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

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JURISDICTIONAL STATEMENT

Pursuant to Ninth Circuit Rule 28-2, the Community states the following:

(a) The statutory basis of subject matter jurisdiction of the district court.

This district court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) because it involves the interpretation of a federal statute—25 U.S.C. § 1645(c)—and 28 U.S.C. § 1362, which provides the district courts with original jurisdiction over all civil actions brought by any Indian tribe where "the matter in controversy arises under the Constitution, laws, or treaties of the United States."

(b) The basis for claiming that the judgment or order appealed from is final or otherwise appealable, and the statutory basis of jurisdiction of this Court.

The judgment appealed from [ER 5] is final and appealable because it disposes of all claims between the parties. *See Dannenburg v. Software Toolworks Inc.*, 16 F.3d 1073, 1074 (9th Cir. 1994) (a final order disposes of all claims against all parties). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

(c) The date of entry of the judgment or order appealed from; the date of filing of the notice of appeal; and the statute or rule under which it is claimed the appeal is timely.

The district court's order [ER 6] was entered on March 23, 2017; the clerk's judgment [ER 5] was entered on the same date. The Community and GRHCC filed their notice of appeal [ER 3] on April 4, 2017. The notice of appeal was timely filed under Fed. R. App. P. 4(a)(1)(B) as it was filed within 60 days after the entry of the order and judgment appealed from.

ISSUE PRESENTED FOR REVIEW

25 U.S.C. § 1645(c) requires the Department of Veterans Affairs ("VA") to reimburse Indian tribes for health care provided to veterans. The VA refuses to reimburse the Community unless the Community enters into a "sharing agreement" which includes terms and limitations not contained in Section 1645(c).

Does the Veterans' Judicial Review Act apply to an Indian tribe's claim seeking a declaration of whether 25 U.S.C. § 1645(c) allows the VA to require Indian tribes to enter into sharing agreements?

STATEMENT OF THE CASE

The Community, through its wholly-owned tribal corporation, Gila River Health Care Corporation ("GRHCC"), provides health care services through a

compact of self-governance with the United States Indian Health Service ("IHS") under Title V of the Indian Self-Determination and Education Assistance Act ("ISDEAA"). [ER 44] The Community provides a range of direct health care services to eligible persons through GRHCC staff at GRHCC facilities, and contract health services (which are also referred to as purchase/referred care or PRC) when referral to an outside provider is medically necessary. [ER 44] These services are provided to veterans, even if they are entitled to receive benefits directly through the VA. [ER 44]

Health care for Native Americans has been historically underfunded and Congress has taken several steps over the years to address this issue. [ER 45] Under the Indian Health Care Improvement Act ("IHCIA"), Congress enacted a statutory framework to enhance the ability of Indian tribes and tribal organizations to secure third-party reimbursements for the cost of health care otherwise covered through a tribal program. 25 U.S.C. § 1621e. [ER 45] In 1999, a federal "payer of last resort" ("PLR") regulation was adopted to confirm that IHS would pay secondary to state and local payment sources and private insurance. [ER 45]

On March 23, 2010, the Patient Protection and Affordable Care Act ("ACA") was signed into law. [ER 46] The ACA made several statutory reforms designed to improve health care services among Native Americans and to address

historic underfunding and disparate treatment of tribal health programs. [ER 46] It was no coincidence that Congress added two changes affecting Native American health care together in the ACA and specifically intended to ensure that tribal health care funding would take priority over other federal programs: First, the ACA enacted a statutory PLR rule, codified at 25 U.S.C. § 1623(b), which confirms for the first time that federal programs, in addition to all other payment sources, must be exhausted before tribal health program monies are used. [ER 46] Second, the ACA enacted 25 U.S.C. § 1645(c), which expressly requires the VA to assume primary payer status for Native American veterans. Section 1645(c) provides that Indian tribes or tribal organizations "shall be reimbursed" by the VA for veterans who receive healthcare through a tribal program instead of from the VA. [ER 46] This is of particular importance to the Community because more patients have elected to receive their healthcare through GRHCC because of ongoing issues with access to care at the Phoenix VA facility. [ER 47]

The impact of these provisions in the ACA is to allow Native American veterans the ability to choose where they receive their health care based upon the quality of care received, while ensuring that tribal budgets are not depleted when patients choose tribal services over VA services. [ER 47]

When the changes which became 25 U.S.C. § 1645(c) were being considered, the VA knew what was coming and lobbied strongly against the reimbursement provision. [ER 47-48, 58-95] The VA expressly acknowledged that the changes would require the VA to reimburse IHS, Indian tribes or tribal organizations for healthcare provided by those entities to VA-eligible beneficiaries. [ER 48, 58, 60, 62, 64] However, after the ACA was enacted, the VA failed to comply with 25 U.S.C. § 1645(c) and did not commence reimbursements as the law requires. [ER 48] Instead, the VA withheld its compliance with the statute while it negotiated a "template" reimbursement agreement with IHS. [ER 48] The VA did so without any substantive consultation with any tribal governments—including the Community—knowing that its actions would impact Indian tribes and tribal organizations and contrary to its own tribal consultation policy and Executive Order 13175. [ER 48] The VA's negotiation efforts were intended to limit the scope of reimbursements, contrary to the plain language of 25 U.S.C. § 1645(c). [ER 48-49]

On December 6, 2012, well after VA reimbursements should have begun, IHS and the VA announced a "national agreement" purporting to allow the VA to reimburse IHS for direct care services. [ER 50] The express language of this agreement, and a companion inter-agency agreement, restricted reimbursement

rights contrary to 25 U.S.C. § 1645(c). [ER 50] The VA and IHS failed to inform Indian tribes and tribal organizations that the national agreement limited statutory reimbursement rights; instead, the VA began a publicity campaign soliciting tribal health programs to "sign on" to the national agreement. [ER 50] This was three years after the VA was required to commence reimbursements to Indian tribes and tribal organizations. [ER 50] Because the VA refuses to provide reimbursements to Indian tribes who do not sign their agreement, the VA has become a de facto secondary payer, contrary to the Congressional mandates found in 25 U.S.C. §§ 1623(b) and 1645(c).

While the Community and GRHCC have continually maintained that they do not need to enter into an agreement to receive reimbursements under 25 U.S.C. § 1645(c), in February of 2013, the VA and GRHCC began discussions in an attempt to reach an agreement. [ER 50] Unfortunately, the VA's proposed template agreement contained limitations not found in 25 U.S.C. § 1645(c), including that: (1) the VA would only reimburse prospectively, instead of from the effective date of the ACA; (2) reimbursement would be for direct care services only; and (3) GRHCC would have to submit disputes to the VA for resolution by the VA's contracting officer. [ER 51] The VA insisted that no reimbursements would be provided unless GRHCC entered into the VA's template agreement. [ER 51]

Despite numerous efforts by the Community and GRHC, the VA refused to budge from its position and its legal counsel ultimately confirmed that the VA would not change its position unless the Community and GRHCC sued the federal government and prevailed. [ER 51] So the Community and GRHCC sued the federal government.

On March 22, 2016, the Community and GRHCC filed suit against the VA and then-VA Secretary McDonald in his official capacity. [ER 69] On July 12, 2016, the Community and GRHCC filed their first amended complaint. [ER 41, 68] On August 10, 2016, the VA and Secretary moved to dismiss the first amended complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. [ER 29, 68] The Community and GRHCC filed their response on September 9, 2016, and the defendants replied on September 26, 2016. [ER 15, 68, 69] On March 23, 2017, the district court entered an order granting the motion to dismiss and the clerk entered judgment on the same date. [ER 5, 6]

The Community and GRHCC filed their notice of appeal on April 4, 2017. [ER 3]

SUMMARY OF ARGUMENT

This case raises the simple issue of whether the Community's claims about 25 U.S.C. § 1645(c) are subject to the Veterans' Judicial Review Act ("VJRA"). They are not. Section 1645(c) is a mandatory cost-shifting statute which is intended to completely relieve the financial burden on Indian tribes that provide health care to their tribal members who are VA-eligible veterans. The jurisdiction-stripping provision of the VJRA, through its plain language, applies only to care provided by the VA or to veterans. Section 1645(c) requires reimbursement for care provided to veterans by IHS, Indian tribes or tribal organizations. Section 1645(c) does not affect the provision of benefits by the VA and is essentially self-administering. Because Section 1645(c) does not affect any benefit provided to any veteran and is not a law administered by the VA, the VJRA does not apply to limit federal court jurisdiction over the Community's claims. Moreover, Section 1645(c) is not controlled by Title 38 of the United States Code ("Veterans' Benefits") because Congress placed these provisions in Title 25 ("Indians") and stated that the reimbursement rights apply notwithstanding federal law (including the VJRA) to the contrary. This Court should find that original jurisdiction in the district court is appropriate under 28 U.S.C. § 1362.

ARGUMENT

THE CLAIM THAT 25 U.S.C. § 1645(c) DOES NOT EMPOWER THE VA TO REQUIRE AN INDIAN TRIBE TO ENTER INTO A "SHARING AGREEMENT" AS A CONDITION OF RECEIVING STATUTORILY-MANDATED REIMBURSEMENTS IS NOT SUBJECT TO THE PROVISIONS OF THE VETERANS' JUDICIAL REVIEW.

Pursuant to Circuit Rule 28-2.5, the Community[1] states that the issue raised on appeal was preserved in its response to the VA's motion to dismiss. [ER 15] This Court reviews dismissals under Rules 12(b)(1) and 12(b)(6) de novo. *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007) (citing *Holcombe v. Hosmer*, 477 F.3d 1094, 1097 (9th Cir. 2007)). "For the purposes of reviewing such dismissals, and where, as here, no evidentiary hearing has been held, all facts alleged in the complaint are presumed to be true." *Id.* (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289–90, (1995)) (alterations and internal quotation marks omitted). In a de novo review of dismissal for lack of subject matter jurisdiction, this Court must favorably view the facts alleged to support federal court jurisdiction. *Boettcher v. Secretary of Health & Human Servs.*, 759 F.2d 719, 720 (9th Cir. 1985).

There are also two presumptions which should be considered in this matter. *First*, there is a strong presumption in favor of judicial review of administrative

[1] For ease of reference, the Gila River Indian Community and Gila River River Health Care Corporation are referred to collectively as "Community."

action governing the construction of jurisdiction-stripping statutes. *ANA Intern., Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004) (citing *INS v. St. Cyr*, 533 U.S. 289, 298 (2001)). "Even where the ultimate result is to limit judicial review, the Court cautions that as a matter of the interpretive enterprise itself, the narrower construction of a jurisdiction-stripping provision is favored over the broader one." *Id.* (citing *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 480-483 (1999)). This Court has concluded that a "jurisdictional bar is not to be expanded beyond its precise language." *Id.* (citing *Kwai Fun Wong v. United States INS*, 373 F.3d 952 (9th Cir. 2004). An agency "bears a heavy burden in attempting to show that Congress prohibited all judicial review of the agency's compliance with a legislative mandate." *Mach Mining LLC v. EEOC*, 135 S.Ct. 1645, 1651 (2015) (citing *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); quotation marks omitted).

Second, the Court should also keep in mind what is sometimes referred to as the "Indian canon of construction" or "*Blackfeet* presumption." That is, "[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 *Blackfeet* presumption simply requires 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, for ambiguities in federal law have been construed generously in order to comport with … traditional notions of sovereignty and with the federal policy of encouraging tribal independence."" *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003), *cert. denied* 543 U.S. 815 (2004) (citations omitted). Because Congress chose to add both the budget-shifting and PLR provisions of the ACA to Title 25 of the United States Code, it is clear that the Community is entitled to the benefit of the *Blackfeet* presumption in this case.

A. Section 1645(c) is not a statute administered by the VA, but a mandatory cost-shifting statute enacted for the specific benefit of Indians.

This case involves the Community's challenges to the VA's position on 25 U.S.C. § 1645(c) ("Section 1645(c)"), a cost-shifting statute which provides:

> **(c) Reimbursement**
> The Service, Indian tribe, or tribal organization shall be reimbursed by the Department of Veterans Affairs or the Department of Defense (as the case may be) where services are provided through the Service, an Indian tribe, or a tribal organization to beneficiaries eligible for services from either such Department, notwithstanding any other provision of law.

Section 1645(c) was included in Indian Health Care Improvement Act amendments adopted by reference as part of the Patient Protection and Affordable Care Act in 2010. To understand why this matter does not fall within the scope of

the VJRA's jurisdiction-stripping provision, it is important to understand why Section 1645(c) was enacted and how it is intended to work.

When enacted, the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), incorporated by reference the Indian Health Care Improvement Reauthorization and Extension Act of 2009. S. 1790, 111th Cong. (2009). A primary purpose of S. 1790 was to fulfill the special trust responsibility of the United States to Indian tribes in the area of health care. The provisions of S. 1790 were not new to the Congress, having been previously introduced as H.R. 1328, the Indian Health Care Improvement Act Amendments of 2007. 110th Cong. (2007). Section 406 of H.R. 1328 is identical to Section 1645, including a reimbursement provision identical to Section 1645(c).

When H.R. 1328 was introduced, the VA interpreted it *exactly* the same as the Community interprets Section 1645(c), and contrary to the VA's position in this litigation. Then Acting VA Secretary Gordon R. Mansfield wrote identical letters to members of Congress urging them to strike the tribal reimbursement provision from the bill. [ER58-65] Why? Because it "would require the Department of Veterans Affairs (VA) to reimburse the Indian Health Service (IHS), tribes, or tribal organizations *whenever* a VA-eligible beneficiary chooses to receive, and receives, care from any of those entities." *Id.* (emphasis added). The

VA noted that, "[t]his provision would require the VA to pay for care without having *any control over how that care is provided*." *Id.* (emphasis added). In "strongly objecting" to the provision, the VA pleaded that it "should not be required to pay for the care of all veterans in IHS, tribe, or tribal organization facilities." *Id.* Like the Community in this lawsuit, the VA correctly recognized Section 1645(c) as a self-administering mandatory cost-shifting provision.

As to Sections 406 (identical to Section 1645) and 407 (identical to 25 U.S.C. § 1623(b)), the report on H.R. 1328 states:

> ***Section 406. Sharing arrangements with Federal agencies***
> Section 406 authorizes the Secretary to enter into or expand arrangements for the sharing of medical facilities and services between the Service, Indian Tribes, and Tribal Organizations and the Department of Veterans Affairs and the Department of Defense. The Secretary is prohibited from taking certain actions that would: (1) Impair the priority access of any Indian to health care services provided through the Service and the eligibility of any Indian to receive health services through the Service; (2) the quality of health care services provided to any Indian through the Service; (3) the priority access of any veteran to health care services provided by the Department of Veterans Affairs; (4) the quality of health care services provided by the Department of Veterans Affairs or the Department of Defense; or (5) the eligibility of any Indian who is a veteran to receive health services through the Department of Veterans Affairs. *The Department of Defense or the Department of Veterans Affairs shall reimburse the Service, Indian tribe, or Tribal Organization for services provided to beneficiaries eligible for services from either Department.*
>
> ***Section 407. Payor of last resort***
> Section 407 mandates that, notwithstanding any federal, state, or local law to the contrary, the Indian Health Programs and health care programs

> operated by Urban Indian Organizations are the payor of last resort for services provided to eligible persons.

H.R. Rep. No. 110-564 Pt. 1, 110th Cong., 121 (2008) (emphasis added). If there is a context within which to interpret Section 1645(c), it would be with the PLR provision which was ultimately codified at 25 U.S.C. § 1623(b). The cost-shifting and PLR provisions appeared together in the introduction of H.R. 1328 and through the adoption of S. 1790 in the ACA. The joint purpose of these provisions is not to affect any benefit received by a veteran, but to completely shift the cost burden away from IHS and Indian tribes.

Section 1645(c) is *not* administered by the VA. As the VA itself notes, the statute does not give the VA any control over how the care is provided to veterans; it simply requires the VA to pay for care whenever provided and, arguably, is self-administering. If there is any administration of the statute, it is by the Indian tribe or tribal organization seeking payment from the VA. The VA refuses to comply with Section 1645(c), despite the unambiguous mandatory language of the cost-shifting provision. Instead, the VA argues that the Community must make individual claims to the VA using the VA's administrative claims process.

Section 1645(c) is not codified in Title 38 of the United States Code ("Veterans' Benefits"), but Title 25 ("Indians"), which is significant. Every "example" of an issue over which the Board of Veterans Affairs claims jurisdiction

contains a citation to either Title 38 of the United States Code or Title 38 of the Code of Federal Regulations. 38 C.F.R. § 20.101(a). None of the examples cited as issues over which the Board of Veterans Appeals ("BVA") has jurisdiction involve cost-shifting between different "pots" of federal monies and none involve health care provided by IHS, Indian tribes or tribal organizations.

Most of the laws in Title 25 are based on the unique relationship between the United States and Indian tribes. The political relationship between Indian tribes and the federal government can be traced to the Commerce Clause and Treaty Clause of the United States Constitution. Art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes); Art. II, § 2, cl. 2 (Treaty Clause). The Commerce Clause, therefore, "anticipat[es] and affirm[s] federal law that singles out Indian nations and their members for separate treatment." *Cohen's Handbook of Federal Indian Law* §14.03[2][b][i] (2012 ed.). Tribes are pre-constitutional sovereign governments and the relationship between the federal government and tribes is a unique one. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). This relationship creates the impetus for what is known as the "trust relationship" between the government and Indians and Indian tribes. *Cohen,* §5.04[3][a] ("*Cherokee Nation v. Georgia* [30 U.S. 1, 17 (1831)] provided the basis for

analogizing the government-to-government relationship between tribes and the federal government as a trust relationship with a concomitant federal duty to protect tribal rights to exist as self-governing entities.").

Because of this special relationship, the Supreme Court has held that Congress has the power to "legislate on behalf of federally recognized Indian tribes." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). This legislation includes statutes designed to provide services and funding to Indian tribes—with the trust relationship often cited by Congress when passing legislation designed for tribes or tribal citizens. *See e.g.* 25 U.S.C. § 1901 (enacting Indian Child Welfare Act "recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people"); 25 U.S.C. § 450 (enacting Indian Self-Determination and Education Assistance Act "after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people"). The trust doctrine is considered a "cornerstone" of federal Indian law. *Cohen*, §5.04[3][a]. At least one court has held that placing a law in Title 25 recognizes the special nature of Indian lands, even if those lands would be treated differently under a different statute as public land. *Capurro v. United States*, 2 Cl. Ct. 722,

725 (1983) ("Under these circumstances, it would be wholly inappropriate to apply [43 U.S.C.] section 912 here.").

When the Indian Health Care Improvement Act Amendments of 2007 were introduced (as H.R. 1328), Section 2 expressly provided that "Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique relationship with, and resulting responsibility to, the American Indian people." H.R. 1328, § 2. Likewise, S. 1790 included a similar statement in Section 3. S. 1790, § 3. These provisions were incorporated into the ACA and ultimately codified as Section 1645(c).

B. The Community's claims about Section 1645(c) are excluded from review under the VJRA by the plain language of 38 U.S.C. § 511(a).

The VA contends that the Veterans' Judicial Review Act ("VJRA"), Pub. L. 100-687, 102 Stat. 4105 (1988) provides the exclusive vehicle for the Community to challenge the VA's unlawful actions. The VA is incorrect. 38 U.S.C. § 511(a) ("Section 511(a)"), the VJRA's jurisdiction-stripping provision, provides:

> 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. Subject to subsection (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.

(emphasis added). This is a broad provision; however, its plain language does not reach the Community's claims in this matter, particularly when viewed in light of the presumption against jurisdiction-stripping provisions.

It is well-settled in the Ninth Circuit that "statutory interpretation begins with the plain language of the statute." *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (quoting *United States v. Chaney*, 581 F.2d 1123, 1126 (9th Cir. 2009)). "The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous."*Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). "In statutory interpretation, courts must adhere to the plain language of a statute unless "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."" *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1236 (9th Cir. 1995) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

The VA's analysis of Section 511(a)'s plain language misconstrues the phrase "under a law that affects the provision of benefits," and disregards two critical terms following that phrase—the benefits must be provided ***by*** the Secretary and ***to*** veterans. Section 511(a) is concerned with laws that affect a

veteran's eligibility for VA benefits. In contrast, Section 1645(c) does not affect a veteran's eligibility for benefits. Section 1645(c) neither expands nor diminishes a veteran's right to either IHS or VA benefits. It merely shifts which federal budget bears the burden of paying for benefits a veteran is otherwise eligible for. Nor does Section 1645(c) affect any benefits provided "by the Secretary to Veterans." Section 1645 affects *only* who pays for benefits that are provided through IHS or a tribal health facility.

One need only look at the ordinary meaning of these words to see that Section 511(a) is concerned with decisions by VA with regard to benefits that the VA administers to veterans, and does not address the cost-shifting required by Section 1645(c), which pertains to health care provided and administered through a federal benefit scheme (in Title 25) wholly separate from the VA. Under Section 1645(c), the only thing to be provided from the VA is reimbursement to an Indian tribe or tribal organization "to beneficiaries eligible for services from" the VA. While Section 511(a) governs a dispute between a veteran and the VA, it would not and does not affect reimbursement obligations under Section 1645(c) by the VA for individuals with eligibility that is not in dispute. In the case at bar, VA has categorically denied all reimbursements, regardless of eligibility.

How Section 1645(c) operates is unambiguous from a reading of the statute. First, the reimbursement for services provided through IHS, an Indian tribe or tribal organization is mandatory; Section 1645(c) uses the term "shall." Second, by its express terms, Section 1645(c) applies only to services provided "through" IHS, an Indian tribe (such as the Community) or tribal organization (such as GRHCC), and not to the provision of benefits "by" the VA "to" veterans. Third, the reimbursement obligation of Section 1645(c) applies "notwithstanding any other provision of the law."

The VA relies on a definition of "benefit" from 38 C.F.R. § 20.3(e), the section of the CFR which contains the rules of practice and procedure governing appeals to the BVA, to argue in favor of jurisdiction and the district court relied on the same definition of "benefit" in determining that the VA is providing benefits to veterans when it makes payments to third parties. [ER 10] This reasoning is flawed for three reasons: First, the reimbursement in this matter is not to a non-governmental third party, but to IHS, an Indian tribe or trial organization. Second, the statutes relied upon by the district court are veterans statutes in Title 38, not federal Indian statutes in Title 25. Third, the reimbursements under Section 1645(c) are not mandated or regulated by any statute or regulation administered by the VA.

To the extent the VA and the district court rely on the definition of "benefit" in 38 C.F.R. § 20.3(3), the Community contends that a federal agency cannot, by agency rule, *expand* the scope of a federal statute—Section 511(a)—intended to limit federal court jurisdiction. *See e.g. United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007) (procedural rules created by the judiciary cannot shrink or expand the scope of federal jurisdiction, *citing and quoting Kontrick v. Ryan*, 540 U.S. 443, 453 (2004), that "[i]t is axiomatic that such rules do not create or withdraw federal jurisdiction."). The VA should not be permitted to rely on its own interpretation of Section 511(a) in support of jurisdiction stripping to the extent it alters federal court jurisdiction beyond the VJRA.

Finally, it is worth noting that the template agreement the VA has required Indian tribes and tribal organizations to sign makes no reference to or mention of the VJRA as a mechanism for resolving disputes regarding reimbursements under 25 U.S.C. § 1645(c).[2]

C. The Community's position is supported by the VJRA's legislative history and purpose.

The VJRA's legislative history supports the Community's position that Section 511(a) (originally enacted as 38 U.S.C. § 211(a)) does not apply here

[2] Template Sharing Agreement Between VA and Individual THPs § 9. Available at https://www.va.gov/tribalgovernment/docs/VA-THP_Agreement_Template_Draft.pdf .

because the VJRA was intended to reform the system for reviewing individual veterans' claims. The first paragraph of the House of Representatives' report on H.R. 5288 states that the purpose of the legislation is "to provide an improved system of review of decisions of the Veterans' Administration with respect to claims for *veterans'* benefits." H.R. Rep. No. 100-963, 1 (1988) (emphasis added). In describing the newly created Court of Veterans Appeals, it "would have exclusive jurisdiction to consider all questions involving benefits under laws administered by the VA." *Id.* at 5. The discussion of the history of judicial adjudication of veterans' benefits focused almost entirely on the role of courts in adjudicating the claims of individual veterans. *Id*. at 9-10.

In discussing the then-current state of adjudication of claims for veterans' benefits in 1988, the House emphasized that—in the context of individual claims for benefits—"Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits." *Id.* at 13. This non-adversarial system includes components designed to: (1) develop the veteran's claim to the fullest extent possible before a decision on the merits; (2) resolve all issues by giving the veteran the benefit of the doubt; and (3) remove "adversarial concepts" from the process, such as cross-examination and strict rules of evidence. *Id.*

Characterizing previous legislation, the House concluded that "the Congress, when it has spoken on the issue at all, has generally precluded judicial review of decisions in claims for veterans' compensation and pension benefits." *Id.* at 18. The Supreme Court's decision in *Traynor v. Turnage*, 485 U.S. 535 (1988) was criticized because it endorsed "judicial scrutiny of *individual benefit determinations* whenever an allegation is made that a decision implicates a constitutional principle or construction of a statute not codified in Title 38 of the United States Code." *Id.* at 22 (emphasis added). This case does not involve an individual benefit decision or determination.

In attempting to restore the balance between the executive and judicial branches "with respect to the adjudication of veterans' claims," the House reasoned that the courts "do not wish to take on the very technical and specialized task of applying a well established body of law governing the adjudication of veterans' claims to thousands of factual disagreements which arise between the VA and claimants." *Id.* at 25. In commenting on the VJRA, the VA opposed the legislation on the ground that "[t]he Agency has historically opposed legislation that would involve the courts in individual benefits determinations or otherwise complicate and lengthen the nonadversarial administrative claims process." *Id.* at 43 (quoting the testimony of Donald L. Ivers, General Counsel of the VA).

The issue in this case falls outside of the plain language of Section 511(a), and it is inconsistent with the legislative history of the VJRA to use the VA's administrative process in the manner the VA advocates in this case. The VJRA process was designed for the adjudication of individual benefit claims involving veterans; this case does not require the adjudication of a single individual claim.[3] The VJRA process was designed to avoid having the courts decide technical issues of veterans' claims; this case involves basic principles of statutory interpretation that have long been the province of the courts. Finally, the issue in this case is not an issue suited for a non-adversarial process, as demonstrated by the VA's arguably adversarial actions toward GRHCC in attempts to resolve this matter.[4]

D. District court review of the VA's final agency action would not have any effect on a benefit received by a veteran and does not require the review of any VA benefit decision.

The positions taken by the VA throughout its consideration of the Community's position and in all meetings with the Community did not depend on

[3] The district court would not have to review whether an injury is service-connected or any medical or technical questions that invariably arise in the determination of individual claims.

[4] Consider the VA's conduct in its negotiations with the Community. At no time did the VA take the position or indicate that a claim for reimbursement under Section 1645(c) must be brought under the Title 38 process for individual VA benefit determinations. [ER 54] They basically said, "sue us." This sounds more like an adversarial process than one in which the VA is assisting a claimant.

any individual benefit decision made by the VA, and reimbursement by the VA under Section 1645(c) would not affect the individual benefits that a veteran is entitled to under Title 38. [ER 53-54] These facts are deemed admitted by the VA for purposes of the proceeding below and this appeal. In addition, the template agreement the VA requires Indian tribes to sign as a condition of receiving reimbursements expressly provides that "[n]othing in this Agreement restricts the right(s) of a Veteran to challenge or dispute, pursuant to Federal law or regulation, an eligibility determination made by VA."[5]

Instead of a plain language analysis of § 511(a), or attempts to square the claims in this matter with the legislative history of the VJRA, the VA relies heavily on this Court's en banc decision in *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) (en banc), *cert. denied* 133 S.Ct. 849 (2013). The Community believes that the direction in *Shinseki*, and the subsequent panel decision in *Recinto v. U.S. Dep't of Veterans Affairs*, 706 F.3d 1171 (9th Cir.), *cert. denied sub nom.* 134 S.Ct. 83 (2013), provide guidance in interpreting Section 511(a) and an answer here in favor of district court jurisdiction.

Veterans for Common Sense was an action brought by two non-profit organizations "to remedy delays in the provision of mental health care and the

[5] Template Sharing Agreement, *supra* note 2, at § 8.4.

adjudication of service-connected disability compensation claims *by* the VA." 678 F.3d 1016 (emphasis added). This Court's thorough discussion of the history of judicial review of veterans' benefits determinations and the enactment of the VJRA provides specific guidance on the question in this case. "Congress indicated that the Veterans Court's authority would extend to "*all* questions involving benefits under laws *administered by* the VA."" 678 F.3d at 1021 (quoting H.R. Rep. No. 100-963, at 5) (emphasis of "all" in original; emphasis on "administered by" added). However, Section 1645(c) is not administered by the VA.

In summarizing the limitations of the VJRA, the Court said, "Congress has expressly disqualified us from hearing cases related to *VA benefits* in 511(a)." 678 F.3d at 1023 (emphasis added). In its judicial construction of Section 511(a), the Court cited its prior decision in *Littlejohn v. United States*, 321 F.3d 915 (9th Cir.), *cert. denied* 540 U.S. 985 (2003), in which it held that although the Federal Circuit is the only Article III court with jurisdiction to hear challenges to VA determinations regarding disability benefits, it could hear an FTCA claim involving negligence against VA physicians "because doing so would not "possibly have any effect on the benefits he has already been awarded."" 678 F.3d 1023 (quoting *Littlejohn*, 321 F.3d at 921).

The Community cannot emphasize this single point enough: *A federal court hearing and deciding this matter would not have **any** effect on **any** benefit received by **any** veteran.* After discussing prior cases, including cases from other circuits, the Ninth Circuit concluded that Section 511 "precludes jurisdiction over a claim if it requires the district court to review "VA decisions that relate to benefits decisions."" 678 F.3d at 1925 (quoting *Beamon v. Brown*, 125 F.3d 965, 971 (6th Cir. 1997)). *There is no benefits decision here.* In fact, VA has refused to provide reimbursements, regardless of whether a veteran is clearly eligible for benefits from both the VA and GRHCC.

This Court further explained that the preclusion of judicial review of decisions under Section 511 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." 678 F.3d at 1025-26 (citations omitted). This case is neither a case involving a question of whether the VA acted properly in handling a veteran's claim nor is it a decision that would affect such cases. The broad interpretation of Section 511 in *Veterans for Common Sense* does not encompass the claims made in this case or the unique nature of Section 1645(c).

The primary reason this Court rejected the claims in *Shinseki* was because "granting VCA its requested relief would transform the adjudication of veterans' benefits into a contentious, adversarial system—a system that Congress has actively legislated to preclude." *Id.* at 1016 (citation omitted). Granting the Community its requested relief in this matter would have no such effect. In fact, the opposite would be the case if the Court requires the Community to bring its adversarial lawsuit in a non-adversarial administrative process.

The Community's position is further bolstered by the subsequent decision in *Recinto v. U.S. Dep't of Veterans Affairs*, 706 F.3d 1171 (9th Cir. 2013). *Recinto* involved a challenge to VA decisions regarding payments to veterans under the Filipino Veterans Equity Fund. 706 F.3d at 1172. In its first decision following its en banc decision in *Veterans for Common Sense*, the Court limited the scope of § 511 to whether the claims made required the court to consider individual veterans' benefits decisions:

> *Stated another way, if reviewing Plaintiffs' claim would require review of the circumstances of individual benefits requests, jurisdiction is lacking. See id.* at 1034. "Benefits" include "any payment, service, ... or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans and their dependents and survivors." *Id.* at 1026 (citing 38 C.F.R. § 20.3(e)). We must therefore evaluate both of Plaintiffs' claims to determine whether they require us to consider veterans' *individual benefits decisions*.

706 F.3d at 1175 (citing *Veterans for Common Sense*) (emphasis added). This matter does not require the district court to consider individual benefits decisions. Like the facial equal protection challenge in *Recinto*, this case requires *only* an evaluation of the text of the statute requiring the VA to reimburse IHS, Indian tribes or tribal organizations for benefits that the VA would otherwise be obligated to provide. As in *Recinto*, "[t]o assess this claim we need not assess whether individual claimants have a right to veterans benefits." 706 F.3d at 1176.

A review of appellate court decisions in which courts have found that Section 511(a) precludes judicial review shows that most meet common criteria: They are "group challenges" brought by veterans' organizations on behalf of veterans or putative class action lawsuits. *See Veterans for Common Sense* (two non-profits groups representing class of veterans); *Recinto* (group of Filipino World War II veterans and their widows); *Beamon* (putative class action by honorably discharged war veterans); *Blue Water Navy Vietnam Veterans Ass'n v. McDonald*, 830 F.3d 570 (D.C. Cir. 2016) (organizations representing "blue water" Navy veterans during Vietnam War); *de Fernandez v. U.S. Dep't of Veterans Affairs*, 2013 WL 623240 (N.D. Cal. 2013) (putative class action brought by Filipino World War II veterans and non-profit organization).

This case involves a unique issue that is *not* analogous to a group challenge to veteran benefits decisions—a statutory interpretation of a Congressional funding directive which prioritizes between two competing federal budgets. Neither *Veterans for Common Sense* nor any decision the district court considered addresses this precise issue. *Veterans for Common Sense* is easily distinguished on the bases that: (1) the Community is seeking a declaration of its statutory reimbursement rights for VA-eligible beneficiaries; (2) the Community is seeking relief under Title 25 "notwithstanding" federal law (including Title 38) to the contrary; and (3) *Veterans for Common Sense* did not address either the presumption against jurisdiction-stripping or the *Blackfeet* presumption.

E. The Community's claims about Section 1645(c) are within the original jurisdiction of the district court under 28 U.S.C. § 1362.

This matter is easily resolved by directing the district court to proceed under 28 U.S.C. § 1362, which states:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The Community brought suit against the VA and Secretary relying on 28 U.S.C. § 1362 as a basis for federal court jurisdiction. Original jurisdiction means the power of a court to hear a case for the first time, as opposed to appellate

jurisdiction. The Community contends that the grant of original jurisdiction in 28 U.S.C. § 1362 trumps any limitation of federal court jurisdiction under Section 511(a).

The VA may argue that reliance on 28 U.S.C. § 1362 is a "new" issue on appeal. It is not a new issue, but an additional argument in support of the Community's position. Federal courts have long held that issues involving subject matter jurisdiction may be raised at any time, even for the first time on appeal. The "objection that a federal court lacks subject-matter jurisdiction ... may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006); *see also Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 571 (2004) (noting that subject-matter jurisdiction challenges may be raised for the first time on appeal). Issues regarding subject matter jurisdiction may be raised at any time, even on appeal, by motion or sua sponte by the court. Fed. R. Civ. P. 12(h)(3); *Snell v. Cleveland, Inc.*, 316 F.3d 822, 826-27 (9th Cir. 2002).

Even if the VA had not raised the issue of jurisdiction, this Court has an independent obligation to determine its subject matter jurisdiction. *See Bova v. City of Medford*, 564 F.3d 1093, 1095 (9th Cir. 2009) (although the parties did not raise the issue, courts have an independent obligation to inquire into jurisdiction)

(citation omitted); *see also Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002) (court must raise issues concerning subject matter jurisdiction, such as standing, sua sponte). As this Court noted in *Benavidez v. Eu*, 34 F.3d 825, 830 (9th Cir. 1994), "we have an obligation to raise sua sponte issues concerning subject-matter jurisdiction, whether it be ours or the district court's that is in doubt." (citations omitted).

If there is any conflict between Section 511(a) and 28 U.S.C. § 1362 regarding the jurisdiction of the district court, the latter should control this matter. This case does not involve benefit eligibility determinations which are arguably within the VA's expertise and subject to the VA's forum. Rather, this case deals with the interpretation of an Indian statute, which is within the clear purview of the federal district court.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, there are no related cases pending in this or any court.

CONCLUSION

The order and judgment of the district court should be reversed.

DATED this 13th day of July, 2017.

GILA RIVER INDIAN COMMUNITY

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b)(i) and Ninth Circuit Rule 32-1 because this brief contains 7,303 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007, 14-point Times New Roman.

DATED this 13th day of July, 2017.

GILA RIVER INDIAN COMMUNITY

By *s/ Thomas L. Murphy*
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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2017, I electronically filed Appellants' Opening 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

By *s/ Thomas L. Murphy*
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