No. 17-15629

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GILA RIVER INDIAN COMMUNITY and GILA RIVER HEALTH CARE CORPORATION,

Plaintiffs - Appellants,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS and DAVID J. SHULKIN, Secretary, United States Department of Veterans Affairs,

Defendants - Appellees.

On appeal from the United States District Court for Arizona
D.C. No. 2:16-cv-00772-ROS

APPELLANTS' REPLY BRIEF

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INTRODUCTION

In the first paragraph of its brief, the Department of Veterans Affairs ("VA") touts the fact that over 100 Indian tribes have entered into agreements with the VA for reimbursement. This appeal is not about how many tribes have succumbed to VA's "take it or leave it" approach to discharging its statutory obligations under 25 U.S.C. § 1645(c) ("section 1645(c)"), but the scope of a jurisdiction-stripping statute, 38 U.S.C. § 511(a) ("section 511(a)"), which clearly does not fit the unique claims made in this case. In the context of the actual issues of statutory interpretation in this case, the fact that 100, 200 or even 500 Indian tribes have signed the VA's one-sided agreement does not mean anything, other than that the VA can brag and unfairly wield its governmental power against Indian tribes.

The Community and Gila River Health Care Corporation (collectively "Community") filed this action to require the VA to comply with the plain language of section 1645(c). The VA seeks to banish the Community to an administrative process that, while they describe it as a remedial scheme intended "to produce timely, consistent, and fair determinations for veterans," VA Br. at 5,[1]

[1] The VA's Brief for Appellees (Docket Entry #18) is cited herein as "VA Br." and the Community's Opening Brief (Docket Entry #10) is cited as "GRIC Br."

they admit that it could take the Community—which is not a veteran—up to five years to navigate it to a final decision.[2]

REPLY ARGUMENT

I. 38 U.S.C. § 511(a) IS A JURISDICTION-STRIPPING STATUTE WHICH MUST BE INTERPRETED NARROWLY AND CANNOT BE EXPANDED BY AGENCY RULE.

The VA proudly touts the jurisdiction-stripping abilities of 38 U.S.C. § 511(a). It says it can do so "because the [Veterans Judicial Review Act] channels claims with respect to veterans' benefits, including claims for reimbursement brought by entities that have provided care to veterans, through an exclusive scheme of administrative and judicial review, culminating in review in the Federal Circuit, and *broadly divests all other courts of jurisdiction over such claim*." VA Br. at 2. While the VA likes to invoke the VJRA to avoid liability for its actions in federal district court, the VJRA is not a statute of unlimited power of lawsuit dismissal and should not be used to dismiss this lawsuit.

First, while the scope of section 511(a) is broad, it remains a jurisdiction-stripping statute and must be interpreted as such. In reviewing the reported cases involving section 511(a), the Community has not found any where an appeals court properly analyzed section 511(a) in the context of exactly what it is—a

[2] https://www.militarytimes.com/news/pentagon-congress/2017/03/24/once-a-fixed-issue-the-va-disability-claims-backlog-is-on-the-rise-again/

statute which strips or divests federal courts of jurisdiction.[3] The VA does not mention or address this issue in its brief; instead, it continues to rely primarily on its own agency definitions and prior cases involving section 511(a). This Court should be persuaded by neither.

This Circuit follows the "general rule to resolve any ambiguities in a jurisdiction-stripping statute in favor of the narrower interpretation." *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 894 (9th Cir. 2004); *Orozco-Solis v. Immigration & Naturalization Serv.*, 143 Fed.Appx. 769, 770 (9th Cir. 2005) ("[j]urisdiction stripping statutes are interpreted narrowly"). Likewise, "there is a strong presumption in favor of judicial review of administrative actions, and prohibitions against judicial review are to be narrowly construed." *Marble Mountain Audubon Soc'y v. Rice*, 914 F.2d 179, 181 (9th Cir. 1990) (citing *Love v. Thomas*, 858 F.2d 1347, 1356 (9th Cir. 1988), *cert denied*, 490 U.S. 1035 (1989)). The presumption in this matter is in favor of judicial review of the VA's actions and the statute the VA relies upon to preclude judicial review must be narrowly construed.

While section 511(a) is a jurisdiction-stripping statute and should be interpreted accordingly, the VA seeks to impermissibly expand the scope of its

[3] Neither the presumption in favor of judicial review of administrative actions nor the jurisdiction-stripping status of section 511(a) were discussed in *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) (en banc).

reach through what it argues is a "broad definition of a benefit provided to veterans." VA Br. at 14 (citing 38 C.F.R. § 20.3(e)). That is, the VA relies on the definition of "benefit" in the rule *it* promulgated—albeit in the context of administrative proceedings[4]—to *expand* the scope of a jurisdiction-stripping statute. Under the applicable standard of review, the VA cannot use its promulgated definition of "benefit" for administrative proceedings to expand the scope of a statute which must be narrowly construed.

Second, the plain language of the section 511(a) excludes the Community's claims from the VJRA. In its principal brief, GRIC Br. at 17-21, the Community relies on the following plain language of the section 511(a) in making this argument:

> The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that ***affects the provision of benefits by*** the Secretary ***to*** veterans or the dependents or survivors of veterans.

38 U.S.C. § 511(a) (emphasis added). While the Community contends that a plain language interpretation of this statute should be resolved in its favor, a narrow construction of this provision, as the case law directs, should leave no doubt.

[4] 38 C.F.R. § 20.3(e) is a definition contained in 38 C.F.R. Part 20, the rules of practice and procedure governing appeals to the Board of Veterans' Appeals. 38 C.F.R. § 20.1(a).

Any benefits in this matter are *not* provided *by* the Secretary; they are provided *by* the Community (through GRHCC). And any benefits are not provided *by* the Secretary *to* veterans; they are provided *by* the Community (through GRHCC) *to* veterans. Under the standards explained above, a proper *narrow* construction of this jurisdiction-stripping statute necessarily results in an interpretation favorable to the Community; that the Community's claims are not excluded under the VJRA. This case does not involve questions of law "under a law that affects the provision of benefits by the Secretary to veterans"; rather, it involves questions involving a law which shifts the cost of health care provided by an Indian tribe to veterans. To the extent the VA's primary defense to this argument is its own definition of benefit, 38 C.F.R. § 20.3(e), it should be rejected as contrary to a narrow construction of section 511(a).

Third, the VA does not adequately respond to the Community's argument that the Community's position is supported by the history and intent of the VJRA. The VJRA was intended to create a non-adversarial system to adjudicate the benefits of individual veterans. It allows veterans to fully develop their claims for benefits and be given the benefit of the doubt in decisions. Finally, it removes adversarial components from the process. Given the VA's consistent adversarial posture with the Community in this matter (and with the Indian Health Service

after section 1645(c) was enacted), requiring the Community to go through the VA's process is like fitting a square peg in a round hole. Does the VA intend to assist the Community in fully developing its claim? Will the VA advocate that the Community be given the benefit of the doubt?[5]

Stripping federal court jurisdiction for review of "virtually all actions," to use the VA's language, VA Br. at 16, is not "all actions." This is one such action in which federal court jurisdiction should be recognized.

II. THE *BLACKFEET* PRESUMPTION SHOULD BE APPLIED TO A NECESSARY INTERPRETATION OF 25 U.S.C. § 1645(c).

While this case involves the interpretation of section 511(a), it necessarily implicates 25 U.S.C. § 1645(c). Section 1645(c) is implicated because it is the law the VA claims affects the provision of benefits by the Secretary to veterans. Thus, while interpretation of section 1645(c) certainly goes to the merits of the Community's claims, it also must be considered by the Court in determining whether the district court properly applied section 511(a) to deny judicial review. And interpretation of section 1645(c) clearly requires consideration of the *Blackfeet* Presumption.

[5] The VA appears to disclaim those portions of the legislative history of section 511(a) which describe the VJRA as establishing a non-adversarial process for resolving disputes. VA Br. at 28 n. 8. That the VA admits that it is the adversary of veterans when an ordinary individual benefits case "gets to a certain level" is both shocking and disheartening.

The VA incorrectly characterizes the Community's citation of the *Blackfeet* Presumption as supporting the Community's interpretation of section 511(a). VA Br. at 30. In discussing the standard of review for this matter, the Community reminded the Court that there are two presumptions which apply: First, the presumption in favor of judicial review of administrative actions (and against jurisdiction-stripping); and, second, the presumption that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

The Community did not suggest application of the *Blackfeet* Presumption to section 511(a), as the VA seems to believe, but to section 1645(c). GRIC Br. at 11. Although it is their statute, the VA appears to forget that section 511(a) expressly references *other* laws. Section 511(a) strips federal court jurisdiction for review by the Secretary "under *a law* that affects the provisions of benefits by the Secretary to veterans." 38 U.S.C. § 511(a) (emphasis added). The question is whether section 1645(c) is "a law." Determination of the scope of section 511(a) necessarily involves consideration of what the VA claims is "a law" falling within its scope. This, in turn, requires an interpretation of that law which, in this case, is section 1645(c).

Whether section 1645(c) falls within the scope of section 511(a) *necessarily* involves an interpretation of section 1645(c). And, because it is beyond question that section 1645(c) was enacted for the benefit of Indians, the *Blackfeet* Presumption applies to its interpretation. In support of its position that section 1645(c) should not fall within the scope of section 511(a), the Community made a number of arguments which are clearly relevant in the context of the *Blackfeet* Presumption:

First, section 1645(c) is *not* administered by the VA. The VA does not respond to this argument. In the past, the VA objected to identical legislation on the very basis that it would not have "any control over how that care is provided." GRIC Br. at 13 (citation omitted). This does not go exclusively to the merits of the case, but also to whether section 1645(c) is included within the scope of section 511(a). *Second*, section 1645(c) is *not* codified in the VA's statutes; it is *not* a VA benefit law. Section 1645(c) is not codified at Title 38, but in Title 25 of the United States Code ("Indians").[6] This is further indication that section 1645(c) is not "a law" within the meaning of section 511(a). *Finally*, any benefits provided under

[6] *All* of the third-party reimbursement statutes the VA cites, VA Br. at 19, 22, are codified in Title 38. None involve mandatory cost-shifting under a different title, let alone Title 25.

section 1645(c) are provided by Indian tribes or tribal organizations to veterans, not the VA.

Interpreting section 1645(c) can be done without addressing any individual claim for benefits or reimbursement. In light of the *Blackfeet* Presumption, section 1645(c) can and should be interpreted in a manner to allow the Community's action to proceed in the district court.

III. BECAUSE 38 U.S.C. § 511(a) IS AMBIGUOUS AS TO THE CLAIMS MADE IN THIS CASE, APPLICATION OF THE PRESUMPTION AGAINST JURSIDICTION-STRIPPING AND THE *BLACKFEET* PRESUMPTION MANDATE REVERSAL.

The VA ***concedes that this case does not require the adjudication of a single individual claim***. VA Br. at 27. This is a significant concession. The Community has not, as the VA alleges, "disavowed relief" based on any individual veteran. To the contrary, the Community has treated and continues to treat Native American veterans (and lots of other Native American patients) at its health care facilities. The VA relies on the portion of *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1027 (2012) (en banc), *cert. denied*, 568 U.S. 1086 (2013), which describes the actions of the plaintiff organizations as going "out of their way to forswear any individual relief." However, aggregating data regarding delays in *individual* cases is far different than the issue presented in this case. The Community is not challenging the VA's decision in any individual case, but the

VA's action in stating that it will not comply with section 1645(c) in *any* case without an agreement. No "aggregation" is required for the Community to pursue its claims.

The VA seems to concede that the Community's approach in seeking "general injunctive relief" prior to making any individual claims for reimbursement is permissible under section 511(a) because, while "nothing" in the statute suggests Congress intended to permit such an approach, a proper narrow interpretation of the statute would certainly allow for it. The VA's use of the word "nothing" to describe section 511(a), VA Br. at 27, is significant here because it implies and possibly concedes that section 511(a) is ambiguous at least with respect to the Community's claims in this matter.

Finally, the VA is wrong when it asserts that the Community's relief would somehow embroil the district court in the day-to-day operations of the VA and require the district court to monitor individual benefits determinations. VA Br. at 27-28. To the contrary, if the VA complies with section 1645(c)'s mandate, then there would be no need for the district court to involve itself in either the day-to-day operations of the VA or in individual benefit determinations. The VA's claim of future judicial involvement is an implicit suggestion that, if this matter is

resolved in the Community's favor, the VA will find additional ways to obstruct the statutory mandate of section 1645(c).

CONCLUSION

The Community's objective in its lawsuit is a simple one—to get the VA to comply with a cost-shifting law enacted to benefit Indian tribes because of a long history of underfunding for Native American health care. The VA refuses to do so, which is exactly why federal court review is appropriate and necessary in this matter. The order and judgment of the district court should be reversed.

DATED this 4th day of October, 2017.

GILA RIVER INDIAN COMMUNITY

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CERTIFICATE OF COMPLIANCE

Appellants' Reply Brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 11 pages, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

DATED this 4th day of October, 2017.

GILA RIVER INDIAN COMMUNITY

By *s/ Thomas L. Murphy*
Thomas L. Murphy

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2017, I electronically filed Appellants' Reply Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

GILA RIVER INDIAN COMMUNITY

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