

EXHIBIT

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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

I. INTRODUCTION

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

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

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

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20 **II. BACKGROUND**

21 Plaintiffs are non-profit organizations that represent the
22 interests of veterans of the Iraq, Afghanistan and earlier
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24 ¹ The Court reminds both parties that the Civil Local Rules
25 are not optional. In particular, the Court directs both parties to
26 familiarize themselves with Rule 7-4(b). Plaintiffs have filed an
27 Opposition in violation of this Rule. Defendants, not to be
28 outdone, have filed a Reply that is also in violation of this Rule.
If this pattern continues the Court will strike all material
exceeding the page limits set out in Rule 7-4(b).

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

6 Veterans seeking benefits for service-connected disability or
7 death must file a claim in one of 58 regional VA offices. The
8 proceedings at the regional offices are ostensibly designed to be
9 non-adversarial. For example, veterans are prohibited from paying
10 an attorney for assistance at this initial stage, see 38 U.S.C. §
11 5904(c)(1); discovery tools are limited or nonexistent, see id. §
12 5103A; and veterans are generally prevented from compelling the
13 attendance of witnesses to support their claims, see id. § 5711.

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

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

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14 **III. STANDING**

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

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

25 Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc., 528
26 U.S. 167, 181 (2000).

27 Plaintiffs have alleged that their organizations are
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1 comprised of veterans, including many who have claims pending
2 before the VA or the BVA, who receive VA benefits that have been
3 threatened with reduction by the VA, or who suffer from PTSD.
4 Compl. ¶¶ 35-38. Such allegations are sufficient, at this stage,
5 to satisfy the Court that Plaintiffs' members would "otherwise
6 have standing to sue in their own right." Friends of the Earth,
7 528 U.S. at 181. In addition, Plaintiffs argue that they
8 themselves are harmed by Defendants' alleged violations because
9 Plaintiffs are forced to spend their resources in attempting to
10 secure benefits for their members. See Havens Realty Corp. v.
11 Coleman, 455 U.S. 363, 379 (1982) (stating that an allegation of a
12 "consequent drain on the organization's resources" is sufficient
13 to satisfy the standing requirement of a "concrete and
14 demonstrable injury . . ."); see also Warth v. Seldin, 422 U.S.
15 490, 515 (1975) (holding that "[t]here is no question that an
16 association may have standing in its own right to seek judicial
17 relief from injury to itself and to vindicate whatever rights and
18 immunities the association itself may enjoy").

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

26 To satisfy this standing requirement, the following is
27 required:

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

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

1 such claims will be barred for lack of standing.²

2 Finally, Defendants argue that Plaintiffs have failed to meet
3 the requirements for prudential standing and should instead seek
4 redress in the representative branches of government. "In
5 addition to the immutable requirements of Article III [standing],
6 the federal judiciary has also adhered to a set of prudential
7 principles that bear on the question of standing." Bennet v.
8 Spear, 520 U.S. 154, 162 (1997) (internal quotation marks
9 omitted). Defendants essentially assert that because Plaintiffs
10 direct their claims against the VA, Plaintiffs impermissibly seek
11 to compel this Court to usurp the role of the political branches
12 and "shape the institutions of government in such fashion as to
13 comply with the law and constitution." Lewis v. Casey, 518 U.S.
14 343, 349 (1996). In support of this, Defendants argue that
15 "absent from the complaint is a claim of injury to any individual
16 from these challenged matters." Mot. to Dismiss at 5. As noted
17 above, however, the Court disagrees with this characterization of
18 Plaintiffs' claims. To the contrary, the Complaint alleges that
19 thousands of veterans, if not more, are suffering grievous
20 injuries as the result of their inability to procure desperately-
21 needed and obviously-deserved health care. The issue, as detailed
22 below, is whether it is within this Court's power to remedy the
23 current situation. For the reasons stated above, the Court finds
24 that Plaintiffs have satisfied the requirements for standing.

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26 ² As discussed below, such claims would also be precluded by
27 38 U.S.C. § 511(a), which bars judicial review in district courts
28 of the VA Secretary's decisions on individual benefits claims.

1 **IV. SOVEREIGN IMMUNITY**

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

7 An action in a court of the United States
8 seeking relief other than monetary
9 damages and stating a claim that an
10 agency or an officer or employee thereof
11 acted or failed to act in an official
12 capacity or under color of legal
13 authority shall not be dismissed nor
14 relief therein be denied on the ground
15 that it is against the United States . .
16 . .

17 5 U.S.C. § 702. See also Gallo Cattle Co. v. Dep't of Agric., 159
18 F.3d 1194, (9th Cir. 1998) (stating that the APA "does provide a
19 waiver of sovereign immunity in suits seeking judicial review of a
20 federal agency action under [28 U.S.C.] § 1331").

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

27 In The Presbyterian Church v. United States, 870 F.2d 518
28 (9th Cir. 1989), the court stated that section 702 of the APA
"waives sovereign immunity in all actions seeking relief from

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

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

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

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

21 159 F.3d at 1198.

22 The Ninth Circuit recently recognized this internal division,
23 stating, "[w]e see no way to distinguish The Presbyterian Church
24 from Gallo Cattle." Gros Ventre Tribe v. United States, 469 F.3d
25 801, 809 (9th Cir. 2006). The court explained:

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

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

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

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

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

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

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

21 Defendants assert that Plaintiffs have failed to challenge a
22 final agency action and that, even if Plaintiffs were able to
23 identify some final agency action, waiver of sovereign immunity is
24 nonetheless precluded because Plaintiffs cannot demonstrate, as
25 they must, that "there is no other adequate remedy in a court . .
26 . ." 5 U.S.C. § 704. The Court addresses each argument in turn.

27 As a preliminary matter, "[t]he burden is on the party
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1 seeking review under § 702 to set forth specific facts (even
2 though they may be controverted by the Government) showing that he
3 has satisfied its terms." Lujan, 497 U.S. at 884. The Court is
4 mindful that Lujan was decided at the summary judgment stage. See
5 id. Before this Court is Defendants' Rule 12(b)(6) motion to
6 dismiss; as such, Plaintiffs' burden is less than that faced by
7 the plaintiffs in Lujan and the Court "presumes that [Plaintiffs']
8 general allegations embrace those specific facts that are
9 necessary to support the claim." Id. at 889.

10 **A. Final Agency Action**

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

17 [R]espondent cannot seek wholesale
18 improvement of this program by court
19 decree, rather than in the offices of the
20 Department or the halls of Congress,
21 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.

22 Lujan, 497 U.S. at 891.

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

27 Except where Congress explicitly provides

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

11 Id. (internal quotation marks omitted).

12 In the present case, Plaintiffs have sufficiently articulated
13 various actions and delays by Defendants that qualify as "final
14 agency actions." "Agency action" is defined as "the whole or a
15 part of an agency rule, order, license, sanction, relief, or the
16 equivalent or denial thereof, or failure to act" 5 U.S.C.
17 § 551(13). The APA defines "agency rule" as "the whole or a part
18 of an agency statement of general or particular applicability and
19 future effect designed to implement, interpret, or prescribe law
20 or policy" 5 U.S.C. § 551(4). An agency action is
21 "final" under the APA where two conditions are met: (1) the action
22 "mark[s] the consummation of the agency's decisionmaking process .
23 . .--it must not be of a merely tentative or interlocutory
24 nature," Bennet v. Spear, 520 U.S. 154, 178 (1997) (internal
25 citations and quotation marks omitted); and (2) the action is one
26 "by which rights or obligations have been determined, or from
27 which legal consequences will flow." Id. (internal citations and
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1 quotation marks omitted).

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

16 Plaintiffs also challenge the failure by the VA to make
17 timely decisions on benefits claims and provide timely medical
18 care to veterans returning from war. See Compl. ¶¶ 31a, 145-68,
19 184-200. This challenge also falls within the definition of
20 "final agency action." As the APA states, a court reviewing
21 claims against an agency "shall compel agency action unlawfully
22 withheld or unreasonably delayed" 5 U.S.C. § 706(1). See
23 also Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922, 926
24 (9th Cir. 1999) (stating that courts "have permitted jurisdiction
25 under the limited exception to the finality doctrine [of § 706(1)]
26 only when there has been a genuine failure to act"). Unlike the
27 plaintiff in Ecology Center, the Plaintiffs in the present case

1 have in fact "pleaded a genuine § 706(1) claim." Id. Plaintiffs
2 have alleged that the VA is failing to provide health care to
3 veterans returning from Iraq and Afghanistan for a statutorily-
4 mandated term of two years. See Compl. §§ 91-92, 265-66. This
5 failure to act is a properly pleaded § 706(1) claim. Plaintiffs
6 have also alleged systemic, unreasonable delays by the VA in
7 providing health care. These allegations of unreasonable delay
8 also bring Plaintiffs' claims within the exception provided for in
9 § 706(1). For these reasons, the Court finds that Plaintiffs have
10 sufficiently alleged various challenges to "final agency actions."

11 The Court notes, however, that Plaintiffs are forced to tread
12 a fine line. Although Plaintiffs must challenge some "agency
13 action" for a valid waiver of sovereign immunity under the APA,
14 Plaintiffs are nonetheless precluded from challenging any
15 regulations promulgated by the Secretary of the VA. See 38 U.S.C.
16 § 502 (stating that judicial review of VA regulations "may be
17 sought only in the United States Court of Appeals for the Federal
18 Circuit").⁵ At this stage Defendants have not established that
19 the combination of this APA requirement with the preclusive effect
20 of § 502 bars this Court from hearing Plaintiffs' claims.
21 Plaintiffs must nonetheless be mindful of this legal Scylla and
22 Charybdis that Congress has seen fit to impose.

23 **B. Alternate Adequate Remedy**

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

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

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

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

21 The CAVC itself has recognized its limited remedial power,
22 stating: "[I]t must be borne in mind that the jurisdiction of
23 this Court is over final decisions of the BVA. . . . Nowhere has
24 Congress given this Court either the authority or the
25 responsibility to supervise or oversee the ongoing adjudication
26 process which results in a BVA decision." Clearly, 8 Vet. App. at
27 308. Although the facts in Clearly are clearly distinguishable
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1 from those currently before this Court, many of Plaintiffs'
2 challenges are aimed directly at the processes that the regional
3 offices and the BVA use to reach decisions of individual claims.
4 See, e.g., Compl. ¶¶ 30, 31, 227-34. These processes, as conceded
5 by the CAVC itself, are outside the purview of its jurisdiction.
6 It is thus impossible for this Court to understand how the VA
7 system can be considered an adequate alternate forum when that
8 forum cannot entertain the type of claims raised by Plaintiffs in
9 the present action.

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

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

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

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

15 [A] declaratory judgment finding the VA
16 to be in violation of the law; injunctive
17 relief compelling the VA to develop and
18 implement standards and procedures for
19 the timely handling of claims filed with
20 the Cleveland Regional Office of the VA
21 or with the Board of Veterans' Appeals
22 ("BVA"); and injunctive relief ordering
23 the VA to develop and implement standards
24 and procedures for the timely handling of
25 claims remanded from the BVA to the
26 Cleveland Regional Office.

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

25 Underpinning the court's decision in Beamon was the
26 conclusion that the system established by the VJRA contained "two
27 sources of power with which it can remedy claims of unreasonable
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1 administrative delay or inaction." Id. The first source is the
2 All Writs Act, which empowers "[t]he Supreme Court and all other
3 courts established by Act of Congress to issue all writs necessary
4 or appropriate in aid of their respective jurisdictions and
5 agreeable to the usages and principles of law." 28 U.S.C. § 1651.
6 The second source is 38 U.S.C. § 7261(a)(2), which provides that
7 "the Court of Appeals for Veterans Claims, to the extent necessary
8 to its decision and when presented, shall . . . compel action of
9 the Secretary unlawfully withheld or unreasonably delayed."

10 Although the plaintiffs in Beamon acknowledged that these two
11 sources of power do provide "adequate remedies for individuals
12 claiming VA inaction or unreasonably delayed benefits decisions,"
13 Beamon, 125 F.3d at 968, they argued that the Court of Veterans
14 Appeals ("CVA"),⁶ did "not have the power to conduct discovery,
15 issue declaratory judgments, certify class actions, or issue
16 injunctive relief that would address constitutional deficiencies
17 in the VA's procedures." Id. Relying on the All Writs Act and §
18 7621(a)(2), the Sixth Circuit disagreed with the plaintiffs'
19 contentions and stated: "[T]here is no reason to believe that
20 [the VJRA] system cannot provide for the adequate adjudication of
21 [the plaintiffs'] challenges to the process by which the VA
22 decides its benefits decisions." Id.

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

25
26 ⁶ The CVA was the predecessor to the CAVC. See 38 U.S.C. §
27 7261(a)(2), 1998 Amendment, substituting "Court of Appeals for
28 Veterans Claims" for "Court of Veterans Appeals." The statutory
language of § 7252 was not altered.

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

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

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

26 Although this Court also has authority to
27 reach constitutional issues in
28 considering petitions for extraordinary

1 writs under 28 U.S.C. § 1651(a), the
2 Court may, as noted above, exercise such
3 authority only when a claimant has
4 demonstrated that he or she has no
5 adequate alternative means of obtaining
6 the relief sought and is clearly and
7 indisputably entitled to such relief.
8 See Erspamer [v. Derwinski, 1 Vet. App.
9 3, 7 (1990)]. Where, as here, a claimant
10 remains free to challenge the
11 constitutionality of a statute in the
12 U.S. district court, she has not
13 demonstrated that she lacks adequate
14 alternative means of obtaining the relief
15 sought.

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

25 **V. SUBJECT MATTER JURISDICTION**

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

30 The Secretary [of Veterans Affairs] shall
31 decide all questions of law and fact
32 necessary to a decision by the Secretary
33 under a law that affects the provision of
34 benefits by the Secretary to veterans or
35 the dependents or survivors of veterans.
36 Subject to subsection (b), the decision

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

4 38 U.S.C. § 511(a). Defendants read the statute broadly and argue
5 that it precludes this Court from hearing any type of case
6 involving any aspect of veterans benefits except, arguably, facial
7 constitutional challenges to veterans benefits legislation.

8 Plaintiffs read § 511 narrowly and argue that it only precludes
9 district courts from reviewing the Secretary's determinations on
10 individual benefits determinations, and not from considering broad
11 constitutional challenges to the VA system.

12 As a threshold matter it is clear that § 511 does not strip
13 this Court of the ability to hear facial constitutional challenges
14 to the VA benefits system. See, e.g., Larabee v. Derwinski, 968
15 F.2d 1497, 1501 (2nd Cir. 1992) (stating "district courts continue
16 to have jurisdiction to hear facial challenges of legislation
17 affecting veterans' benefits") (internal quotation marks and
18 emphasis omitted); Broudy v. Mather, 460 F.3d 106, 114 (D.C. Cir.
19 2006) (stating "district courts have jurisdiction to consider
20 questions arising under laws that affect the provision of benefits
21 as long as the Secretary has not actually decided them in the
22 course of a benefits proceeding"). Even the Sixth Circuit, while
23 articulating a broad preclusive effect on judicial review of
24 veterans benefits claims, nonetheless acknowledged that facial
25 challenges are permitted in district courts. See Beamon, 125 F.3d
26 at 972-73 (stating "district court jurisdiction over facial
27 challenges to acts of Congress survived the statutory revisions

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

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

26
27 ⁷ Whether Plaintiffs have in fact stated a claim for a facial
28 constitutional challenge is discussed below.

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

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

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

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

28 Id. at 970-71.

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

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

3 [P]laintiffs here point to no specific
4 procedures that violate their
5 constitutional rights. Plaintiffs' bare
6 allegations that VA procedures allow
7 unreasonable delays appear closer to
8 challenges to individual benefit
9 decisions than a constitutional challenge
10 to specific procedures.

11 Id. at 973 n. 5.

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

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

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

23 Soon after Traynor was decided, Congress passed the VJRA.
24 Under the VJRA the CVA was established, thereby providing veterans
25 with an avenue for review that was previously unavailable. The
26 VJRA also provided that appeals could be taken from the CVA to the
27 Federal Circuit and, from there, to the Supreme Court. The actual
28

1 language of § 211 changed only slightly. Compare 38 U.S.C. §
2 211(a) (1979) with 38 U.S.C. § 211(a) (1988).⁸ The parties'
3 dispute regarding the significance of the VJRA thus hinges on its
4 legislative history and the subsequent interpretation of § 511 by
5 other courts.

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

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

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

26
27 ⁸ Section 211(a) was renumbered as section 511(a) in 1991.
28 See Bates v. Nicholson, 398 F.3d 1355, 1364 n.7 (Fed. Cir. 2005).

1 court stated:

2 In the defendants' view, § 511(a)
3 prevents a district court from exercising
4 jurisdiction over any case that would
5 require it to decide a question of law or
6 fact that arises under a law that affects
7 the provision of benefits. . . . This
8 argument misreads the statute. Section
9 511(a) does not give the VA exclusive
10 jurisdiction to construe laws affecting
11 the provision of veterans benefits or to
12 consider all issues that might somehow
13 touch upon whether someone receives
14 veterans benefits. Rather, it simply
15 gives the VA authority to consider such
16 questions when making a decision about
17 benefits . . . and, more importantly for
18 the question of our jurisdiction,
19 prevents district courts from reviewing
20 the Secretary's decision once made . . .

21
22
23 Id. at 112 (internal quotation marks and citations omitted,
24 emphasis in original).

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

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

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

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

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

26
27 ⁹ The Court examines Plaintiffs' claims below to determine
28 which may be classified as a facial challenge.

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

3 Finally, it is important to recognize the CAVC's
4 understanding of the scope of § 511. This is especially true in
5 light of Defendants' argument that the CAVC and the other forums
6 for adjudicating veterans claims, as established under the VJRA,
7 have exclusive jurisdiction over Plaintiffs' claims. In Dacoran,
8 4 Vet. App. at 118, the CVA held that federal district courts
9 provided an alternative forum to the VA system to litigate
10 constitutional challenges. The court stated:

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

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

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

1 are attacking various aspects of the VJRA, which is an act of
2 Congress. See Disabled Am. Veterans v. Dept. of Veterans Affairs,
3 962 F.2d 136, 140 (2nd Cir. 1992) (stating "it is well established
4 . . . that the Article III district courts have power to rule on
5 the constitutionality of acts of Congress"). So long as
6 Plaintiffs limit their challenges to Acts of Congress and certain
7 actions and failures to act by the VA, as discussed in section IV.
8 A, supra, and refrain from challenging any VA regulations, § 502
9 will not preclude judicial review in this Court.

10
11 **VI. CONSTITUTIONAL CLAIMS**

12 Defendants argue that even if the Court has jurisdiction to
13 hear Plaintiffs' constitutional claims, these claims nonetheless
14 fail to state a claim as facial constitutional challenges. A
15 Federal Rule of Civil Procedure 12(b)(6) motion to dismiss tests
16 the sufficiency of the complaint. Dismissal pursuant to Rule
17 12(b)(6) is appropriate only where it "appears beyond doubt that
18 the plaintiff can prove no set of facts in support of his claim
19 which would entitle him to relief." Levine v. Diamantheset, Inc.,
20 950 F.2d 1478, 1482 (9th Cir. 1991) (citing Conley v. Gibson, 355
21 U.S. 41, 45-46 (1957)). In reviewing the motion, a court must
22 assume all factual allegations made by the nonmoving party to be
23 true and construe them in the light most favorable to the
24 nonmoving party. North Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d
25 578, 590 (9th Cir. 1993).

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

1 Salerno, 481 U.S. 739 (1987). In Salerno, the Court stated that
2 "[a] facial challenge to a legislative Act is, of course, the most
3 difficult challenge to mount successfully, since the challenger
4 must establish that no set of circumstances exists under which the
5 Act would be valid." Id. at 745. The Ninth Circuit has recently
6 affirmed Salerno as the controlling standard. See Engine Mfrs.
7 Ass'n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1049
8 (9th Cir. 2007).

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

14 **A. Due Process**

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

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

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

1 procedures used, and the probable value,
2 if any, of additional or substitute
3 procedural safeguards; and finally, the
4 Government's interest, including the
5 function involved and the fiscal and
6 administrative burdens that the
7 additional or substitute procedural
8 requirement would entail.

9 Mathews v. Eldridge, 424 U.S. 319, 335 (1976). "Procedural due
10 process requires adequate notice and an opportunity to be heard."

11 Kirk v. U.S. I.N.S., 927 F.2d 1106, 1107 (9th Cir. 1991)

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

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

1 commensurate with the adjudication procedures with which they are
2 confronted. See Walters v. Nat'l Ass'n of Radiation Survivors,
3 473 U.S. 305, 320 (1985) (stating "'due process' is a flexible
4 concept--that the processes required by the Clause with respect to
5 the termination of a protected interest will vary depending upon
6 the importance attached to the interest and the particular
7 circumstances under which the deprivation may occur").

8 Defendants' insistence that "plaintiffs cannot seriously dispute
9 that the initial, regional office step of the claims process is
10 not, in any sense, adversarial," is undermined by the Federal
11 Circuit's contrary conclusion cited above. At this stage of the
12 proceedings, and without further factual development, the Court
13 cannot conclude that Plaintiffs have not stated a valid claim for
14 due process violations. In addition, Defendants' blanket
15 assertion that the VA system provides adequate due process is
16 premature and insufficient to support a motion to dismiss.

17 Finally, it is worth emphasizing that to state a valid facial
18 constitutional challenge, a plaintiff need not establish that the
19 entire statute is unconstitutional. See Engine Mfrs. Ass'n, 498
20 F.3d at 1049 (9th Cir. 2007) (stating "Salerno does not require a
21 plaintiff to show that every provision within a particular
22 multifaceted enactment is invalid"). The Court is satisfied that
23 Plaintiffs' have, at this stage, sufficiently alleged due process
24 violations within the VJRA. For example, Plaintiffs' claim that
25 veterans are systematically denied statutorily mandated health
26 care within two years after returning from wars and lack any
27 recourse for obtaining this entitlement states a valid due process
28

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

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

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

17 Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 321
18 (1985) (citing Matthews, 424 U.S. at 344).

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

21 **B. Right of Access**

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

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

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

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

23 24 **VII. STATUTORY CLAIMS**

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

26 Plaintiffs' third cause of action seeks declaratory relief
27 for violations of 38 U.S.C. § 1710(e)(1)(D). Plaintiffs allege
28

1 that the VA "violated a clear statutory mandate under 38 U.S.C. §
2 1710 to provide two years of medical care to returning veterans."
3 Opp'n at 23.

4 Section 1710 states, in relevant part:

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

10 38 U.S.C. § 1710(e)(1)(D) (emphasis added). Section 1710(e)(3)(C)
11 provides the two-year period for medical care, "beginning on the
12 date of the veteran's discharge or release from active military,
13 naval, or air service" Id. § 1710(e)(3)(C).

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

22 The requirement in paragraphs (1) and (2)
23 [of section (a)] that the Secretary
24 furnish hospital care and medical
25 services, the requirement in section
26 1710A(a) of this title that the Secretary
27 provide nursing home care, the
28 requirement in section 1710B of this
title that the Secretary provide a
program of extended care services, and
the requirement in section 1745 of this
title to provide nursing home care and

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

5 Id. § 1710(a)(4). Nothing in this language indicates that the
6 mandatory entitlement to health care for two years, as provided in
7 § 1710(e)(1)(D), is limited by this subsection. This reading is
8 reinforced by the fact that those sections that were intended to
9 be limited by § 1710(a)(4) were specifically listed. The Court is
10 therefore convinced that § 1710(e)(1)(D) provides a mandatory
11 entitlement to health care for veterans for two years upon leaving
12 the service. Contrary to Defendants' assertion, § 1710(a)(4) does
13 in fact create a property interest protected by the Due Process
14 Clause.

15 Defendants also argue that this Court is prohibited from
16 reviewing this claim because it requires the examination of
17 individual benefits decisions to determine whether there has been
18 improper delay or denial. Such an argument would be correct if
19 Plaintiffs were individual veterans challenging a decision made by
20 the Secretary that affected their benefits. See 38 U.S.C. § 511.
21 That is not the case, however. First, Plaintiffs have alleged
22 that some veterans are being totally denied this statutory
23 entitlement. At the very least, this states a claim for denial of
24 due process. Cf. Devine v. Cleland, 616 F.2d 1080, 1086 (9th Cir.
25 1980) (stating that where a veteran "has a statutory entitlement
26 to receipt of an educational assistance allowance," "[s]uch a
27 statutory entitlement does constitute a 'property right' protected

1 by the Due Process Clause").

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

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

13 **B. Rehabilitation Act**

14 Plaintiffs' fourth cause of action seeks relief from
15 violations of section 504 of the Rehabilitation Act, codified at
16 29 U.S.C. § 794(a). Section 504 states, in part:

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

22 29 U.S.C. § 794.

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

28

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

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

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

17 968 F.2d at 1501 (internal citations omitted). The Sixth Circuit
18 in Beamon, 125 F.3d at 972, reached the same conclusion.

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

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

1 applications of Veterans' Administration
2 policy connected with veterans' benefits
3 decisions

485 U.S. at 1379-80.

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

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

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

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

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

5
6 **VIII. JURISDICTION OVER U.S. COURT OF APPEALS FOR VETERANS CLAIMS**

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

19
20 **IX. CONCLUSION**

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

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

3 Plaintiffs' Motion for Preliminary Injunction, Docket No. 88,
4 filed on December 12, 2007, was also stayed pending the issuance
5 of this Order. Defendants have not yet filed an Opposition and
6 the Court therefore sets the following briefing schedule:

7 Defendants' Opposition shall be electronically filed no later than
8 12:00 p.m. on Wednesday, January 30. Plaintiffs' Reply shall be
9 filed by 12:00 p.m. on Wednesday, February 6, and the hearing for
10 the Preliminary Injunction is scheduled for Friday, February 22,
11 at 10:00 a.m. in Courtroom # 1 on the 17th Floor.

12
13
14 IT IS SO ORDERED.

15
16 Dated: January 10, 2008



17
18 UNITED STATES DISTRICT JUDGE