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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Gila River Indian Community; and Gila River Health Care Corporation,

Plaintiffs,

v.

United States Department of Veterans Affairs; and Robert A. McDonald, Secretary, United States Department of Veterans Affairs

Defendants.

No. 2:16-CV-772

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Despite the breadth of the Veterans' Judicial Review Act ("VJRA"), Plaintiffs offer a narrow construction of the statute in an attempt to avoid the congressionally mandated administrative review procedure applicable to their claims here. Plaintiffs' argument misconstrues the statutory text and binding Ninth Circuit precedent, and would result in the upending of well-established practices of the Department of Veterans Affairs ("VA") in a host of similar circumstances. Such a result is not warranted.

Moreover, the administrative process provided in the VJRA provides the means by which the agency takes a final action, as is required for judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*. Plaintiffs' reliance on the breakdown of discussions over a sharing arrangement and a nonbinding advisory opinion from the VA Office of General Counsel cannot substitute for the final decision of the agency by way of the Board of Veterans' Appeals. The actions taken thus far are not agency actions in APA terms, they lack finality, and they have no binding legal effect. Thus, this Court lacks jurisdiction, and Plaintiffs should be required to proceed through the administrative process.[1]

Even if the Court were to address the substance of Plaintiffs' claims, their interpretation of 25 U.S.C. § 1645 suffers from fatal flaws. Plaintiffs ignore the basic rule of statutory construction that requires the Court to consider a statute as a whole and instead ask the Court to interpret one subsection without regard for the rest of the section, let alone other similar schemes that provide useful context. Read with the use of requisite interpretive tools, it is plain that section 1645 requires reimbursement to tribal organizations only under a sharing arrangement, which Plaintiffs lack.

Accordingly, under either Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6), Plaintiffs' Complaint should be dismissed.

ARGUMENT

I. The Court Lacks Subject Matter Jurisdiction.

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

In enacting the VJRA, Congress placed express limits on judicial review of "all

[1] As noted in VA's opening brief, regardless of whether the final agency action requirement is jurisdictional in the Ninth Circuit, *see* Defs.' Mem. In Supp. of Mot. To Dismiss 9 n.6, ECF No. 15 ("Defs.' Br.") (citing conflicting precedent), its absence remains a basis for dismissal under Rule 12(b)(6).

questions of law and fact necessary to a decision by the Secretary [of Veterans Affairs] under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. § 511(a). The Ninth Circuit interpreted section 511 to "preclude[] 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." *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1025 (9th Cir. 2012) (en banc) (citations omitted). That standard, the court explained, "is reflected in § 511(a)'s plain statement that we may not review a 'decision by the Secretary under a law that affects the provision of [veterans'] benefits,' 38 U.S.C. § 511(a)." *Id.* (alteration in original). As VA explained in its opening brief, that standard precludes this Court from determining whether VA is required to provide the payments at issue here for health care services provided to eligible veterans. Plaintiffs' arguments to the contrary misconstrue section 511 and misapprehend VA's role under 25 U.S.C. § 1645.

Plaintiffs argue that the VJRA does not apply to this case because section 1645 does not "affect any benefits provided 'by the Secretary to veterans.'" Pls.' Resp. to Mot. To Dismiss 8, ECF No. 16 ("Pls.' Br.") (quoting 38 U.S.C. § 511(a)). Plaintiffs contend that the only benefits at issue in section 1645 are those provided "through [the Indian Health Service ('IHS')] or a tribal health facility." *Id.* But this narrow understanding of the VJRA is inconsistent with the breadth of the statute, the way in which Congress designed VA's operations, and longstanding VA practice.

First, contrary to Plaintiffs' suggestion, VA benefits are at issue in a dispute about section 1645. While Plaintiffs focus on the healthcare services provided by IHS or tribal organizations to eligible veterans, section 1645 also refers to payments made by VA for these services. As explained in VA's opening brief, VA payments, which are tied

directly to services provided to veterans deemed eligible under VA laws, fall comfortably within accepted definitions of "benefits," including VA's own regulations. *See* Defs.' Br. 8–9; 38 C.F.R. § 20.3(e) (defining benefit as "any payment, service, commodity, function, or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans and their dependents and survivors"). Plaintiffs quibble with VA's use of this regulatory definition, stating that "it is worth noting" that this definition comes from "the rules of practice for the Board of Veterans' Appeals," Pls.' Br. 13, but as the Supreme Court has noted, courts must defer to an agency's reasonable interpretation of its statutory jurisdiction, *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870–71 (2013). The agency's regulatory definition of a "benefit" is certainly reasonable, and indeed, Plaintiffs offer no alternative definition, nor do they suggest any other source to which the Court should look to find one. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. . . . It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.") (citations omitted).

Plaintiffs also contend that section 511 would not reach this case even under the regulatory definition because VA does not administer section 1645. Again, Plaintiffs omit any citation or reasoning for that assertion. It is true that VA is not the sole agency charged with administering section 1645, as the statute also includes roles for the Secretary of Health and Human Services and the Secretary of Defense. For this reason, VA has not argued that its interpretation of the statute merits *Chevron* deference. *See Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (explaining that, where multiple agencies have promulgated regulations under a statute of general applicability,

Chevron deference is not appropriate). But VA is involved in administering the statute insofar as it is authorized to enter into prospective sharing arrangements in accordance with its own authority under Title 38 and make eligibility determinations and administer reimbursements pursuant to such sharing arrangements. Indeed, section 1645 includes a cross-reference to VA's administrative authority under Title 38, thus making clear Congress's understanding that VA would be involved in section 1645 sharing arrangements within the scope of VA's own authorities. 25 U.S.C. § 1645(b) (citing "subchapter IV of chapter 81 of title 38").

Plaintiffs appear to believe that section 511 only applies where payment is made directly from VA to a veteran. But decisions regarding payments under section 1645, which are expressly tied to care for eligible veterans, fall under the VJRA's provisions and are reviewed under VA's administrative process in the same manner as many other VA benefit payments made to providers and other individuals or entities. For example, 38 U.S.C. § 1741 authorizes the Secretary to pay states per diem at specified rates "for each veteran receiving . . . care in a State home, if such veteran is eligible for such care in a Department facility." States may appeal per diem determinations to the Board of Veterans' Appeals, just as Plaintiffs may do here. *See* 38 C.F.R. § 51.30(f).[2] Similarly, VA's provision of benefits also includes payments to non-Department facilities for care provided to veterans in certain emergency situations, and the attendant administrative

[2] Indeed, the General Counsel for VA issued a published precedential opinion, which binds the agency, concluding that these per diem determinations are subject to the VJRA. *See* General Counsel Department of Veterans Affairs, Jurisdiction of the Board of Veterans' Appeals in Consideration of Per Diem Payments to a State Home, (Dec. 14, 2000), http://www.va.gov/ogc/opinions/2000precedentopinions.asp. The General Counsel reasoned that the review scheme in section 511 applied, regardless of the fact that VA payments were made to states rather than veterans, where the payment was "provided for particular veterans." *Id.* at 7.

review scheme applies. *See* 38 U.S.C. § 1725; *id*. § 1728. *See also St. Patrick Hosp. v. Principi*, 4 Vet. App. 55 (1993) (affirming Board of Veterans' Appeals decision denying entitlement to payment for unauthorized medical expenses). Additional examples of such benefit provisions with applicable administrative review abound. *See, e.g.*, 38 C.F.R. § 17.904 (providing that health care providers may appeal determinations concerning payment for spina bifida and other covered birth defects); *id.* § 70.40 (providing for appeals to the Board of Veterans' Appeals for claimants who provide or pay for beneficiary travel for eligible veterans).

Moreover, section 1645 is "a law that affects the provision of benefits by the Secretary to veterans," 38 U.S.C. § 511, because it is designed to allow veterans to receive care outside of VA facilities at VA's expense. Sharing arrangements under section 1645 thus shift the manner in which VA provides benefits in certain circumstances consistent with other situations described above—rather than providing health care benefits directly to veterans in VA facilities, sharing arrangements entered into under section 1645 and applicable Title 38 authority allow VA to provide benefits to eligible veterans in the form of payments to IHS, Indian tribes and tribal organizations that provide care to such veterans.[3] Congress recognized that section 1645 would affect VA's provision of benefits, and therefore provided that no action be taken that would impair "the quality of health care services provided by the Department of Veterans

[3] Indeed, it is possible that VA's actions under section 1645 could affect VA's provision of benefits to veterans who do *not* receive care at IHS and tribal facilities. For example, the availability of VA coverage for veterans receiving care at IHS and tribal facilities under sharing arrangements may attract additional patients to those facilities and away from VA facilities. If VA determines that a sufficient number of veterans prefer to receive care at IHS or tribal facilities, VA may not have enough patients at a certain facility to justify its continued operation, meaning that other veterans may have to travel to another VA facility to receive VA care.

Affairs." 25 U.S.C. § 1645(b)(4).

The application of the VJRA to section 1645 is further supported by Ninth Circuit precedent, and Plaintiffs' attempts to distinguish this precedent are unpersuasive. They first quote from *Veterans for Common Sense* and emphasize that section 511 applies to "laws *administered by* the VA" and "cases related to *VA benefits*." Pls.' Br. 10. But as explained above, this case also deals with a statutory provision that VA is involved in administering by providing payments under section 1645 sharing arrangements, and such payments qualify as VA benefits. Plaintiffs further contend that "[h]earing this matter would not have any effect on the benefits actually received by any veteran," *id.* at 11, but again, Plaintiffs reasoning relies on a limited definition of "benefit" and fails to recognize the link between VA's payment and the health care services provided to the veteran. The interpretation and application of section 1645 affects the extent of coverage required of VA. If section 1645 does not apply to a particular veteran—either because there is no sharing arrangement or because he is ineligible—the veteran is not entitled to coverage from VA for the care received at a tribal facility. If section 1645 does apply, VA coverage is extended to the veteran, and the Secretary provides benefits to the veteran through payment to the tribal facility.

The remainder of Plaintiffs' arguments boil down to a contention that section 511 applies only to individual benefits requests. Pls.' Br. 8, 12. Plaintiffs conceive of section 511 as providing a different avenue for judicial review for individual veterans (or a group thereof) to appeal specific benefits determinations. But as explained in VA's opening brief, section 511 is not so limited. Defs.' Br. 7, 9; *Veterans for Common Sense*, 678 F.3d at 1026 (rejecting notion that a plaintiff could "circumvent [section 511] by disavowing relief on behalf of any individual veteran"); *Blue Water Navy Vietnam*

Veterans Ass'n, Inc. v. McDonald, No. 15-5109, 2016 WL 4056093 at *3–4 (D.C. Cir. July 29, 2016) (rejecting argument that section 511(a) encompasses "only challenges to *individual* benefits determinations—not challenges alleging that the VA improperly interpreted its statutory and regulatory obligations" and noting that *Veterans for Common Sense* suggested "just the opposite"). Rather than focusing on whether an individual veteran is involved, section 511 focuses on the Secretary and his authority to "decide all questions of law and fact necessary" in decisions affecting veterans benefits, and implements a specific review scheme for those decisions. 38 U.S.C. § 511(a). This case presents such a question of law, and therefore this Court lacks jurisdiction.[4]

B. There Has Been No Final Agency Action Subject to Judicial Review.

As section 511 makes clear, VA has in place administrative procedures for review of claims for payment for services provided at non-Department facilities, which allow VA to come to a final decision on the relevant questions of law and fact. Under 38 C.F.R. § 17.123, for example, "the hospital, clinic, or community resource which provided the services" may file a claim for payment, which may then be appealed to the

[4] Plaintiffs appear to question whether the Board of Veterans' Appeals ("Board") would have jurisdiction because in prior cases the Court of Appeals for Veterans' Claims ("CAVC") held that the Board could not review the Secretary's grant of equitable relief for past errors or extend a deadline. Pls.' Br. 13 (citing *Darrow v. Derwinski*, 2 Vet. App. 303 (1992); *Edwards v. Peake*, 22 Vet. App. 29 (2008)). Those cases bear no relationship to the present case. At issue here is whether the Secretary is obligated to make certain payments for care veterans received, an issue of law, not equity, that is squarely within the Board's purview. *See, e.g.*, *Fritz v. Nicholson*, 20 Vet. App. 507 (2006) (reviewing Board decision denying veteran claim for payment of unauthorized private medical expenses); *see also Darrow*, 2 Vet. App. at 306 (distinguishing between a requirement of law and relief which is equitable in nature).

Plaintiffs' contention that "defendants' attorneys were unable to guarantee that the Board of Veterans' Appeals would have jurisdiction over the matter," Pls.' Br. 13 n.1, is likewise irrelevant. What matters here is what 38 U.S.C. § 511 requires, not whether defendant's counsel can guarantee a certain decision from the Board.

Board of Veterans' Appeals and the CAVC, and in appropriate circumstances, to the Federal Circuit and the United States Supreme Court. Plaintiffs' efforts to evade these requirements should be rejected, as none of the mix of actions they point to constitute final agency action subject to judicial review.

In their Complaint, Plaintiffs based their challenge on the breakdown of discussions with VA and agency counsel's statements in meetings. As explained in VA's opening brief, precedent from this and other circuits makes plain that these informal statements do not constitute final agency action. Defs.' Br. 11. Rather than addressing that precedent, Plaintiffs now shift their argument and instead claim that the final agency action is a "legal opinion . . . authored by William A. Gunn, Esq., General Counsel for the VA." Pls.' Br. 15. This argument fares no better. The opinion Plaintiffs cite is an advisory opinion,[5] which represents the views of the Office of General Counsel, not the agency, and which is not binding on the agency. *See* 38 C.F.R. § 14.507; VA Office of General Counsel, General Counsel Handbook, Chapter 13, Opinion Writing, 13.06 (2007). The Ninth Circuit has previously held that such advisory opinions do not constitute final agency action subject to judicial review. In *Air California v. U.S. Department of Transportation*, for example, the Ninth Circuit explained that an advisory letter from the agency "was neither a definitive statement of the agency's position nor a document with the status of law." 654 F.2d 616, 620 (9th Cir. 1981).[6] *See also NGV Gaming, Ltd. v.*

[5] This is noted by the label "VAOPGCADV" on the top of the memo, which means "VA Opinion General Counsel Advisory." *See* Pls.' Br. Ex. 1. By contrast, the label "VAOPGCPREC" indicates a precedent opinion of the General Counsel, which binds the agency. *See* 38 C.F.R. §§ 19.5, 2.6(e)(8).

[6] By contrast, in *International Longshoremen's & Warehousemen's Union v. Meese*, the Ninth Circuit held that an advisory opinion could be reviewed because the action was "final in the sense that the [plaintiff] has no administrative remedy to overturn the advisory opinion or policy statement." 891 F.2d 1374, 1378 (9th Cir. 1989). As

Upstream Point Molate, LLC, 355 F. Supp. 2d 1061, 1065 (N.D. Cal. 2005) ("[T]he advisory opinion of NIGC's General Counsel that the lease provisions violate IGRA has no legal effect because it is not a final decision of the agency."); *Sw. Airlines Co. v. U.S. Dep't of Transp.*, No. 15-1036, 2016 WL 4191190, *4 (D.C. Cir. Aug. 9, 2016) (holding that DOT's guidance letter was not final where agency initiated administrative proceeding designed to resolve "the very issues addressed" in the challenged letter); *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 644 (6th Cir. 2004) ("Having no direct, binding effect on Air Brake and having no legal consequences for Air Brake by virtue of the deference courts might give to them, the Chief Counsel's letters are not 'final' agency action under the APA."); *Taylor-Callahan-Coleman Ctys. Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991) (holding that DOL "opinion letters" are not final agency action where plaintiff is "still free to seek its own opinion letter and is free to challenge any opinion letter issued to it").

Plaintiffs cite *Navajo Nation v. U.S. Department of the Interior*, 819 F.3d 1084 (9th Cir. 2016), as support for their assertion that the advisory opinion is final agency action, but in fact that case is completely consistent with VA's position. In *Navajo Nation*, following an informal opinion from the Department of Interior's solicitor, the National Park Service "removed 303 sets of human remains and associated funerary objects" from the Navajo Reservation to inventory them and repatriate them to culturally-affiliated tribes. *Id.* at 1085. The Navajo Nation sued, arguing that the "decision to inventory the remains and objects" violated the law. *Id.* at 1086. The Ninth Circuit rejected the Park Service's contention that the tribe was required to wait until the end of the inventory process to bring suit. *Id.* at 1091. The court explained that the challenged action—the

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explained above, here Plaintiffs have an available administrative remedy by way of request for reimbursement and appeal through the VA administrative process.

determination that the agency had jurisdiction to inventory the remains and objects—had been consummated by "the decision to follow Interior's solicitor's guidance and continue inventorying the remains and objects" and that the action had legal consequences because it affected the tribe's "complete ownership of the remains and objects pursuant to its treaty rights." *Id.* at 1092–93. Contrary to Plaintiffs' contention, it was not the Interior solicitor's "informal opinion" that resulted in the final agency action. Instead, it was the agency's actions consistent with that opinion—taking possession of the remains and objects, thereby interfering with the plaintiff's asserted ownership rights.

There has been no such action in this case. Indeed, where the agency in *Navajo Nation* took the position that the plaintiff needed to wait until it had finished the inventory process, Plaintiffs here already have access to the avenue by which they may receive a final agency decision subject to review. They need only file a claim for payment, which the agency can then review.

The advisory opinion neither consummates VA's decision-making process nor does it have legal consequences for Plaintiffs' reimbursement. *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Plaintiffs have not yet begun VA's process to request reimbursement and, if and when they do, the persons making the determination will not be bound by the advisory opinion. Thus, Plaintiffs' challenge here is premature and should be dismissed.[7]

[7] Though at times Plaintiffs allege that the VA "failed to act," Pls' Br. 14, Plaintiffs clarify in their opposition that they are challenging VA's actions under 5 U.S.C. § 706(2), rather than alleging a failure to act under 5 U.S.C. § 706(1). Pls.' Br. 17.

II. Plaintiffs' Complaint Fails to State a Claim Because the Statute Does Not Obligate VA to Reimburse the Tribe.

Even setting aside the jurisdictional problems, Plaintiffs' suit fails to state a claim upon which relief can be granted. As explained in VA's opening brief, rather than reading the plain language of the statute in its appropriate context, Plaintiffs read subsection (c) in isolation. Defs.' Br. 14–20. Such a reading is inconsistent with principles of statutory interpretation and should be rejected here.

Plaintiffs begin by citing the *Blackfeet* presumption, which states that "when there is doubt as to the proper interpretation of an ambiguous provision in a federal statute enacted for the benefit of an Indian tribe, the doubt [will] benefit the Tribe." *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003) (citation omitted). Yet, the remainder of Plaintiffs' arguments purport to rely only on the "plain language of the statute," Pls.' Br. 19, and do not point to any ambiguity that would bring this presumption into play. Moreover, as Plaintiffs recognize, the Supreme Court has also held that provisions should be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *see also Imel v. Laborers Pension Trust Fund for N. Cal.*, 904 F.2d 1327, 1331 (9th Cir. 1990) ("The Supreme Court has instructed us 'to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.'"); *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1344 (Fed. Cir. 2003) ("[W]hen interpreting statutes relating to veterans, 'interpretive doubt is to be resolved in the veteran's favor.'") (citation omitted).[8] Thus, to the extent

[8] Plaintiffs claim that this presumption applies "in favor of individual veterans and *against* the United States and applies only in cases involving the provision of benefits to

the statute is ambiguous, the Court should also take this presumption into account, and consider, for example, that VA's interpretation allows the agency to take steps to ensure that high-quality health care services are provided in non-VA facilities.

Turning to the text of the statute, Plaintiffs continue to focus on subsection (c) without regard for the remainder of the section, ignoring the well-established rule that in statutory interpretation, context is a necessary part of plain meaning analysis, and not something that comes into play only when ambiguity arises. *See Westwood Apex v. Contreras*, 644 F.3d 799, 803 (9th Cir. 2011) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.") (citation omitted). Plaintiffs first focus on the mandatory language in section 1645, requiring that IHS, tribes, or tribal organizations "shall be reimbursed" by VA for services provided to eligible veterans. *See* Pls.' Br. 20 (quoting 25 U.S.C. § 1645(c)). Plaintiffs claim that this language cannot be reconciled with subparagraph (a)'s permissive language, which allows, but does not require, sharing arrangements, and that in any event, reimbursements are not "sharing agreement[s]," making the title of the statute inapplicable. *Id*. Plaintiffs view this supposed irreconcilability as a reason to reject any attempt to read the statute as a whole. But the problems Plaintiffs point to are of their own making and easily disappear under VA's interpretation.

First, the permissive language in subsection (a) creates no conflict with the mandatory language in subsection (c). As Plaintiffs recognize, subsection (a) authorizes the creation or expansion of sharing arrangements between IHS, tribes, tribal organizations, and VA. Read in context with that authorization and the rest of the section, subsection (c)

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veterans." Pls.' Br. 19. Not only do Plaintiffs fail to cite any authority for that limitation, but for the reasons explained above, section 1645 involves veterans' benefits.

provides that where the parties agree to such an arrangement, IHS, the tribe, or the tribal organization "shall be reimbursed by" VA. 25 U.S.C. § 1645(c). Subsection (c) thus makes clear that it is VA—not IHS, the tribe, or tribal organization—that must be responsible for payment under these sharing arrangements. This is an important distinction, given that just two sections later, there is a provision requiring that "the Secretary [of Health and Human Services ('HHS')] shall provide for veteran-related expenses incurred by eligible Indian veterans" receiving services at IHS or certain tribal facilities, pursuant to a local memorandum of understanding between the Secretary of HHS and the Secretary of Veterans Affairs. *Id.* § 1647(c)(1).

Equally unpersuasive is Plaintiffs' contention that reimbursements do not constitute "sharing." Subsection (a) effectively defines what is included in a sharing arrangement, explaining that the arrangement is "for the sharing of medical facilities and services." Thus, under the arrangements, the tribe shares its facilities and services with VA-eligible beneficiaries and VA, in turn, provides payment. This is perfectly in line with similar arrangements required by 38 U.S.C. § 8111, under which VA and the Department of Defense share health care resources, and the providing agency receives reimbursement. 38 U.S.C. § 8111(a), (e)(3)(E).[9] And indeed, as VA explained in its opening brief, the sharing arrangement provides a means for the necessary guidance as to how reimbursements are calculated and obtained, similar to provisions in other statutes providing for VA payment.

[9] Plaintiffs argue that 38 U.S.C. § 8111 requirement for sharing arrangements between VA and the Department of Defense "suggests that Congress knows the difference between a mandatory provision and a permissive provision." Pls.' Br. 24. There is no question that is the case. But Plaintiffs do not explain how that is inconsistent with VA's interpretation here, which gives effect to Congress's decision to make the sharing arrangements in section 1645 permissive, while the payment scheme under such arrangements is mandatory.

Defs.' Br. 16–17. Plaintiffs fail to explain how such guidance might occur in the absence of these arrangements.[10]

Plaintiffs cite *Campbell v. Allied Vans, Inc.*, 410 F.3d 618 (9th Cir. 2005), in support of their contention that subsection (c) should be read without regard for the remainder of the section. Their reliance is misplaced. In that case, the court recognized its obligation to "construe a statute as a whole" and thus the Court "read the attorney's fee provisions in light of the arbitration program with which they share" a statutory section. *Id*. at 621. In approving the award of attorneys' fees, the Court merely concluded that the statute did not condition receipt of fees on participation in arbitration—a reasonable conclusion, where the statute only required that a carrier "agree to offer" arbitration, and not that the shipper agree to utilize it. *Id.* at 620. Plaintiffs' interpretation in this case is far different, as they decline to read section 1645 as a whole or even provide any reason that subsection (c) as they read it would be included in a section in which every other subsection is concerned with sharing arrangements.

Should the Court deem section 1645 sufficiently ambiguous to resort to legislative history, Plaintiffs' interpretation gains no further support. Indeed, the House Report that Plaintiffs cite can hardly be said to provide any aid in understanding the statute. Like the statutory text itself, the report explains that the statute authorizes "arrangements for the sharing of medical facilities and services," explains the five limitations on such arrangements, and then states that VA "shall reimburse" IHS, the tribe, or the tribal organization. H.R. Rep. 110-564 Pt. 1, 110th Cong., 121 (2008). Thus, the language of the report essentially quotes the statutory language. It discusses the reimbursements in the

[10] Nor do Plaintiffs offer any response to VA's explanation that their interpretation of the statute undermines the limitations imposed on sharing arrangements under 25 U.S.C. § 1645(b). *See* Defs.' Br. 19–20.

same paragraph as the sharing arrangements, just as the statute discusses both in one section.[11]

Finally, Plaintiffs' citation to the payer of last resort provision in 25 U.S.C. § 1623(b) does not affect the outcome here. As VA explained, Defs.' Br. 22–23, that provision does not alter VA's obligations under section 1645, nor do Plaintiffs argue otherwise.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint for lack of jurisdiction or, in the alternative, failure to state a claim upon which relief can be granted.

DATED: September 26, 2016

Respectfully submitted,

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[11] Plaintiffs' reference to letters from the former Acting Secretary of Veterans Affairs to members of Congress during congressional consideration of the statute should have no weight. They represent the views of VA OGC staff concerned with informing Congress when a statute poses a litigation risk to the agency. They are not an official agency interpretation, as no final agency action issued from that view.

CERTIFICATE OF SERVICE

I hereby certify that on September 26 2016, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing which served a copy of the attached document and Notice of Electronic Filing to the following CM/ECF registrants:

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