IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director
JOSHUA E. GARDNER
District of Columbia Bar No. 478049
KIMBERLY L. HERB
Illinois Bar No. 6296725
LILY SARA FAREL
North Carolina Bar No. 35273
BRIGHAM JOHN BOWEN
District of Columbia Bar No. 981555
JUDSON O. LITTLETON
Texas Bar No. 24065635
Trial Attorneys
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-7583
Facsimile: (202) 616-8202
E-mail: joshua.e.gardner@usdoj.gov

Attorneys for DEFENDANTS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

Noticed Motion Date and Time:
April 5, 2012
2:00 p.m.

DEFENDANTS' OPPOSITION TO MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

REGULATIONS

RULES

MISCELLANEOUS

INTRODUCTION

Plaintiffs seek to certify a broad class spanning nearly 100 years to press scattershot claims related to disparate and amorphous "human testing programs" under the Administrative Procedure Act ("APA") and the Constitution. Despite having over three years to file for class certification, and aided by more than two million pages of discovery and approximately forty depositions, Plaintiffs have demonstrated neither a cognizable injury sufficient to confer standing nor the existence of a single common question (or answer) to warrant a class action. Perhaps recognizing as much, Plaintiffs seek to certify a class over, among other things, new claims not contained in Plaintiffs' complaint, claims they previously abandoned, and even claims the Court dismissed with prejudice. Plaintiffs' motion to certify a class for their claims against the Department of Defense ("DoD"), the Department of the Army, the Central Intelligence Agency ("CIA"), and Department of Veterans Affairs ("VA") must be denied.

Plaintiffs' claims can be distilled into four requests, and they have failed to demonstrate standing for even one of them. First, Plaintiffs bring claims for notice from DoD, but the class representatives already have received precisely the relief they seek. Second, Plaintiffs seek health care from DoD, yet none of the class representatives have demonstrated any injury resulting from their receipt of health care from VA, rather than DoD, for conditions arising from military service. Third, Plaintiffs seek a declaration invalidating purported secrecy oaths, yet (to the extent such oaths ever existed) DoD has released them from any non-classified disclosure restrictions—and in any event, no class representative feels meaningfully constrained by an alleged secrecy oath. Fourth, Plaintiffs seek to require the VA to readjudicate claims for benefits, yet the class representatives lack an injury that would confer standing to raise this claim, and the relief Plaintiffs seek—including readjudication of claims and judicial review of VA policy and procedures—is not redressable by the Court under 38 U.S.C. § 511. The class representatives' lack of standing dooms Plaintiffs' class certification motion.

Nor have Plaintiffs established the elements necessary to certify a class action under Rule 23. First, Plaintiffs' claims are so overbroad and imprecise as to potentially encompass any soldier who went through basic training, as well as individuals involved in VA and CIA test

programs unrelated to this case. Second, despite Plaintiffs' best efforts to describe DoD's test programs as a single monolithic entity, the facts describe substantially different programs occurring over more than a half century during World War II and the Cold War. The variations in the test programs resulted in a patchwork of directives and regulations (or absence thereof) governing the test programs such that there is not a common duty to all class members and certification under Rule 23 would be improper. Even if a common duty to provide notice and health care existed, factual differences prevent this Court from finding common answers regarding the relief to which putative class members might be entitled. Finally, Plaintiffs' own allegations demonstrate sufficient disparities in the purported administration and reach of secrecy oaths to render this claim unsuitable for classwide resolution. Plaintiffs' motion for class certification should be denied.

BACKGROUND

I. DIRECTIVES AND MEMORANDA GOVERNING DOD TEST PROGRAMS[1]

DoD's test programs comprised several disparate programs, including Army and Navy WWII-era mustard gas and lewisite testing;[2] chemical testing on service members primarily at Edgewood Arsenal, Maryland between 1955-1976;[3] biological agent testing centered at Ft. Detrick, Maryland between 1954-1973, Ex. 8 (Pittman at 183); and other testing that did not

[1] Plaintiffs make a number of allegations in relation to their claim against VA. While we disagree with Plaintiffs' characterization of VA programs and efforts, we believe these factual misstatements are immaterial for class certification purposes and thus do not address them here.

[2] This testing included patch/drop ("commonly used in basic training . . ."), chamber, and field tests. *Possible Long-Term Health Effects of Short-Term Exposure to Chemical Agents* ("*NRC Report*"), Vol. 1, p. 1, Ex. 1; *Veterans At Risk: The Health Effects of Mustard Gas and Lewisite* at 31, Ex. 2.

[3] These tests may have involved up to 400 compounds and analogs, ranging from agents including GB, VX, and LSD to Benadryl, caffeine, and Ritalin. *See* Feb. 21, 2008 Presentation, at 8, Ex. 3. The last test of chemical agents on humans occurred on July 28, 1976, (*see* Dkt. 142-3 ¶ 4), though some limited testing continued for the following three years for purposes of testing protective suits, NRC Vol. 1, p. 1. Although the precise number of test participants is unknown, it is estimated that approximately 7,000 service members participated in the military's Cold War-era chemical testing program. *See* DAIG Report at 103, Ex. 5(determining, that between 1955 and 1975, 6,992 volunteers were available for the Cold War-era testing, with 3,425 individuals actually used in agent tests); s*ee NRC Report* Vol. 3, p. 2, Ex. 6 ("Some 6,720 volunteers participated in the Army tests."); *see also* Roberts Decl. ¶ 5 (Sept. 15, 2010) Ex. 4 (stating that DoD possesses 6,723 personnel records concerning testing of chemical agents at Edgewood Arsenal, as well as 1,116 personnel records relating to testing at other locations). DoD no longer conducts testing on humans using live agents. Ex.7, Lee Tr. 45:1-46:16.

involve service members at all. The only common threads between these various programs are that they involved human volunteer research and that they have been thoroughly documented in the public record for decades.

Just as DoD's programs varied in fact, participation, timing, and purpose, so too did the legal regimes that applied to them. The so-called 1953 Wilson Memorandum (Feb. 26, 1953) ("Wilson Memo")[4] , applied to all of the service branches and set forth preparations the branches should undertake pursuant to the test programs. Ex. 9. Army Chief of Staff Memorandum 385 (June 30, 1953) ("CS:385")[5] is similar to the Wilson Memorandum and provides safeguards to be utilized as part of Army test programs. Ex. 10. The Army then issued AR 70-25 in 1962, and re-issued it in 1974.[6] Like CS:385, these regulations required "medical treatment and hospitalization … for all casualties" of Army testing but, notably, made no reference to any forward-looking duty to notify participants.[7] Finally, in January 1990, the Army promulgated a new version of AR 70-25. Ex. 13. Unlike the prior versions of AR 70-25, the 1990 version identified a "duty to warn." Nothing in this provision of AR 70-25 suggests that the "duty to warn" applies retroactively.[8]

II. HISTORIC OUTREACH EFFORTS TO TEST PARTICIPANTS

[4] Nothing in the Wilson Memo imposes an obligation on the part of the Army or DoD to provide health care to veterans who contend that they have manifested injuries or ailments decades after an experiment has concluded. And there is nothing in the Wilson Memo that supports Plaintiffs' purported "duty to notify" service members on a continuing basis.

[5] Nothing in CS:385 imposes an obligation on the Army to provide medical treatment to veterans who allege medical conditions decades after the test at issue. Nor does CS:385 provide a basis for Plaintiffs' claimed "duty to notify."

[6] CS: 385 applies only to the Army, whereas the Wilson Memo applies to all service branches. Ex. 14, Kilpatrick Tr. 422:4-22. DoD is not bound by Army regulations such as AR 70-25 and CS: 385. Ex. 14, Kilpatrick Tr. 513:19-514:14; Ex. 15, Hamed Tr. 172:22-173:1; 175:10-14; 201:21-25.

[7] The Appendices to the 1962 and 1974 versions of AR 70-25, entitled "Legal Implications," make clear that AR 70-25 is a housekeeping statute and does not confer any substantive rights to health care from DoD or the Army upon test participants. AR 70-25, App. ¶ 2, Ex. 11, 12.

[8] Indeed, the remainder of this provision demonstrates precisely the opposite. *See* AR 70-25 (1990), 3-2.a.(1)(b), 3-2.h, Ex. 13 (requiring establishment of an identification and notification system and imposing forward-looking obligations, such as the publication of directives and regulations for, *inter alia*, procedures for accomplishing the duty to warn). Ex. 14, Kilpatrick Tr. 139:8-140:12; 143:1-14; 151:6-11; 170:23-171:3. In addition, the 1990 version of AR 70-25 makes clear that it continues to be a housekeeping directive. *See* AR 70-25 (1990), App. G, G-2, Ex. 11, 12, 13.

Although not legally required, DoD has nonetheless endeavored, through multiple initiatives, to reach out to test participants. In 1979, the Army issued guidance calling for a review of "all research programs."[9] VET017_000279, Ex. 22. The guidance stated that notification should be undertaken "[i]f there is reason to believe that any participants in such research programs face the risk of continuing injury," which in turn required "a medical determination," made primarily by the Army Surgeon General, who was "authorized to consult with an outside expert body such as the National Academy of Sciences." *Id.*

In accordance with that memorandum, with regard to chemical testing, the Army conducted a follow-up study of LSD test participants and issued its report in October 1980. *See* VET001_009579, Ex. 23. That study "attempted to contact every individual for whom present addresses could be obtained and invite them to enter one of three Army medical centers for evaluation." *Id.* at VET001_009581. Of the 686 individuals identified as LSD subjects at Edgewood Arsenal, 220 subjects were examined directly, and an additional 100 returned completed medical history questionnaires. *Id.* at VET001_009598.

In approximately 1980, the Army requested that the National Research Council ("NRC") evaluate the possibility of long-term or delayed health effects from the test programs. *NRC Report* Vol. 1, p. x, Ex. 1; Ex. 14, Kilpatrick Tr. 126:22-127:10. The NRC conducted a five-year investigation based on health status questionnaires that were sent to all living Edgewood test subjects for whom addresses could be located . *Id.* Vol. 3, Exec. Summary at 1, Ex. 6. The NRC sent out surveys to nearly 5,000 test subjects (88% of the volunteers alive at the time), and more than 4,000 responded, including, among others, class representative Mr. Blazinski. *Id.* Vol. 3, at p. 7-8; Ex. 24, Blazinski Tr. 36:1-37:5. Because the NRC concluded that there were no untoward long-term health effects regarding LSD exposure, DoD concluded that further notification was

[9] Evidence of DoD follow-on efforts pre-date the September 1979 Memorandum. *See, e.g.*, EA Technical Report, *Long-Term Followup of Medical Volunteers*, at 10 (March 1972) Ex. 16 (noting examinations of 40 subjects and a finding of no "long term physical or psychological effects"); Ex. 17 (DoD testimony regarding outreach, including medical examinations, to hundreds of test subjects). In addition, there are notifications of participation, which include the specific agents used, in some service member test files as early as the mid-1970s. *See, e.g.*, [redacted] File of Tim Josephs, Ex.19; Ex. 20, Josephs Tr. 193:6-196:5; Ex. 81; Ex. 21.

not necessary. Ex. 14, Kilpatrick Tr. 131:14-25.[10]

With respect to the biological test program, in the early 2000s, the Army conducted outreach to the approximately 2,300 service members who participated in "Project Whitecoat," which primarily involved Seventh Day Adventists who were conscientious objectors and agreed to participate in biological research in lieu of combat training. Ex. 25, Finno Tr. 113:6-15; *see* Pittman at p. 183, Ex.8. A total of 358 former Project Whitecoat participants completed a questionnaire about their health status and ongoing clinical symptoms. *Id.* at 184. The study concluded that "no adverse impact on the overall health of the Project Whitecoat volunteers could be conclusively attributed to their participation" in the tests. *Id.* at 187.[11]

III. CURRENT OUTREACH EFFORTS TO TEST PARTICIPANTS

A. Outreach Related to WWII-Era Test Programs

More recent outreach efforts related to the WWII-era test programs have included: (1) a 1990 VA initiative to contact Navy veterans identified in then-known files, *see* Ex. 27 (DVA014 001257) (128 veterans contacted); (2) a 1991-1993 Institute of Medicine ("IOM") study culminating in the publication of *Veterans At Risk: The Health Effects of Mustard Gas and Lewisite*; (3) a multi-year initiative in the mid-1990s by DoD to identify test participants.[12] As a

[10] In the early 2000s, the Army funded another study to consider the long-term health effects of exposure to sarin and other anticholinesterase chemical agents used during the test program. *See* Ex. 26, VET001_003454-460. More than 4,000 test subjects were identified and sent surveys as part of the outreach for this study. Ex. 24, Blazinski Tr. 40:17-42:15; Ex. 20, Josephs Tr. 199:21-201:2; Ex. 81. That study concluded that there were "few statistically significant differences in current" health between those who participated in tests and a control group who were not exposed to those substances, and that those exposed to anticholinesterase had a lower rate of attention problems than the control group, but a higher rate of sleep disturbances. *Id.* at VET001_003460.

[11] This was a follow-up to a 1991-1992 questionnaire provided by the Army which was completed by approximately 200 biological test participants. *See id.* at 187.

[12] Partially in response to *Veterans at Risk*, DoD began investigating into the WWII-era test programs. Ex. 15, Hamed Tr. 16:1-12; Ex. 28, Kolbrener Tr. 21:7-12; 165:18-25. DoD's primary objective was identifying veterans. Ex. 15, Hamed Tr. 52:1-3. At the outset, DoD did not expect to find many test participant names because a large number of WWII-era records were destroyed during a 1970s fire at the National Personnel Records Center in the 1990s. Ex.15, Hamed Tr. 189:6-190:4. Also, in a number of instances, the names of test subjects were not written down, and instead were referred to as "observers" or "subjects." Ex. 15, Hamed Tr. 190:9-13. Nonetheless, through extensive site visits and other research efforts, DoD identified 6,400 service members and civilians who were exposed to mustard agents and other chemical substances during WWII. *See* Feb. 2008 GAO Study, at 2, 9, Ex. 29. DoD sent certificates of commendation to more than 700 individuals for whom it could find contact information. *See* Feb. 2008 GAO

(Footnote continues on next page.)

result of the latter DoD initiative, VA received a database from DoD in 2004 containing information on 2,800 full-body mustard agent exposures and 1,750 partial body exposures. *See* Ex. 27 (DVA014 001259). After seeking to locate contact information for the participants, VA began sending WWII-era test participants notice letters in March 2005. Ex. 30, (DVA006_108759); Ex. 27, at DVA014_001259.[13]

B. Outreach Related to Cold War-Era Test Programs

Consistent with section 709 of the National Defense Authorization Act of 2003 (the "Bob Stump Act") Pub. L. No. 107-314 § 709, 116 Stat. 2458, 10 U.S.C. § 1074 note (2003) Ex. 31, in February 2004, DoD began developing plans to implement the Act's requirement to identify all chemical and biological test participants. In September 2004, DoD issued a task order in September 2004 to Battelle Memorial Institute ("Battelle") to identify additional service members. Ex. 14, Kilpatrick Tr. 288:7-11; 325:10-326:20. Battelle conducted a wide-ranging search for personally identifiable information concerning test subjects, at a cost of many millions of dollars and many years – a search that has largely been completed. Ex. 7, Lee Tr. 72:25-73:11 (explaining that Battelle had visited 16 sites); Ex. 14, Kilpatrick Tr. 145:17-20 (task approximately 97% completed as of summer 2011). DoD's efforts included seeking information about the test agents used, the test doses, and the treatment details, including any potential injuries resulting from the testing, and it created a database in which this information could be collected. Ex. 32, Morris Tr. 113:4-15; 142:2-143:1; *see also* Ex. 14, Kilpatrick Tr. 168:7-22. Once the data was verified, it was placed into the database and provided to VA. Ex. 25, Finno Tr. 64:16-21; 72:8-13. DoD provides updates of the database to VA. Ex. 32, Morris Tr. 130:4-17; Ex. 25, Finno Tr. 65:1-7.

VA began sending notice letters to Cold War-era test participants on June 30, 2006. Ex.

(Footnote continued from previous page.)

Study, at 2, 9, Ex. 29; Ex. 15, Hamed Tr. 146:2-11; 190:21-25.

[13] The WWII-era letters included information that the recipient was exposed to mustard agents or Lewisite; the locations where such exposures took place; a discussion of compensation for full-body exposure; a discussion of disabilities that may result from full-body exposure; a discussion of the release from any purported "secrecy oath"; and contact information both for the VA to file a claim and for DoD to obtain information about the testing. *Id.*

53 (VET001-014266-67). To date, VA has sent out letters for every Cold War-era test participant for whom it has contact information. Ex. 37, Salvatore Tr. 233:5-10; *see* Ex. 36, Abbot Tr. 220:6–20. Both Mr. Josephs and Mr. Blazinksi received a notice letter from the VA. Ex. 20, Josephs Tr. 212:1-213:7; Ex. 34. The purpose of these letters was to inform the service members about the tests and address health concerns. It explained that, to the extent veterans had questions about the tests or about releasing classified information, they should contact DoD at a toll-free number. *Id.*[14] The VA also offered a free "clinical examination to veterans who receive this notice." *Id.* The notice further stated that, to the extent veterans believed they suffer from a chronic health problem as a result of the testing, they should call a VA toll-free number to speak to a VA representative about filing a disability claim, and that veterans could also contact a local veterans service organization for assistance. *Id.* VA's mailing included a DoD fact sheet and a DoD set of frequently asked questions. Ex. 53 (VET001-014268-71). The DoD fact sheet provided a general overview of the Cold War-era test program, described the classes of agents tested (*e.g.*, nerve agents, psychochemicals, etc.), and described the results of the three-volume IOM study discussed above. *Id.* Ex. 53 (VET001-014268-69).

DoD also developed public websites so that interested individuals could obtain information about the test programs. The websites, located at www.fhpr.osd.mil/CBExposures and http://mcm.fhpr.osd.mil/home.aspx, contain detailed information about both the WWII-era and the Cold War-era tests, including copies of, among other things, GAO reports, scientific studies, Congressional testimony, and DoD briefings to veterans service organizations—including Plaintiff VVA. *Id.*; Ex. 32, Morris Tr. 150:4-13. The website also contains frequently asked questions on a number of topics and provides both a phone number and address so that veterans may verify participation in the tests or obtain information about their participation, including

[14] The purpose of the 800 number is to answer questions veterans may have about the tests, including about test substances, locations and dates. Ex. 37, Salvatore Tr. 84:21-85:7; *see also* Ex. 35, VET001_011998-12052 (call logs reflecting utilization by veterans). The staff at the hotline answers questions and refers test participants to the Army so they can obtain their test records. Ex. 32, Morris Tr. 58:22-59:4; Ex. 40, L. Roberts Tr. 15:14-20; 25:8-11; 16:18-17:4 (114 requests in 5 years); 18:24-7 (400 Edgewood participant requests in years prior to last 5); 65:4-13 (double the number of requests than in previous years).

obtaining a copy of their test file. Ex. 40, L. Roberts Tr. 19:10-15.[15]

IV. WHILE THERE IS NO EVIDENCE OF POST-WWII WRITTEN SECRECY OATHS, DOD NONETHELESS HAS PROVIDED RELEASES

There is no evidence of written secrecy oaths concerning the WWII-era or Cold War-era test participants.[16] And Plaintiffs have admitted that they have no evidence that the CIA administered any secrecy oaths to any service member. Ex. 43 (Resp. to Interrog. No. 7, p.15). Nevertheless, in accordance with *Veterans At Risk*, DoD issued a March 1993 memorandum ("the Perry Memo") that released "any individuals who participated in testing . . . associated with any chemical weapons research conducted prior to 1968 from any non-disclosure restrictions or written or oral prohibitions (e.g., oaths of secrecy)." *See* Ex. 44, VVA 025766. The Perry Memo applies broadly to any non-classified information related to chemical research conducted by DoD prior to 1968. *Id.*; Ex. 15, Hamed Tr. 44:23-45:6. Moreover, it was broadly distributed through the officials identified in the Memo and to VA. Ex. 15, Hamed Tr. 43:6-11. In addition, DoD had contact with veterans, mentioned the Perry Memo to them by name, provided copies of it to veterans, and told them that they had been released from any secrecy oaths that they may have taken. Ex. 15, Hamed Tr. 33:14-25; 44:7-9; 45:13-18, 46:21-24, 47:5-7.[17]

Because VA expressed concerns that veterans may still be reluctant to talk to health care providers, particularly post-1968 test participants, DoD ultimately issued a January

---

[15] Notably, VVA has supported the government's outreach efforts. For example, in the March/April 2008 edition of the VVA publication *The Veteran*, VVA included an article inviting veterans to contact DoD at the toll-free number identified in the VA notice letter, and indicating that "DoD's Force Health Protection and Readiness operation has set up three chemical/biological exposure databases. It is DoD's responsibility to collect and validate chem/bio exposures to service members while on active duty and to maintain these databases. It is the responsibility of VA to inform veterans about their exposures and the benefits to which they may be entitled, and to advise these veterans of procedures to follow if they have health concerns." VVA published a similar notification in the November/December 2008 edition of *The Veteran*. Ex. 41, 42.

[16] Despite specifically looking for evidence of secrecy oaths, DoD never found any written secrecy oaths for either the WWII-era or Cold War-era tests. Ex. 14, Kilpatrick Tr. 77:6-13; Ex. 32, Morris Tr. 209; 217-18; Ex. 40, Roberts Tr. 28:3-7; Ex. 15, Hamed Tr. 50:22-51:7; Ex. 28, Kolbrenner Tr. 109:14-18.

[17] In 1993, VA conducted outreach to WWII-era veterans and indicated that they were released from secrecy oaths and provided a toll-free number for assistance. Ex. 27 (DVA014 001258). DoD placed the contents of the Perry Memo on its publicly accessible website and distributed the Memo to veteran service organizations ("VSO"). Ex. 14, Kilpatrick Tr. 457:1-22; *see* Ex. 45. DoD wrote statements regarding the Perry Memo for inclusion in VSO magazines. Ex. 14, Kilpatrick Tr. 457:1-22.

2011memorandum that released chemical and biological research volunteers from any non-classified disclosure restrictions, regardless of the timing of the testing. Ex. 46, VET021_000001; Ex. 14, Kilpatrick Tr. 177:14-178:1. The memorandum explained that the release "pertains to addressing health concerns and to seeking benefits from [VA]," and that "veterans may discuss their involvement in chemical and biological agent research programs for these purposes." *Id.* The memorandum precludes the "sharing of any technical reports or operational information concerning research results, which should appropriately remain classified." *Id.*[18] The January 2011 memorandum is posted on the publicly accessible DoD website. *See* Ex. 47.

ARGUMENT

I. PLAINTIFFS SEEK TO CERTIFY CLAIMS THAT ARE NOT PROPERLY BEFORE THE COURT

As a threshold issue, Plaintiffs improperly seek certification over certain issues that (1) were not pleaded in Plaintiffs' Third Amended Complaint, Dkt. 180 ("3AC"); (2) Plaintiffs have abandoned; or (3) were dismissed with prejudice by the Court. Accordingly, certification of a class concerning these claims is inappropriate.

First, Plaintiffs improperly seek to certify claims and forms of relief not pleaded in their 3AC. For example, Plaintiffs seek class certification concerning "an ***injunction*** forbidding Defendants from refusing to notify test participants that they are released from such secrecy oaths." Dkt. 346-1 ¶ 2 (emphasis added); Dkt. 346 at 9, 15. However, Plaintiffs' 3AC carefully delineates between their claims for declaratory relief and those for which they seek injunctive relief, and Plaintiffs sought only declaratory relief in their 3AC with regard to purported secrecy oaths. *Compare* Dkt. 180 ¶¶ 21, 183 *with id.* ¶ 189.

Plaintiffs also seek to certify a class requesting "a declaration that DoD violated the Official Directives by failing to implement procedures to determine whether members of the

[18] This limitation is based upon the concern that there is still some information, "particularly on the delivery of chemical and biological agents, that in the hands of the wrong people would essentially be a cookbook on how to do it because the information came from the period of time when there was an offensive program. That information would have nothing to do with an individual's health. It would have more to do with nozzle size, altitudes for delivery, that sort of thing." Ex. 14, Kilpatrick Tr. 455:5-456:3.

Proposed Class have particular diseases – mental or physical – as a result of the testing programs." Dkt. 346-1 ¶ 1.e. Plaintiffs also seek "a declaration that in subjecting members of the Proposed Class to participation in the human testing programs, DoD put members of the Proposed Class at risk of adverse health effects." *Id.* ¶ 1.f. These claims for declaratory relief appear nowhere in Plaintiffs' 3AC. Dkt. 180 ¶¶ 183-87. Indeed, these two claims appear to challenge the lawfulness of the test program itself, an issue which, as discussed below, the Court dismissed with prejudice. Plaintiffs' request to expand the proposed class beyond the claims and forms of relief pleaded in the operative 3AC should be denied. *See Plascencia v. Lending 1st Mortg.*, No. C 07-4485, 2012 WL 253319, at *2-4 (N.D. Cal. Jan. 26, 2012) (denying request to amend definition of class to include claims not raised in operative complaint).[19]

Second, Plaintiffs seek certification of a class to pursue constitutional claims for notice and health care that they previously abandoned. Specifically, Plaintiffs seek certification regarding whether DoD's alleged failure to provide notice, medical care, and a release from secrecy oaths violates the First Amendment and the procedural and substantive due process rights of members of the Proposed class. Dkt. 346-1 at ¶¶ 3, 4; Dkt. 346 at 10 ("That test participants have no procedure by which to challenge this denial further violate the procedural due process rights of test participants."). As this Court previously recognized, Defendants moved to dismiss Plaintiffs' Second Amended Complaint "in its entirety for lack of subject matter jurisdiction and for failure to state a claim." Dkt. 59 at 1. With respect to Plaintiffs' notice claim, Defendants expressly argued that Plaintiffs have no constitutional right to government information. Dkt. 34 at 20. Plaintiffs agreed with Defendants' position and represented to the Court that they "do not seek relief based on . . . a constitutional right to information." Dkt. 43 at 24 (quotation omitted). Instead, Plaintiffs argued that their notice claim and health care claims were based only upon

[19] *See Oliver v. Ralphs Grocery Store*, 654 F.3d 903, 907-08 (9th Cir. 2011) (holding that court could not consider allegations not raised in complaint in resolving summary judgment); *Anderson v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 525, 528-29 (5th Cir. 2008) (holding that district court abused discretion by certifying a class based on claims not pled in complaint because if failed to put "defendant on notice as to what conduct is being called for defense in a court of law."); 7B Wright et al., *Fed. Prac. & Proc.* § 1798 (3d ed. 2011) ("All of the pleading provisions of the federal rules are applicable in class actions.").

Defendants' "own duties and regulations." *Id.* Accordingly, because they disavowed their constitutional claim for notice during the pendency of Defendants' motion to dismiss, Plaintiffs cannot now resurrect that same claim for purposes of class certification.

Furthermore, in Defendants' partial motion to dismiss Plaintiffs' 3AC, DoD unequivocally moved dismiss Plaintiffs' claim for health care in its entirety. Dkt. 187 at 19. In that motion, DoD explained that "Plaintiffs' claims of entitlement to medical care from DoD are predicated on DoD policy and regulations, namely a 1953 memorandum from the Army Chief of Staff and AR 70-25." *Id.* In response, Plaintiffs did not allege that they were asserting a constitutional claim for health care. Dkt. 217. And in considering Defendants' motion, the Court expressly stated that Plaintiffs' health care claim was based upon the June 1953 memorandum and AR 70-25. Dkt. 233 at 3-4, 8. As a result, Plaintiffs have abandoned their constitutional claims against DoD for notice and health care. *See* Dkt. 281 at 6 (concluding Plaintiffs had abandoned their claims against CIA where they were on notice of a challenge to their claims and had an opportunity to oppose, but failed to contest dismissal).

In addition, there is no reference in Plaintiffs' 3AC to a procedural due process challenge against DoD or a challenge to the purported lack of procedures to "challenge" denials of medical care. The only reference to an alleged Fifth Amendment violation in Plaintiffs' 3AC appears to be a substantive due process claim. 3AC ¶¶ 184a, 186. Accordingly, even if Plaintiffs somehow could maintain constitutional claims for notice and health care after previously abandoning them, it is improper for Plaintiffs to seek class certification over a procedural due process claim that they failed to plead in their 3AC.

Finally, Plaintiffs appear to seek certification over claims that the Court previously dismissed. Plaintiffs seek to certify a class concerning whether Defendants "obtained the informed consent of test participants, adopted reasonable testing protocols and procedures, and complied with their obligations to adopt procedures for continued medical care and treatment of casualties." Dkt. 346 at 16. The Court previously dismissed with prejudice Plaintiffs' declaratory relief claim regarding the lawfulness of the testing program "because a declaration would not redress their past injuries or prevent future harm to them." Dkt. 59 at 11. Plaintiffs cannot seek

to resurrect these dismissed claims under the guise of class certification.

II. PLAINTIFFS HAVE NOT IDENTIFIED A PROPER CLASS REPRESENTATIVE

In their 3AC, Plaintiffs identified VVA and Swords to Plowshares ("Swords") as the class representatives, while unilaterally "reserve[ing] the right to amend" the 3AC to add additional class representatives. 3AC ¶¶ 175–176; *see also* 3AC at ¶ 222; Dkt. 43 at 1. Without seeking to amend their 3AC, however, Plaintiffs have now designated VVA, Tim Josephs, and William Blazinski as class representatives.[20] Having failed to identify Mr. Josephs and Mr. Blazinski as class representatives in their 3AC, Plaintiffs cannot now functionally amend their 3AC through their motion for class certification. *See Bull v. City of San Francisco*, 2010 WL 3516099, at *7–8 (N.D. Cal. Sept. 08, 2010).

Nor can VVA properly serve as a class representative in this case. Federal Rule 23(a) provides that "*one or more members of a class* may sue . . . as representatives parties on behalf of all members"—a fundamental principle the Supreme Court has recently reaffirmed. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members."). Plainly, VVA—a membership organization formed to promote the interests of Vietnam veterans (and not all Cold War-era class members)—is not a member of the proposed class of "[a]ny current or former member of the armed forces, or in the case of deceased members, the personal representatives of their estates." Dkt. 346 at 1. Nor was VVA a "test subject[] in any human testing program involving chemical or biological substances." *Id.*[21] Accordingly, VVA is an improper class representative in this case. *See Black Grievance Comm. v. Phila. Elec. Co.*, 79 F.R.D. 98, 110–11 (E.D. Pa. 1978) ("The Committee is not an adequate representative . . . because the Committee *per se* is not a member of either class and, therefore, has not suffered the

[20] Plaintiffs have apparently abandoned their initial intention to designate Swords as a class representative. 3AC ¶ 175. Given that Swords is not a member of the class under Plaintiffs' proposed definition, and Swords has not joined in the claim against VA, *see id.* ¶ 223 (heading), it is unclear whether Swords remains a proper plaintiff in this case.

[21] Similarly, VVA has not suffered the same injuries that have allegedly been suffered by the proposed class members: It does not seek notice of the substances it has been exposed to or the dosage or method of administration of such tests, and it does not seek medical care from DoD.

same alleged injury as the individual class members.").[22]

Nonetheless, Plaintiffs contend that VVA's standing is derived from its members. Dkt. 346 at 22. True enough, prior to *Wal-Mart*, the Ninth Circuit stated that "an association has standing to represent its members in a class suit" but this was limited to only those instances where there was a "'compelling need to grant [it] standing in order that the constitutional rights of persons not immediately before the court might be vindicated.'" *Black Coalition v. Portland Sch. Dist. No. 1*, 484 F.2d 1040, 1043 (9th Cir. 1973) (citation omitted).[23] *Black Coalition* provides no justification for departing from the plain language of Rule 23(a), and it was plainly before the Supreme Court's pronouncement that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart*, 131 S. Ct. at 2550. Those issues aside, however, , Plaintiffs have made no effort to carry their burden of demonstrating a "compelling need" for VVA to serve as a class representative to vindicate the putative rights of other persons not currently before the Court. *Black Coalition*, 484 F.2d at 1043; *see Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 978 (9th Cir. 2011). Plaintiffs have demonstrated *no* need—much less a compelling one—for VVA's participation here when there are currently seven named Plaintiffs who are being represented by counsel on a *pro bono* basis. Dkt. 346 at 23. Further, VVA's membership is open only to Vietnam veterans and its charter focuses solely on advancing the interests of Vietnam veterans; yet the proposed class would

[22] *See also Wilhite v. S. Cent. Bell Tel. & Tel. Co.*, 426 F. Supp. 61, 64–65 (E.D. La. 1976) ("The union is not, however, itself a member of the class; hence it does not meet the first requirement . . . that the representative be a member of the class and sue as a representative party."), *abrogated on other grounds*, *Taylor v. Bunge Corp.*, 775 F.2d 617 (5th Cir. 1985); *Air Line Dispatchers Ass'n v. Cal. E. Airways*, 127 F. Supp. 521, 524–25 (N.D. Cal. 1954) (dismissing a party in part because, "[i]n short, the Union is not a member of the class suing").

[23] Plaintiffs cite *Cal. Rural Legal Assistance v. Legal Servs. Corp. ("CLRA")*, 917 F.2d 1171, 1175 (9th Cir. 1990), in support of the proposition that VVA can serve as a class representative. Dkt. 346 at 22. But that case provided no reasoning and cited no authority (including the prior Ninth Circuit decision in *Black Coalition*) for so holding, other than a conclusory statement that the unions there were acting on behalf of their members. *Cal. Rural Legal Assistance*, 917 F.2d at 1175. Further, it did not address whether there was any "compelling need" for the unions to represent their members, as required by *Black Coalition*. To the extent *CLRA* and *Black Coalition* can be harmonized, *Black Coalition* applies here, as it involved an association rather than a union. To the extent they are in conflict, this Court still must apply *Black Coalition* because it is the earlier of the two decisions. *See Fluck v. Blevins*, 969 F. Supp. 1231, 1236 (D. Or. 1997); *see also McMellon v. U.S.*, 387 F.3d 329, 333 (4th Cir. 2004) (collecting cases).

include service members who were test subjects at any time between 1922 and 2012 (or even their spouses, if deceased). VVA can allege at most that "*[s]everal* of VVA's 65,000 members"—again, limited only to the Vietnam era—"were test subjects in the experiments at issue." *Id.* at 21 (emphasis added). In sum, as neither Josephs, Blazinski, nor VVA is a proper class representative in this case, no class may be certified.

III. THE PROPOSED CLASS REPRESENTATIVES LACK STANDING

"Standing is a jurisdictional element that must be satisfied prior to class certification." *Lee v. Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997). Accordingly, "[n]o class may be certified that contains members lacking Article III standing." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012). If none of the proposed class representatives "establishes the requisite case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The proposed class representatives must show that they have been *personally* injured, "not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Cady v. Anthem Blue Cross Life & Health Ins. Co.*, 583 F. Supp. 2d 1102, 1106 (N.D. Cal. 2008) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)). At least one proposed class representative must establish personal standing as to each claim against each named defendant, *id.*, and with respect to each form of relief sought. *Ellis*, 657 F.3d at 978. Critically, the class representatives bear the burden of demonstrating they have met these requirements. *Id.*

The proposed class representatives must show that they have suffered an injury in fact that is concrete, particularized, and actual or imminent; that the injury is fairly traceable to the challenged conduct; and that the injury is likely to be redressed by a favorable decision on their claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (2000). Further, the standing analysis can change over time—Article III requirements are no longer satisfied once a case loses "its character as a present, live controversy." *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997). This can happen "when an administrative agency has performed the action sought by a plaintiff in litigation," thereby precluding a court from being able to "grant

effective relief" and rendering the claim moot. *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1173 (9th Cir. 2009).[24]

As explained below, Plaintiffs have failed to meet their burden to demonstrate that the proposed class representatives (or, in the case of VVA, any of its members upon whose standing it relies[25]) have standing on a claim-by-claim basis. Indeed, aside from conclusory assertions of "injuries" that merely restate the purported claims for relief, Plaintiffs have not even attempted to make that required showing. *See* Dkt. 346 at 20, 22. Class certification must be denied.

A. Plaintiffs Lack Standing for Their Notice, Health Care, and Secrecy Oath Claims

1. The Class Representatives Have Already Received Notice of the Test Programs, and Therefore Lack a Redressable Injury

Plaintiffs seek to compel DoD to provide notice to the proposed class members of the substances to which they were exposed, the "doses" and "route of exposure" of those substances, and the potential health effects associated with those substances. Dkt. 346 at 2, 9, 14. But the proposed class representatives have not met their burden to demonstrate a redressable injury because they have already received all the information that they could obtain through this suit.

Well before initiation of this suit, both named class representatives received notice regarding their participation in the test programs. Mr. Josephs requested information from the Army about his testing, and the Army responded with a letter in 1975 explaining that he [redacted]

[24] To the extent the Court considers VVA as a potential class representative, *but see supra* Argument Part II, VVA would have standing to advance the claims of its members only if its members would have standing to sue in their own right, the interests it seeks to protect are germane to its purpose, and neither the claim nor the requested relief requires the participation of its individual members in this suit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

[25] VVA cites deposition testimony of four of its members who are not named plaintiffs to show that some of its members would be members of the proposed class. *See* Dkt. 346 at 21–22. Three of those VVA members did not participate in chemical or biological testing. [redacted] *see* Ex. 60 (VET140_001609) (referring to "training" at Redstone). Accordingly, even if VVA had attempted to demonstrate standing through its members (which it has not), those three individuals could not support that effort because they lack standing. Thus, only the fourth VVA member who is not a named Plaintiff, [redacted], as well as the two named Plaintiffs who are VVA members, Mssrs. Josephs and Dufrane, could support VVA's standing. As explained below, they do not.

[redacted] Exs. 78, 21; Ex. 20, Josephs Tr. 193:6–196:5. Mr. Josephs also received his Army service member test file, which contains the information in DoD's possession about his participation, including the substances, doses, and routes of exposure. Ex. 20, Josephs Tr. 210:20–211:16; Ex. 19 (VET034_011012-011095). Mr. Josephs also received a notice letter from VA in 2006 (Ex. 33; Ex. 20, Josephs Tr. 212:1–213:7.); *see* Background Part III.B at p. 6-7 (describing VA notice letters). Similarly, Mr. Blazinski obtained his Edgewood service member test file in 1992. Ex. 24, Blazinski Tr. 10:3–12:6, 31:13–16, 107:15–111:1; Ex. 48. This file contained the information in DoD's possession about the tests Mr. Blazinski participated in, including substances, doses, and route-of-exposure information. Ex. 48; Ex. 24, Blazinski Tr. 109:20–110:8;

The same is true as to VVA members other than Mr. Josephs that VVA could rely upon to establish its associational standing. Mr. Dufrane, a named plaintiff and VVA member, obtained his service member test file from Edgewood in the early 1990s. Ex. 50; Ex. 51, Dufrane Tr. 143:21–144:19. This file contains detailed information about the tests Mr. Dufrane participated in, including the substances, dosages, and routes of exposure. Ex. 49 (PLTF 000049-000134).

[redacted]

Finally, the proposed class representatives can demonstrate no injury in fact with respect to receiving notice of the potential health effects associated with their participation in the testing. This is because DoD has concluded, after conducting multiple follow-up studies, that it is unaware of any general long-term health effects associated with the chemical and biological testing programs. Ex. 14, Kilpatrick Tr. 131:14–25.[26] Critically, the DoD Edgewood Fact Sheet

[26] As discussed above, there are other studies supporting this conclusion. Nat'l Academies, Institute of Medicine, *Long-Term Health Effects of Exposure to Sarin and Other Anticholinesterase Chemical Warfare Agents* (March 2003) at VET001_003460, Ex. 26; *NRC Report* Vol. 3, at 31, Ex. 6; Army LSD Follow-Up Study (Oct. 1980) at VET001_009582, Ex. 23; EA Technical Report, *Long-Term Followup of Medical Volunteers* 10 (March 1972) Ex. 16.

sent to many test subjects with the VA notice letter informed veterans of the three-volume IOM study that "did not detect any significant long-term health effects in Edgewood Arsenal volunteers." Ex. 53 at VET001_014268. Moreover, DoD's public website about the chemical and biological test programs informs participants and the public of this information as well. *See* Ex. 38. VA's public website contains similar information and also refers veterans to the DoD website. *See* Ex. 54. Each of the proposed class representatives received this fact sheet from VA and accordingly was informed of DoD's conclusion regarding health effects associated with Edgewood testing. Ex. 33; Ex. 20, Josephs Tr. 212:13–213:7; Ex. 53; Ex. 24, Blazinski Tr. 111:12–113:6; Ex. 82; Ex. 51, Dufrane Tr. 156:9–19. Thus, Plaintiffs have failed to meet their burden of demonstrating an injury in fact that can be redressed by this lawsuit with respect to health effects[27] or any other information they seek in their notice claim against DoD. *See Ellis*, 657 F.3d at 978–79.

2. The Class Representatives Have Not Sought Health Care from DoD and Currently Receive Health Care from VA, and Thus Have Not Suffered Harm

Plaintiffs also seek declaratory and injunctive relief requiring DoD to provide medical care to all participants for any conditions arising out of the test programs. "To challenge an action by the government, an individual must be adversely affected by that action. Injury consisting *solely* of a government's alleged failure to act in accordance with law has been held not to amount to judicially cognizable injury in fact for purposes of Article III standing." *Dimond v. District of Columbia*, 792 F.2d 179, 190 (D.C. Cir. 1986) (citations omitted).

The proposed class representatives have mustered no factual showing that they have suffered any actual or imminent harm from DoD's failure to provide them medical care for

[27] Throughout the course of this litigation, Plaintiffs have contended that information regarding the health effects associated with particular substances is relevant to their claims, suggesting they might wish to challenge DoD's conclusions in the reports and studies set forth in the text. *See, e.g.*, Sept. 22, 2011 Hrg. Tr. 77:17-21 Ex.71; Dec. 15, 2011 Tr. 64:25-65:9, Ex. 72; Aug. 4, 2011 Tr. 27:21-28:2, Ex. 73. But any such challenge is completely inappropriate in this proposed class action. For one thing, it would require substantial inquiry (mostly via expert testimony) into individualized circumstances not common to the class—specifically, the possible health effects associated with each of a wide variety of substances to which any one particular proposed class member might have been exposed. More fundamentally, however, such a challenge to DoD's conclusion would amount to a challenge to final agency action under Section 706(2) of the APA—a challenge Plaintiffs have not brought in this case.

conditions they believe are a result of their participation in the chemical test program. Setting aside Plaintiffs' failure to make *any* showing in this regard, neither Mr. Josephs nor Mr. Blazinski has ever even sought medical care from DoD since leaving the service. Ex. 20, Josephs Tr. 221:17–22; Ex. 24, Blazinski Tr. 122:16–21.) Both of them *did* receive medical care during and immediately after the tests they participated in, while they were still on active duty. Ex. 20, Josephs Tr. 99:6–22, 106:13–107:9; Ex. 24, Blazinski Tr. 78:4–79:7, 82:11–13, 82:22–83:5, 88:17–21, 90:21–92:19. [redacted]

More fundamentally, no proposed class representative has even attempted to demonstrate an alleged injury from seeking health care from VA, rather than from DoD. The proposed class representatives seek medical care from DoD for conditions arising out of their participation in the test programs, which would presumably require them to demonstrate that a particular medical condition is actually a result of the test program—the same showing they must currently make to VA to make them eligible for VA health care.[28] Yet they have not alleged that they would be more likely to successfully make that showing in front of DoD (if DoD even had such a mechanism) as opposed to VA. Nor have the proposed class representatives alleged that VA health care is in any other way inferior to the health care they believe they could receive from DoD. The burden is on the proposed class representatives to demonstrate injury, *Ellis*, 657 F.3d at 978, and Plaintiffs have failed to do so. *See Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 597 (9th Cir. 2008).

Finally, as Plaintiffs have acknowledged, their claim for medical care is in essence a claim for money damages. Aug. 4, 2011 Hrg. Tr. at 42:9-14, Ex. 73 (confirming that "plaintiffs are seeking…that their health care be paid for by the government"). But claims for money damages

[28] If a veteran has a service-connected disability or is otherwise eligible for VA health care, *see* 38 U.S.C. § 1710, the veteran is eligible for all necessary care under VA's medical benefits package. This is true irrespective of the nature and cause of the veteran's service-connection. Therefore, all of the named plaintiffs other than Mr. Blazinski—even those who have been denied service-connection for a disability attributable to Edgewood Arsenal testing—are nonetheless eligible to receive necessary care under VA's medical benefits package. *See* 38 C.F.R. § 17.38.

are not cognizable under the APA and thus are not redressable through the claims that Plaintiffs seek to have the proposed class assert. *See U.S. v. Park Place Assoc., Ltd.*, 563 F.3d 907, 929 (9th Cir. 2009). Although Plaintiffs have styled their claims as seeking only declaratory and injunctive relief, the Federal Circuit has "cautioned litigants that dressing up a claim for money as one for equitable relief" is not enough to trigger the APA's waiver of sovereign immunity. *Suburban Mortg. Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1124 (Fed. Cir. 2007). Indeed, other courts have found that claims similar to the medical care claim against DoD are essentially claims for money damages and therefore are not cognizable under the APA. *See, e.g.*, *Schism v. U.S.*, 316 F.3d 1259, 1273 (Fed. Cir. 2002) ("In our view, however, full free lifetime medical care is merely a form of pension, a benefit received as deferred compensation upon retirement in lieu of additional cash."); *Jaffee v. U.S.*, 592 F.2d 712, 715 (3d Cir. 1979). Accordingly, in addition to rendering this putative class action unsuitable under Rule 23(b)(2), the proposed class representatives' claim for medical care against DoD is subject to dismissal under Article III for lack of redressability.

3. The Class Representatives Do Not Believe They Are Currently Bound by Secrecy Oaths and Accordingly Lack Injury

The proposed class representatives seek a declaration that any "secrecy oaths" taken by members of the proposed class are invalid. Plaintiffs argue that the putative class has suffered injury because secrecy oaths have prevented service members who participated in the test program from seeking health care and counseling related to any harm they believe resulted from their participation. *See* Dkt. 346 at 16–17, 21; 3AC ¶ 158; Dkt. 251 at 4, 7–8; *see also* Jan. 19, 2010 Order, Dkt. 59 at 12 (finding standing to challenge secrecy oaths in light of Plaintiffs' allegations that the oaths "prohibit the individual Plaintiffs from seeking treatment and counseling for the harm inflicted by the experiments"). Yet because the proposed class representatives have already been released from their secrecy oaths for these purposes and do not *in fact* feel constrained by those secrecy oaths, they have failed to demonstrate standing.

No test subjects, including the proposed class representatives, are currently precluded by a secrecy oath from seeking health care or counseling related to their participation in the test

programs. The Perry Memo released all participants in chemical agent tests prior to 1968 from secrecy oaths that were placed upon them. Ex. 44, VVA025766-7. The 2011 Memo released *all* chemical and biological test participants, regardless of their participation date, from any non-classified disclosure restrictions so that they could seek medical care and benefits from VA. Ex. 46, VET021_000001. Accordingly, because none of the proposed class members are currently prohibited by a secrecy oath from seeking health care or counseling allegedly related to their participation in chemical and biological testing, they have not demonstrated redressable injury.[29]

Indeed, each of the proposed class representatives—including the VVA members who purportedly support VVA's associational standing—has made clear that he does not currently feel constrained by a secrecy oath. Mr. Josephs has told his wife "everything" about his involvement at Edgewood, including the substances he was tested with, and his wife has been conducting research on those substances since the 1970s. Ex. 20, Josephs Tr. 41:9–17, 43:5–9, 46:10–15. Indeed, Mr. Josephs has written to VA and expressly set forth the names of the substances that he knows and believes he was tested with. *See* Ex. 55, VET 019_005348–49. Mr. Josephs admits that he currently does not believe that he is precluded from discussing his time at Edgewood Arsenal. Ex. 20, Josephs Tr. 169:19–22. Although Mr. Blazinski did recall being instructed not to talk about his tests while he was at Edgewood, Ex. 24, Blazinski Tr. 101:5–22, 102:5–18, he no longer feels inhibited in any way from sharing what he knows about Edgewood, *id.* at 104:15–105:14. [redacted] Finally, Mr. Dufrane has discussed his time at Edgewood with his current wife, Ex. 51, Dufrane Tr. 83:23–85:4, other named plaintiffs in this case, *id.* at 12:16–13:5, a reporter for the Detroit Free Press, *id.* at 14:4–11, and members of Congress, *id.* at 88:12–89:4, 89:24–90:18.

[29] Plaintiffs appear to fault the Perry Memo and the 2011 Memo for being "partial and qualified" because they did not effect a *total* release from secrecy oaths. Dkt. 346 at 15. True enough, the 2011 Memo specified that it "does not affect the sharing of any technical reports or operational information concerning research results, which should appropriately remain classified," and that it "does not affect classification or control of information, consistent with applicable authority, relating to other requirements pertaining to chemical or biological weapons." Ex. 46, VET021_000001. But no proposed class representative has claimed to know any information that would fall into these categories.

He testified that he felt he could talk about Edgewood in order to seek medical care and that he believed Edgewood was public knowledge, *id.* at 90:22–91:7; 92:17–22, and he could not identify any information that he wished to discuss about the test programs but could not because of a secrecy oath, *id.* at 93:21–94:23.

Because none of the proposed class representatives believes he is precluded from discussing anything about his time at Edgewood, Plaintiffs have failed to demonstrate redressable injury. A declaration invalidating the secrecy oaths cannot grant the proposed class representatives any relief that they do not already have. Accordingly, they lack standing to assert secrecy oath claims against either DoD or the CIA.

Plaintiffs lack standing for their secrecy oath claim against the CIA for additional reasons. Plaintiffs' 3AC contains not a single allegation that the CIA was involved in the administration of secrecy oaths or that any of the named Plaintiffs or VVA members believes he has a secrecy oath with the CIA. Dkt. 251 at 8. Discovery has confirmed the absence of CIA secrecy oaths, as each individual Plaintiff and VVA member was asked whether they had personal knowledge of CIA involvement in the test programs and *all* said that they did not. Dkt. 245 at 4 (describing deposition testimony of named Plaintiffs); Ex. 56, [redacted] Ex. 57, [redacted] Ex.52, [redacted] Ex. 58, [redacted] Furthermore, the CIA conducted extensive searches for information related to its alleged involvement in testing on service members and, as a result, "the CIA has concluded that no such agreements exist." Dkt 245-18 at 5-6. In light of these undisputed facts, Plaintiffs have failed to identify a class representative with standing to assert a secrecy oath claim against the CIA.

B. The Class Representative Cannot Demonstrate that VA Claims Have Been Improperly Denied Due to Bias

In an apparent attempt to avoid the preclusive bite of 38 U.S.C. § 511, Plaintiffs articulate a vague and general claim of bias and forswear any intent to challenge VA's action with respect to their individual claims. Yet without demonstrating that their claims were improperly denied due to bias, Plaintiffs cannot establish injury for purposes of standing. And if Plaintiffs assert that their claims were denied because of VA's alleged bias, this court lacks jurisdiction to review

those individual claims (or VA policies) under section 511(a).

The class representatives lack an injury-in-fact that could confer standing either to themselves or to others.[30] [redacted] Under 38 U.S.C. § 5107(a), "a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary." *See also Holton v. Shinseki*, 557 F.3d 1362, 1368 (Fed. Cir. 2009) (veteran has "general evidentiary burden" to establish all element of claim); *Hogan v. Peake*, 544 F.3d 1295, 1297 (Fed. Cir. 2008). Mr. Blazinski submitted claims to the VA based upon leukemia and colitis, (Ex. 24, Blazinski Tr. 61:22-62:20), [redacted] 38 U.S.C. § 5103A(b) [redacted] 38 U.S.C. §§ 5108, 5109A; *Cook v. Principi*, 318 F.3d 1334, 1337 (Fed. Cir. 2002) (en banc). [redacted]

[30] "[O]ne can not have standing in federal court by asserting an injury to someone else." *Vietnam Veterans of America v. Shinseki*, 599 F.3d 654, 662 (D.C. Cir. 2010) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-05 (1983)).

experience at Edgewood Arsenal. Ex. 20, Josephs Tr. 216:21–217:3. VA granted compensation to Mr. Josephs for his Parkinson's disease based upon his presumptive exposure to Agent Orange during his Vietnam service. Ex. 20, Josephs Tr. 59:3–6; 177:3–8; 38 U.S.C. §§ 1116(a), (c), (f); 38 C.F.R. §§ 3.307(a)(6) and 3.309(e). VA has not rendered any decision on whether Mr. Josephs' claim alleging that his Parkinson's disease is due to testing at Edgewood Arsenal, nor is there any need to make such a determination as it would have no effect on Mr. Josephs' disability rating or on his entitlement to any other VA benefit.[31] Accordingly, because Mr. Josephs' Parkinson's disease is already service connected, he cannot demonstrate any injury-in-fact that is fairly traceable to VA's alleged inherent facial bias.

Even if the proposed class representatives could establish an injury-in-fact, any such injury could not be redressed by this Court due to 38 U.S.C. § 511. As this Court has recognized, "It is well-settled that section 511 precludes federal district courts from reviewing challenges to individual benefits determinations, even if they are framed as constitutional challenges." *See* Dkt. 177 at 8 (citing *Tietjen v. U.S. Veterans Admin.*, 884 F.2d 514, 515 (9th Cir. 1989); *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 658 (D.C. Cir. 2010); *Beamon v. Brown*, 125 F.3d 965, 972 (6th Cir. 1997)). Importantly, the Court noted that Plaintiffs "mount a facial attack on the DVA as a decision-maker," that they "do not challenge the DVA's procedures or seek review of an individual benefits determination," and that they do not "attack any particular decision made by the Secretary." *See* Dkt. 177 at 11.

Yet it is clear that this is precisely the relief Plaintiffs now seek. For example, Plaintiffs state in their motion that "Plaintiffs seek injunctive relief with respect to Defendants' ***policies and***

[31] To the extent that Plaintiffs assert that Mr. Josephs has not received the disability rating he is allegedly due because of VA's alleged "facial bias," such an accusation is false. All ratings for service-connected Parkinson's disease are evaluated pursuant to the VA rating schedule for neurological conditions and convulsive disorders based upon the extent of disability caused by the disease, not on the cause of the disability. 38 C.F.R. § 4.24a; 38 U.S.C. § 1155 (authorizing VA rating schedule based "upon the average impairment of earning capacity resulting from" specific injuries or combination of injuries). A grant of service connection based on Edgewood Arsenal testing for the exact same disability for which he is currently service connected (Parkinson's disease) would not increase Mr. Josephs' rating.

procedures." *See* Dkt. 346 at 25 (emphasis added).[32] The requested relief, this Court's determination regarding VA policies, is clearly barred by section 511. *See Hicks v. Small*, 69 F.3d 967, 970 (9th Cir. 1995) (adjudication of tort claims of outrage and intentional infliction of emotional distress would require prohibited review of VA's action in deciding claim); *Price v. U.S.*, 228 F.3d 420, 422 (D.C. Cir. 2000) ("Because a determination whether the VA acted in bad faith or with negligence would require the district court to determine first whether the VA acted properly in handling [plaintiff's claim], judicial review is foreclosed by 38 U.S.C. § 511(a)").

In sum, Plaintiffs lack standing to assert that VA's alleged bias has resulted in the denial of claims other than their own, yet the purported class representative can demonstrate no injury. Even if a class representative could demonstrate an injury, this Court does not have jurisdiction to review that injury under section 511. Moreover, Plaintiffs' "facial bias" claim is clearly barred by section 511 because their requested relief would require the Court to make a determination regarding VA policies.

IV. PLAINTIFFS CANNOT SATISFY THE REQUIREMENTS OF RULE 23

Plaintiffs bear the burden of proving the required elements of Federal Rule 23. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). "Rule 23 does not set forth a mere pleading standard." *Wal-Mart*, 131 S. Ct. at 2551. Instead, Plaintiffs "must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* As a result, "[w]hen considering class certification under Rule 23, district courts are not only at liberty to, but must perform 'rigorous analysis [to ensure] that the prerequisites of Rule 23(a) have been satisfied.'" *Ellis*, 657 F.3d at 980 (citation omitted). This, in turn, necessarily may "entail some overlap with the merits of the plaintiff's underlying claim." *Id.*

To warrant class certification, Plaintiffs must first establish that their class is sufficiently precise and ascertainable such that the court can identify the members. Next, Plaintiffs must demonstrate that they have meet the requirements of Rule 23(a), requiring that Plaintiffs prove

[32] To the extent that Plaintiffs decide to remove their requests for injunctive relief, they would then be asking this Court for an advisory opinion, which is improper. *See Calderon v. Ashmus*, 523 U.S. 740, 747 (1998).

that (1) "the class is so numerous that joinder of all members is impracticable," (2) "there are questions of law or fact common to the class," (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class," and (4) "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a); *see also Wal-Mart*, 131 S. Ct. at 2548. Finally, Plaintiffs must prove the existence of at least one of the requirements in Rule 23(b). *Id.*; *see also Wal-Mart*, 131 S. Ct. at 2548. Plaintiffs cannot meet this burden.

A. The Proposed Class Is Not Ascertainable Because It Is Overbroad and Imprecise

The Court must first consider whether Plaintiffs' proposed class is ascertainable and sufficiently definite. "An adequate class definition" requires that the "members be identified with particularity.'" *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 593 (E.D. Cal. 2008) (citation omitted); *Aiken v. Obledo*, 442 F. Supp. 628, 658 (E.D. Cal. 1977) (stating that "the proposed class must be sufficiently definite," which is met "if it is administratively feasible to determine if a given individual is a member of the class") (citing 7 Wright et al., *Federal Practice and Procedure*, § 1760 at p. 582). Namely, the Court must consider "whether the class can be readily identified in some manner other than an individualized hearing." *Cortez v. Best Buy Stores, LP*, No. CV 11-05053, 2012 WL 255345, at *4 (C.D. Cal. Jan 25, 2012).

Here, Plaintiffs' proposed class is not sufficiently ascertainable because it is imprecise and overbroad. First, Plaintiffs' class includes "any current or former member of the armed forces . . . who were test subjects in any human testing program." Dkt. 346 at 1. This definition, however, does not require that the class members have been service members *at the time* they were test subjects. Accordingly, Plaintiffs' class definition would include veterans allegedly tested at VA facilities (tests unrelated to those that are the subject of this lawsuit) who could have no notice, secrecy oath, or health care claims against DoD (or secrecy oath claim against CIA). Plaintiffs' definition also could include individuals who participated in a CIA test program and served in the military at any point before or after their participation, even if those events were decades apart; Plaintiffs have no notice or health care claim against the CIA, and these individuals clearly would not be entitled to relief from DoD. Under Plaintiffs' definition, the Court could only determine whether an individual would be a member of the class by conducting an individualized hearing.

Second, Plaintiffs have failed to define "testing program" as part of their proposed class definition, requiring the Court to consider whether the administration of a particular agent in a particular set of circumstances qualifies as a test program. Such imprecision leads to the possibility, for example, that basic training exercises[33] and similar agent exposures (such as modern day anthrax vaccinations) would be encompassed within the class.[34] Thus, the definition is unworkable because it would require individualized hearings to determine whether those exposures qualify as a test program.

Third, Plaintiffs' proposed class is likewise overbroad as it applies to VA, and therefore not ascertainable. Plaintiffs seek to require VA to readjudicate the claims of all test participants, yet Plaintiffs' proposed class encompasses a) individuals who have never applied for VA benefits; b) individuals who have never received an adverse determination on their application for benefits; and c) individuals who are already receiving benefits based on their experience at Edgewood Arsenal.[35] Such overbreadth and imprecision is fatal to the proposed class. *See Shaw v. BAC Home Loans Servicing, LP*, No. 10cv2041, 2011 WL 6934434, at *3 (S.D. Cal. Dec. 29,

[33] As part of basic training, soldiers participate in a exercises involving the administration of tear gas to test their gas mask. Ex.28, Kolbrener Tr. 203:8-204:21; Ex. 25, Finno Tr. 172:5-16; Ex. 14, Kilpatrick Tr. 95:15-96:1. Nearly every soldier in the Army has undergone these basic training exercises, which have been administered for decades. *Id.* Similarly, drop tests using mustard agents (*i.e.*, mustard confidence tests) were "commonly used in basic training to raise single blisters to impress upon the trainees the toxicity of these agents and the need for immediate responses to any orders to don gas masks." *See* Veterans at Risk, at p. 31, Ex. 2. Until 1969, the mustard gas confidence test was a standard basic training exercise covered by Army field manual 21-40. Ex. 28, Kolbrener Tr. 203:8-204:21.

[34] Plaintiffs assert that some documents "indicate that the testing may have continued into the 1980s or 1990s," and rely upon two exhibits. Dkt. 346 at 3, n.3. The first directly contradicts Plaintiffs' assertion, and makes clear that the "military ceased the use of soldiers in chemical and biological testing in 1975," but continued ***training*** with live agents until the mid-1980s. *See* Ex. 60 (VET140_001609). Plaintiffs' reliance upon this document simply highlights the overbreadth of Plaintiffs' class and the lack of ascertainability. The second discusses the use of soldier trainees in combat medic school, which post-dated Project Whitecoat, and was governed by federal and DoD requirements implemented in 1974. *See* Ex. 61 (VET125-047490); *See* VET001_009749, at VET001_0097752. To the extent Plaintiffs' contend that this discrete testing is included within their class definition, it is yet one more reason why the class suffers from a lack of commonality and typicality. Beyond that, Plaintiffs have not asserted, much less provided any evidence, that the Army currently is involved in chemical and biological testing. Accordingly, it is unclear why Plaintiffs seek a class that includes present day "test subjects." Dkt. 346 at 1-2.

[35] Many of the named plaintiffs are receiving benefits for claims based on Edgewood Arsenal exposure. Ex. 51, Dufrane Tr. 161:7-10, Ex. 63, [redacted] 276:16-279:17, Ex. 64, [redacted] 13, Ex. 65, [redacted] Another named plaintiff is currently receiving benefits for the only claim he has made to VA. Ex. 20, Josephs Tr. 175:12-16; 181:10-14.

2011) (finding a proposed class not ascertainable where it included members who had not completed the application process for the benefits to which they claimed entitlement); *Mazur v. eBay, Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009) (holding that a proposed class was not ascertainable where it included individuals who had not been harmed as a result of allegedly wrongful conduct and included individuals who were barred by statute from receiving benefits).

B. Plaintiffs Cannot Establish a Single Common Question or Typicality

The primary issue with regard to Rule 23(a) is whether Plaintiffs can meet the commonality and typicality elements. The "typicality" and "commonality" provisions of Rule 23(a) "tend to merge." *Falcon*, 457 U.S. 1, 157 n.13. Both provisions of Rule 23(a) "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart*, 131 S. Ct. at 2551 n.5. In this Circuit, "'[a]ll questions of fact and law need not be common to satisfy the rule.'" *Ellis*, 657 F.3d at 981 (citation omitted). "However, it is insufficient to merely allege any common question." *Id.* As the Supreme Court recently held, the language of Rule 23(a)(2) "is easy to misread, since '[a]ny competently crafted class complaint literally raises common 'questions.'" *Wal-Mart*, 131 S. Ct. at 2551. "Commonality requires the plaintiff demonstrate that the class members 'have suffered the same injury.'" *Id.* This, in turn, means more than "merely that [the class] have all suffered a violation of the same provision of law" and instead that the class's "claims must depend upon a common contention . . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Plaintiffs' burden is a significant one, requiring evidence and proof that a common question exists. *Ellis*, 657 F.3d at 983 ("If there is no evidence that the entire class was subject to the same allegedly [unlawful conduct], there is no question common to the class."). As set forth below, Plaintiffs cannot meet this standard for any of the claims identified in their motion.

1. Plaintiffs' APA Claims Fail the Commonality and Typicality Requirements

a. Plaintiffs Have Failed to Prove a Common Duty for Their Notice Claim, and Any Such Duty Would Nevertheless Require Individual Hearings

i. There Is Not a Single Duty Common to the Entire Class

First, by Plaintiffs own admission, there is not a common source of alleged duty applicable to all class members. Plaintiffs argue that "[s]ince 1953, Defendants' own regulations and directives have explicitly recognized their duty to provide Notice," and they cite CS:385 and the 1962 version of AR 70-25 as the sources of this alleged duty.[36] Dkt. 346 at 6. Thus, under Plaintiffs' own construction of the applicable legal framework, the Army's alleged duties to test participants did not arise until 1953. Although Plaintiffs have not alleged or identified a possible source of an APA duty that predates 1953, Plaintiffs seek to certify a class including any individual involved in the test programs "between the inception of the testing programs in approximately 1922 and the present." Dkt. 346 at 2. Even if the Court were to determine that post-1953 directives and regulations imposed some form of notice or medical care duty on the Army, individuals tested prior to 1953 would not be entitled to that relief.[37]

Second, Plaintiffs argue that the Army's post-1953 directives and regulations require "the Army to provide to all members of the Proposed Class: Notice regarding their participation in the testing (*where unknown*)." Dkt. 346 at 7, 14 (emphasis added). By Plaintiffs own admission, the alleged duty does not attach if participation is known. This is a critical distinction, as Plaintiffs have alleged varying degrees of awareness of the test program. Indeed, in their class certification motion, Plaintiffs contend that "*many members of the class may not know that they were exposed*

[36] Plaintiffs do not identify a single document contemporaneous with the test programs that would have required DoD to provide notice into the future regarding the health effects of test substances. Instead, Plaintiffs argue that a 1990 version of AR 70-25 "contained a formal acknowledgment of the ongoing nature of the Army's 'duty to warn.'" Dkt. 346 at 6. Plaintiffs fail to cite any legal authority for the proposition that the 1990 regulation, which became effective in February 1990, can have retroactive effect to events a half-century earlier.

[37] This breadth also defeats typicality. Both Mr. Josephs and Mr. Blazinski participated in the test programs in 1968, (3AC ¶¶ 192, 214), and thus the claims of neither would be typical of someone who participated from 1922-1952. Additionally, VVA's membership is limited to those individuals who served in the Vietnam War between 1961-1975. Ex. 66, Weidman Tr. 39:20-40:3, and Plaintiffs have identified no VVA members who participated in pre-Vietnam-era testing. Finally, Plaintiffs have not identified a single individual whose claims are typical of widows.

to chemical or biological agents." Dkt. 356 at 12 n.6; *see also* 3AC ¶ 161 (alleging some participants were "duped" into participation and were "secretly" tested). At the same time, the claims of the named Plaintiffs demonstrate that many putative class members were not only aware of the test programs, but also what substances they were exposed to during the programs.[38] This is in addition to the thousands of test participants who were contacted by the NRC and Defendants over the past forty years about the test programs, as discussed *supra* Background Part II-III. Thus, at a minimum, the proposed class includes multiple groups of test subjects with different levels of awareness of the test programs, which necessarily defeats class-wide resolution in a case where rights only adhere if participation is "unknown."

Third, as discussed above, *supra* Argument Part IV.A at p. 24-29, Plaintiffs' proposed class definition is overbroad because it potentially includes (1) individuals who served in the military and then participated in a VA or CIA test program at any point in their lives, (2) service members who participated in tear gas exposures or three-drop mustard exposures as part of basic training, and (3) members of the Army who receive the anthrax vaccine. However, even Plaintiffs recognize that CS:385 and AR 70-25 extend, at most, to "medical research" conducted *by DoD*. Dkt. 346 at 6. Thus, none of the three identified groups would fall within this ambit, as individuals in the first group were not tested by DoD, and individuals in the second and third groups are not engaged in a DoD medical research program. As a result, there is no common duty to the class, and the Court cannot reach a common answer that would resolve all claims in one stroke. Moreover, Plaintiffs lack a class representative whose claims would be typical of those exposed to a substance by one of these methods.

ii. Even if there were a common duty, factual differences prevent the Court from ruling on whether it has been unfulfilled for all class members

Plaintiffs acknowledge that some members of the putative class have received notice letters from DoD. Dkt. 346 at 7. Nevertheless, Plaintiffs contend that these efforts were insufficient because DoD decided "*not to* inform test participants regarding the substances to

[38] Mr. Blazinski was told, at the time of the test program, what substance would be administered, the general nature of the substance, why the test was conducted, and what the effects would be. *See, e.g.*, Ex. 24, Blazinski Tr. 37:18-38:6, 81:6-82:7, 82:18-21, 99:12-18.

which they were exposed, the dosages associated with those exposures, and the potential health effects." *Id.* Thus, in Plaintiffs' view, the question of whether the Army has satisfied its alleged notice obligations depends not only on whether it has informed participants of the test programs, but also on whether it informed Plaintiffs of the substances, dosage, and health effects. These questions are not amenable to classwide resolution because they generate answers that vary greatly within the putative class.

(a). Because putative class members have received a wide-variety of notices regarding the test programs, this claim lacks common answers

Plaintiffs acknowledge that DoD has provided some test participants with notice regarding not only the test programs, but also the substances to which they were exposed, dosage information, and some health effects information. *See* 3AC ¶ 19 ("DEFENDANTS began to give some of the 'volunteers' access to portions of their available Edgewood files").[39] These files, even Plaintiffs acknowledge, contain information on substances and health effects, precisely what Plaintiffs seek through this litigation. *See supra* nn.38, 39. Plaintiffs argue that the notice provided to some volunteers stands in contrast to "[o]ther 'volunteers' [who] have never been notified at all." *Id.* Furthermore, in their motion for class certification, Plaintiffs concede that the Army conducted an outreach effort to contact test participants regarding the test programs and that this effort in the mid-2000s alone might have resulted in the Army sending notice letters to nearly 4,000 individuals. Dkt. 346 at 7-8.

Indeed, the record demonstrates that test participants have received from Defendants information concerning their participation in a variety of ways.[40] Some individuals knew of their

[39] For instance, Mr. Josephs received a copy of his Army file with the chemical substances he was administered in 1975. Ex. 20, Josephs Tr. 193:6-196:5; Ex.78. Mr. Dufrane, Mr. Muth, Mr. Meirow, and Mr. Rochelle received their records in 1996, 1986, 2003, and 2004, respectively. *See* Ex. 67, PLTF 001119; Ex. 69, VET001_002067; Ex. 70, VET082_003308. The Army provided Mr. Price with a copy of his service member test file on June 12, 2001. Ex. 68, PLTF 000303.

[40] Individual plaintiff Eric Muth distributed surveys regarding the test programs to subjects he could identify and collected the results. Ex. 77. Those self-reported surveys illustrate the many differences in the notice that subjects received. Ex. 64 Muth Tr. 82:17-18. For instance, Mr. Blazinski reported which agents he was exposed to and that he was contacted as part of two follow-up studies. Ex. 48 at PLTF00605, while Mr. Meirow does not list his agent exposures and reports having received different notification letters. *Id.* at PLTF006324.

exposure at the time of administration. Hundreds of others received copies of their Edgewood test files. Ex. 40, Roberts Tr. 16:18-17:4, 18:24-7. Separately, hundreds of service members exposed during the World War II era received notifications that included information regarding, *inter alia*, health effects of mustard agents. Biological testing participants received separate forms of notice, both before and during testing, as well as through independent follow-up efforts. *See supra* Background Part II p.5. Given numerous different Army outreach efforts, the question of whether the Army has failed to fulfill alleged notice obligations is not amenable to classwide resolution. This issue would be further complicated by the fact that there are likely endless groups of test participants who received "notice" through different combinations of notice mechanisms, making it difficult to determine whether any single notice effort would have been sufficient by itself. Yet commonality requires more than a common question and instead "requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted).

(b). Even if there were a common duty, the Court cannot determine whether it is unfulfilled without considering health effects

Plaintiffs contend that notification that does not state the health effects of the test programs fails to comply with the alleged duty provided in the post-1953 Army regulations and directives. Dkt. 346 at 7. A necessary corollary to Plaintiffs' argument, however, is that an individual who suffered no health effects would not need to be notified of any health effects.[41] Moreover, under Plaintiffs' theory, litigation of these claims will require inquiry into the varied purported health effects of hundreds of substances. *See, e.g.*, Sept. 22, 2011 Hrg. Tr. 77:17-21, Ex. 71; Dec. 15, 2011 Hrg. Tr. 64:25-65:9, Ex. 72; Aug. 4, 2011 Hrg. Tr. 27:21-28:2, Ex. 73. As a result, individuals within the putative class could have suffered different injuries (if any) arising from Defendants' alleged failure to provide health effects information, assuming such a duty even exists.

[41] This corollary is not merely a theoretical one – there were test participants who would not have any health effects because they only received placebos as a result of their participation in the test programs or were exposed to drugs for which there are no known health effects, such as a single dose of caffeine. 3AC ¶¶ 7, 231 (acknowledging the Army's use of placebos and "benign substances" in some instances).

b. Plaintiffs' Health Care Claim Lacks Commonality

Similar to Plaintiffs' notice claim, Plaintiffs' health care claim will require consideration of two threshold questions: (1) whether either DoD or the Army has a duty to provide health care to test participants, and (2) whether DoD or the Army has failed to fulfill that duty. And once again, neither question is capable of classwide resolution.

i. The Alleged Health Care Duty Does Not Apply to the Entire Class

Plaintiffs contend that the duty to provide medical care to test participants arises from the same post-1953 Army directives and regulations as their notice claim. As with their notice claim, however, Plaintiffs have not alleged or identified a possible source of duty that predates 1953 that could serve as the basis for an exposure from 1922-1952. Additionally, as was also discussed above, Plaintiffs' proposed class would encompass individuals tested in VA and CIA programs, as well as service members who were not involved in a DoD medical research program. Plaintiffs also have failed to identify an authority that would require DoD to provide medical care to these individuals. As a result, Plaintiffs cannot demonstrate that all members have even suffered an injury derived from the same provision of law, let alone the same injury.

ii. There Can Be No Duty If No Medical Effects Arise from Test Programs

As Plaintiffs themselves acknowledge, putative class members would only be eligible for "medical care for any conditions associated with participation in the test programs." Dkt. 346 at 9; *see id.* at 13; 3AC ¶ 189 (requesting medical care "with respect to any disease or condition that may be linked to their exposures"). To determine whether DoD or the Army has failed to provide medical care, the Court must inquire into whether the individual has suffered health effects as a result of the test programs. Indeed, Plaintiffs have long contended that questions related to the health effects of the test programs are critical to the Court's resolution of their health care claim. *See, e.g.*, Dkt. 258 at 7; Dkt. 128 at 10; Sept. 22, 2011 Tr. 77:17-21, Ex. 71; Dec. 15, 2011 Tr. 64:25-65:9, Ex. 72; Aug. 4, 2011 Tr. 27:21-28:2, Ex. 73. The Court cannot resolve questions related to the DoD or the Army's alleged failure to provide medical care in one stroke. Instead, under Plaintiffs' theory of the case, the Court must analyze potentially hundreds of substances that Plaintiffs contend were administered to test participants. 3AC ¶ 5. Only after finding that

there are, in fact, health effects could the Court reach the question of whether the DoD or the Army has failed to provide medical care for those health effects.

2. Factual Distinctions Within the Class Regarding the Existence and Effects of Purported Secrecy Oaths Defeat Commonality

Nor can Plaintiffs establish commonality with respect to their secrecy oath claims. First, Plaintiffs' definition of "secrecy oaths" includes written, oral, formal, and informal oaths, Dkt. 346 at 2 n.2, and thus demonstrates the lack of commonality. By Plaintiffs' own admission, the Court must review and consider oaths allegedly administered in a variety of circumstances and with varying degrees of formality. The court's resolution of these factual matters is not capable of class-wide resolution, as an oath's enforceability would be entirely dependent on the circumstances in which it is administered. If, for instance, the Court were to determine that informal, oral oaths are not enforceable, then all class members falling into that category would have not sustained a cognizable injury as a result of the alleged failure to provide a release from secrecy oaths.

Additionally, there is no evidence that the CIA entered into secrecy oaths with any putative class member, nor have Plaintiffs alleged that any participant has a secrecy oath with the CIA. Plaintiffs' 3AC does not contain a single allegation that the CIA directly administered secrecy oaths to test participants.[42] Fact discovery has borne this out, as each of the individual Plaintiffs and VVA members testified that they had no personal knowledge of any CIA role in the test programs, let alone in the administration of secrecy oaths. Dkt. 245 at 4; Ex. 56, [redacted]; Ex. 57, [redacted] Ex. 52, [redacted]; Ex. 58, Smith Tr. 48:4-6. Nevertheless, Plaintiffs maintain that, even if the CIA was not directly involved in the administration of secrecy oaths, it conspired with the Army in relation to the test programs and therefore would be culpable if the Army administered of such oaths. Dkt. 251 at 8. Even if the Court *could* effectuate relief from the CIA where its only involvement was limited to a conspiracy in the broad test programs, Plaintiffs' position would require the Court to make three

[42] Plaintiffs admit that they have not identified any facts that the CIA administered secrecy oaths to test participants. Dkt. 251 at 8.

individualized determinations for each test participant: (1) the date during which the putative class member was tested, (2) whether the CIA was involved in the test programs during that period, and (3) whether the CIA could have conspired with DoD with respect to those specific oaths allegedly administered during that period. In addition to all these factual differences, Plaintiffs have never suggested that CIA was involved in the WWII-era mustard exposures or that it administered secrecy oaths in connection with such testing. Indeed, given that the CIA was not established until 1947, such an allegation would necessarily be unfounded. Thus, even under Plaintiffs' dubious theory of CIA liability for oaths allegedly administered by DoD, there will not be common answers as to whether the CIA administered secrecy oaths.

Nor is there commonality with regard to any purported continuing obligation to maintain secrecy. As Plaintiff concede, some test participants received a letter that, in Plaintiffs' words, "DOD had authorized them to discuss exposure information with their health care providers." 3AC ¶ 160. As a factual matter, DoD has provided a much broader release than stated. As discussed above, DoD issued "the Perry Memo" releasing "any individuals who participated in testing . . . associated with any chemical weapons research conducted prior to 1968 from any non-disclosure restrictions or written or oral prohibitions (e.g., oaths of secrecy)." *See* Ex. 44, VVA 025766. The Perry Memo applies broadly to any chemical research conducted by DoD before 1968, and it is a wholesale release permitting test participants to discuss any and all non-classified aspects of the test programs in any manner. [43] Furthermore, in 2011, DoD released *all* individuals who participated in the chemical or biological test programs to discuss the non-classified aspects of the test programs with medical professionals or to pursue claims with VA. If the Court believes that DoD entered into some enforceable secrecy agreements, there will be distinct classes of individuals who have varying degrees of a release–some will have been released in full, as they do not have or know any classified information; some will be released to discuss any non-classified aspect of the test programs; and others are released to discuss the programs with medical professionals or to pursue claims for benefits from the VA. Such categories demonstrate

[43] No one has the right to reveal properly classified information. *See, e.g.*, *Wilson v. C.I.A.*, 586 F.3d 171, 183 (2d Cir. 2009).

that there cannot be classwide resolution sufficient to establish commonality.[44]

Finally, even if the Court were to assume the continued existence of enforceable oaths, the putative class members would have suffered disparate injuries as a result of the alleged secrecy oaths, with many having no injury at all and others expressing constraint, such that there will not be common answers. The 3AC is replete with references to the fact that individual Plaintiffs have discussed their participation in the test programs to varying degrees with their families, friends, members of Congress, and the public at large. For instance, Plaintiffs contend that putative class members "have repeatedly petitioned Congress" in relation to the test programs. 3AC ¶ 20.[45] The 3AC also claims that some individual Plaintiffs have discussed the test programs with medical professionals, *id.* ¶¶ 50 (Muth), 59 (Rochelle), 80 (Dufrane), while others also have discussed the programs with their families, *id.* ¶¶ 38 (Price), 69 (Meirow). Yet it is possible that some putative class members may still feel constrained, perhaps because they believe they know classified information or for some other reason. E. Roberts Tr. 118:24-119:3 (stating that a representative of Swords has spoken to 10-100 individuals unwilling to discuss their participation). As a result, to determine whether class members have been harmed by the continued existence of alleged secrecy oaths, the Court would need to conduct individualized hearings for each subclass of individuals alleging a different harm.

Additionally, the CIA previously has provided a sworn declaration to this Court that it has no evidence of secrecy oaths with the test participants. Dkt. 245-18 at 6. As a result of broad-based searches looking for information on the named Plaintiffs, VVA members, and service

[44] Also, Plaintiffs have not identified a class representative who participated in the test programs pre-1968. Both Mssrs. Blazinski and Josephs were involved in the test programs post-1968. 3AC ¶¶ 192, 218. To the degree Plaintiffs claim some infirmity with regard to secrecy oath releases, Plaintiffs have not identified a class representative who could represent the claims.

[45] For example, Mr. Blazinski does not feel inhibited in any way from sharing what he knows about Edgewood. Ex. 24, Blazinski Tr. 105:11-14. Mr. Josephs does not recall being administered a secrecy oath. Ex. 20, Josephs Tr. 160:3-13; 163:22-164:3. Nor does Mr. Josephs believe he is precluded from publicly discussing his participation in the test program. *Id.* 169:19-22. In addition, plaintiffs Rochelle, Muth, Meirow and Dufrane have had numerous correspondence with a variety of Congressmen in which they have petitioned the government concerning the test program. *See* 11/21/11 Interrogatory Responses, Ex. 75. Even if the Court imagined a putative class member who *did* have standing, that imagined class member would demonstrate the lack of commonality with respect to these uninhibited putative class members.

members generally, "the CIA has concluded that no such agreements with the Agency exist." *Id.* at 6. Thus, even if this Court were to believe that some secrecy oaths existed, it could not fashion a single basis for relief, as it could not order the CIA to release that which does not exist.

3. Commonality and Typicality are Lacking Because the Court Must Resolve Affirmative Defenses that Would Require Individualized Determinations

"The predominance of individual issues necessary to decide an affirmative defense may preclude class certification." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 420 (5th Cir. 2004). Here, Defendants have raised a number of affirmative defenses, not least of which are *res judicata* and that Plaintiffs' claims are barred by the statute of limitations, that will require the Court to make a number of individual determinations. Indeed, this Court previously noted that "Plaintiffs' claims concerning the consent forms and secrecy Oaths . . . might be time-barred." Dkt. 59 at 19. Nonetheless, it declined to decide the issue at the motion to dismiss stage because there was insufficient evidence of "Plaintiffs' awareness as to the lawfulness of their consent or secrecy oaths," thereby indicating that factual development was necessary to determine what each individual Plaintiff knew. Dkt. 59 at 19. As discussed above, discovery has revealed wide variations regarding what test subjects know regarding the test substances on which they were tested and regarding whether and to what extent they believed they could not discuss the test programs. *See, e.g.*, Ex. 24, Blazinski Tr. 37:18-38:6, 81:6-82:7, 82:18-21, 99:12-18; Ex. 20, Josephs Tr. 160:3-13; 163:22-164:3. Claims requiring individual determinations are not "susceptible to class-wide treatment" because they require "proof of what statements were made to a particular person [and] how the person interpreted those statements." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 398 (6th Cir. 1998).

In addition to questions regarding the applicability of the statute of limitations, this Court will have to resolve questions regarding *res judicata*.[46] Many members of the class have

[46] Similarly, Plaintiffs continue to assert claims on behalf of individuals who have been previously compensated for injuries arising out of the test programs. By way of illustration, Plaintiffs maintain that James Thornwell is a member of the putative class. Sept. 22, 2011 Hrg. 102, Ex. 71. However, Congress enacted a private law for the benefit of Mr. Thornwell in 1980 that expressly stated the "sum shall be in full satisfaction of all claims of James R. Thomwell, his heirs, executors, personal representatives, or assigns, of any nature whatsoever against the United States and its agencies, or against any past or present employee, agent, officer, or person of or

(Footnote continues on next page.)

previously brought claims against DoD and the CIA for events and injuries allegedly arising out of the test programs. For example, a number of former test subjects, including individual plaintiffs Price and Dufrane, have filed claims for monetary damages with either DoD or the CIA *See Price v. U.S.*, 2007 WL 22897891 (E.D. Tenn. 2007); Ex. 84. The claims of Mr. Price, Mr. Dufrane and other test participants are likely barred by *res judicata*, which precludes this Court from generating common answers capable of resolving Plaintiffs' claims in one stroke. *See, e.g.*, *Sweet v. U.S.*, 687 F.2d 246 (8th Cir. 1982); *Stanley v. CIA*, 639 F.2d 1146 (5th Cir. 1981); *Lewis v. U.S. Navy*, 865 F. Supp. 294 (D.S.C. 1994); *Bishop v. U.S.*, 574 F. Supp. 66 (D.D.C. 1983); *Thornwell v. U.S.*, 471 F. Supp. 344 (D.D.C. 1979); *Schnurman v. U.S.*, 490 F. Supp. 429 (1980).

4. Plaintiffs' Alleged Constitutional Claims Provide No Basis for Class Certification

In addition to the secrecy oath and facial bias claims, which cannot be certified for the reasons stated above, Plaintiffs outline four putative constitutional claims: (1) a procedural due process claim, (2) a substantive due process claim, including the right to bodily integrity, (3) a claim premised on whether DoD violated its own rules and procedures, and (4) a claim related to class members' right of access to the courts. Dkt. 346 at 16. These claims do not support certification for several reasons. First, claims (2)-(4) are simply variants of their APA claims for notice and health care, which lack commonality and typicality for the reasons discussed above, or are recast challenges to the lawfulness of the test program, which the Court dismissed with prejudice.[47] Second, with respect to Plaintiffs' procedural due process challenge, as discussed above, Plaintiffs failed to allege such a claim in their 3AC. Indeed, even in their motion for class certification, they fail to provide any concrete articulation as to what "procedures" or even agency

---

(Footnote continued from previous page.)

associated with the United States." Priv. L. No. 96-77, 94 Stat. 3591 (1980).

[47] Plaintiffs' access to the court claim necessarily is ancillary to an underlying claim. *See Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002). Plaintiffs allege that secrecy oaths hindered the ability of veterans to discuss their participation with Swords. 3AC ¶ 158. This claim is uncertifiable for the reasons stated above; it also fails under Rule 23. The claim lacks numerosity, E. Roberts Tr. 118:24-119:3 (10-100 individuals unwilling to discuss their participation); is not common to the class, *id.*; and the putative representative's claims are not typical (as none of the class representatives has sought Swords' services), Ex. 20, Josephs Tr. 58:6-17; Ex. 24, Blazinski Tr. 68:8-18; Ex. 52, [redacted] Ex. 51, Dufrane Tr. 23:16-22; *see also Sprague*, 133 F.3d at 388.

action they are challenging. Accordingly, Plaintiffs have provided no basis to certify this unpled, amorphous claim.

C. Plaintiffs Cannot Meet the Requirements of Rule 23(b)

1. Common Issues Not Only Fail to Exist, But Also Fail to Predominate, and Thus Certification Under Rule 23(b)(2) Is Inappropriate

"Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment." *Wal-Mart*, 131 S. Ct. at 2557. Rule 23(b)(2) does not apply when class members "would be entitled to an individualized award of monetary damages." *Id.* Instead, class relief must be "indivisible," premised on "conduct . . . that . . . can be enjoined or declared unlawful only as to all of the class members or as to none." *Id.* Indeed, "the (b)(2) class is distinguished . . . by class cohesiveness . . . . Injuries remedied through (b)(2) actions are really group, as opposed to individual injuries." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 n. 8 (11th Cir. 1983); *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000) (stating that "Rule 23(b)(2) operates under the presumption that . . . the case will not depend on adjudication of facts particular to any subset of the class nor require a distinct remedies).

Plaintiffs are aware that, under 23(b)(2), certification is appropriate only when the requested relief applies to all members of the putative class, yet they have taken no steps to reconcile this recognition with the facts of this case. For instance, in Plaintiffs' proposed order, they ask this Court to certify a class finding that "DOD has a continuing duty to update members of the Proposed Class of exposures and medical effects as new information is learned or acquired." Dkt. 346-1 at 2. Plaintiffs, however, recite in great detail the evolution of DoD directives and regulations regarding medical research programs, from the 1953 directive, to the 1962 version of AR 70-25, to the 1990 iteration. Dkt. 346 at 6. Thus, even by Plaintiffs' count, there are at least three different sets of regulations and directives that have governed DoD's alleged notice duty for the members of the putative class, and there is also no such set of

regulations or directives for 1922 to 1952. Thus, a single injunction could provide relief to every member of the class, as the Court would have to adjudicate and provide relief dependent on the applicable legal framework. Similarly, Plaintiffs seek an "injunction forbidding DOD from refusing to provide Notice to all members of the Proposed Class." Dkt. 346-1 at 2. Yet, as discussed in more detail above, even Plaintiffs have acknowledged that at least 4,000 individuals have received some form of notice. Accordingly, to resolve this claim, the Court would need to determine whether those 4,000 individuals remained entitled to notice and, if so, whether and how it should differ from the notice provided to other test participants.[48] For these reasons, as well as those articulated above in Argument Part IV.B, this Court cannot fashion a single declaration that would apply equally to all members of the class.

Plaintiffs' claim for medical care fails for one additional reason, namely that it is one essentially for monetary damages. Rule 23(b)(2) does not apply when class members "would be entitled to an individualized award of monetary damages." *Wal-Mart*, 131 S. Ct. at 2557. As discussed above, Courts have ruled that a claim for medical care arising from military service is a claim for payable benefits and compensation. *Schism*, 316 F.3d at 1273; *see also Jaffee*, 592 F.2d at 715; *cf. Zinser*, 253 F.3d at 1195-96.

2. Precedent Establishes that Rule 23(b)(1)(A) Is Inapplicable

Finally, Plaintiffs' contention that the proposed class satisfies Rule 23(b)(1)(A) is contrary to binding precedent in this Circuit. Rule 23(b)(1)(A) provides for the maintenance of a class action where the prosecution of separate actions by individual class members would create a risk of "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct[.]" Fed. R. Civ. P. 23(b)(1)(A). "This danger exists in those situations in which the defendant by reason of the legal relations involved cannot as a practical matter pursue two different course of conduct," such as in the context of "actions to declare bond issues invalid, to fix the rights and duties of a riparian owner, and to determine a

[48] Plaintiffs' secrecy oath claim also illustrates why they cannot certify a class. Rule 23(b)(2) requires that Defendants have acted in the same manner as to the class as a whole, yet as described above, Plaintiffs cannot demonstrate that the CIA acted to administer secrecy oaths to even a single class member.

landowner's rights and duties respecting a claimed nuisance." *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 n.10 (9th Cir. 1976). The Ninth Circuit has stated that while "separate actions could reach inconsistent results and inconsistent resolutions of the same question of law [that] might establish 'incompatible standards of conduct' in the sense of different legal rules governing the same conduct," such differences were permissible because "(b)(1)(A) was not intended to permit class actions simply when separate actions would raise the same question of law." *McDonnell-Douglas Corp. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975).

Here, Plaintiffs seek to invoke Rule 23(b)(1)(A) on the very same basis that has been rejected by the Ninth Circuit. Plaintiffs' sole contention with regard to the applicability of Rule 23(b)(1)(A) is that there is a risk of varying "determination[s] by a court that any plaintiff's rights were violated under federal law, or that Defendants owed a duty to any plaintiff." Dkt. 346 at 25. This rationale for a Rule 23(b)(1)(A) class was expressly rejected by *McDonnell-Douglas*. Furthermore, as discussed above, the Ninth Circuit has ruled that a claim seeking service connection for an ailment or entitlement to ongoing medical care is essentially one for damages, and such claims are not appropriate for certification under Rule 23(b)(1)(A). *See Zinser*, 253 F.3d at 1194-95. Plaintiffs' claim for class certification under Rule 23(b)(1)(A) should be denied.

CONCLUSION

For the reasons stated above, Defendants respectfully request that this Court deny Plaintiffs' Motion for Class Certification.

Dated: March 8, 2012

Respectfully submitted,

IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director

/s/ Joshua E. Gardner
JOSHUA E. GARDNER

KIMBERLY L. HERB
LILY SARA FAREL
BRIGHAM JOHN BOWEN
JUDSON O. LITTLETON
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-8356
Facsimile: (202) 616-8470
E-mail: Joshua.E.Gardner@usdoj.gov

Attorneys for Defendants