

April 7 Transcript

Volume 1

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE SAMUEL CONTI

Veterans for Common Sense, and  
Veterans United for Truth, Inc.,

Plaintiffs,

vs.

James B. Peake, M.D., Secretary  
of Veterans Affairs, et al.,

Defendants.

NO. C 07-3758-SC

San Francisco, California  
Monday  
April 7, 2008  
10:00 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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(Appearances Continued On Next Page)

Reported By: Lydia Zinn, CSR #9223, RPR  
Official Reporter - U.S. District Court

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- 1 APPEARANCES (CONT'D)
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- 2 U.S. Department of Civil Division, Federal Programs Branch
- Veterans Affairs: 20 Massachusetts Avenue, NW
- 3 Room 6104
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- Page 1

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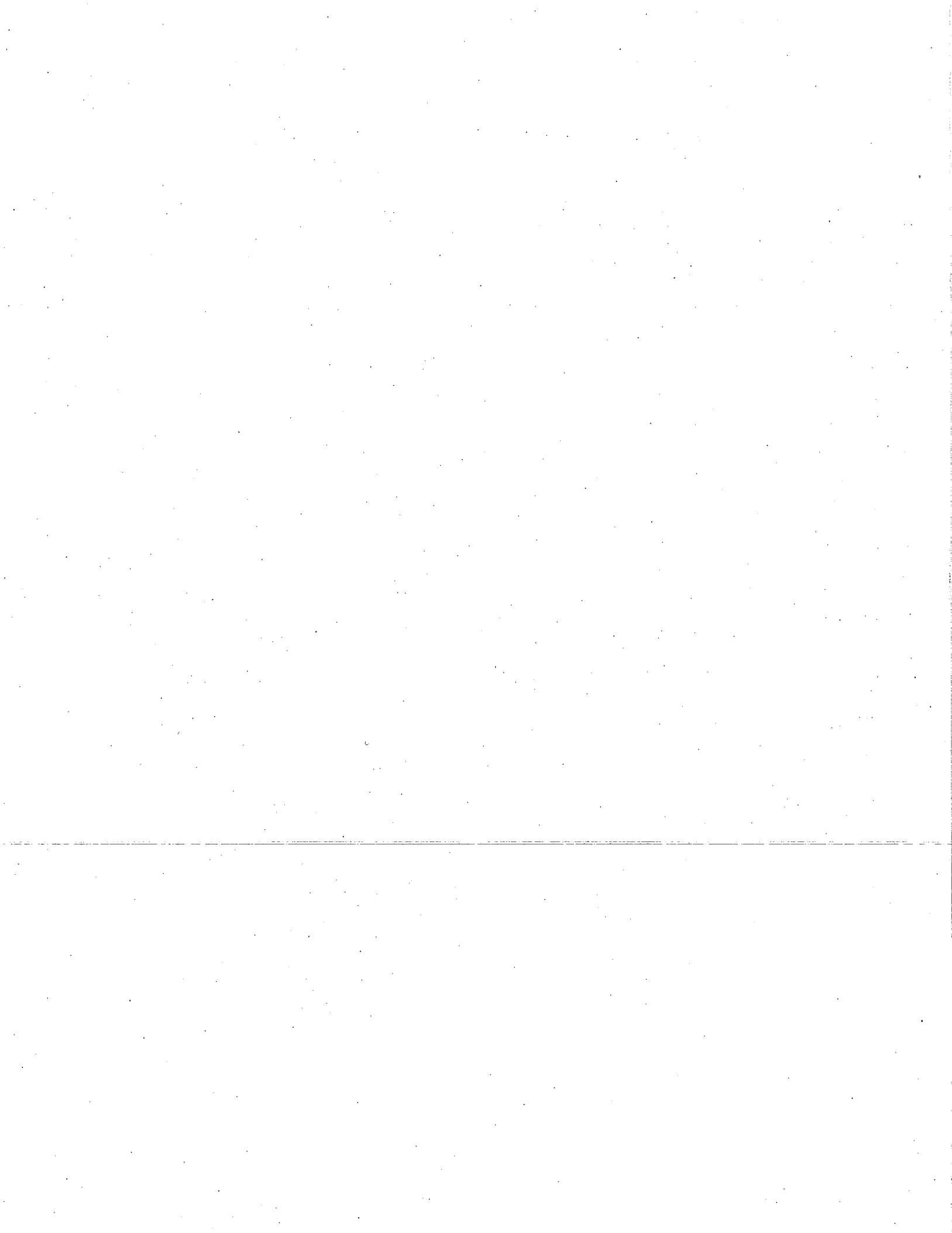
April 7 Transcript  
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1 THE CLERK: Calling Civil 07-3758, Veterans for  
2 Common Sense, et al., versus James Peake, et al.  
3 Counsel, please state your appearance for the record.  
4 MS. FREENY: Good morning, your Honor. Heather Moser  
5 of Morrison Foerster, for the plaintiffs. Good morning.  
6 THE COURT: Good morning.



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3 way to cut the Order to a reasonable level.

4           The first is the suicide incident briefs; that  
5 they -- first thing they start with, one: they're not  
6 relevant, because they have all the specific veterans'  
7 information. And if you redact all that out, there's really  
8 nothing left. And they aren't going to let them come up with a  
9 suicide rate, because they're not going to see many of them,  
10 because they're entirely protected by law, and we could not  
11 produce any of them.

12           And we actually had -- we put together, I think,  
13 seven or eight.

14           THE COURT: If I was to cut it down the way you say,  
15 do they have the -- I would like them to have the rates per  
16 year, if you have that statistics.

17           MR. LEPLEY: You know, Mr. Erspamer testified or  
18 announced what he thought the rates were at the first hearing  
19 in this case. Our witnesses testified during the preliminary  
20 injunction what those rates were.

21           Now there's a lot of different views on what those  
22 rates are, but the evidence of what the rates are is already in  
23 the record. They have that. And we can debate what the  
24 relevance of it is and who's right, but that's already there.

25           The other trouble with the incident briefs is they

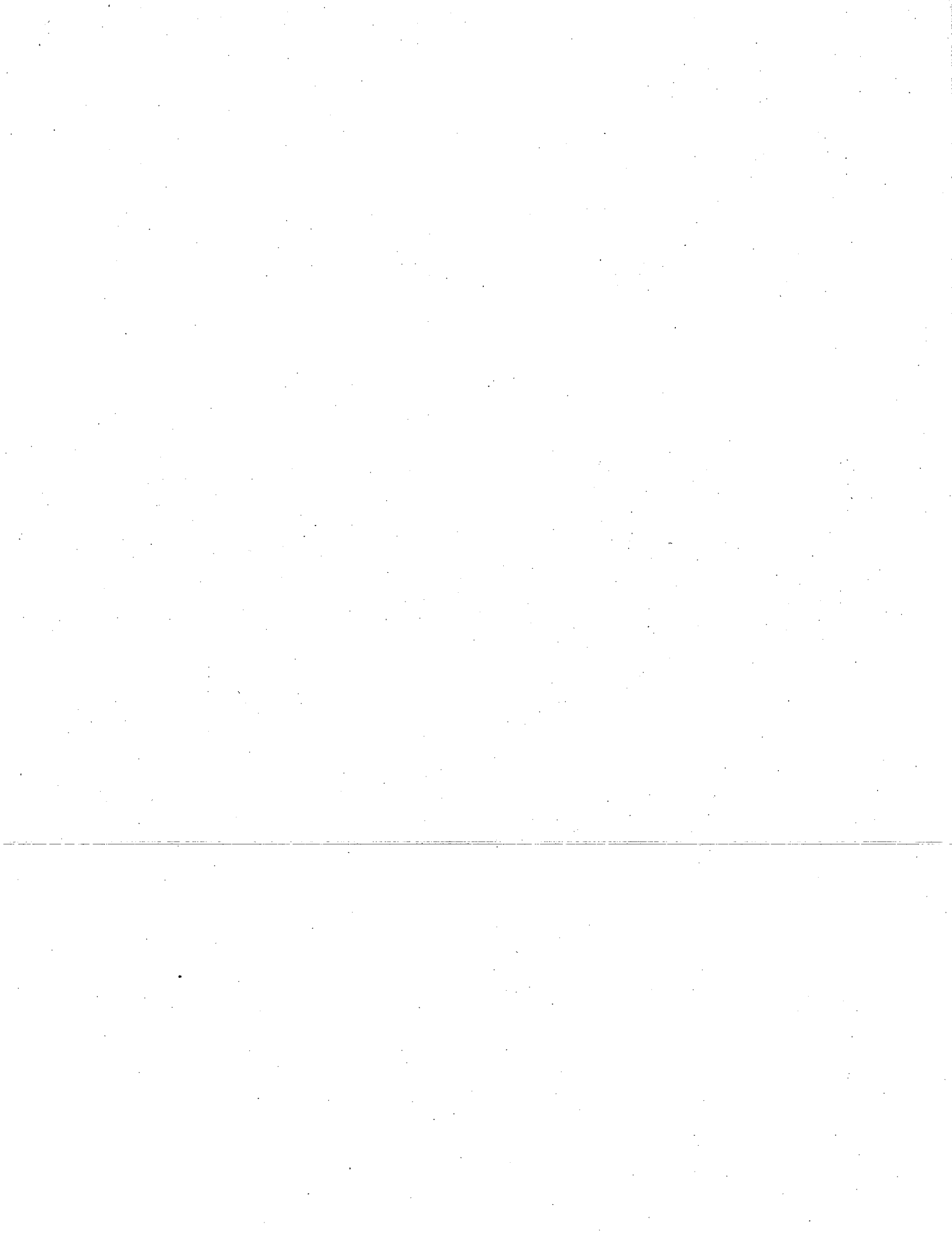
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1 really aren't relevant to the issues before the Court. They go  
2 to specific veterans' experiences. And that isn't what's  
3 before the Court.

4           You're looking at the policies of -- whether the VA  
5 has a policy in place that is unlawful. And these don't really



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9 this case is about.

10 so we think that's a whole category of documents --  
11 hundreds of thousands of documents -- that really aren't  
12 relevant to this case. And to process them is going to take a  
13 lot of money, a lot of time, and really is not going to serve  
14 any purpose.

15 But we want -- you know, one thing I wanted to make  
16 sure the Court is aware of is we -- you know, we've put on 63  
17 attorneys reviewing it. In my 20 years of representing the  
18 United States, I've never seen an agency jump this fast; but  
19 they are trying to meet that deadline of April 17th. And I  
20 think we'll come pretty darn close to doing it. If we can --

21 THE COURT: You're telling me -- you say you've given  
22 them -- they have the information on the rates of suicide. Is  
23 that what you're saying?

24 MR. LEPLEY: There certainly is a lot of data already  
25 in this record and documents we've turned over that cover that.

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1 whether they have every single document that might  
2 address the rate -- no, I wouldn't go that far, your Honor.  
3 And I don't mean to suggest that.

4 THE COURT: well, what about this suicide tracking  
5 they're talking about?

6 MR. LEPLEY: The SMITREC data, are we talking about?  
7 which suicide tracking does the Court refer --

8 THE COURT: They were talking about some suicide  
9 tracking data they wanted. Is that the same thing as the  
10 suicide rate?

11 MS. FREENY: Your Honor, I believe the suicide  
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12 tracking database is one of the two databases that we told  
13 plaintiffs earlier this week -- and we submitted in the letter  
14 to this Court -- that the agency cannot lawfully release.  
15 That's actually -- it's -- it's underlying data, so it's  
16 individually identifiable data on the individuals who committed  
17 suicide. That would be the number two, I believe, in the  
18 Court's Order, but we are prohibited by 42 U.S.C. 242 M.D. from  
19 releasing that information.

20 We did tell plaintiffs that we would release the  
21 reports. And we -- and we will. And I expect they would  
22 release them on Friday. That would be not the underlying data,  
23 but the reports about the data. And they will get that data.

24 THE COURT: When?

25 MS. FREENY: Just not the individual data on: this

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1 guy committed suicide on this date, and this guy committed  
2 suicide on this date.

3 THE COURT: How about the -- you were -- she was  
4 talking about something about the VA has money, but they're not  
5 being utilized. Seems to me we went over that in the  
6 preliminary injunction. Didn't we go over all of that?

7 MS. FREENY: We did, your Honor. And I think what  
8 was established was that VA operates under a lump-sum  
9 appropriation, which means under the Supreme Court case --  
10 Lincoln v. Vigil -- that the agency has discretion to spend  
11 that money, so long as they're meeting their statutory  
12 obligations, as they see fit.

13 So the appropriations, it would seem, don't change --

14 THE COURT: Well, I think that's something --