UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION, INC., and MILITARY-VETERANS ADVOCACY, INC.,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:13cv1187-EGS**
ERIC K. SHINSEKI, Secretary of Veterans Affairs, in his official capacity,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

In 2008, the United States Court of Appeals for the Federal Circuit decided the very issue that lies at the heart of the claims raised here – namely, that the U.S. Department of Veterans Affairs ("VA") permissibly interpreted the Agent Orange Act of 1991 and the agency's own regulations when it required that for a claimant for Veteran disability benefits to receive a presumption that the claimant was exposed to herbicides such as Agent Orange, the claimant must have been present within the land borders of Vietnam at some point during the claimant's duties. Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008). Despite the Federal Circuit's ruling in favor of the government, Plaintiffs – two Veterans organizations – have brought suit in this Court, challenging VA's continuing implementation of the requirement that was upheld by the Federal Circuit. For several reasons, the Court should dismiss this suit.

First, the Court lacks subject matter jurisdiction over Plaintiffs' Administrative Procedure Act claims because Congress has created a comprehensive mechanism for adjudicating claims seeking to contest any aspect of any decision by the VA regarding Veterans' benefits. Plaintiffs who allege harm resulting from VA actions, regulations, policies, or procedures related to benefits must do so within the adjudicatory scheme established by the Veterans Judicial Review Act, 102 Stat. 4105 (codified, as amended, at 38 U.S.C. §§ 7251–7292), which provides for review of VA benefits decisions by, successively, the U.S. Court of Appeals for Veterans Claims, the Federal Circuit, and the Supreme Court. Because the Veterans' Judicial Review Act precludes review by this Court of claims such as Plaintiffs', and vests exclusive jurisdiction to review such claims in the adjudicatory mechanism provided by that Act, the Court lacks subject matter jurisdiction over Plaintiffs' claims. Second, to the extent that Plaintiffs contend that they

are not seeking individual relief for any of their members, they lack standing under Article III, as the D.C. Circuit has recently held in a similar case. Third, to the extent that Plaintiffs rely on provisions of law other than the Administrative Procedure Act to attempt to invoke the subject matter jurisdiction of the Court, that reliance is misplaced because these provisions do not provide an independent basis for the assertion of subject matter jurisdiction.

In the alternative, the Court should dismiss Plaintiffs' complaint for failure to state a claim on which relief can be granted. Because Plaintiffs have an adequate alternative remedy in a court available for their claims in the form of the comprehensive adjudicatory mechanism established by the Veterans Judicial Review Act, Plaintiffs cannot maintain suit under the Administrative Procedure Act. Additionally, Plaintiffs' claims are meritless for the reasons provided by the Federal Circuit in the Haas decision. Finally, Plaintiffs fail to state a valid claim for relief under the Mandamus Act because Plaintiffs fail to identify a relevant provision of law imposing a purely ministerial duty on the Secretary of Veterans Affairs, and because Plaintiffs have an adequate alternative remedy available to them.

For these reasons, the Court should dismiss Plaintiffs' complaint.

BACKGROUND

In 1991, Congress enacted the Agent Orange Act, Pub. L. No. 102-4, 105 Stat. 11, which established a comprehensive statutory framework of disability compensation for Veterans exposed to herbicides such as Agent Orange.[1] The Act specifies a list of diseases and provides that when one of these diseases becomes manifest "in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era," the disease will

[1] Agent Orange is a herbicide used by the United States in Vietnam for the purposes of "defoliation, crop destruction, and on a smaller scale, clearing vegetation around U.S. fire bases and other installations, around landing zones, and along lines of communication." S. Rep. No. 100-439, at 64–65 (1988).

be considered to have been incurred in or aggravated by such service." 38 U.S.C. § 1116(a)(1), (a)(2). In addition, the Act directs the VA to identify other diseases associated with herbicide exposure. Id. § 1116(a)(1)(B), (b)(1). The Agent Orange Act provides that any Veteran who "served in the Republic of Vietnam during the Vietnam era" and who has a disease designated by the Secretary "shall be presumed to have been exposed during such service to an herbicide agent. . . , and may be presumed to have been exposed during such service to any other chemical compound in an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service." Id. § 1116(f). As used in the Act, the term "Vietnam era" means "[t]he period beginning on February 28, 1961, and ending on May 7, 1975, in the case of a veteran who *served in the Republic of Vietnam* during that period." Id. § 101(29)(A) (emphasis added).

In 1997, the VA Office of General Counsel issued a precedential opinion[2] construing the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 101(29)(A) not to apply to service members whose service was on ships and who did not serve within the borders of the Republic of Vietnam during the "Vietnam era." VA Op. Gen. Counsel Prec. 27-97 (1997).[3] The opinion

[2] A precedential opinion of the VA's General Counsel is a written opinion addressing a question of law that will likely have significance beyond the particular case or matter in which the issue arose, such as an opinion that interprets a statute or regulation as a matter of first impression or that necessitates a regulatory change. 38 C.F.R. § 14.507(b). Opinions designated as precedential are binding on all VA adjudicators. See 38 U.S.C. § 7104(c); 38 C.F.R. § 14.507(b).

[3] *Available at* http://www.va.gov/ogc/opinions/1997precedentopinions.asp.; see 62 Fed. Reg. 63,603, 63,604 (Dec. 1, 1997) (notice of the opinion's holding). "In resolving a motion to dismiss for lack of subject matter jurisdiction, the Court may consider materials outside the pleadings to determine whether it has jurisdiction." Eleson v. United States, 518 F. Supp. 2d 279, 282 (D.D.C. 2007); accord EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624-25 n.3 (D.C. Cir. 1997); Herbert v. Nat'l Acad. of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992). "When ruling on a Rule 12(b)(6) motion, the Court may consider 'the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice.'" Burkes v. Holder, __ F. Supp. 2d __, 2013 WL 3685016, at *3 (D.D.C. July 15, 2013) (quoting Gustave-Schmidt v. Chao, 226 F. Supp. 2d 191, 196 (D.D.C. 2002)). Because Plaintiffs expressly mention and cite the VA General Counsel opinion and VA's Adjudication Manuals, they are incorporated by reference in the complaint. See Compl.

noted that the definition of the phrase "service in the Republic of Vietnam" in the VA's Agent Orange Act regulations, 38 C.F.R. § 3.307(a)(6)(iii), "requires that an individual actually have been present within the boundaries of the Republic to be considered to have served there," and that for purposes of both the Agent Orange Act regulation and 38 U.S.C. § 101(29)(A), service "in the Republic of Vietnam" does not include service on ships that traversed the waters offshore of Vietnam, absent the service member's presence at some point on the land mass of Vietnam. VA Op. Gen. Counsel Prec. 27-97, at 4-5. Under both the Agent Orange Act and the VA's implementing regulations, a Veteran who "served in the Republic of Vietnam" receives a presumption that he or she was exposed during that service to herbicide agents such as those found in Agent Orange. See 38 U.S.C. § 1116(f); 38 C.F.R. § 3.307(a)(6). In addition, certain enumerated diseases are presumed to be caused by herbicide exposure. 38 C.F.R. § 3.309(e). Service members who are not entitled to the presumption of herbicide exposure may still provide evidence that shows that they were actually exposed to herbicides during their service. See 38 C.F.R. § 3.309(e).

Later in 1997, in a proposed rule addressing payments to children of Vietnam Veterans born with spina bifida, VA proposed to use the same regulatory definition for "service in the Republic of Vietnam" that it had used in the Agent Orange Act regulation. Proposed Rule, 62 Fed. Reg. 23,724, 23,725 (May 1, 1997). One commenter objected to the proposed definition and suggested that the phrase "if the conditions of service involved duty or visitation in the Republic of Vietnam" be eliminated from the final rule. See Final Rule, 62 Fed. Reg. 51,274, 51,274-75 (Sept. 30, 1997). In declining to make the suggested change, the VA explained:

¶¶ 21, 24, 29, 40. These items are also public records of which the Court may take judicial notice. With the exception of the VA General Counsel opinion, Defendant is citing these materials as background material only.

"Because herbicides were not applied in waters off the shore of Vietnam, limiting the scope of the term service in the Republic of Vietnam to persons whose service involved duty or visitation in the Republic of Vietnam limits the focus of the presumption of exposure to persons who may have been in areas where herbicides could have been encountered." Id. at 51,274.

In 2001, the VA issued a proposed rule to include Type 2 diabetes among the diseases for which presumptive service connection would be recognized based on herbicide exposure. Proposed Rule, 66 Fed. Reg. 2376 (Jan. 22, 2001). One commenter suggested that the VA's definition of "service in the Republic of Vietnam" should include service in Vietnam's inland waterways or its territorial waters. Final Rule, 66 Fed. Reg. 23,166, 23,166 (May 8, 2001). In its final rule, the VA noted that it is "commonly recognized" that the term "service in the Republic of Vietnam" included inland waterways. Id. However, with respect to service in offshore waters, the VA explained that even before the passage of the Agent Orange Act, the agency had taken the position that service offshore required some duty or visitation within the Republic of Vietnam to qualify for the presumption of herbicide exposure, and that service in a deep-water vessel in waters offshore of the Republic of Vietnam did not constitute such service. Id. The VA also noted that the commenter had "cited no authority for concluding that individuals who served in the waters offshore of the Republic of Vietnam were subject to the same risk of herbicide exposure as those who served within the geographic borders of the Republic of Vietnam, or for concluding that offshore service is within the meaning of the statutory phrase 'Service in the Republic of Vietnam.'" Id. The final rule therefore did not incorporate the suggested change.

In early 2002, the VA amended the language of its Veterans Benefits Administration Adjudication Manuals (designated as "M21-1" and "M21-1MR") to specifically incorporate the agency's interpretation of the Agent Orange Act regulations as requiring a service member's presence at some point on the land mass of Vietnam to trigger the presumption of herbicide exposure. The amended version of Manual M21-1, published in February 2002, reiterated that, under 38 C.F.R. § 3.307(a)(6), a Veteran "must have actually served on land within the Republic of Vietnam (RVN) to qualify for the presumption of exposure to herbicides." Manual M21-1, Part III, ¶ 4.24(e)(1) (Feb. 27, 2002).[4]

In Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008), a Navy service member who had served on an ammunition supply ship in the Pacific Ocean during the Vietnam War contended that he was eligible for the presumption of herbicide exposure, despite the fact that he had never set foot on the physical landmass of the Republic of Vietnam. Id. at 1173. The Federal Circuit held that "the agency's requirement that a [benefits] claimant have been present within the land borders of Vietnam at some point in the course of his duty constitutes a permissible interpretation of the [Agent Orange Act] and its implementing regulation." Id. at 1172. Later in 2008, the VA revised its M21-1MR Manual to state that "service in the Republic of Vietnam (RVN)" for the purposes of the Agent Orange Act regulations' presumption of exposure to herbicides included "service in the RVN or its inland waterways, or service in other locations if the conditions of service involved duty or visitation in the RVN." Manual M21-1MR, part IV, subpart ii, ch. 1, § H (Sept. 5, 2008).[5] The current version of the M21-1MR Manual contains

[4] The referenced pages of the 2002 and 2008 Adjudication Manuals are attached hereto as Exhibit 1.

[5] Paragraph 29 of Plaintiffs' complaint incorrectly refers to an "April of 2008" revision to the manual. On April 15, 2008, VA published a Federal Register notice rescinding certain earlier manual provisions following a decision by

similar language. M21-1MR, Part IV, Subpart ii, Chapter 1, Section H, at 1-H-7 (December 12, 2011).[6]

At the request of the VA, the National Academy of Sciences' Institute of Medicine conducted a study to determine whether service members who had served in deep-water naval vessels off the coast of Vietnam during the Vietnam War had experienced exposures to herbicides and their contaminants comparable to those of service members who had served in the Republic of Vietnam on the ground or in the Republic's inland waterways. See Notice, 77 Fed. Reg. 76,170, 76,171 (Dec. 26, 2012). In 2011, the Institute issued a report entitled "Blue Water Navy Vietnam Veterans and Agent Orange Exposure."[7] Id. After reviewing and analyzing the available data, the Institute concluded that ground troops and service members who had served in the inland waterways of Vietnam had more pathways of exposure to Agent Orange-associated contaminants than did service members who had served in deep-water naval vessels off the coast of Vietnam. Id. The Institute found that a paucity of scientific data concerning potential exposures for this latter group of service members made it impossible to determine whether they had been exposed to Agent Orange-associated contaminants. Id. Following his review of the Institute's report, the Secretary of Veterans Affairs determined that the available evidence did not support establishing a presumption of exposure to herbicides for service members who had served in deep-water naval vessels off the coast of Vietnam. Id. The VA reiterated that the

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the U.S. Court of Appeals for Veterans Claims, Haas v. Nicholson, 20 Vet. App. 257 (Vet. App. 2006), and during the pendency of this decision's appeal to the Federal Circuit (which reversed that decision). See Notice, 73 Fed. Reg. 20,363 (Apr. 15, 2008).

[6] *Available at* http://www.benefits.va.gov/WARMS/M21_1MR4.asp.

[7] *Available at* http://www.iom.edu/Reports/2011/Blue-Water-Navy-Vietnam-Veterans-and-Agent-Orange-Exposure.aspx.

agency would continue to accept and review individual benefits claims asserted by these service members on a case-by-case basis. Id.

On August 1, 2013, two non-profit corporations filed the complaint in this case against Secretary of Veterans Affairs Eric Shinseki, in his official capacity. Plaintiffs allege that "[t]he actions of the Secretary in implementing and to persist in the continued application of the 1997 General Counsel's Opinion and the corresponding changes to the M21-1 Manual and its revisions" lacked a reasoned analysis, did not consider all relevant factors, failed to articulate an explanation for its decision, was arbitrary and capricious, was unsupported by substantial evidence, and was contrary to law. Compl. ¶¶ 116-37. Plaintiffs invoke the Court's jurisdiction under the general federal question statute, 28 U.S.C. § 1331; the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"); the Mandamus Act, 28 U.S.C. § 1361; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; and Rule 65 of the Federal Rules of Civil Procedure. Compl. ¶ 4. The Secretary now respectfully asks this Court to dismiss this action on the ground that the Court lacks jurisdiction over the subject matter of this case or, in the alternative, because Plaintiffs fail to state a claim on which relief can be granted.

ARGUMENT

I. The Court Should Dismiss For Lack of Subject Matter Jurisdiction.

A. The Veterans Judicial Review Act Precludes APA Review by This Court.

The APA does not apply to cases in which "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). Nor does the APA waive sovereign immunity for such cases. Van Allen v. U.S. Dep't of Veterans Affairs, 925 F. Supp. 2d 119, 126 (D.D.C. 2013). Section 511(a) of Title 38, United States Code, provides just such statutory preclusion. Section 511 divests Article III

courts of jurisdiction to review claims that would require them to revisit any decision made by the Secretary of Veterans Affairs in the course of making benefits determinations. Likewise, Section 502 of Title 38 precludes review of challenges to VA regulations by Article III courts.[8] Therefore, because Plaintiffs' claims ask this Court to review a decision made by the Secretary in the course of making benefits determinations, and challenge the lawfulness of VA regulations, the Court should dismiss the complaint for lack of subject matter jurisdiction.

1. Section 511 of VJRA Prohibits Review by Federal District Courts of "All Questions of Law and Fact Necessary to a Decision by the Secretary Under a Law that Affects the Provision of Benefits."

Judicial review by federal district courts of VA benefit-related decisions is not available because federal law specifically provides:

> 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 to veterans or the dependents or survivors of veterans. Subject to [38 U.S.C. § 511(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). The fact that this statutory provision possesses such a sweeping preclusion is clear not just from its language but also from its history.

Section 511(a) was derived from 38 U.S.C. § 211(a), which barred judicial review of any decision by the Secretary "on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans[.]"[9] The legislative history of § 211 demonstrates that it was intended to "make it perfectly clear that the Congress intends to exclude

[8] Additionally, although Plaintiff attempts to assert an APA claim, "under 5 U.S.C. § 701(a)(1), the APA does not waive sovereign immunity when statutes preclude judicial review, as [38 U.S.C.] § 511 explicitly does." Van Allen, 925 F. Supp. 2d at 126 (citation and internal punctuation omitted).

[9] 38 U.S.C. § 211(a) (1988 ed.). In 1991, the code numbering was changed to § 511(a). Pub. L. No. 102-83, § 2(a), 105 Stat. 378, 388 (1991).

from judicial review all determinations with respect to noncontractual benefits provided for veterans and their dependents and survivors." H.R. Rep. No. 91-1166, at 10-11 (1970), reprinted in 1970 U.S.C.C.A.N. 3723, 3731.

In 1974, the Supreme Court confirmed in Johnson v. Robison, 415 U.S. 361 (1974), that § 211 precluded district court review of the type of claims raised by Plaintiffs here. While the Court identified one type of benefits-related claim – that is, challenges to the constitutionality of Veterans' benefits statutes – that could be reviewed by district courts, it simultaneously emphasized that § 211 was intended to prevent the courts from engaging in "day-to-day determination and interpretation of [the Secretary's] policy." Johnson, 415 U.S. at 372. Because a constitutional challenge to a VA statute addresses an act or 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 § 211. Id. at 373.

Following Johnson, courts of appeals carved out additional exceptions to § 211's preclusion of review, 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 to permit district court review of a claim that VA regulations violated the Rehabilitation Act, a non-VA statute. Nonetheless, the Court reaffirmed that § 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 (emphasis in original).

Within four months of Traynor, Congress enacted the Veterans Judicial Review Act, Pub. L. No. 100-687, Tit. II, 102 Stat. 4105, 4113-22 (codified, as amended, at 38 U.S.C. §§ 7251–

7292) ("VJRA"), in which, for the first time, Congress provided for judicial review of Veterans' benefits decisions. In the House report accompanying the bill that became VJRA, Congress noted that the extension of the Supreme Court's reasoning in Johnson "has taken the courts further into individual decision-making than Congress heretofore intended" and criticized the Traynor decision as likely to exacerbate that trend. H.R. Rep. No. 100-963, at 21-22, reprinted in 1988 U.S.C.C.A.N. 5782, 5803. To retain and reinforce its intended limits on judicial review of VA benefits determinations, Congress chose to "broaden the scope of section 211" and limit outside "court intervention" in the VA decisionmaking process. Id. at 27, 1988 U.S.C.C.A.N. at 5809; see also Larrabee ex rel. Jones v. Derwinski, 968 F.2d 1497, 1501 (2d Cir. 1992) ("The VJRA . . . broadens section 211's preclusion of judicial review by other courts."). Whereas the former non-reviewability provision only prohibited review of "decisions . . . under any law . . . providing benefits for veterans," 38 U.S.C. § 211(a) (1970), the current provision prohibits review of "*all* questions of law and fact *necessary to a decision* by the Secretary *under a law that that affects the provision of benefits*." 38 U.S.C. § 511(a) (2006) (emphasis added).

VJRA created an exclusive review procedure for issues concerning Veterans' benefits determinations, see Zuspann v. Brown, 60 F.3d 1156, 1158 (5th Cir. 1995), cert. denied, 516 U.S. 1111 (1996), by establishing "a multi-tiered framework for the adjudication of claims regarding veterans benefits." Beamon v. Brown, 125 F.3d 965, 967 (6th Cir. 1997). In brief, under this framework, the Board of Veterans' Appeals, an appellate body within the VA, hears appeals from Veterans' benefits determinations made by VA regional offices, 38 U.S.C. § 7104(a); the United States Court of Appeals for Veterans Claims ("Veterans Court") has exclusive jurisdiction to review final decisions of the Board, id. §§ 7252(a), 7266(a); and the

Federal Circuit has exclusive jurisdiction to review the decisions of the Veterans Court. Id. § 7292(a).

As Congress explained, this new Veterans Court "would have exclusive jurisdiction to consider *all* questions involving benefits under laws administered by the VA. This would include factual, legal, and constitutional questions." H.R. Rep. No. 100-963, at 5; 1988 U.S.C.C.A.N. at 5786 (emphasis added). Congress intended for the Veterans Court to "be more clearly perceived as [a body] which has as its sole function deciding claims in accordance with the Constitution and laws of the United States." H.R. Rep. No. 100-963, at 26, 1988 U.S.C.C.A.N. at 5808. As the Sixth Circuit has observed, "Congress enacted the [Veterans Court] to provide claimants with an avenue for the review of VA decisions that would otherwise have been unreviewable" under prior Veterans-related legislation. Beamon, 125 F.3d at 972. The Veterans Court's powers include the authority to decide any question of law relevant to benefits proceedings, 38 U.S.C. § 7261(a)(1), and to "compel action of the Secretary unlawfully withheld or unreasonably delayed." Id. § 7261(a)(2). The Veterans Court also has authority under the All Writs Act to issue "all writs necessary or appropriate in aid of [its] jurisdiction[]." 28 U.S.C. § 1651(a); see also Erspamer v. Derwinski, 1 Vet. App. 3, 7 (1990) (holding that "this court has jurisdiction to issue extraordinary writs under the All Writs Act").

And as noted above, decisions of the Veterans Court are reviewed exclusively by the Federal Circuit, which "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(a), (c), (d)(1). If necessary, a claimant may petition the United States Supreme Court to review the decision of the Federal Circuit. Id. § 7291.

The non-reviewability provision in 38 U.S.C. § 511(a) is subject to four exceptions, two of which are relevant here. First, the Veterans Court and the Federal Circuit may review the Secretary's decisions regarding Veterans benefits. 38 U.S.C. § 511(b)(4); see id. §§ 7252, 7292. Second, the Federal Circuit may review challenges to VA rules and regulations within the scope of 5 U.S.C. §§ 552(a)(1) and 553, including challenges to agency interpretations and statements of policy. 38 U.S.C. §511(b)(1); see id. § 502.

Thus, the revised § 211 (now § 511), in conjunction with the other provisions of the VJRA, clearly reflects "Congress' intent to include all issues. . . necessary to a decision which affects benefits" within the ambit of the "exclusive appellate review scheme" created by that statute. Hicks v. Veterans Admin., 961 F.2d 1367, 1370 (8th Cir. 1992); accord Sugrue v. Derwinski, 26 F.3d 8, 11 (2d Cir. 1994); Larrabee, 968 F.2d at 1501. This review scheme allows for review of benefit decisions by the Veterans Court and the Federal Circuit, and precludes review of benefits-related issues in federal district courts.

The D.C. Circuit and other courts have recognized the principle that Section 511(a) divests federal district courts of jurisdiction to review VA decisions affecting benefits. See Thomas v. Principi, 394 F.3d 970, 975 (D.C. Cir. 2005) (holding that Section 511 divested district court of jurisdiction over claim that the VA denied appropriate medical care to a Veteran); Price v. United States, 228 F.3d 420, 421 (D.C. Cir. 2000) (per curiam) (holding that Section 511 divested district court of jurisdiction over claim that the VA wrongfully failed to reimburse Veteran for medical expenses); Frison v. Principi, No. 03-5095, 2003 WL 22097797, at *1 (D.C. Cir. Aug. 28, 2003) (per curiam) (holding that Section 511 divested district court of jurisdiction over appellants' claims for injunctive relief seeking review of the VA's actions

related to the determination of disability benefits because underlying the claims was an allegation that the VA had unjustifiably denied a Veteran's benefit); Beamon, 125 F.3d at 972-74 (holding that Section 511 divests district court of jurisdiction over claims alleging that the VA's procedures for processing benefits claims violated the APA and the Constitution); Larrabee, 968 F.2d at 1499-1501 (holding that Section 511 divests district court of jurisdiction over due process claim relating to benefits); Hicks, 961 F.2d at 1368.

In a recent en banc decision, Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012), the Ninth Circuit synthesized D.C. Circuit case law with the Sixth Circuit's Beamon decision and concluded that "§ 511 precludes jurisdiction over a claim if it requires the district court to review VA decisions that relate to benefits decisions, including any decision made by the Secretary in the course of making benefits determinations" and that "[t]his preclusion extends not only to cases where adjudicating veterans' claims requires the district court to determine whether the VA acted properly in handling a veteran's request for benefits, but also to those decisions that may affect such cases." Id. at 1025-26 (citing Beamon, 125 F.3d at 971; Price, 228 F.3d at 422; Thomas, 394 F.3d at 974; Broudy v. Mather, 460 F.3d 106, 114-15 (D.C. Cir. 2006)) (internal punctuation omitted). And although Broudy stated that Section 511 does not divest district courts of jurisdiction over claims relating to benefits in the unique circumstance where the VA has not "actually decided" a question arising under laws that affect the provision of benefits, id. at 114, the D.C. Circuit confirmed that Section 511 prohibits courts from revisiting issues "explicitly considered" by the Secretary when making a decision under a law that affects the provision of benefits to Veterans. Id. at 114.

Here, Plaintiffs allege that "[t]he actions of the Secretary in implementing and to persist in the continued application of the 1997 General Counsel's Opinion and the corresponding changes to the M21-1 Manual and its revisions" lacked a reasoned analysis, did not consider all relevant factors, failed to articulate an explanation for its decision, was arbitrary and capricious, was unsupported by substantial evidence, and was contrary to law. Compl. ¶¶ 116-37. Plaintiffs' challenges to the VA's interpretation of the Agent Orange Act raise questions of law and fact that were necessarily inherent in any and all benefits decisions made by the VA under that Act. It makes no difference that Plaintiffs purport to assert their claims under the APA and other statutes: since the passage of VJRA, courts have recognized that litigants cannot avoid Section 511's bar by framing their challenges to VA actions in administering Veterans' benefits in other statutory terms. See, e.g., Beamon, 125 F.3d at 972 (APA challenge to VA claims adjudication procedures barred by § 511); Van Allen, 925 F. Supp. 2d at 125 ("The Court also lacks jurisdiction because plaintiff's claims fall, not under the APA, but under 38 U.S.C. § 511, which explicitly bars judicial review of such claims."); Price, 228 F.3d at 421-22 (no jurisdiction to review claim that VA had wrongfully failed to pay plaintiff's medical bills as federal tort claim because doing so would require review of underlying denial of benefit); Zuspann, 60 F.3d at 1159-60 (no jurisdiction over claim that VA violated Rehabilitation Act and due process in denying plaintiff adequate medical care because gravamen of complaint was challenge to denial of benefits). Plaintiffs' recourse therefore lies not with this Court, but instead with the procedures established in the VJRA for challenging VA decisions that affect benefit determinations.

Plaintiffs might contend that they are not seeking to appeal any VA benefits decisions. However, it is the substance of the claims, not the labels that Plaintiffs assign them, that governs this Court's jurisdictional determination. Weaver v. United States, 98 F.3d 518, 519-20 (10th Cir. 1996); Price, 228 F.3d at 421 (whether the plaintiff had pursued a formal reimbursement claim with the VA was irrelevant to the jurisdictional inquiry: "because [plaintiff] is challenging the VA's action or inaction with respect to a veterans' benefits matter, the district court lacks subject matter jurisdiction over the complaint") (citing 38 U.S.C. § 511 and Weaver); cf. Kidwell v. Dep't of Army, 56 F.3d 279, 284 (D.C. Cir. 1995) (plain language of complaint does not settle question of Tucker Act jurisdiction – court looks to complaint's substance, not merely its form). Ultimately, Plaintiffs are alleging that the VA based its determination – that the presumption of herbicide exposure under the Agent Orange Act does not apply to claimants who served in deep-water naval vessels off the coast of Vietnam – on a flawed analysis of the available factual and scientific information. Adjudicating whether the established scope of an evidentiary presumption led or will lead to the improper denial of claims involves a question "necessary to a decision by the Secretary under a law that affects the provision of benefits," 38 U.S.C. § 511(a), and thus falls within the exclusive province of the VA, subject to judicial review solely in the Veterans Court and the Federal Circuit. See Van Allen, 925 F. Supp. 2d at 125 ("District courts are explicitly deprived of jurisdiction to review any claim made by the VA 'that affects the provision of benefits . . . to veterans.'") (quoting 38 U.S.C. § 511).

In short, the claims Plaintiffs raise are precisely the kind for which Congress has specifically designated an alternative and exclusive review scheme. Consequently, Plaintiffs' APA claims fall outside this Court's jurisdiction.

2. To the Extent That Plaintiffs Challenge VA Action Referred to Under Sections 552 or 553 of the APA, 38 U.S.C. § 502 Precludes Review.

38 U.S.C. § 502 vests the Federal Circuit with exclusive jurisdiction to consider challenges to VA action referred to under Sections 552 or 553 of the APA. As part of the Veterans Codification Act of 1991, Pub. L. 102-83, 105 Stat. 378 (1991), Congress enacted a provision entitled: "Judicial review of rules and regulations." Id. § 2(a), 105 Stat. 386.[10] As amended, this provision presently states, in relevant part: "An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review. *Such review* shall be in accordance with chapter 7 of title 5 and *may be sought only* in the United States Court of Appeals for the Federal Circuit." 38 U.S.C. § 502 (emphasis added). As the Federal Circuit has explained: "The referenced sections 552(a)(1) and 553 of title 5 are part of the [APA] and deal primarily with procedures for agency rulemaking." Preminger v. Sec. of Veterans Affairs, 632 F.3d 1345, 1348 (Fed. Cir. 2011). Furthermore, "the Federal Register publication requirement under § 552(a)(1)" applies not only to "substantive rules of general applicability," but also "statements of general policy" and "interpretations of general applicability." Id. at 1348-49.

In substance, Plaintiffs' complaint challenges the established meaning of 38 C.F.R. § 3.307(a)(6), an existing regulation VA promulgated through notice-and-comment rulemaking. Thus, this Court lacks jurisdiction to consider Plaintiff's challenge to a VA regulation. See Vietnam Veterans of Am. v. Shinseki, 599 F.3d 654, 657 (D.C. Cir. 2010) ("Congress. . . specified that *challenges to VA regulations* may only be brought in the Federal Circuit.") (emphasis added). Courts of Appeals that have reached the issue have held that Section 502 divests all courts but the Federal Circuit of jurisdiction to review challenges to VA regulations.

[10] VJRA contained a similar provision, which was codified at 38 U.S.C. § 223(c), but was superseded by the 1991 Act. See VJRA § 103(a)(1), 102 Stat. 4105.

See Preminger v. Principi, 422 F.3d 815, 821 (9th Cir. 2005) (district court lacked jurisdiction to entertain a facial challenge to a VA regulation because under 38 U.S.C. § 502 such challenges are reviewable exclusively in the Federal Circuit); Chinnock v. Turnage, 995 F.2d 889, 893 (9th Cir. 1993) (same); see also Hall v. U.S. Dep't of Veterans' Affairs, 85 F.3d 532, 535 (11th Cir. 1996) (same).

More broadly, Plaintiffs' claims here are barred to the extent that they challenge an action of the Secretary to which Section 552(a)(1) or 553 of Title 5 (or both) refers. Plaintiffs' complaint erroneously argues that this action cannot be brought in the Federal Circuit "because it does not deal with rulemaking or a request for rulemaking, but with an interpretive regulation . . . and a precedential General Counsel Opinion," Compl. ¶ 5. This distinction is directly contradicted by the plain language of 38 U.S.C. § 502, which vests the Federal Circuit with exclusive jurisdiction over "an action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers." Section 552(a)(1) refers to, inter alia, "statements of general policy or interpretations of general applicability formulated and adopted by the agency." As Plaintiffs themselves acknowledge, and as the Federal Circuit found in Haas, the documents Plaintiffs seek to challenge reflect the VA's generally applicable interpretation of statutory and regulatory provisions. Haas, 525 F.3d at 1189. As such, they fall squarely within the scope of 38 U.S.C. § 502.

Case law construing 38 U.S.C. § 502 makes clear that it extends not only to substantive rules published in the Code of Federal Regulations, but to all other actions to which 5 U.S.C. §§ 552(a)(1) and 553 refer, including interpretations of general applicability stated in agency manuals, directives, and General Counsel opinions. See Military Order of Purple Heart v. Sec'y

of Veterans Affairs, 580 F.3d 1293, 1296 (Fed. Cir. 2009) (finding jurisdiction to review a procedure of the VA established through an internal guidance letter, which the court determined affected Veterans' substantive as well as procedural rights); Preminger, 632 F.3d at 1352 (finding that 38 U.S.C. § 502 vests the Federal Circuit with jurisdiction over the Secretary's denial to promulgate a rule); Splane v. West, 216 F.3d 1058, 1062-63 (Fed. Cir. 2000) (finding jurisdiction under § 502 to review interpretation in VA General Counsel precedential opinion); see also Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs, 308 F.3d 1262, 1266 (Fed. Cir. 2002) (finding that court lacked jurisdiction under Section 502 to consider a facial challenge to a VA General Counsel opinion where the opinion was rendered in regard to a specific Veteran's case and could be challenged on direct appeal in such case, but "was not a statement of general applicability and future effect designed to implement or prescribe law or policy").

Accordingly, courts other than the Federal Circuit have consistently found that they lack jurisdiction over challenges to VA regulations, interpretations, and similar matters governed by the APA. See Hall, 85 F.3d at 535 (finding that § 502 precluded the court's review of challenge to VA regulation); Chinnock, 995 F.2d at 893 (finding that § 502 precluded the court's review of VA's regulation and VA's interpretation of that regulation). The Court of Appeals for this Circuit has likewise construed 38 U.S.C. § 502 to bar review in this Circuit of challenges to VA guidance documents within the scope of Sections 552(a)(1) or 553 of the APA. In White v. Nicholson, 541 F. Supp. 2d 87 (D.D.C. 2008), a putative class of benefits claimants sought review of a VA "Agent Orange Program Guide," an internal VA guide "designed for use by agency adjudicators" to provide information on adjudicating claims based on Agent Orange exposure. Id. at 89. After this Court ruled in the VA's favor on the merits, the D.C. Circuit

vacated and remanded with directions to dismiss the action on the ground that 38 U.S.C. § 502 vests the Federal Circuit with exclusive jurisdiction over such actions. White v. Shinseki, 329 Fed. App'x 285 (D.C. Cir. 2009). As the Federal Circuit noted in the related petition subsequently filed in that circuit, the D.C. Circuit's actions in White reflect its conclusion that the Federal Circuit "'is the only place where jurisdiction is conceivable'" over the challenge to VA's internal guidance document. Block v. Sec'y of Veterans Affairs, 641 F.3d 1313, 1316 (Fed. Cir. 2011) (quoting White v. Shinseki, No. 08-5161, 2009 WL 1065219 (D.C. Cir. Apr. 7, 2009) (unpublished order)). Thus, Plaintiffs' challenges fall squarely within the Federal Circuit's exclusive jurisdiction under 38 U.S.C. § 502 and are therefore barred from consideration by this Court.

B. To the Extent That Plaintiffs Claim They Are Not Seeking Individual Relief for Any of Their Members, They Lack Standing to Sue.

Plaintiffs might try to evade the preclusive effect of the VJRA by asserting – as the organizational plaintiffs did in Vietnam Veterans of America v. Shinseki, 599 F.3d 654 (D.C. Cir. 2010), and in Veterans for Common Sense – that they are not challenging any individual benefits decisions by the VA. Such an assertion would not vest the Court with jurisdiction. Plaintiffs may not circumvent the jurisdictional barriers of VJRA by stating their claims at such a high level of generality that they appear not to implicate any "decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans," 38 U.S.C. § 511(a), or any VA regulation, id. § 502. As the D.C. Circuit recognized, it is "settled law that an association has standing to sue only if at least one member would have standing [in] his or her own right." Vietnam Veterans of Am., 599 F.3d at 661 (citation omitted). And here, as in Vietnam Veterans of America, Plaintiffs could not make such a showing because 38 U.S.C. § 511 precludes federal

district courts from reviewing allegations by an individual Veteran that the VA failed to adjudicate his or her claim for benefits properly. Likewise, an individual Veteran could not bring a claim in federal district court challenging VA regulations because 38 U.S.C. § 502 – providing for exclusive review of VA regulations in the Federal Circuit – would divest a district court of jurisdiction over such a claim. See Chinnock, 995 F.2d at 893. Accordingly, because suits by individual Veterans challenging the VA's disposition of any specific benefits claim would plainly be barred, Plaintiffs here cannot satisfy the requirement to show that "at least one member [of their respective organizations] would have standing on his or her own right." Vietnam Veterans of Am., 559 F.3d at 661 (citation omitted).

For this very reason, the D.C. Circuit in Vietnam Veterans of America held that the two Veterans' organizations in that case lacked standing to sue. 599 F.3d at 661-62 (affirming dismissal for lack of jurisdiction where "appellants, in a rather apparent attempt to avoid the preclusive bite of both [38 U.S.C.] § 511 and [5 U.S.C.] § 704, went out of their way to forswear any individual relief for" their members whose individual benefits cases were pending and who had submitted affidavits); see also Veterans for Common Sense, 678 F.3d at 1027 (noting, without deciding, that Veterans organization that disavowed relief for any of its individual members might not possess standing). Thus, if Plaintiffs similarly disavow any intention that they are seeking any relief on behalf of their individual members, the Court should dismiss Plaintiffs' claims for lack of standing.[11]

[11] Additionally, Plaintiffs are independently barred by sovereign immunity from challenging the 1997 VA General Counsel Opinion or the 2002 change to the VA manual. The only waiver of sovereign immunity potentially applicable to Plaintiffs' claims is that found in the APA. See 5 U.S.C. § 704. This waiver of sovereign immunity is limited, however, by the applicable statute of limitations. Specifically, under 28 U.S.C. § 2401(a), "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Limitations and conditions upon which the federal government consents to be sued will be strictly construed in favor of the sovereign. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 41 (D.D.C. 2010)

C. Neither the Declaratory Judgment Act Nor Rule 65 of the Federal Rules of Civil Procedure Provides a Basis for Subject Matter Jurisdiction.

In addition to other provisions, Plaintiffs' complaint also attempts to invoke the Court's jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and Rule 65 of the Federal Rules of Civil Procedure. Compl. ¶ 4. However, it is a "well-established rule that the Declaratory Judgment Act is not an independent source of federal jurisdiction. Rather, the availability of declaratory relief presupposes the existence of a judicially remediable right." C&E Servs., Inc. v. Dist. of Columbia Water & Sewer Auth., 310 F.3d 197, 201 (D.C. Cir. 2002) (citation and internal punctuation omitted). And here, Plaintiffs have identified no such independent basis for the Court to exercise jurisdiction. As explained above, see supra I.A, 38 U.S.C. §§ 502 and 511 preclude review by this Court of Plaintiffs' APA claims. Moreover, as explained below, see infra II.A, II.C, Plaintiffs do not have a judicially remediable right under the APA or the Mandamus Act because VJRA provides them with an adequate remedy at law. Consequently, because Plaintiffs have failed to identify a federal statute providing Plaintiffs with a right of action in this Court, the Declaratory Judgment Act does not provide the Court with subject matter jurisdiction.

Plaintiffs' attempt to invoke the Court's jurisdiction under Rule 65 of the Federal Rules of Civil Procedure similarly fails. "[I]t is axiomatic that the Federal Rules of Civil Procedure do

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(citing Soriano v. United States, 352 U.S. 270, 276 (1957)); see also Block v. North Dakota, 461 U.S. 273, 287 (1983) (holding that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, "those conditions must be strictly observed, and exceptions thereto are not to be lightly implied"). Accordingly, the Court has subject matter jurisdiction over Plaintiffs' claims only if they were brought within the six-year statute of limitations.

Plaintiffs' complaint challenges "[t]he actions of the Secretary in implementing and to persist in the continued application of the 1997 General Counsel's opinion and the corresponding changes to the M21-1 manual and its revisions." Compl. ¶¶ 117-24; see also id. ¶¶ 125-27, 150. However, to the extent that Plaintiffs' claims challenge a precedential General Counsel opinion issued on July 23, 1997, and a February 27, 2002 change to VA's Adjudication Procedures Manual – and assuming for the purposes of this motion that these actions constitute "final agency action" under the APA – those claims are time-barred by the APA's six-year statute of limitations.

not create or withdraw federal jurisdiction." Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978); see also Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 70 (2d Cir. 1990) ("The Rules do not provide an independent ground for subject matter jurisdiction over an action for which there is no other basis for jurisdiction."); Palkow v. CSX Transp., Inc., 431 F.3d 543, 555 (6th Cir. 2005) ("Merely invoking the Federal Rules of Civil Procedure is not sufficient grounds to establish federal question jurisdiction."). The Rules themselves expressly provide: "These rules do not extend or limit the jurisdiction of the district courts. . . ." Fed. R. Civ. P. 82. Thus, Federal Rule of Civil Procedure 65 cannot be the basis for invoking the Court's subject matter jurisdiction.

II. In the Alternative, the Court Should Dismiss for Failure to State a Claim.

As explained above, the Court lacks subject matter jurisdiction over Plaintiffs' claims because Congress has removed the subject matter jurisdiction of Article III courts to review claims related to Veterans' benefits, and because Plaintiffs fail to invoke the Court's jurisdiction under other provisions they cite. But even if the Court were to find it has jurisdiction over this suit, Plaintiffs have not stated a claim on which this Court can grant relief. First, Plaintiffs cannot maintain an APA claim because they cannot show that they lack an adequate alternative remedy in a court.[12] Second, and in any event, Plaintiffs' claims are meritless. Addressing the

[12] The D.C. Circuit recently indicated that although the issue is not completely free from doubt, "the proposition that the review provisions of the APA [including 5 U.S.C. § 504] are not jurisdictional is now firmly established." Vietnam Veterans of Am., 599 F.3d at 661. Therefore, Defendant has moved to dismiss on the ground that an adequate alternative remedy in a court exists for Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6), rather than Rule 12(b)(1).

In another sense, the fact that the availability of another avenue of judicial relief precludes APA (and mandamus) review here could be viewed as jurisdictional in nature. The two plaintiff-organizations, which have brought suit in an attempt to vindicate the rights that they claim their members have, possess standing to do so only to the extent that at least one member could bring suit in his or her own right. Id. Because standing is a jurisdictional consideration, see Deutsche Bank Nat'l Trust Co. v. FDIC, 717 F.3d 189, 194 n.4 (D.C. Cir. 2013), the fact that individual Veterans would not be able to pursue the APA (and mandamus) claims raised here means that Plaintiffs'

central legal issue presented here, the Federal Circuit has held that the VA permissibly interpreted its governing statute and implementing regulations when it required that a benefits claimant must have been present within the land borders of Vietnam at some point during the course of the claimant's duties. Third, Plaintiffs cannot maintain a claim for mandamus relief because they fail to identify any provision of law prescribing a purely ministerial duty that would support the application of mandamus, and because an adequate alternative remedy is available to Plaintiffs. Thus, even if the Court did possess subject matter jurisdiction, it should dismiss this case because Plaintiffs have not stated a claim on which this Court can grant relief.

A. Plaintiffs Cannot Assert a Claim Under the APA Because the VJRA Provides Plaintiffs with an Adequate Remedy at Law.

Suit against federal agencies can be maintained under the APA only if there is "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Where Congress provides for a "special and adequate review procedure," APA review is not permitted. Bowen v. Massachusetts, 487 U.S. 879, 904 (1988); accord Garcia v. Vilsack, 563 F.3d 519, 522 (D.C. Cir. 2009). Because Congress provided just such a review procedure when it enacted VJRA, Plaintiffs cannot show that they lack an adequate alternative remedy in a court.

Under VJRA, the adjudication process begins when a Veteran seeking disability benefits "file[s] a claim with the VA at one of its 57 regional offices throughout the country." Vietnam Veterans of Am., 599 F.3d at 656. The regional office "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

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claims are jurisdictionally deficient. The larger point is that however the Court views the question, Plaintiffs' case must be dismissed.

Secretary to veterans." 38 U.S.C. § 511(a).[13] Upon receiving a decision from the regional office, the claimant may appeal the decision to the Board of Veterans Appeals, which either issues the final decision of the Secretary of Veterans Affairs or remands the claim to the regional office for additional development and subsequent appeal. See id. § 7104.

VJRA gives Veterans the right to challenge a wide range of VA decisions in the Veterans Court, including all decisions denying applications for benefits as well as any broader statutory issues that arise in those claims. As the Supreme Court has explained, "the Veterans Court's scope of review, [38 U.S.C.] § 7261, is similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." Henderson ex rel. Henderson v. Shinseki, 131 S. Ct. 1197, 1201 n.2 (2011). Indeed, similar to the APA, 38 U.S.C. § 7261(a)(3) provides the Veterans Court with the authority to "hold unlawful and set aside" rules, decisions, findings, and regulations "found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law." This is precisely the type of challenge that Plaintiffs are asserting here. See Compl. ¶¶ 116-37 (alleging that "[t]he actions of the Secretary in implementing and to persist in the continued application of the 1997 General Counsel's Opinion and the corresponding changes to the M21-1 Manual and its revisions" lacked a reasoned analysis, did not consider all relevant factors, failed to articulate an explanation for its decision, was arbitrary and capricious, was unsupported by substantial evidence, and was contrary to law).

[13] The Secretary of Veterans Affairs has delegated this decisionmaking power to VA regional offices. See 38 C.F.R. § 3.100.

Decisions by the Veterans Court have precedential effect, and can result in system-wide revision of the VA's policies and readjudication of entire classes of claims. See, e.g., Kent v. Nicholson, 20 Vet. App. 1, 9-10 (2006) (imposing additional notice requirements in claims to reopen previously denied claims). The Veterans Court can also enforce compliance with its decisions. See Tobler v. Derwinski, 2 Vet. App. 8, 11-12 (1991). Moreover, although the Veterans Court may review only individual claims, as distinguished from suits on behalf of organizations, that does not render the VJRA inadequate as a remedy. See Beamon, 125 F.3d at 970 ("The VJRA system is not an inadequate alternative forum because it does not operate with the same body of procedural tools that govern federal district courts and does not allow individual claimants to aggregate their claims as a class action. Plaintiffs may bring their claims individually, and the [Veterans Court's] decisions of individual claims will have a binding effect on the manner in which the VA processes subsequent veterans' claims"). And as the D.C. Circuit has held, a process providing for case-by-case relief is adequate even if it might be "more arduous, and less effective in providing systemic relief" than other forms of action. Women's Equity Action League v. Cavazos, 906 F.2d 742, 751 (D.C. Cir. 1990). Furthermore, where a special review procedure is available to members of an organization, it is irrelevant that the organization itself may be unable to use that procedure to vindicate its members' rights, because "the statutes that create the special review channel adequately protect those rights." Shalala v. Illinois Council on Long Term Care, 529 U.S. 1, 24 (2000).

"Because this system of judicial review, established by [VJRA] provides an adequate alternate remedy, claims such as [Plaintiffs'] fall within the § 704 exception to the APA's waiver of sovereign immunity." Van Allen, 925 F. Supp. 2d at 126. Van Allen was a putative class

action brought on behalf of two classes of Veterans purportedly seeking administrative review of certain Veteran service-connected disability claims and review of administrative denials of reconsideration. Id. at 121. This Court dismissed, explaining that the plaintiff's "claims fall, not under the APA, but under 38 U.S.C. § 511, which explicitly bars judicial review of such claims," and also determined that VJRA provides for an adequate alternative remedy at law. Id. at 125, 126. Other courts have also found that the VJRA provides an adequate alternative remedy to the APA. See Vietnam Veterans of Am., 599 F.3d at 659 (Veterans Court "possesses the exact same authority to deal with excessive delay in its statute that district courts have under the APA"); Beamon, 125 F.3d at 967-70, 974 (Section 704 of APA waives immunity only when the agency action is final and there is no other adequate remedy in a court; system of judicial review created by VJRA provided an adequate alternate remedy).

In sum, the right to judicial review in this specialized Article I court constitutes an adequate alternative remedy for Plaintiffs' claims, foreclosing review of the same claims by this Court. The Court should thus dismiss Plaintiff's complaint for failure to state claims on which relief can be granted.

B. In Any Event, Plaintiffs' Claims Are Meritless Because the VA's Requirement That a Claimant Must Have Been Present Within the Land Borders of Vietnam During the Course of the Claimant's Duty to Receive a Presumption of Herbicide Exposure Constitutes a Permissible Interpretation of the Agent Orange Act.

In any event, as the Federal Circuit has held, Plaintiffs' claims are meritless. See Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008), reh'g denied, 544 F.3d 1306 (Fed. Cir. 2008), cert. denied, 555 U.S. 1149 (2009). As noted above, the Federal Circuit in Haas held that "the agency's requirement that a [benefits] claimant have been present within the land borders of

Vietnam at some point in the course of his duty constitutes a permissible interpretation of the statute and its implementing regulation." Id. at 1172. Because the crux of Plaintiffs' case is the proposition that was rejected in Haas, even if this Court had jurisdiction over Plaintiffs' claims, it should dismiss for failure to state a claim based on the legal reasoning underlying the Federal Circuit's Haas decision.

In Haas, as in the present case, the central issue was "whether veterans who served on ships off the coast of Vietnam during the Vietnam War served 'in the Republic of Vietnam' and thus are entitled to the presumption of service connection [under the Agent Orange Act] if they suffer from one of the listed diseases [in the Act]." 525 F.3d at 1172. In reaching its decision, the Federal Circuit examined both the 1997 General Counsel opinion and the 2002 revision to VA's Adjudication Manual M21-1 that Plaintiffs challenge in this case. See id. at 1180-81, 1182. After determining that the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 116(a)(1)(A) was ambiguous, id. at 1183-86, the court examined the VA's interpretation of its regulation defining this term, as expressed in the 1997 General Counsel opinion and in other materials. Id. at 1186-95. The General Counsel opinion had "[f]ocus[ed] on legislative history that emphasized Congress's concern with ground troops who had been present on the landmass of Vietnam before August 1964," and had thus "determined that service offshore was not included within the meaning of service 'in the Republic of Vietnam'" for purposes of the statute. Id. at 1191. The Federal Circuit "f[ou]nd nothing in the [General Counsel] opinion's analysis that renders the [VA's] interpretation plainly erroneous." Id. at 1190. To the contrary, "[t]he opinion correctly noted that there was no indication in the legislative history that Congress intended for the definition of [38 U.S.C. §] 101(29)(A) to include service on a deep-water vessel

off the shores of Vietnam within the scope of the phrase 'served in the Republic of Vietnam.'" Id. at 1191.

The Federal Circuit also found that the VA had adequately explained its decision to draw the line for presumptive herbicide exposure at the Vietnamese coast. Id. at 1192-95. As the court noted, the agency's stated rationale for this line-drawing was that "Agent Orange was sprayed only on land, and therefore the best proxy for exposure is whether a veteran was present within the land borders of the Republic of Vietnam." Id. at 1192. The Federal Circuit explained that "[d]rawing a line between service on land, where herbicides were used, and service at sea, where they were not, is prima facie reasonable." Id. at 1193. Moreover, it noted, "the line drawn by the agency does not cut off all rights of sea-going veterans to relief based on claims of herbicide exposure, in that even servicemembers who are not entitled to the presumption of exposure are nonetheless entitled to show that they were actually exposed to herbicides. . ." Id. Consequently, the VA's interpretation of its own regulation "as excluding servicemembers who never set foot within the land borders of Vietnam . . . was not unreasonable, and it certainly did not rise to the level of being plainly erroneous or inconsistent with the regulation." Id. (citations and internal punctuation omitted).[14] The Federal Circuit thus concluded that the VA's "interpretation is a plausible construction of the statutory language and it is based on a simple but undisputed fact – that spraying [of herbicides such as Agent Orange] was done on land, not over the water. Applying the substantial deference that is due to an agency's interpretation of its own regulations, we uphold the [VA's] interpretation of [its regulation]." Id. at 1195.

[14] The Federal Circuit also addressed and rejected the appellee's argument that the VA's interpretation ran contrary to scientific studies, including a study conducted for the Australian Department of Veterans Affairs, an argument that is also made by Plaintiffs here. Compare 525 F.3d at 1193-94 with Compl. ¶¶ 54-85.

Moreover, even aside from the fact that Haas ruled in favor of the VA on the central issue presented in this case, and the fact that the legal reasoning underlying its decision is persuasive, the VA's interpretation of the relevant statute and regulation should be upheld because it is entitled to deference and is reasonable. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984) (a court will defer to an agency's reasonable regulatory interpretation of a statute if the statute is ambiguous or contains a gap that Congress has left for the agency to fill through regulation).

In sum, Plaintiffs' claims lack merit. Thus, even if the Court were to find it has jurisdiction over this suit, it should dismiss Plaintiffs' claims based on the same legal reasoning underlying the Federal Circuit's holding that the VA permissibly interpreted the Agency Orange Act when it required that a benefits claimant must have been present within the land borders of Vietnam during the course of the claimant's duty in order to receive a presumption of herbicide exposure under the Act.

C. The Court Should Dismiss Plaintiffs' Mandamus Claims Because Plaintiffs Have Failed to Identify a Clear Duty Owed by VA to Plaintiffs or a Clear Right to the Relief They Seek, or to Show That No Adequate Remedy Is Available to Plaintiffs.

Well-settled law holds that mandamus is a drastic remedy to be used only in extraordinary circumstances. See Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980); Power v. Barnhart, 292 F.3d 781, 784 (D.C. Cir. 2002). The D.C. Circuit has been as explicit as it can be in saying that mandamus is available only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) no other adequate remedy is available to the plaintiff. Id.; see also Baptist Memorial Hosp. v. Sebelius, 603 F.3d 57, 62 (D.C. Cir. 2010). Because Plaintiffs have failed to identify any such clear, non-discretionary duty on the

part of the Secretary, and because another adequate remedy is available to Plaintiffs, the Court should dismiss Plaintiffs' mandamus claims. See In re Russell, 155 F.3d 1012, 1012-13 (8th Cir. 1998) (per curiam) (dismissing petition for mandamus relief to issue order compelling Board of Veterans' Appeals and Veterans Court to act on Veteran's request for benefits).[15]

The scope of a duty that could allow a court to exercise mandamus jurisdiction is extremely well-defined and tightly constrained. "Mandamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion." Work v. United States ex rel. Rives, 267 U.S. 175, 177 (1925); see also Consolidated Edison Co. v. Ashcroft, 286 F.3d 600, 605 (D.C. Cir. 2002) ("[M]andamus is inappropriate except where a public official has violated a ministerial duty. Such a duty must be so plainly prescribed as to be free from doubt and equivalent to a positive command. Where the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.") (internal citations and punctuation omitted); 13th Regional Corp. v. U.S. Dep't of Interior, 654 F.2d 758, 760 (D.C. Cir. 1980) ("[M]andamus will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable.")

[15] The D.C. Circuit has explained that the question of whether the statute relied upon by a plaintiff imposes a "clear and compelling" duty on the defendant merges into an issue of the merits of the complaint. In re Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). Therefore, "if dismissal rests on a plaintiff's failure to point to a clear and compelling duty, it should be treated as a dismissal for failure to state a plausible entitlement to relief, not as a dismissal for lack of subject matter jurisdiction." Jory v. Sec'y, U.S. Dep't of Homeland Sec., 859 F. Supp. 2d 72, 76 n.4 (D.D.C. 2012) (citing Ahmed v. Dep't of Homeland Sec., 328 F.3d 383, 386-87 (7th Cir. 2003)).

Plaintiffs fail to identify any provision of law prescribing a purely ministerial duty that would support the application of mandamus. See Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218 (1930) (mandamus may be not be used "to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either"); Work, 267 U.S. at 177-78 ("If an act is within a federal officer's discretion, mandamus cannot be used to compel such an action."). Additionally, as explained above, see supra II.A, Plaintiffs have another adequate remedy available to them in the form of a lawsuit in the Veterans Court or the Federal Circuit. The Court thus lacks jurisdiction under the Mandamus Act to adjudicate Plaintiffs' claims.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court dismiss this case for lack of subject matter jurisdiction or, in the alternative, because Plaintiffs fail to state a claim on which relief can be granted.

Dated: October 24, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2013, I caused the foregoing document to be served via electronic case filing.

/s/ Daniel Riess
Daniel Riess