims for which no disability rating is required. Non-rating claims include dependency changes, claims for burial benefits, initial death pension claims for widows, and adjustments to benefits due to incarceration. Rubens Decl. ¶ 6.

The Claims Adjudication Process

The process for adjudicating rating claims is non-adversarial. Pursuant to the Veterans Claims Assistance Act (VCAA), 38 U.S.C. §§ 5103, 5103A, the VA is required to assist a veteran to develop all evidence supporting the issues in a claim. 38 C.F.R. §§ 3.103(a), 3.159. A veteran may be represented throughout the RO claim adjudication process. 38 U.S.C. §§ 5901-5904; 38 C.F.R. §§ 14.629-14.630. Veterans Service Organizations like plaintiff Vietnam Veterans of America provide free representation to veterans who ask for it.² 38 U.S.C. § 5902; 38 C.F.R. § 14.628. The VA provides these VSOs with space within the RO, with computer systems, with access to VA databases, and with free telephone service. Rubens Decl. ¶ 8. A veteran may also be represented by a lawyer at this stage, but by statute the lawyer may not be compensated at this initial stage. 38 U.S.C. § 5904(c)(1). No advocate for VA opposes a claim. Rubens Decl. ¶ 8.

Once a claim is filed, the VCAA imposes a “duty to notify” under which a VBA employee known as a Veterans Service Representative (VSR) informs the veteran of what evidence the VBA will need to adjudicate the claim and, of that evidence, what evidence the veteran must supply and what evidence the VBA will seek on his behalf. 38 U.S.C. § 5103(a); 38 C.F.R. § 3.159(b)(1); Rubens Decl. ¶ 9. Under the VCAA’s duty to assist, VBA must seek all federal government records that may pertain to the claim. 38 U.S.C. § 5103A(c); 38 C.F.R. § 3.159(c)(2) & (3). Typically, these will include military service personnel and medical records, but may also include VA medical treatment records, social security records, or other records. *Id.*; Rubens Decl. ¶ 9. The VA must continue to seek these records until it concludes either that the records do not exist or that further efforts to obtain those records would be futile. 38 C.F.R. § 3.159(c)(2).

The duty to assist also requires VBA to undertake reasonable efforts to acquire non-federal records identified by the veteran, typically private medical records. 38 C.F.R. § 159(c)(1). VBA cannot initiate the search for these records without a release executed by the veteran. 38 C.F.R. § 3.159(c)(ii). The VBA duty-to-notify letter includes the necessary release forms for the veteran to execute. Rubens

² Plaintiff Veterans of Modern Warfare is not recognized by VA under 38 U.S.C. § 5902 and 38 C.F.R. § 14.628 as a VSO to assist claimants in the preparation, presentation, and prosecution of claims for benefits before VA.

Decl. ¶ 10. In the alternative, the veteran may personally acquire the private records and present them to VBA himself. Id. By regulation, the duty-to-notify letter provides veterans with a 30-day deadline to respond with any releases and with any evidence in their possession. 38 C.F.R. § 3.159(b). Once the releases are received, VBA requests the private records from their custodian. Rubens Decl. ¶ 10. The request asks the provider to return the records within 30 days. Id. If the provider fails to do so, VBA sends out another request seeking a reply within 30 days. Id.

VBA may order a medical examination, known as a Compensation & Pension Examination. Rubens Decl. ¶ 11. The purpose of this examination is to confirm that a disability exists, and to obtain information concerning the current level of disability to assist a claims adjudicator to determine the percentage to which the veteran will be considered disabled pursuant to the rating schedule. 38 C.F.R. § 3.159(c)(4). Thus, even veterans who have been treated for a disability at a VA medical facility may be required to undergo a C&P Exam, as medical treatment records may not provide the information needed to determine the percentage a veteran is disabled. Rubens Decl. ¶ 11. VBA arranges for and pays for this examination. Id. Currently, the time between a request and the examination is approximately 30 days. Id.

By regulation, the evidentiary record remains open throughout the claims adjudication process. See 38 C.F.R. §§ 19.37, 20.800, 20.1304. At any point, the veteran may supply new evidence or information about the existence of evidence. Id. The VCAA duty to assist applies to this new evidence, thereby possibly requiring VBA to issue new requests for private records and to wait up to an additional 60 days for a response. Rubens Decl. ¶ 12. Additionally, at any time the veteran may introduce a new issue into the claim. Id. For new issues, the entire claim development process will have to be re-initiated to develop the evidence in support of this new disability. Id. It is estimated that as many as 20% of all claims have a new issue presented during the pendency of the claim. Id.

Once all the evidence has been gathered, a Rating Veteran Service Representative (RVSR) will rate all the issues that are ready for rating. Rubens Decl. ¶ 13. The RVSR determines whether the disability should be service connected and, if so, assigns the percent disability according to the statutory

rating schedule and assigns the effective date. Id. The RVSR prepares a rating decision for those issues that have been decided. Id. A VSR then processes and promulgates the rating decision and, if appropriate, an award letter to the veteran. Id.

When an RVSR rates a claim, the veteran receives the benefit of several burden-of-proof rules. For example, by statute, 38 U.S.C. § 5107(b), if the total evidence for and against the veteran on any issue is in equipoise, the RVSR must grant the issue. Additionally, the VA is required to develop and adjudicate not just those disabilities that the veteran requested, but also any “inferred” issues that the medical records may reveal. Roberson v. Principi, 251 F.3d 1378, 1384 (Fed. Cir. 2001). Approximately 82% of all rating claims are at least partially granted, meaning at least one issue is granted, though it may be rated as a 0% disability entitling the veteran to no monetary benefit. Rubens Decl. ¶ 14.

The Appellate Process

A veteran dissatisfied with a rating decision may appeal the decision first within the VBA, and then to the Board of Veterans Appeals (the Board).³ The veteran initiates an appeal by filing a Notice of Disagreement (NOD), an informal paper stating that he disagrees with some part of the rating decision. 38 U.S.C. § 7105(a). The veteran must file the NOD within one-year from the mailing of the notice of the result of the rating decision. 38 U.S.C. § 7105(b)(1). The veteran need not present arguments or other details, but in a multiple issue claim, the veteran may be required to specify what part of the decision he disagrees with. Rubens Decl. ¶ 15. If the paper that the veteran submits is ambiguous as to whether or not it is truly a NOD, the RO will contact the veteran seeking clarification; the veteran has 60 days to respond. 38 C.F.R. § 19.26(c)(1).

A veteran may appeal any part of any issue in the rating decision: the denial of service connection, the percentage disability assigned, or the effective date. Rubens Decl. ¶ 16. In a multiple issue claim, an appeal may entail one issue, several, or all of them. Id. If the rating decision being appealed from was granted, at least in part (for example, the veteran’s claim was granted but he is

³ After that, further appeals lie to CAVC and then to the United States Court of Appeals for the Federal Circuit as to legal issues. 38 U.S.C. §§ 7252(a), 7292(a). Lastly, certiorari may be sought to the United States Supreme Court. 28 U.S.C. § 1254. Until the appeal proceeds to the CAVC, no advocate appears on behalf of the VA against the veteran.

appealing the percentage disability awarded), the veteran begins to receive the granted benefit immediately despite the appeal. *Id.* The record remains open at all times, permitting the veteran to attempt to change the rating decision by submitting additional evidence. *See* 38 C.F.R. §§ 19.37; 20.800, 20.1304. The VCAA duty to assist applies to any new evidence submitted at this stage. 38 U.S.C. § 5103A. Thus, VBA may be required to seek additional private records and readjudicate the claim at this stage. Rubens Decl. ¶ 16. A veteran may be represented by a paid attorney at this stage. 38 U.S.C. § 5904(c).

There are two non-exclusive paths an appeal may take: (1) a traditional appeal that proceeds straight to the Board if the rating agency does not change its decision in response to the NOD or later submissions by the veteran or (2) a prior review (before proceeding to the Board) by an Decision Review Officer (DRO). Rubens Decl. ¶ 17. The Board currently consists of 60 Veterans Law Judges (VLJs) who exercise *de novo* review over appealed claims. Ex. 2, Declaration of Steven L. Keller, ¶ 5. They are assisted in these reviews by 320 staff attorneys who review the claims files and prepare draft decisions for review by the assigned VLJs. *Id.* A DRO is a senior RVSR located in the RO where a claim was adjudicated who may exercise another level of *de novo* review prior to an appeal being forwarded to the Board. Rubens Decl. ¶ 17. Upon receiving a NOD, an RO will send a veteran a letter providing the veteran with 60 days to elect which path he desires to follow. 38 C.F.R. § 3.2600(c). Because this period follows receipt of the NOD, it is counted as part of the time to resolve the appeal. Rubens Decl. ¶ 17.

Under the “traditional” path, the RO will prepare a Statement of the Case (SOC) after receipt of the NOD. 38 U.S.C. § 7105(d). A SOC is a more detailed explanation of the rationale underlying the rating decision. *See id.* Currently, the average time from the filing of the NOD until the completion of the SOC is 194.3 days. Rubens Decl. ¶ 18. Once the SOC is issued, the veteran has the greater of (1) one year from the date of the mailing of the notice of determination in the rating decision or (2) 60 days from the date of the SOC to file a Substantive Appeal on a VA Form 9. 38 U.S.C. § 7105(d)(3); 38 C.F.R. §§ 19.32, 20.302(b). Again, this period is counted as part of the time to resolve the appeal. Rubens Decl. ¶

18. Unlike the NOD, the Substantive Appeal should specify specific arguments relating to alleged errors of fact or law made by the RO. 38 U.S.C. § 7105(d)(3).

Here again, the record remains open and the veteran may submit additional evidence at any time. See 38 C.F.R. § 19.37; 38 C.F.R. §§ 20.800, 20.1304. If the veteran does so, the VBA must readjudicate his claim and, if it does not totally grant the relief the veteran seeks, it must issue a Supplemental Statement of the Case (SSOC). 38 C.F.R. §§ 19.31, 19.37. A veteran is provided 30 days to respond to the SSOC before the appeal proceeds. 73 Fed. Reg. 40748 (Jul. 16, 2008). For FY 2008, 58% of all appeals had at least one SSOC issued, indicating that additional evidence was presented to the VBA after the SOC issued.⁴ Rubens Decl. ¶ 19. In that same year, 23% of all appeals had two or more SSOCs issued. Id.

Under the alternative DRO path, a DRO will review the file, meet with the veteran and his representative, consider new evidence, reconsider old evidence, and can alter the decision if warranted. 38 C.F.R. § 3.2600; Rubens Decl. ¶ 20. If the DRO resolves some but not all of the appeal, a SOC will be prepared, and the veteran will be given 60 days to file a Substantive Appeal. 38 C.F.R. § 3.2600(f); Rubens Decl. ¶ 20. Even if the DRO resolves 90% of the appeal, the appeal will not be considered resolved as to the remaining 10%. Rubens Decl. ¶ 20.

Once the formal appeal has been received, the VBA certifies the appeal to the Board. 38 C.F.R. § 19.35. Despite certification, a file may not be transferred immediately to the Board, but may remain at the RO pending a “Travel Board” hearing or other action by the RO. As part of an appeal to the Board, the veteran may request a hearing before a VLJ. 38 U.S.C. § 7107(b); 38 C.F.R. § 20.700. At the veteran’s option, this hearing may be held in Washington, D.C., by video conference, or at the veteran’s local regional office. 38 C.F.R. §§ 20.700-20.705. If a veteran chooses to have the hearing at his local regional office, the hearing must await the next time that a VLJ travels to that office to hold hearings. Keller Decl. ¶ 5. Such “Travel Board” hearings are held once or twice a year at each RO, more frequently

⁴ SSOCs may also issue after a remand to the RO from the Board.

at the larger ROs. Id. At a minimum, a veteran must be given at least 30 days notice before a hearing is convened. 38 C.F.R. § 19.76.

Once a file is received by the Board, it is placed on the Board's docket. Nevertheless, in approximately 50% of the appeals, claimants are represented by a VSO before the Board and, therefore, one additional step may remain before the Board may adjudicate the appeal. Keller Decl. ¶ 21. If a veteran is represented by a VSO (such as one of the plaintiffs here), the file is provided to that VSO for review and preparation of a written argument (this generally occurs in cases where no hearing has been requested). Id. Completion of the review and return of the file are at the discretion of the VSO. Id. In FY 2008, plaintiff VVA took an average of over 273 days to return files to the Board in the 527 cases that it reviewed, compared to an average of 227 days for all VSOs. Id. Not counting the time that the files are lodged with the VSOs, the Board's average time to adjudicate an appeal (known as Board cycle time) was 155 days in FY 2008. Id.

The Board may grant or deny a claim, or may remand the claim to the RO for further development or other action. 38 C.F.R. §§ 19.7, 19.9; Keller Decl. ¶ 11. Each Board decision must contain a written statement of the reasons for the Board's findings. 38 U.S.C. § 7104(d); Keller Decl. ¶ 11. The Board does not have a policy of deciding one issue at a time on appeal. Keller Decl. ¶ 12. Rather, the Board's practice is to decide all issues presented on appeal that can be decided. Id.; see 38 C.F.R. § 19.7(b). The Board has no jurisdiction to decide issues that the RO has not adjudicated in the first instance. See Disabled American Veterans v. Sec'y of Veterans Affairs, 327 F.3d 1339, 1346-48 (Fed. Cir. 2003). For example, if an RO denied a claim based on no service connection, it would not have decided the percent disability and effective date. If the Board grants service connection, the Board may not then decide these remaining issues; it is required to remand the claim to the RO to initially adjudicate those matters. On remand, the RO will adjudicate the claim elements that were remanded, which may then be the subject of a continued appeal by the veteran. See id.

A growing cause of delay for appeals consists of court decisions interpreting the VA's duty to notify. Under the VCAA, VBA is required to provide duty-to-notify letters in all disability-compensation

claims filed each year. Keller Decl. ¶ 19. Although the precise content of these letters may vary with the nature of each claim, VA generally employs similar language and content in its notice in each of the hundreds of thousands of disability-compensation claims filed each year. Id. When a court finds a defect in the generally-applicable notice template that VBA uses for a particular type of claim, the defect potentially affects each of those claims in which the template was used, and the prior use of that letter in any cases then pending on appeal must be considered presumptively prejudicial to appellants, likely requiring a remand. See Sanders v. Nicholson, 487 F.3d 881 (Fed. Cir. 2007) (holding that a VCAA notice error is presumed prejudicial, requiring remand, unless VA affirmatively shows otherwise) cert. granted, 76 U.S.L.W. 3529, 76 U.S.L.W. 3649, 76 U.S.L.W. 3654 (U.S. Jun 16, 2008) (No. 07-1209); Simmons v. Nicholson, 487 F.3d 892 (Fed. Cir. 2007) (same).

Even without the impact of Sanders and Simmons, CAVC's imposition of claim-specific notice requirements in several recent cases adversely impacts adjudication and appeals timeliness. See, e.g., Vazquez-Flores v. Peake, 22 Vet. App. 37, 43 (2008) (imposing additional notice requirements in claims for increased disability-compensation ratings); Kent v. Nicholson, 20 Vet. App. 1, 9-10 (2006) (imposing additional notice requirements in claims to reopen previously-denied claims, including disability-compensation claims); Dingess v. Nicholson, 19 Vet. 473, 488-89 (2006) (imposing additional notice requirements in disability-compensation claims). Accordingly, each judicial decision identifying a defect in a VCAA notice provided in disability-compensation claims could result in remands of hundreds or thousands of other cases, all of which increases appeal resolution time. Keller Decl. ¶ 19.

Plaintiffs complain of undue appellate delays, although the delays on which they focus affect only a very small portion of the ratings claims filed each year. On average, claimants file a NOD in only approximately 11% to 14% of the claims adjudicated by VBA, and only approximately 5% proceed to the Board. Rubens Decl. ¶ 22. In FY 2008, the Board denied approximately 39% and remanded approximately 37 % of the appeals that it decided.⁵ Keller Decl. ¶ 22. A remand does not necessarily

⁵ Plaintiffs mistakenly assert that the Board has consciously increased the number of appeal denials since FY 2004. Board Judges are required to apply the law to the case as they find it, and this Court may not presume otherwise. Ex parte Royall, 117 U.S. 241, 252 (1886); Hamdan v. Gates, 565 F.Supp.2d 130, 137 (D.D.C. 2008).

mean that the VBA made any error. Changes in the law and new court precedent may provide the reason for some remands. Id. ¶ 23. An avoidable remand is defined as an appeal in which at least one error occurred prior to the VBA certifying the case to the Board. Rubens Decl. ¶ 22. As calculated by VBA, the current avoidable remand rate is 17.7% of those cases that reach the Board. Id. Additionally, the evidentiary record remains open for at least part of the Board appellate process, thus partially explaining why some cases may have been remanded. Id. Most significantly here, the Board grants benefits sought in only approximately 20% of the cases that it hears either before or after a remand (of those cases that are remanded, the vast majority – 75% – are returned to the Board and ultimately are reflected in the 20% grant or the 39% denial rates). Id. Given that only 5% of all claims are ultimately appealed to the Board, the 20% reversal rate means that only approximately 1% of all RO decisions are reversed.

The Ratings Claim Inventory

In fiscal year 2008, the VBA received 888,112 ratings claims.⁶ Rubens Decl. ¶ 23. Since FY 2000, the number of rating claims received by the VBA has increased 53% (from 580,773). Id. During this same period, the number of issues contained in these claims has increased 83%, from approximately 1,656,466 to 3,043,809. Id. As a claim remains open until all issues are adjudicated, the more issues a claim contains the longer it will likely be open. In FY 2008, at least 61,666 claims had 8 or more issues. Id. Since fiscal year 2005, the number of original claims with 8 or more issues has risen almost 41%, while the number with 7 or fewer has remained essentially steady. Id. Since fiscal year 2001, the number of claims with 8 or more issues has risen 171%. Id.

Average Days to Complete (ADC) measures the average time to adjudicate all rating claims completed over a finite period of time. Rubens Decl. ¶ 24. ADC is computed by taking all rating claims adjudicated during a period (a year, a month, or fiscal year to date), adding the number of days it took to complete each one, and dividing by the total number of claims that were adjudicated. Id. The ADC for fiscal year 2008 was 178.9 days, for FY2009 to date ADC is 162.6 days. Id. As shown in the following table, ADC has generally been trending steadily down since May, for the reasons explained below. Id.

⁶ In addition to ratings claims, VBA processed 781,800 non-rating claims in FY2008. Rubens Decl. ¶ 23.

FY08	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	FY09	Oct	Nov
ADC	178.4	179.6	177.2	189.6	187.2	182.2	178.7	183.0	174.1	174.3	174.5	170.4		161.9	163.5

Id. Between FY 2000 and FY 2008, ADC increased only 3.4%, from 173 days to 179 days, id. ¶ 25; between FY 2000 and FY 2009 year-to-date ADC has actually decreased 5.8%, id. ¶ 26. So despite the 83% increase in issues filed between FY 2000 and FY 2008, VBA's performance has improved.

The VA Is Aggressively Shortening The Time To Adjudicate Claims And To Resolve Appeals

The VA, the GAO, and outside commissions have studied the reasons for the increase in claims – and issues – per year and what can be done to address the workload created by those increases. The GAO has long recognized that factors external to VA contribute to delays, factors such as the impact of laws and court decisions, continued increases in the number and complexity of claims being filed, and difficulties in obtaining evidence to support a claim, such as military records. *Veteran's Disability Benefits: Processing of Claims Continues to Present Challenges*, GAO-07-562T (Mar. 13, 2007). As early as 2000, the GAO recognized that a good portion of the delays were caused by the structure of the disability compensation program as enacted by Congress. *Veterans Benefits Administration – Problems and Challenges Facing Disability Claims Processing* GAOT-HEHS/AIMD-00-146 at 11 (May 18, 2000) (“some issues affecting VBA's performance are not in direct control and are a function of the design of the program. As a result, it may be that only incremental gains can be made without changes in the current design of the program.”). In October 2007, the Veterans Disability Benefits Commission, established by Public Law 108-136, noted that many claimants could expedite the process by filing a more complete claim. *Veterans Disability Benefits Commission, Honoring the Call to Duty: Veterans Disability Benefits in the 21st Century* at 306 (noting that veterans frequently could provide evidence (such as private medical records) at the outset of the claim rather than have the RO develop the evidence under its VCAA duty to assist). This commission also remarked on the significant increase in VBA workload between 2000 and 2006, in particular the sharp increase in the number of issues, each of which essentially requires its own rating decision. Id. at 309-310. VA has determined that the reasons for this

increase include the current overseas conflicts, presumptive service connections of certain diseases for Vietnam-era veterans, and the aging of the veteran population as a whole. Rubens Decl. ¶ 27.

No matter what factors underlie the increases in the time to adjudicate ratings claims, VBA and the Board have been aggressively attempting to shorten processing times for several years. In 2001, the VBA instituted the Claims Process Improvement Model, whereby the processing of rating claims was standardized across all ROs. Rubens Decl. ¶ 28. Additionally, in 2002, the VBA created four Resource Centers dedicated to adjudicating rating claims that ROs had fully developed but were unable to rate promptly. Id. Based on the success of this concept, VBA has established five more Resource Centers. Id. Currently, over 100,000 rating claims per year are brokered from ROs to these centers or to other ROs that have additional capacity to rate claims. Id. These two improvements are primarily responsible for limiting the rise of ADC between 2000 and 2007 to just 3.6% while the number of issues adjudicated rose over 68.9%. Id.

Based on the success of the Resource Centers, the VBA has recently established four Development Centers to handle the evidentiary development of ratings claims for those ROs that have a surplus of claims awaiting development. Rubens Decl. ¶ 29. Other recent initiatives to improve timeliness include increased overtime, rehiring retired annuitants, and operational consolidations such as assigning all pension work to three ROs and creating national call centers to handle the millions of calls per year previously handled by all the ROs. Id.

But by far the biggest impact on decreasing adjudication delays is the recent increase in the C&P adjudication workforce. In the spring of 2007, Congress provided funding to VBA to hire an additional 3,100 employees. Rubens Decl. ¶ 30. Over 2,950 of these new employees were hired into C&P. Id. These 2,950 new employees are in addition to the approximately 8,100 who were already employed in C&P. Id. The impact that these additional employees is having on ADC is readily borne out by the FY 2008 and FY 2009 ADC statistics. As the majority of positions were filled in late 2007 and early 2008, ADC initially worsened because experienced adjudicators had to be diverted to training and supervising the new hires. Id. But since May 2008, ADC has dramatically dropped as these new employees have

begun to complete rudimentary training and become more proficient through actually performing their duties. Id. Currently, ADC has decreased to 163. Id. ¶ 24. Based primarily on these new hires, VBA projects that ADC for all ratings claims will continue to improve as VBA seeks to reach its strategic goal for ADC of 125 days, which is the absolute best that management estimates it could ever do based on the current statutory compensation system. Id. ¶ 30.

Similar efforts have been made to improve appeal times. In 2004, the VA consolidated most of the work on cases remanded by the Board at the Appeals Management Center (AMC) in Washington, D.C. Rubens Decl. ¶ 31. The staffing of the AMC has recently been increased from 89 to 111. Id. Based on the success of the seven claims Resource Centers, VBA has just established two Appeals Resource Centers to assist the RO's with the processing of appeals. Id.

Lastly, the Board and VBA are currently implementing an Expedited Claims Adjudication Initiative at four ROs. Keller Decl. ¶ 17. This is a two-year test to see if certain required time periods may be waived resulting in more rapid adjudication of appeals. Id. A veteran's participation in this pilot initiative is voluntary. Id. Under the initiative, a veteran agrees to accept several shortened deadlines (e.g., 60 days v. 1 year to file NOD; 30 days v. 60 days to file a Substantive Appeal after receiving a SOC). Id. In return, VBA agrees to forward the file to the Board generally within 30 day of receiving a Substantive Appeal, and the Board agrees to prescreen these files to determine whether all information is present to render a decision and, if not, to promptly attempt to correct any identified defects by remanding the case so that it is ready for review when the case reaches its place on the Board's docket. Id.

In summary, VA faces a huge caseload in which adjudications are handled under multi-layered processes designed to protect veterans' rights. Nevertheless, VA is actively working to structure its processes and procedures to minimize delay.

ARGUMENT

I. The Complaint Should Be Dismissed Because Of Jurisdictional And Other Reasons

"Without jurisdiction the court cannot proceed at all in any cause." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) (quoting Ex parte McCardle, 74 U.S. 506, 514 (1968)). For

several independent reasons, plaintiffs have failed to meet their burden to establish subject matter jurisdiction over their claims in this Court and hence plaintiffs' complaint should be dismissed pursuant to Fed. R. Civil P. 12(b)(1).

A. Plaintiffs' Lack Standing to Maintain this Action

The doctrine of "standing is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). At the pleadings stage "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke . . . the exercise of the court's remedial powers.'" Renne v. Geary, 501 U.S. 312, 315 (1991), quoting Bender v. Williamsport Area School Dist., 475 U.S. 534, 546 n.8 (1986). Standing requires a plaintiff, at an irreducible minimum, to show: (1) a distinct and palpable injury, actual or threatened; (2) that the injury is fairly traceable to the defendant's conduct; and (3) that a favorable decision is likely to redress the complained-of injury. See Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000).

An organizational plaintiff, including the two organizations who are the only plaintiffs in this action, may have standing to sue either on its own behalf ("organizational" standing) or on behalf of its members ("representational" standing). See Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). While the plaintiffs claim to "bring this action on their own behalf and as representatives of their members and constituencies," Compl. ¶ 15, in fact, there is no allegation in the complaint that these plaintiff entities, as such, have been harmed and therefore this case presents representational standing issues only.⁷

An organization's representational standing is contingent upon the standing of its members to bring suit. Therefore:

[t]o establish representational standing, [an organization] must demonstrate that: "(a) its members would have standing to sue in their own right; (b) the interests it seeks to vindicate are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

⁷ Plaintiffs have no standing to represent their supposed "constituencies," Compl. ¶ 15, separate from their actual members. See Smith v. Pacific Properties, 358 F.3d 1097,1101 (9th Cir. 2004).

Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333, 341-43 (1977); see also Arizonans for Official English v. Arizona, 520 U.S. 43, 65-66 (1997). Consequently, “[t]he focus of our inquiry is whether at least one of petitioners’ members has standing to sue in her or his own right.” American Library Ass’n v. FCC, 401 F.3d 489, 492 (D.C. Cir. 2005).

Plaintiffs fail at least the first element of this representational standing test. Plaintiffs’ complaint fails to identify a single member of either organization who is suffering any alleged injury fairly traceable to defendants’ conduct, instead alleging only vague claims about harm to veterans generally. Plaintiffs have assiduously avoided discussion of any individualized facts or individual injuries, see Compl. ¶ 16, so as to be able to maintain the fiction that their claims are not barred by 38 U.S.C. § 511, which prohibits district court review of issues of fact necessary to VA decisions affecting benefits. That making an individualized showing of harm would cause plaintiffs to run afoul of section 511(a) and thereby itself deprive this Court of statutory jurisdiction does not excuse plaintiffs from the requirement to establish standing. Article III power “does not wax and wane in harmony with a litigant’s desire for a hospitable forum. . . .” Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 476 n.13 (1982).

Plaintiffs’ generalized grievances fail to create the kind of “concrete factual context conducive to a realistic appreciation of the consequences of judicial action,” sufficient to discharge plaintiffs’ burden to establish standing.⁸ Valley Forge, 454 U.S. at 472. The Article III case and controversy requirement prohibits parties from seeking sweeping judicial relief unmoored to individual controversies. See Sierra Club v. Morton, 405 U.S. 727, 740 (1972); see also Conservation Law Found. v. Reilly, 950 F.2d 38, 43 (1st Cir. 1991) (“[A]djudication of [] non-individualized, abstract issues raises serious separation of powers concerns”). Federal courts “were simply not constituted as ombudsmen of the general welfare.” Valley Forge, 454 U.S. at 487.

⁸ Even if plaintiffs had alleged a concrete injury suffered by some of their members for which they could seek redress in this Court, they would still not have standing to pursue the kind of *systemwide* relief they seek. See Lewis v. Casey, 518 U.S. 343, 358 n.6. (“the right to complain of *one* administrative deficiency” does not confer the “right to complain of *all* administrative deficiencies”).

Plaintiffs must also establish, therefore, that at least one of their members has suffered a “concrete and particularized” injury that is fairly traceable to each of the agency practices they seek to challenge and that is likely to be redressed by the relief they seek. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Moreover, because plaintiffs seek prospective injunctive relief, Compl. ¶ 17, they must establish not merely that their members were injured in the past or that some veteran in the future may be harmed, but rather that the organizations’ members themselves are “realistically threatened by a repetition of [the alleged violations].” City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983); see also Bano v. Union Carbide Corp., 361 F.3d 696, 714 (2d Cir. 2004) (request for injunctive relief does not automatically confer representational standing). This essential allegation of a causal nexus relating to an individual member’s injury is also completely lacking in plaintiffs’ complaint.

B. Plaintiffs’ Claims Are Not Reviewable Under The APA

It is “axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.” United States v. Mitchell, 463 U.S. 206, 212 & n.9 (1983) (citing United States v. Sherwood, 312 U.S. 584, 586 (1941)). Moreover, “the terms of [the government’s] consent to be sued in any court define that court’s jurisdiction to entertain suit.” Sherwood, 312 U.S. at 586. Such consent cannot be implied, but must be “‘unequivocally expressed’ in the statutory text” and strictly construed in favor of the government. Dep’t of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999) (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)); see also Lehman v. Nakshian, 453 U.S. 156, 161 (1981) (“limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied”). “The party who sues the United States bears the burden of pointing to . . . an unequivocal waiver of [sovereign] immunity.” Holloman v. Watt, 708 F.2d 1399, 1401 (1983).

The only statute possibly capable of providing the requisite waiver of sovereign immunity for plaintiffs’ claims is the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706. See Compl. ¶¶ 10-11. Section 702 of Title 5 waives sovereign immunity for certain suits seeking to obtain judicial review of agency action but, like all waivers of sovereign immunity, it must “be strictly construed, in terms of its

scope, in favor of the sovereign.” Blue Fox, Inc., 525 U.S. at 261. To state a claim within the APA’s waiver of sovereign immunity in 5 U.S.C. § 702, plaintiffs must establish that they challenge a discrete agency action rather than seeking wholesale revisions to an agency program. Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 64 (2004). An action brought under the APA must challenge agency action that is final, and for which there is no alternate adequate remedy. 5 U.S.C. § 704; Center for Auto Safety v. NHTSA, 452 F.3d 798, 805 (D.C. Cir. 2006). Plaintiffs’ claim fails on all three counts.⁹

1. Plaintiffs Have Not Challenged Discrete Agency Action

Plaintiffs’ complaint alleges that “VA routinely and as a matter of policy and practice fails to issue timely final decisions,” Compl. ¶ 25, and further complains about the “overall inadequacy of the VA’s performance,” Compl. ¶ 26. These allegations are not challenges to “agency action” under the APA. See 5 U.S.C. § 551(13) (defining “agency action” as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. . . .”); Norton, 542 U.S. at 64.

To the extent plaintiffs are not challenging concrete VA rules or decisions on individual claims, but rather are broadly seeking improvements to programs they do not like, their claims are not cognizable in this Court under the APA’s waiver of sovereign immunity. As the Supreme Court has repeatedly held, plaintiffs simply “cannot seek *wholesale* improvement of [an agency] 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.” Norton, 542 U.S. at 64 (quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 891(1990)) (emphasis in original).

In Lujan, the Court found that “the ‘land withdrawal review program’” plaintiffs had challenged in that case “is not an identifiable action or event. . . . [Plaintiffs] cannot demand a general judicial review of the [agency’s] day-to-day operations.” 497 U.S. at 899. Like the unspecified VA “polic[ies] and practice[s],” Compl. ¶ 25, and “overall inadequacy of . . . performance,” Compl. ¶ 26, that plaintiffs

⁹ In VCS, Judge Conti recognized the force of defendants’ arguments as to application of principles of sovereign immunity, (as reflected in the scope of the APA’s authorization for judicial review) and the preclusive effect of 38 U.S.C. §§ 502 and 511, when he held that “[a]lthough these delays in benefits claims adjudications, especially for appeals, are substantial, the existing statutory framework and caselaw prevent this Court from taking remedial action” on any of plaintiffs’ claims. VCS supra 563 F.Supp.2d at 1083.

challenge here, the Department of the Interior's "land withdrawal review program" was not a discrete agency action. Instead, that "program" was "simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the [agency] in reviewing applications" and carrying out other administrative responsibilities. Id. The Court held that the "program" was not an identifiable agency action for purposes of review under the APA, and consequently, "the flaws in the entire 'program' – consisting principally of many individual actions referenced in the complaint" could not be "laid before the courts for wholesale correction under the APA." Id. at 893. For the same reason, plaintiffs' wholesale challenge to unspecified policies and practices of the VA also cannot be entertained by this Court.¹⁰

As Lujan recognized, such an approach may be "understandably frustrating" to organizations seeking across-the-board change, 497 U.S. at 894, but nevertheless, the "case-by-case approach" is the "traditional, and remains the normal, mode of operation of the courts." Id. Thus, unless Congress has explicitly provided for review at a higher level of generality, courts may "intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." Id.

Plaintiffs' attempt to couch their claim in terms of a "failure to act" by VA under 5 U.S.C. § 706(1) fares no better. As the Supreme Court held in Norton, 542 U.S. 55 (2004), a genuine failure to act may be reviewable as a final agency action under § 706(1) only where the agency has "failed to take a *discrete* agency action that it is *required to take*."¹¹ 542 U.S. at 64. (emphasis in original). Plaintiffs have pointed to no single, *discrete* agency action that VA has failed to take in spite of a Congressional

¹⁰ Any order mandating wholesale improvement in claims adjudication procedures in some unspecified way to benefit all veterans would far exceed the Court's authority. "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." Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 67 (2004). See also Long Term Care Pharmacy Alliance v. Leavitt, 530 F. Supp 2d 173, 185 (D.D.C. 2008) (suits challenging overall programs agencies establish to carry out legal obligations are "rarely if ever appropriate for federal court litigation).

¹¹ The typical § 706(1) case involves a "specific statutory command requiring an agency to promulgate regulations by a certain date." Lujan, 497 U.S. at 891.

mandate to do so.¹² Accordingly, they have failed to meet their burden to establish a right of review under § 706(1).

2. Plaintiffs Have Not Challenged Any Final Agency Action

Plaintiffs likewise have not challenged agency action that is “final” as is required by section 704 to bring a claim under the APA. An agency action is final only when it “mark[s] the consummation of the agency’s decision making process” and is an action “*by which rights or obligations have been determined, or from which legal consequences will flow.*” Bennett v. Spear, 520 U.S. 154, 178 (1997) (emphasis added). Because plaintiffs have not specified which particular agency policies, practices or rules they believe unlawfully cause the delays or they allege, they have similarly never established, as they must for a claim under the APA, that they challenge final agency action.

It is not altogether surprising that plaintiffs have failed to satisfy the final agency action requirement, since they have deliberately styled their case as a challenge to the entire VA system rather than individual VA rules, policies or other decisions. See Compl. ¶ 25. Agency policies for administering statutorily-mandated programs are “ordinarily not considered the type of agency action ‘ripe’ for judicial review” until there has been “some concrete action *applying [the policy] to the claimant’s situation . . .*” Lujan, 497 U.S. at 891 (emphasis added). Thus, the only relevant “final agency actions” in this case would be the individual benefits decisions which “consummat[e] . . . the agency’s decision making process” and determine claimants’ rights. See Bennett, 520 U.S. at 178; see also 5 U.S.C. §§ 551(11), (13). As noted above, plaintiffs have pointedly disavowed any intention to assert causes of action based on the individual disability claims of particular veterans. Compl. ¶ 16. In consequence of that decision, they have failed to state a claim for review of final agency action.

3. Veterans Have An Adequate Alternative Remedy

Review in this Court under the APA is only available if “there is no other adequate remedy in a court.” 5 U.S.C. § 704. However, the Veterans’ Judicial Review Act (“VJRA”), Pub. L. No. 100-687, 102

¹² Congressional admonitions to provide “expeditious treatment” of remanded claims, see 38 U.S.C. § 5109B and 7112, may be relevant to an individual veterans’ claim that his application for benefits is being unduly delayed, but, for the reasons set forth herein, cannot provide the basis for a challenge to the alleged systematic failure to meet such goals.

Stat. 4105 (1988), provides veterans with the right to challenge a wide range of VA decisions in the Court of Appeals of Veterans Claims (CAVC), including all decisions denying, in whole or in part, applications for benefits as well as any broader statutory or constitutional issues that arise in those claims. See 38 U.S.C. § 7261. Decisions of the CAVC have powerful precedential effect, frequently requiring VA to revise its policies and readjudicate entire classes of claims. Hence, this right to judicial review in a specialized, Article I court constitutes an adequate alternative remedy, foreclosing the right to bring the same claims in district court under the APA.

It is irrelevant that the alternate remedy prescribed by Congress might be less desirable than an action in district court. For example, in Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990), this Circuit held that Section 704 precludes APA review of enforcement and oversight activity by the Department of Education, because direct suits were available against alleged discriminators, despite the fact that such suits were "more arduous, and less effective in providing systemic relief." Id. at 751. See also National Wrestling Coaches Assoc. v. Dep't of Educ., 366 F.3d 930 (D.C. Cir. 2004). Similarly, in Beamon v. Brown, 125 F.3d 965, 967-970 (6th Cir. 1997), the Court recognized that the Court of Appeals for Veterans Claims provides an adequate remedy to challenge VA rules and procedures, including constitutional challenges.¹³

C. The Jurisdictional Provisions of the VJRA Deprive District Courts of the Jurisdiction to Entertain Challenges to Actions by the VA "Affecting the Provision of Benefits" to Veterans

In 1988, Congress enacted the VJRA, which created an exclusive review procedure for veterans to resolve issues concerning benefits determinations. See Zuspahn v. Brown, 60 F.3d 1156, 1158 (5th Cir. 1995), cert. denied, 516 U.S. 1111 (1996). Under the VJRA, jurisdiction to review final decisions of the Board of Veteran Appeals is conferred exclusively on the CAVC, 38 U.S.C. §§ 7252(a), 7266(a), and the

¹³ As the court recognized in Beamon, "the [CAVC] can 'compel action of the Secretary unlawfully withheld or unreasonably delayed.'" 125 F.3d at 968; 38 U.S.C. § 7261(a)(2). The CAVC, through the All Writs Act, 28 U.S.C. § 1651, "has the power to issue writs of mandamus in aid of its jurisdiction," and thus can provide a remedy if VA unreasonably delays or withholds action. Bates v. Nicholson, 398 F.3d 1355, 1359 (Fed. Cir. 2005) (citing Cox v. West, 149 F.3d 1360, 1363 (Fed. Cir. 1998)). The CAVC can also address plaintiffs' constitutional claims. See 38 U.S.C. § 7252; Wanner v. Principi, 370 F.3d 1124, 1130-31 (Fed. Cir. 2004) (constitutional challenge to rating schedule); Tropf v. Nicholson, 20 Vet. App. 317, 325 (2006) (same). The CAVC can enforce compliance with its decisions, see Tobler v. Derwinski, 2 Vet. App. 11-12 (1991), and is capable of addressing any issues that may arise relating to destruction of records, premature denial of claims, or any other wrongful acts by VA employees. See, e.g., Fossie v. West, 12 Vet. App. 1, 5-6 (1998).

United States Court of Appeals for the Federal Circuit has exclusive jurisdiction to review the decisions of the CAVC, 38 U.S.C. § 7292(a). Congress has also expressly directed that determinations by VA that affect veterans' benefits are not reviewable in district court. Section 511 provides:

(a) 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).¹⁴

Plaintiffs cannot credibly dispute the broad scope and sweep of Section 511, which was included in the VJRA to resolve a dispute that had arisen regarding the congressional intent behind 38 U.S.C. § 211, the predecessor of Section 511(a). Until 1973, 38 U.S.C. § 211 (now Section 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" *Id.* The legislative history demonstrates that the purpose behind Section 211 was to "make it perfectly clear that Congress intends to exclude from judicial review all determinations with respect to noncontractual benefits provided for veterans and their dependents and survivors." H.R. REP. NO. 1166, 91st Cong., 2d Sess. 11 (1970) reprinted in 1970 U.S.C.C.A.N. 3723, 3731.¹⁵

However, in 1973, in Johnson v. Robison, 415 U.S. 361 (1974), the Supreme Court held that the preclusion-of-review language in Section 211 did not serve as an absolute bar to judicial review of all matters touching upon the administration of veterans' benefits. The Johnson Court found that, in contrast to the preclusion of review of "day-to-day determination and interpretation of [the Secretary's] policy," the courts had jurisdiction to review challenges to the constitutionality of veteran's benefits statutes. Johnson, 415 U.S. at 372. Because a constitutional challenge to a VA statute itself addresses an act or

¹⁴ Section 511 was enacted in 1988 with the passage of the VJRA, and was codified at Section 211(a). In 1991 the code numbering was changed to Section 511(a). Pub. L. No. 102-83, §2(a), 105 Stat. 378, 388 (1991).

¹⁵ Indeed, "[s]ince Congress first legislated in the area of veterans' benefits over fifty years ago, it has consistently precluded judicial review of veterans' benefits determinations" in federal district court. Larrabee by Jones v. Derwinski, 968 F.2d 1497, 1499 (2d Cir. 1992). See generally H.R. REP. NO. 963, 100th Cong., 1st Sess. 19 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5800.

decision of Congress, as opposed to an act or decision of the Secretary, the Johnson Court held that such a challenge did not come within the purview of the Section 211 bar. Id. at 373. Subsequent to Johnson, a number of courts of appeals carved out other exceptions to the Section 211 preclusion-of-review provision, culminating in the Supreme Court's opinion in Traynor v. Turnage, 485 U.S. 535 (1988). In Traynor, the Supreme Court extended the Johnson exception further by permitting district court review of a challenge to VA regulations on the ground that they violated a non-VA statute, the Rehabilitation Act. However, the Supreme Court reaffirmed that Section 211 prohibited review of:

decisions of law or fact that arise in the *administration* by the [VA] of a *statute* providing benefits for veterans . . . [and] insulates from review . . . decisions made in interpreting or applying a particular provision of that statute to a particular set of facts.

Id. at 543-44 (emphasis in original).

Within four months of the Traynor decision, Congress enacted the VJRA in which, for the first time, Congress provided for judicial review of veterans' benefits decisions. The VJRA was obviously the product of Congressional dissatisfaction with judicial decisions, culminating in Traynor, that found ways to avoid the preclusion of judicial review contained in the predecessor statute, 38 U.S.C. § 211. In the House report accompanying the VJRA, Congress explicitly noted 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. 100-963, at 21 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5803, involvement which Congress strongly opposed. Consequently, Congress tightened section 211's preclusion of review language, noting that "[t]he effect of this change is to broaden the scope of section 211," id. at 27, to prevent federal district courts from entertaining precisely the sort of challenge that plaintiffs bring in this action.¹⁶ See also Larrabee v. Derwinski, 968 F.2d 1497, 1501 (9th Cir. 1992).

This clear Congressional intent argues against a narrow interpretation of section 511(a)'s preclusion of review language by construing it to apply only to decisions by the Secretary made in an individual benefit determination. Instead, the Court should give effect to the plain language of the statute,

¹⁶ "The committee believes that it is strongly desirable to avoid the possible disruption of VA benefit administration which could arise from conflicting opinions on the same subject due to the availability of review in the 12 Federal Circuits and the 94 Federal Districts. The committee also believes that the subject of veterans benefits rules and policies is one that is well suited to a court which has been vested with other types of specialized jurisdiction." Id. at 28 (emphasis added).

which precludes this Court from reviewing 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 . . .” *Id.* (emphasis added). So, for example, decisions by the Secretary on how to organize and assign staff to implement the VA claims administration statutes, 38 U.S.C. §§ 5101-5109A, the crucial decisions affecting claim and appeal processing times, are squarely within section 511's preclusion of review, since administrative determinations as to how to implement VA benefit statutes undeniably “affect[] the provision of benefits to veterans.” *Cf. Bates v. Nicholson*, 398 F.3d 1355 (Fed. Cir. 2005).

Plaintiffs may cite *Broudy v. Mather*, 460 F.3d 106 (D.C. Cir. 2006) in a futile attempt to avoid the preclusive effect of section 511. *Broudy* was an action brought by veterans exposed to radiation who alleged that a cover-up of the extent of their exposure by VA and the Defense Department denied them access to the courts. The *Broudy* Court held that section 511 did not apply because it was undisputed that the only two points potentially at issue – whether the information withheld impaired the consideration of veterans' claims and whether the VA failed to consider relevant information – had never been decided by the VA. *Id.* at 114.

Broudy's rationale is inapplicable here because the plaintiffs challenge a plethora of both informal policies and formal rules the VA has considered and adopted. For example, the scope and extent of access to documents at the Regional Office stage of a claim was considered and decided by the Secretary when the VA adopted its regulations establishing the process by which claims will be adjudicated at the Regional Office, 38 C.F.R. § 3.103. To find the Secretary's decisions improvident would require the Court to assess the relevance and weight of literally thousands of benefits decisions involving “questions of law and fact . . . that affect the provision of benefits” in direct contravention of the explicit terms as well as the underlying intent of section 511.

D. Section 502 of the VJRA Requires that all Challenges to VA Rules be Brought Exclusively in the Court of Appeals for the Federal Circuit

Section 502 of Title 38 of the United States Code governs challenges to regulations of the Department of Veterans Affairs and provides that such rules shall be subject to judicial review “only in

the United States Court of Appeals for the Federal Circuit. ..." 38 U.S.C. § 502. By this provision therefore, district courts are denied jurisdiction to adjudicate challenges to VA regulations.

Plaintiffs' challenge to VA "policies and practices," Compl. ¶ 25, in adjudicating claims necessarily encompasses challenges to agency rules that define the scope of VA's authority in adjudicating claims. To the extent plaintiffs' challenge is to such VA regulations, it is crystal clear that under 38 U.S.C. § 502, it is not subject to review in this Court but, rather, exclusively in the Federal Circuit. See, e.g., Preminger v. Principi, 422 F.3d 815, 821 (9th Cir. 2005) (section 502 deprived the district court of jurisdiction to entertain a facial challenge to a VA regulation); LeFevre v. Secretary, Department of Veterans Affairs, 66 F.3d 1191, 1196-97 (Fed. Cir. 1995) (Federal Circuit has jurisdiction to review VA "substantive rules of general applicability, statements of general policy and interpretations of general applicability"); Hall v. Department of Veterans Affairs, 85 F.3d 532, 532-33 (11th Cir. 1996) (no jurisdiction under § 502 to review VA regulation).

It is of no moment that plaintiffs may contend that they do not "directly" challenge VA regulations. In any circumstance in which the injunctive relief requested by plaintiffs will have the practical effect of invalidating a VA rule, in whole or in part, section 502 applies to prohibit such an effect. See California Save our Streams Council v. Yeutter, 887 F.2d 908 (9th Cir. 1989); Pediatric Specialty Care v. Arkansas Dept of Human Services, 444 F.3d 991 (8th Cir. 2006). For example, much of the delay in the claims adjudication process that plaintiffs challenge can be attributed to notices that VA must provide claimants and associated response times, which are established by regulation. See e.g. 38 C.F.R. § 3.159(b)(1) (claimant allowed 30 days to respond to VA request for more evidence). And the regulation which imposes a duty on the VA to obtain evidence supporting the claim, see 38 C.F.R. § 3.159(c), also necessarily results in delays in claims adjudication. Because the injunction plaintiffs seek would have the effect of invalidating these rules and others, at least in part, section 502 bars such relief.

Judge Conti recognized the preclusive effect of section 502 in VCS, basing his decision to enter judgment for the government in part on the fact that the relief that plaintiffs sought in that action (like that sought here) would invariably affect VA rules. "Furthermore, were the Court to implement the injunctive

relief requested by Plaintiffs and order that the VA shorten the average wait times, such an order would invariably implicate VA regulations.” 563 F.Supp.2d at 1083. The court further noted,

An order expediting claims adjudications, however, would force the VA to alter or repeal some of these regulations. Although the Court does not suggest that VA regulations alone are responsible for the substantial delays, an injunction requiring expedited claims processing would necessarily challenge some of these regulations, and any such challenge is reviewable only in the Federal Circuit.

Id. at 1084. Consequently, section 502's limitation on district court jurisdiction also requires bars plaintiffs' claims.

II. The Preliminary Injunction Should Be Denied

Injunctive relief is an extraordinary remedy, and the party seeking it has a substantial burden of proof. See American Coastal Line Joint Venture v. United States Lines, Inc., 580 F. Supp. 932, 935 (D.D.C. 1983). Because of the extraordinary nature of this form of judicial relief, courts should grant preliminary injunctions sparingly. Barton v. District of Columbia, 131 F. Supp. 2d 236, 242 (D.D.C. 2001) (citing Moore v. Summers, 113 F. Supp.2d 5, 17 (D.D.C. 2000)). Exercising such caution is more appropriate here because plaintiffs' concerns have already been fully aired during the trial conducted by Judge Conti. Though that case was brought by different plaintiffs and contained additional issues, the two issues raised in this motion for a preliminary injunction – that delays in VBA's processing of claims and in the Board's processing of appeals violate the APA and the Fifth Amendment – were fully aired and considered there, as the approximately 40 cites to Judge Conti's opinion by plaintiffs in their motion establishes. That plaintiffs here do not like the result there does not alter the fact that a federal court has already fully considered their claims on the merits and rejected a permanent injunction. Under such circumstances, preliminary injunctive relief is wholly unwarranted.

A party seeking a preliminary injunction must establish four factors: (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of the preliminary injunction, (3) that the balance of equities tips in its favor, and (4) that the public interest favors the injunction. Winter v. Natural Resources Defense Council, 129 S.Ct. 365, 374 (2008); see also Munaf v. Geren, 128 S.Ct. 2207, 2219 (2008) (same); Amoco Production Co. v. Gambell, 480 U.S. 531, 542 (1987) (same). In

Winter, the Supreme Court held that a party must always demonstrate that irreparable harm is likely – not just possible – before a preliminary injunction may issue. 129 S.Ct. at 375. By so holding, the Court rejected the test then existing in the Ninth Circuit and this Circuit, by which the requisite degree of likelihood of success and the degree of harm to the party seeking the injunction are balanced. See Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843-844 (D.C. Cir. 1977) (if movant demonstrates that balance of equities tips sharply in its favor, it need only show a possibility of success on the merits and vice versa). Post Winter, parties seeking preliminary injunctions must now fully satisfy all four factors before a preliminary injunction may be entered. Plaintiffs cannot do so here and, so, are not entitled to the extraordinary remedy of a preliminary injunction.

A. Plaintiffs Cannot Succeed On The Merits

Each of the reasons supporting defendant’s motion to dismiss also provides an independent reason that plaintiffs cannot prevail on the merits and are incorporated here. Plaintiffs cannot succeed for the following additional reasons:

1. Precedent Bars A Preliminary Injunction Here

By filing this Complaint, plaintiffs in essence ask this Court to resolve a policy difference among themselves, the VA, and Congress. Congress has determined that veterans may be entitled to certain benefits, determined the conditions for the award of such benefits, provided certain due process protections, and appropriated funds to permit the VA to adjudicate claims for these benefits. Given the number of claims that are filed, these funds permit the VA to adjudicate claims at a certain rate. Plaintiffs are unhappy with this pace, a situation that is well-known to Congress.¹⁷ Congress having chosen not to

¹⁷ Congress unquestionably is aware of the concerns raised by these plaintiffs and continues to evaluate methods to improve the claims adjudication process, to include consideration of the type of remedies plaintiffs seek in this case. The most recent Congress held a hearing on several bills to improve claim processing, including a bill (H.R. 1444, 110th Cong. (2007)) that would have required payment of a monthly stipend if VA failed to adjudicate a remanded claim within 180 days. LEGISLATIVE HEARING ON H.R. 67, H.R. 1435, H.R. 1444, AND H.R. 1490; Hearing before the Subcommittee on Disability Assistance and Memorial Affairs of the Committee on Veterans’ Affairs, U.S. House of Representatives, 110th Cong., 1st Sess. (Apr. 17, 2007) (<http://veterans.house.gov/hearings/hearing.aspx?NewsID=15>). Notably, VSOs at the hearing opposed the provision for adjudication deadlines and payments in the event of failure to meet the deadlines, reasoning that the procedure could have effects detrimental to the interests of veterans in the VA claims process. LEGISLATIVE HEARING ON H.R. 67, H.R. 1435, H.R. 1444, AND H.R. 1490, at 22 (statement of Carl Blake, National Legislative Director of Paralyzed Veterans of America); *Id.* at 24 (statement of Gerald T. Manar, Deputy Director, National Veterans Service, Veterans of Foreign Wars of the United States).

impose mandatory deadlines to address plaintiffs' concerns or provide even more additional funds for adjudication, plaintiffs now request this Court to intervene, override Congress's decision, and reorder the agency's priorities so that claims may be adjudicated more quickly.

Precedent bars this result. Over at least the last 25 years, the Supreme Court has consistently instructed that such programmatic disputes are best left to the political branches to decide. Consequently, the Supreme Court has routinely vacated permanent injunctions that have sought the same type of relief that plaintiffs seek here.

In Heckler v. Day, 467 U.S. 104 (1984), the Supreme Court vacated an injunction that is virtually identical to that sought here. There, plaintiffs complained of delays adjudicating disability benefits under the Social Security Act; these delays in the Social Security program were well known and had endured for years. Nevertheless, Congress chose not to impose mandatory deadlines to rectify those delays. Finding that the delays were unreasonable and violated the Social Security Act, a district court granted a permanent injunction, imposing mandatory deadlines on two phases of the adjudication process and, if those deadlines were not met, ordering that interim benefits be paid. The Supreme Court reversed. Deferring to Congress's refusal to impose deadlines despite its concern with the adjudication delays, the Supreme Court held that the injunction was an "unwarranted judicial intrusion." 467 U.S. at 119. Acknowledging that the district court was "moved by long delays that well may have caused serious deprivations," the Supreme Court instructed that "this does not justify imposing absolute periods of limitations applicable to all claims – limitations that Congress repeatedly has declined to enact." *Id.* at 119 n. 33.

Heckler v. Day left implicit what the Supreme Court in subsequent years has made plain: programmatic disputes – such as the delays here – are to be left to the political branches to resolve:

[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.

Lujan, 497 U.S. at 891 (emphasis in original). The rationale underlying this limit on judicial power is to protect agencies from undue judicial interference with their discretion and to avoid judicial entanglement in abstract policy disagreements:

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.

Norton, 542 U.S. at 66-67.

Judicial refusal to become entangled in generalized programmatic disputes is especially appropriate here where, as in Heckler v. Day, claims processing times have long been the subject of Congressional oversight (as confirmed by plaintiffs' own citation to the multiple reports by the General Accounting Office produced at Congress's request, Pls.' Mem. Supp'g Mot. for a Prelim. Inj. at 1-2, nn. 5-8), and, despite this knowledge, Congress has considered but repeatedly refused to impose mandatory deadlines.¹⁸ In refusing to impose the deadlines that plaintiffs seek, Congress has balanced competing priorities.

In Heckler v. Day, those priorities were quality versus timeliness. Here, those priorities include not only quality, but the due-process protections that Congress has granted veterans. For example, under the VCAA, the VBA has a duty to assist veterans develop their claims. 38 U.S.C. §§ 5103, 5103A. But the timelines associated with this assistance all but ensure that the arbitrary 90-day deadline for processing a claim proposed by plaintiffs cannot be met. For example, upon receiving a claim, VBA sends a notice letter to a veteran informing him or her of what records they need to provide to support

¹⁸ Several bills have been introduced in Congress to require the payment of interim benefits if certain deadlines have not been met; none of these bills has passed. See The Salute to Veterans and the Armed Forces Act of 2003, H.R. 2659, 108th Cong. (2003) (requiring VA to pay interim benefits of \$500 per month when a claim is remanded from the Board or CAVC and the VA does not render a decision within 180 days); The Veterans Judicial Improvement Act of 2002, H.R. 4018, 107th Cong. (2002) (authorizing CAVC to order VA to pay interim benefits when VA does not decide a remand from the Board or CAVC within 180 days); Veterans' Claims Administrative Equity Act of 1991, S. 1158, 102nd Cong. (1991) (requiring VA to pay interim benefits if disability and dependency claims were not decided within 180 days); Veterans' Claims Administrative Equity Act of 1991, H.R. 141, 102nd Cong. (1991) (same); Veterans' Claims Administrative Equity Act of 1991, S. 1107, 102nd Cong. (1991) (same); Veterans' Claims Administrative Equity Act of 1990, H.R. 5793, 101st Cong. (1990) (same). The Veterans' Benefits Improvements Act of 1994 required the VA to provide "expedited treatment" of those cases that had been remanded by the CAVC or the Board, Pub. L. No. 103-446, Title III, § 302, Nov. 2, 1994, 108 Stat. 4658, but failed to specify a specific time limit for such action on a remand.

their claim and what records VBA will seek on their behalf. Rubens Decl. ¶ 9. Included with this letter are release forms that the veteran must return before VBA may seek certain federal and all non-federal records that may support the claim. Id. ¶ 10. A veteran has 30 days to respond to this notice letter. 38 C.F.R. § 3.159(b). If non-federal records are involved, VBA will then request them from the custodian. 38 U.S.C. § 5103A; 38 C.F.R. 3.159(b). The initial deadline for a response is 30 days; if no response is received to the initial request, a follow-up request seeks compliance within 30 days. Id. Thus, a claim may be delayed for 90 days through no fault of VBA, but solely as a result of the duty to assist imposed by Congress. See 38 U.S.C. § 5103A. Moreover, veterans are entitled to submit new evidence at any point in the claims process, 38 C.F.R. §§ 19.37, 20.800, 20.1304, a right that may start VA's duty to assist anew at any point.

These due process protections extend to appeals. A typical appeal gives the veteran at least 120 days of discretionary time to respond (60 days to respond to the DRO election letter, 38 C.F.R. 3.2600(c), 60 days to respond to the SOC, id. at § 20.302(b)). This veteran-discretionary time may easily increase if, for example, the veteran submits additional information after the SOC, necessitating time for the RO to develop it (potentially 60 days to seek additional private records, Rubens Decl. ¶¶ 10, 12, and 30 days for the veteran to respond to the resulting SSOC, 73 Fed. Reg. 40748 (Jul. 16, 2008)). If the veteran submits this new evidence for the first time after the case has reached the Board, the case must be remanded to the RO unless the veteran waives initial RO consideration. See Disabled American Veterans v. Secretary of Veterans Affairs, 327 F.3d 1339, 1346-48 (Fed. Cir. 2003). If the RO then fails to resolve all the issues on this type of remand to the satisfaction of the claimant, it must issue a SSOC and then allow the veteran 30 days to respond before returning the case to the Board. If the veteran elects to appear before a travel Board, at least a 30-day delay occurs to provide the veteran sufficient notice of the hearing date. 38 C.F.R. § 19.76. Additionally, if the Board intends to rely on a new medical or legal opinion or new law, the veteran receives an additional 60 days to respond. Id. § 20.903. Thus, many of the causes of delays for appeals lie beyond the ability of VBA or the Board to address.

In light of these protections – protections that would have to be jettisoned were this Court to impose plaintiff’s requested 90-day/180-day injunction – Congress has refused to impose mandatory deadlines to date. Under these circumstances, judicial countermanding of Congress’s policy compromise would be wholly inappropriate. See Schweiker v. Chilicky, 487 U.S. 412, 429 (1988) (“Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program.”). Or as Judge Conti stated “[t]his conclusion is reinforced by the fact that Congress specifically did not include any fixed time limits for the adjudication of veterans benefit claims, an act of which it is perfectly capable and which would definitively and immediately remedy the delays. Veterans for Common Sense, 563 F.Supp. 2d at 1084 (citing Heckler v. Day, 467 U.S. at 117-18).

This is not to say that Congress or the VA has ignored the issue before the Court. In fiscal year 2008, Congress provided funding that has allowed 2,950 new employees to be hired into C&P, a 36 % increase over the existing 8,100 work force. Rubens Decl. ¶ 30. And while the initial assimilation and training of these new personnel had a minor initial adverse impact on adjudication, it appears that these additional employees are primarily responsible for reducing ADC from the 180 days alleged in the Complaint to 163 days for FY 2009 year to date. Id. ¶¶ 24, 30. VBA currently estimates that this trend will continue. Id. ¶ 30. VBA, too, has sought to address the issue in multiple other ways, from concentrating non-disability claim functions such as telephone contact and pension maintenance at specific facilities, to creating specialized centers to help various ROs develop and rate disability claims that would otherwise have to wait in queue. Id. ¶¶ 28, 29.

Thus, the Legislative and Executive branches are acting just as the Supreme Court envisioned in Heckler, Lujan, and Norton. They have considered the programmatic trade-offs and are seeking to improve program performance within the constraints they have identified, including procedural rights and protections for veterans that Congress thought essential. Under such circumstances, it is not for this Court to impose the arbitrary deadlines suggested by plaintiffs. The arbitrariness of the deadlines is evident from plaintiffs’ failure to even suggest how VBA could adjudicate claims within the deadlines,

instead recommending that this Court command VBA to suggest how such compliance could be attained. But this just highlights the agency's unique expertise in ordering its own affairs and this Court's (and plaintiffs') singular inability to do so. Moreover, it is a prime example of the "judicial entanglement" in agency affairs that the Supreme Court has refused to countenance. This case squarely matches the governing Supreme Court precedent and, so, for the same reasons, precludes any injunction – preliminary or permanent – here.

2. Plaintiffs Cannot Establish Any Likelihood Of Success Under The APA

As noted above, plaintiffs' APA claim is barred because they do not challenge discrete agency action but rather generalized program defects. But even were this Court to consider plaintiffs' claims of delay under the APA, relief would still not be warranted. Under the APA, agencies are to conclude matters presented to them within a "reasonable" time, 5 U.S.C. § 555(b), and courts may compel agency action "unreasonably delayed," 5 U.S.C. § 706(1), but Congress has failed to define those terms. In Telecommunications Research & Action Center v. F.C.C., 750 F.2d 70 (D.C. Cir. 1984) ("TRAC"), the court set out the following test to assess an agency's timeliness under section 555(b):

- (1) the time the agency takes to make decisions is governed by a rule of reason;
- (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for the rule of reason;
- (3) delays that might be reasonable in economic regulation are less tolerable when human health and welfare are at stake;
- (4) the court must consider the effect of expediting delayed action on agency activities of a higher or competing priority;
- (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
- (6) the court need not find any impropriety by the agency to find that its actions have been unreasonably delayed.

750 F.2d at 80.

After hearing evidence over a three-week trial, Judge Conti found that the VBA's rating claim adjudication process and the Board's appeal procedure satisfy this test. 563 F.Supp.2d at 1084-85. The

time for an RO to initially adjudicate a rating claim meets the rule of reason. Congress has not chosen to impose a deadline on this part of the process, nor has it otherwise indicated the speed expected of ROs to adjudicate claims, so the governing statutes provide no content for the rule of reason. VBA's strategic goal for processing ratings claims is 125 days. Rubens Decl. ¶ 30. The current ADC for a rating claim in an RO is approximately 163 days. *Id.* ¶ 24. This 38-day difference is simply insufficient to support a finding that the initial adjudication of a rating claim is too long. This is especially true given the tremendous due process rights veterans enjoy. As noted above, if just one private record custodian refuses to respond to a VBA request for information, a minimum of a 60-day delay occurs in the processing of the claim. Perhaps the most important protection is that the record remains open throughout the process, permitting a veteran to bolster his claim or raise an entirely new issue at will. But this protection comes with a significant cost in time as the VBA is required to develop this new evidence in the midst of its adjudication process. Lastly, claims normally contain multiple issues. A claim remains open for purposes of ADC until the final issue is adjudicated, even though a veteran may already be receiving benefits for other issues in the claim. *Id.* ¶¶ 5, 13. Under these circumstances, the current ADC of 163 days is reasonable.

Similarly, the time for appeals is reasonable, though for a different reason. Veterans appeal only 11 to 14% of the over 880,000 claims filed annually. Rubens Decl. ¶¶ 22, 23. This is significant since the Notice of Disagreement is an informal piece of paper from the veteran to the VBA stating that the veteran disagrees with some part of its decision, the veteran need not specify the exact object of disagreement. 38 U.S.C. § 7105. The disagreement may be with only one aspect (denial of an issue, percent of rated disability, effective date of the disability) of a multi-issue claim. Rubens Decl. ¶ 16. Significantly, if the veteran was awarded benefits, the veteran receives those benefits while the appeal is pending. *Id.* Only 5% of all claimants actually proceed to the Board, meaning that the vast majority of them resolve their appeals during the portion of the appellate process that is handled by VBA. *Id.* ¶ 22. And only 20% of those that proceed to the Board (including those that have been previously remanded and returned to the Board) – or approximately 1% of all claims filed annually – are granted by the Board.

Id. Thus, while the delays for those that ultimately proceed to have their appeal reviewed and decided by the Board may be lengthy, in context the overall number affected is small. Moreover, VBA has emphasized initial ratings decisions more than appeals because 82% of all claims result in at least a partial grant by the RO, id. ¶ 14, so this decision ensures that the vast majority of claimants receive some benefit even if they later choose to appeal. Given the small percentage of the overall number of claimants who are adversely affected by any delay on appeal, the emphasis on initial claim production in relation to appeals and the appellate delays that may result fit within the rule of reason.

The remaining factors also favor VBA. Any interest veterans may have in receiving disability compensation, while potentially significant, is attenuated for several reasons. First, veterans' disability benefits are not need-based and, so, unlike other social benefit programs, were not necessarily intended to provide a last line of income for those in need. See 38 C.F.R. § 3.303. While this may nevertheless sometimes be the case, plaintiffs' overemphasis of this factor is misplaced. See Mathews v. Eldridge, 424 U.S. 319, 341 (1976) (non-need-based benefits less significant for due process analysis). Second, to the extent that a veteran is in need, other entitlement programs remain available to them while their claims are being adjudicated. And lastly, as has been noted, some of the delays that plaintiffs complain of occur as a result of the due process protections that veterans enjoy. Plaintiffs' motion carefully ignores these due process protections and their consequences, but this Court cannot ignore them as they, in large part, define the interest that Congress has bestowed on veterans and that plaintiffs purportedly seek to vindicate. Consequently, as substantial as a veteran's interest may be in some circumstances, that interest is somewhat attenuated here.

There is no issue of agency impropriety here. Plaintiffs raise none, nor could they. The record is replete with the actions the VA has taken to improve timeliness and ensure quality, actions that belie any attempt to show that the VA has some improper motive behind these delays. Moreover, given the intense oversight that Congress has devoted to this issue, the dearth of any findings of malfeasance is adequate evidence that none exists.

Accordingly, the last TRAC factor, weighing heavily in the government's favor, is dispositive of the reasonableness of VBA and the Board's timeliness. See Veterans For Common Sense, 563 F.Supp. 2d at 1085 (finding fourth TRAC factor dispositive). Were this Court to order mandatory deadlines, a substantial reordering of agency priorities would occur that would substantially prejudice the affected programs. Funding to adjudicate claims is a zero-sum game. Claims processing staff are funded solely from VBA's General Operating Expense appropriation, a limited fund which supports multiple activities. Rubens Decl. ¶ 32. To comply with mandatory deadlines, VBA would have to redirect funds and employees devoted to other equally important VBA activities to rating claims adjudication. VBA would have to severely curtail successful outreach programs that currently use personnel with claims processing backgrounds. Programs such as Benefits Delivery At Discharge and the Transition Assistance Program where VBA employees brief and actually assist military members leaving active duty to file claims would be cut back. Id. Specialized outreach efforts to homeless veterans, first Gulf War veterans, current Afghanistan and Iraq combat veterans, Vietnam veterans, elderly veterans, and women veterans would all be severely curtailed. Id. Personnel would also have to be redirected from non-rating claim adjudications, which currently number over 781,800 per year. Id. Matters such as death pension for veterans survivors, dependency adjustments, special home adaptation (for disabled veterans), and burial payments would all see processing times increase substantially as a result. Id. New employee training would have to be modified to focus all new employees on only part of the current curriculum, namely gathering evidence and processing interim award benefits, at the expense of learning to actually rate disability claims – leading to substantial delays in the future as the number of qualified adjudicators diminishes for lack of trained replacements. Id. Expert employees currently working to develop and test improvements to the claims process would instead have to be returned to claims processing, at the expense of future efficiencies, especially VBA's progress to a paperless claims process. Id. Quality of claims adjudication would decrease as the quality review program would be curtailed to return experienced reviewers to the adjudication process. Id. Internal controls and system analyses would similarly be affected as personnel devoted to monitoring production were, instead, diverted to meeting the

Court's deadline. Id. This would severely curtail management's ability to oversee production. C&P compensation examinations would suffer because they would have to occur without a proper chance to accumulate all the proper medical records. Id.

As for the Board, it simply has no ability to meet the deadline plaintiffs seek. A review of personnel finds that no qualified VLJs (excluding the Board Chairman and Vice Chairman) and only 2 qualified staff attorneys are not currently assigned to reviewing and deciding cases. Keller Decl. ¶ 5. Currently 320 staff attorneys are assigned to this task, with each one expected to draft 3.5 opinions per week or 156 per year. Id. Each VLJ is expected to review and decide 19 decisions per week, 752 per year. Id. In addition, each VLJ is expected to complete three week-long Travel Board trips per year to conduct hearings at the 57 ROs. Id. There is no way, absent a massive addition to Board personnel that only Congress may authorize, for the Board to move much quicker than it already does. Note that the Board itself takes, on average, only 155 days to adjudicate a claim once it arrives at the Board. Id. ¶ 21. This does not count the 227 days on average that VSOs, such as plaintiff Vietnam Veterans of America, currently take to review files and draft briefs. Id. That process would have to cease if the Board were to comply with the 180-day deadline that plaintiffs seek. But more fundamentally, neither the Board nor VBA in the joint appeals process could comply with that deadline. As noted, once a NOD is filed, a veteran is given 60-days to elect the DRO procedure or standard appeal. See 38 C.F.R. 3.2600(c). As the DRO procedure is a de novo review, it necessarily adds days to the appeal procedure and would have to be terminated. And as for a standard appeal, once a SOC has been filed, a veteran has at least 60 days to file the Substantive Appeal. 38 U.S.C. § 7105; 38 C.F.R. 20.302(b). Similarly, a veteran must be given 30 days notice before a Board hearing is held, if he elects one. 38 C.F.R. § 19.76. Thus, potentially 150 days of plaintiffs' proposed 180 days may elapse through no fault of the VA.

The real impact of plaintiffs' proposed injunction is that this Court would have to order the VA to suspend the many due process protections that have been built into the statutory compensation system. VBA simply cannot meet a 90-day deadline to adjudicate a claim if the VCAA requires it to wait up to 60 days for a private record custodian to respond to a request for records, nor may VBA and the Board meet

a 180-day deadline for processing an appeal when over 150-days or more of notice delays are again built into the system. Plaintiffs simply ignore the existence of these due process protections that Congress and the VA have built into the compensation process, and consequently the need to eliminate them to meet their proposed deadlines. So too, they simply ignore the extreme reordering of agency assets that would also have to occur. These impacts demonstrate the breadth of judicial entanglement were this Court to grant the requested injunction. Under TRAC, the severity of these effects overcomes any and all of the other factors. Accordingly, given that Congress has chosen not to impose mandatory deadlines, this Court may not find that the delays of which plaintiffs complain are unreasonable.

3. Plaintiffs Cannot State A Due Process Claim

Plaintiffs' constitutional Due Process claim necessarily fails for all of the same reasons their APA claim fails. For unless the APA is superfluous, its requirements for timeliness must exceed those of the Constitution. This is confirmed by precedent evaluating claims of administrative delay under the Due Process Clause.

Due Process is a flexible standard, calling for "such procedural protections as the particular situation demands." Mathews, 424 U.S. at 332. In cases asserting inordinate delay, the inquiry is whether "due process is no longer due process because past due." Wright v. Califano, 587 F.2d 345, 354 (7th Cir. 1978). Significantly, "[t]here is no talismanic number of years or months after which due process is automatically violated." Coe v. Thurman, 922 F.2d 528, 531 (9th Cir. 1990). "The mere passage of time, without more, does not constitute a due process violation." Cummins v. Barnhart, 460 F.Supp.2d 1112, 1121 (D. Ariz. 2006). Put another way, "[d]elay is a factor but not the only factor" in assessing agency timeliness. Wright, 587 F.2d at 354. Speed in adjudication cannot be an end in itself, Wright, 587 F.2d at 356, lest accuracy (or quality) suffer. Id. Courts are in a uniquely unsuitable position to properly balance these competing facets of the administrative adjudication process. Id. at 353-354.

Thus, the test under the Due Process clause mirrors that under TRAC and imports the strictures on court power imposed in Heckler, Lujan, and Norton. As under TRAC, VBA has an intense interest in serving all its clients, not just those seeking ratings decisions, and it has a substantial interest in ordering

its own affairs to properly monitor and manage its statutory obligations. Similarly, Congress has exhibited intense interest in how VBA accomplishes its myriad responsibilities, but has refused to order the mandatory deadlines sought here, undoubtedly because it is aware of the severe disruption that this will cause to VBA's activities and because it has not opted to devote additional funds for more personnel (beyond the 3,100 it has just funded). Further, Congress has chosen to emphasize procedural protections in the VA adjudication process over speed, a choice it is unquestionably entitled to make. Thus, any inquiry under the Due Process clause rightly defers to the choices that Congress has made.

4. This Court Cannot Authorize Interim Benefits

"It is an axiomatic principle of constitutional law that the judiciary's power is limited by a valid reservation of Congressional control over public funds." Flick v. Liberty Mutual Fire Ins. Co., 205 F.3d 386, 391 (9th Cir. 2000). This restriction emanates from the Appropriations Clause, which states: "No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." U.S. Const. Art. I, Sec. 9, cl. 7. The Supreme Court has made clear that this clause mandates that any payment of money from the Treasury must be authorized by Congress. O.P.M. v. Richmond, 496 U.S. 414, 424 (1990). In other words, the powers granted the other branches of government in the Constitution are subject to the power of purse granted by the Constitution solely to Congress. Id. at 425. It is for Congress, not the other branches, to make the hard choices as to how to pay the debts of the public fisc. Id. And not even the "temptations of a hard case" permit a court to order a recovery contrary to the appropriations of Congress, "for to do so would disregard the duty of all courts to observe the conditions defined by Congress for charging the public Treasury." Id. at 420 (quoting Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385-386 (1947)). Simply put, as reiterated in Richmond, a long line of authority stands for the widely accepted principle that "a court may not grant a remedy that draws funds from the Treasury in a manner that is not authorized by Congress." Flick, 205 F.3d at 391.¹⁹ Consequently, plaintiffs have no chance of succeeding on their request for an injunction ordering interim relief.

¹⁹ See also Library of Congress v. Shaw, 478 U.S. 310, 314-315 (1986) (absent a specific and explicit waiver by Congress, interest is not permitted to be levied by a court against the United States); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385-386 (1947) (Court erred by awarding insurance recovery against United States on terms that varied from the statutory authorization for the expenditure of funds under the insurance program by Congress);

This rich body of precedent bars any form of interim payment here. Simply put, Congress has restricted benefits to only those veterans who incurred or aggravated their disability while in military service. 38 U.S.C. § 1110. Absent an adjudication of service connection – which by statute is VA’s to make – this Court is barred from awarding the interim benefits that plaintiffs contemplate here.

B. Plaintiffs Overstate Their Claims Of Irreparable Harm

Most if not nearly all of the veterans seeking disability benefits will not suffer any significant delay in receiving their benefits even absent the preliminary relief that plaintiffs seek. Accordingly, any irreparable harm that plaintiffs may suffer if their motion is denied is severely attenuated and cannot justify preliminary relief.

Very few of the over 880,000 ratings claimants who seek benefits in any given year suffer from untoward delays. As noted above, the timelines for veterans and their medical providers to respond to requests for information can easily, through no fault of VBA, lead to a claim remaining open for over 90 days or more. Nevertheless, the ADC for FY 2009 is 163 and has been substantially decreasing since the addition of the 2,950 additional employees to C&P. Rubens Decl. ¶ 24. Given that the best that VBA believes it could ever achieve is 125 days, *id.* ¶ 30, this 38-day difference cannot support the

Reeside v. Walker, 11 How. 272, 291(1851) (judicial money judgment does not authorize payment from Treasury unless Congress appropriates the funds); American Fed’n of Govt. Employees v. Federal Labor Relations Authority, 388 F.3d 405 (3d Cir. 2004) (because Congress had not appropriated funds for that purpose, federal court could not order provision inserted into collective bargaining agreement to have Army depot reimburse union members for damages caused by cancelled leaves); Flick, 205 F.3d at 391-92 (insured had to strictly comply with statutory requirements of federal flood insurance policy to recover as Congress had conditioned the disbursement of appropriated funds by those requirements); Messerschmidt v. State of Arizona, 1996 WL 547918 (9th Cir.) (federal court powerless to find discrimination for failure to fund a business plan under the Rehabilitation Act when Congress had failed to appropriate monies for that program); Maryland Dept. Of Human Resources v. United States Dept. Of Agriculture, 976 F.2d 1462, 1482 (4th Cir. 1992) (district court violated Appropriations Clause by issuing preliminary injunction that barred agency from recouping improperly awarded aid funds; the injunction essentially transferred federal funds to state without an appropriation by Congress). This restriction on the judiciary’s remedial powers applies with equal force to the remedial powers of the Executive. *E.g.*, Knote v. United States, 95 U.S. 149, 154 (1877) (Presidential pardon does not authorize repayment from Treasury of the proceeds derived from sale of convicted’s forfeited property; only Congress may authorize such payments).

Indeed, the Court cannot order the VA to violate the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1350 (making it a crime for any government employee to knowingly spend money in excess of Congressional appropriation). As the Supreme Court has stated, “it would be most anomalous for a judicial order to require a Government official . . . to make an extrastatutory payment of federal funds.” Richmond, 496 U.S. at 430; *see also* Hedges v. Dixon County, 150 U.S. 182, 192 (1893) (courts cannot fashion remedies that would violate either the Constitution or a statute); Thomas v. Whalen, 962 F.2d 358, 363 (4th Cir. 1992) (court cannot violate statute to effect a result it believes would be fair).

extraordinary remedy of a preliminary injunction. And while appeal delays may be longer, the number of claimants affected – just 1-2% – cannot support preliminary relief either.

Further, VBA’s priorities for adjudication, focused on those veterans most in need, also attenuate any irreparable harm here. VBA has for several years now accelerated adjudication of claims for veterans in need such as those over 70, those suffering from a terminal illness, or those who are homeless. Rubens Decl. ¶ 33. Currently, VBA’s highest priority is adjudicating the claims of veterans seriously injured in current combat operations in Afghanistan and Iraq; these claims are being handled before all others.²⁰ Id. And the claims of the remaining current combat veterans also receive priority adjudication, with the goal to complete processing of them within 100 days. Id. Notably, any delay in adjudicating disability benefits for these Afghanistan and Iraq veterans has no impact on their ability to receive medical care at a VA facility: for returning combat veterans are entitled to free medical care at VA facilities for five years from their release from active service, regardless of the status of any disability claim they may (or may not) have filed. 38 U.S.C. § 1710(e)(3). Thus, especially with respect to the cohort of veterans who appear to be at the center of plaintiffs’ case – those veterans most in need and those returning from Afghanistan and Iraq – VBA’s priority initiatives severely undercut plaintiffs’ claims of irreparable harm.

C. Plaintiffs Ignore The Harm To The Government From This Preliminary Injunction

Plaintiffs blithely and mistakenly assume that no harm could befall the government were this Court to issue the preliminary injunction. This brief, however, has already detailed the immense harm that would flow were the Court to order the requested relief. Consequently, that harm need only be briefly recounted here. First, the mandatory deadlines and attendant judicial supervision that plaintiffs seek to impose would severely impact the workings of VBA and the Board. Personnel would have to be diverted from outreach efforts back to claims processing, leaving veterans without VBA assistance in transitioning back to civilian life and in initiating their claims. Rubens Decl. ¶ 32. Management

²⁰ Apart from the C&P Program, Congress in 2005 enacted a new “traumatic injury protection” benefit, 38 U.S.C. § 1980A, which is “designed to provide severely injured service members who suffer a loss as a direct result of a serious traumatic injury, such as a loss of an arm or leg, with monetary assistance to help the member and the member's family through an often long and arduous treatment and rehabilitation period.” 70 Fed. Reg. 75,940 (Dec. 22, 2005). That separate monetary benefit is specifically intended to meet in part economic needs resulting from additional living expenses and wage loss during periods of recovery and treatment following a severe traumatic injury even before a person separates from service. Id.

oversight of VBA would be severely curtailed as the quality review program would have to be reduced to provide more claims processors to comply with the Court's injunction. Id. Future efficiencies in the processing of claims would be sacrificed as the experts developing future processes were returned to the production ranks. Id. And internal controls and system analyses would also suffer, reducing management's ability to detect and respond to problems that arise in various parts of the system. Id.

Second, the injunction will insert this Court into the judicial micromanagement that the Supreme Court has explicitly cautioned against in Heckler, Lujan, and Norton. There will be simply no way for this Court to review the putative plan plaintiffs seek to have VBA produce and supervise its implementation without the Court necessarily having to "work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management." Norton, 542 U.S. at 66-67. As the Supreme Court has made clear, those decisions are to be left to the Legislative and Executive branches which are better suited to the task, and to which the Constitution has granted those powers.

And lastly, such interim payments would undoubtedly cause unnecessary losses to the Treasury as payments would be made to veterans who were not entitled to them, both to those veterans who will be found not disabled by reason of their service and to those found disabled at a rate less than 30%.

D. The Public Interest Weighs Against The Preliminary Injunction

To be sure, as plaintiffs argue, the public does have an interest in seeing that veterans receive the disability payments that they are due. But plaintiffs ignore the full contours of this right, vastly oversimplifying it to justify the injunction that they seek. The public's true interest lies in seeing the difficult policy compromises that Congress has enacted and that define the right sought to be vindicated here are carried out, and in the associated responsibility to pay benefits to only those whom Congress has entitled. Protection against fraud and inadvertent mispayments are just as much in the public's interest here as seeing that veterans receive any benefits to which they may be entitled. Plaintiffs' injunction would have this Court override Congress's difficult and intricate policy choices in this area, unconstitutionally redefine veterans' rights to receive disability benefits, and, by arbitrarily imposing

mandatory deadlines, increase the likelihood that fraud and mispayments will occur, all of which is simply counter to the public interest. See In re Barr Laboratories, Inc., 930 F.2d 72, 76 (D.C. Cir. 1991).

Congress has intricately defined veterans' right to receive disability benefits. See, e.g., VCAA, 38 U.S.C. §§ 5103, 5103A. Congress chose not to grant disability benefits to veterans based merely on their service or on their need, but only if they incurred or aggravated some disease or disability in the service of their country. Accordingly, VBA and the Board may compensate only those who incurred their disabilities while serving their country. 38 C.F.R. 3.303. Thus, unlike medical insurance decisions, which generally address only whether a policy was in force when treatment was sought, veterans' disability decisions include the causal component of service connection, a component that requires additional evidentiary proof of when and where a disability arose. To ease the burden of establishing service connection, Congress has further defined veterans' right to disability payments by granting them various due process protections and evidentiary presumptions. Taken together, these interlocking policy judgments of service connection, due process protections, and evidentiary presumptions represent Congress's grant of compensation to disabled veterans, the right at issue here.

But, as noted above, implementing the full contours of this right necessarily impose significant time burdens on claims adjudication. Fully aware of both the scope of the right it has granted and the resulting implications for timely adjudication, Congress has nevertheless chosen to fund claims adjudication at a certain level, albeit one that has been recently increased 35%. Rubens Decl. ¶ 30. This level of funding represents yet another policy choice, as it is for Congress to determine how much funds are made available to adjudicate veterans disability claims, and also how to allocate funds for the myriad programs, entitlements, and needs across the entire government.

The Constitution reserves to Congress the right to define veterans' entitlement to disability compensation and the amount of funding to adjudicate those claims. Plaintiffs simply ignore this reservation. Nowhere in their Complaint or motion do plaintiffs mention the causal requirement of service-connection or the additional due process protections that add time to the adjudication of veterans claims. Rather, plaintiffs redefine the right, mistakenly asserting only that disabled veterans are (versus

may be) entitled to benefits, without explaining that these other protections have any impact on the timeliness of adjudication. By doing so, plaintiffs seek to induce this Court to substitute its own view of how fast the adjudication process should work, in contravention of the intricate compromise struck by Congress in its appropriations and the enabling statutes, as well as bedrock separation of powers principles. E.g., Norton, 542 U.S. at 63. But more fundamentally here, such a result would be against the public interest as it would lead to hurried adjudications, payment of interim benefits to individuals not entitled to receive them, and, potentially fraud, as individuals would be tempted to file unjustified claims knowing that the government would have great difficulty recouping the interim benefits they received. This result is the antithesis of the public interest.

CONCLUSION

For the reasons stated above, defendant requests that the Court dismiss the Complaint with prejudice. In the alternative, defendant requests that the Court deny plaintiffs' Motion for a Preliminary Injunction.

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Respectfully submitted,

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