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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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Hearing Date: November 12, 2009
Time: 2:00 p.m.
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INTRODUCTION

This is a class action for declaratory and injunctive relief brought on behalf of veterans who as soldiers were used as guinea pigs in top-secret government programs to test chemical and biological weapons and mind control. Having been victimized, they now have been discarded, and left to die by the country they enlisted to serve. This action is led by two prominent non-profit organizations committed to providing services to veterans — Vietnam Veterans of America ("VVA") and Swords to Plowshares: Veterans Rights Organization ("Swords") — both of whom are named as putative class representatives. In addition, Plaintiffs include six individual veterans who were exposed to multiple toxic substances — in the case of Bruce Price, both drugs and some sort of septal implant — and have suffered adverse health consequences as a result.

STATEMENT OF FACTS

The material facts alleged in a complaint are of critical importance because the Court must presume such facts to be true for purposes of a motion to dismiss. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). For that reason alone, it is peculiar that Defendants' Motion to Dismiss ("Motion"), nowhere recites or analyzes the facts alleged in the First Amended Complaint ("Complaint"), even when those facts are critical to the analysis of the issues. For example, Defendants totally ignore the factual allegations concerning the doctrine of equitable estoppel and tolling of the statute of limitations. More importantly, the Motion misrepresents the Complaint's allegations and the claims for relief in numerous material respects, as explained below.[1] In other cases, Defendants assume facts not alleged in the Complaint and which have no supported basis even for a motion for summary judgment, let alone a motion to dismiss. With this context, Plaintiffs provide the following basic summary of the allegations in the Complaint.

This case arises out of top-secret government programs to test hundreds of biological and chemical agents on "volunteers" drawn mainly from the U.S. Army. In violation of a series of

[1] For example, Defendants claim that the Complaint seeks contractual relief — it does not — and Defendants characterize Swords as a *membership* organization and analyzes the standing issues accordingly. (*See* Mot. 7-8, 14-15.) In fact, the Complaint alleges that Swords is a *service* organization, which is governed by different standing requirements. (Compl. ¶ 25.)

government directives and the Nuremberg Code, the soldiers never were given the opportunity to provide informed consent. (Compl. ¶¶ 112-23.) At the same time, the "volunteers" were forced, often before they even arrived at the testing sites, to sign a general consent form that did not even identify the substances or doses to which the "volunteers" would be exposed. (*Id*. ¶¶ 152-63.) In order to secure the soldiers' "consent," Defendants in many cases falsely represented that the purpose of the experiments was to test the design of new gas masks and protective equipment, when the true purpose was to test the effects of chemical and biological agents on humans for intelligence purposes and to assess the military value of such agents for offensive and defensive purposes. (*Id*. ¶¶ 3, 41, 51, 61, 71.) The "volunteers" were sworn to secrecy under threat of court-martial because Defendants feared adverse publicity and lawsuits. The secrecy mandate was eventually relaxed in 2006, when some "volunteers" were notified that they could disclose some details of the testing to their doctors for purposes of medical treatment. (*Id*. ¶ 151.)

Defendants also promised that "volunteers" would receive health care for any medical problems related to their exposures, an obligation codified in Army regulations. (*Id*. ¶¶ 56, 64.) Yet, Defendants have not fulfilled this duty, although some Plaintiffs have received health care from a third party, the Department of Veterans Affairs ("DVA"), based upon service-connected disabilities.[2] As a further inducement to participate, Defendants promised that "volunteers" would have four-day work weeks, could wear civilian clothes, would not have to perform KP duty, and would receive medals. (*See, e.g.*, *id*. ¶¶ 51-52, 61, 71.) Once there, soldiers (like Bruce Price) who balked at particular tests were threatened with bad write-ups. (*Id*. ¶ 28.)

Permission to use human "volunteers" initially was granted in 1943 with respect to one substance only — mustard gas. (*Id*. ¶¶ 2, 101.) In the early 1950's, however, emboldened by the

[2] It is important to distinguish between a lawsuit and a DVA claim for service-connected disabilities. In a DVA claim, a veteran need not prove that his disease or condition was caused by some event that transpired during service or an act of negligence or other tortious conduct. Rather, a veteran need only establish that the disease or condition originated or became manifest during service. *See* 38 C.F.R. § 3.303; *Cotant v. Principi*, 17 Vet. App. 116, 132-33 (2003). The DVA's claim form requires veterans to list the places where they served in the armed forces. Thus, Defendants' argument that the Individual Plaintiffs knew of the claims they now assert when they identified Edgewood Arsenal as part of their service reflects an erroneous view of DVA disability compensation.

protection offered by the Supreme Court's opinion in *Feres v. United States*, 340 U.S. 135 (1950), Defendants dramatically expanded their research into literally hundreds of dangerous biological and chemical agents. (*Id.* ¶¶ 3-4, 103, 107.) In 1953, Defendants promulgated the Wilson Memorandum to bring the United States into compliance with the 1947 Nuremberg Code on medical research. (*Id.* ¶¶ 112-13.) The Wilson Memorandum mandated numerous protective measures for human research subjects, including: (1) requiring advance approval for each new experiment (*id.* ¶ 112(g)); (2) requiring voluntary, full, informed consent for each subject (*id.* ¶ 112(a)); and (3) permitting each test subject to terminate the tests at any time (*id.* ¶ 112(f)).

Defendants, however, never followed the rules they adopted to govern the use of soldiers as guinea pigs; indeed, the government initially classified the Wilson Memorandum as "top secret," thereby preventing most program personnel from even learning about, let alone following, its requirements. Later iterations of the Wilson Memorandum, including executive orders, the Belmont Report, Department of Defense ("DOD") directives, and Army regulations, culminating in the so-called "Common Rule," included a series of similar requirements, which also were not followed. (*Id.* ¶¶ 114-23.) As a result, thousands of service personnel improperly received large doses of hundreds of different toxic agents, including sarin, V-gas, nerve agents, psychochemicals, tranquilizers, irritants, anticholinesterase chemicals, barbiturates, biochemicals, nettle agents, narcotic antagonists, amphetamines, and mind control agents. (*Id.* ¶¶ 3-4, 8.)

Defendants used code names for each subproject under the umbrella of project code names such as MKULTRA, MKSEARCH, and PANDORA, and Defendants changed the code names frequently so they could deny that a particular program was ongoing. (*Id.* ¶ 140.) After word leaked out about the human experiments, Defendants mounted an organized effort to destroy documents related to the research programs, including all CIA documents and individual medical files. (*Id.* ¶¶ 135-36.) As a result, few records concerning the substances tested and results have been made available. During testimony given in investigative proceedings before Congress in 1975 and 1977, the CIA Director promised to locate and assist victims of the human experimentation program. (*Id.* ¶ 11.) And a 1978 DOJ opinion letter concluded that Defendants had a duty to warn participants of the dangers to which they had been exposed. (*Id.* ¶ 12, Ex. A.)

Defendants, however, adopted search criteria that eliminated all living subjects from their search obligation, such as assuming that only "unwitting" subjects had to be notified, which excluded everyone who had signed a consent form, and by eliminating instances in which Defendants had a secondary role, such as financing or developing the sub-projects. (*Id*. ¶ 13.) Similarly, Defendants have not disclosed to the putative class members the known or suspected health effects of their exposures to the toxic chemicals or biological substances. (*Id*. ¶¶ 14, 16.)[3]

ARGUMENT

In their persistence to avoid the mandates required of them by their very own regulations, let alone constitutional and international law, Defendants' Motion seeks to deprive Plaintiffs of their day in court. Defendants' arguments — each of which fails — fall into four basic categories. *First*, Defendants contend that the Court lacks subject matter jurisdiction to entertain any of Plaintiffs' claims, arguing that sovereign immunity and the statute of limitations bars certain claims and that others are not justiciable. *Second*, Defendants argue that the Court should exercise its discretion under the Declaratory Judgment Act, 28 U.S.C. § 2201 ("DJA"), and decline to hear Plaintiffs' claims for declaratory relief. *Third*, Defendants contend that some, but not all, of Plaintiffs' claims fail to state a claim under Rule 12(b)(6). *Finally*, Defendants claim that venue does not lie in this district and that dismissal is warranted. As explained below, none of these contentions warrant a ruling in Defendants' favor.

I. THIS COURT HAS SUBJECT MATTER JURISDICTION.

Defendants argue that this Court lacks subject matter jurisdiction because: (1) Plaintiffs' claims are barred by the doctrine of sovereign immunity; (2) Plaintiffs' claims are time-barred; and (3) Plaintiffs' claims are not justiciable. Each argument fails. The sovereign immunity challenge fundamentally miscasts Plaintiffs' Administrative Procedure Act ("APA") claims and

[3] Since 1953, Defendants' own regulations have recognized their duty to provide health care; Defendants' duty to warn test subjects has been recognized for decades and also is codified in Defendants' regulations. (Compl. ¶¶ 15, 118-21.) It now has been over 30 years since Defendants embarked on their effort to locate and notify the victims of Defendants' gruesome experiments. Defendants' description of their efforts to identify and locate victims as ongoing rings hollow: the snail's pace notification program will not even result in an initial registry of participants until 2011, at which time it will have been pending for nearly 35 years. (*Id*. ¶ 13.)

the scope of the APA's sovereign immunity waiver. The timeliness challenge improperly asserts that the six-year statute of limitations is jurisdictional when it is not, and completely ignores the Complaint's tolling allegations. The justiciability challenge misunderstands the scope and purpose of the DJA, mischaracterizes Plaintiffs' standing allegations, and improperly asserts that Plaintiffs seek only an advisory opinion. In short, the Court has jurisdiction to hear this action.

A. Defendants Misunderstand Plaintiffs' Claims And Misinterpret The APA In Arguing That Plaintiffs' Claims Are Barred By Sovereign Immunity.

Defendants argue that the APA's waiver of sovereign immunity does not apply to Plaintiffs' claims for medical care, notification and documents, or to Plaintiffs' request for a declaration that the *Feres* doctrine is unconstitutional. (Mot. 7-9.) This argument rests on a fundamental mischaracterization of Plaintiffs' claims and a misinterpretation of the APA. The APA permits parties to challenge agency action *or inaction*. The APA also broadly waives sovereign immunity for suits seeking non-monetary relief. Here, Plaintiffs properly invoke the APA as a basis for some claims and as providing a waiver of sovereign immunity for all claims.

1. The APA Waives Sovereign Immunity For Challenges To Agency Action Unlawfully Withheld Or Unreasonably Delayed.

Plaintiffs challenge Defendants' *failure to comply* with their legal duties, *see* Compl. ¶ 20, not "final agency action," as asserted by Defendants. (Mot. 7-8.) Under § 706(1) of the APA, a court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); s*ee, e.g.*, *Liang v. Attorney General*, No. C-07-2349, 2007 WL 3225441, at *4 (N.D. Cal. Oct. 30, 2007).[4] The Complaint identifies numerous clear and non-discretionary duties that Defendants either have failed to fulfill or have failed to fulfill within a reasonable time. *See Yu v. Chertoff*, No. C-06-7878, 2007 WL 1742850, at *3 (N.D. Cal. June 14, 2007) (explaining that APA requires agencies to conclude matters "within a reasonable time").

[4] Section 702 also permits judicial review of "agency action," which includes "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act*." 5 U.S.C. §§ 702 & 551(13) (emphasis added). This definition "undoubtedly has a broad sweep." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004).

For example, since at least 1953, Defendants' policies and regulations governing their human testing programs provided that "[m]edical treatment and hospitalization *will be provided*" for test subjects. (Compl. ¶ 118.) The requirement to provide medical care was memorialized in successive iterations of Defendants' regulations, including in the 1962 version of Army Regulation 70-25. (*Id.* ¶ 121 ("medical treatment and hospitalization *will be provided*").) The current version of that regulation continues to recognize this duty: it provides that test subjects are entitled to "all necessary medical care for injury or disease that is a proximate result of their participation in research." Army Reg. 70-25, *Use of Volunteers as Subjects of Research*, Ch. 3-1(k) (1990) ("AR 70-25"). It also requires medical follow up on research subjects "to ensure that any long-range problems are detected and treated." *Id.* at Ch. 2-5(j). Defendants unlawfully have failed to comply with these obligatory duties to provide Plaintiffs (and other test subjects) with required medical care and follow up — care and follow up which Defendants are singularly qualified to provide. (Compl. ¶¶ 14, 16, 88.)

Defendants also have failed to comply with their duty to provide Plaintiffs with key information concerning the testing programs. Defendants have long recognized their duty to identify and warn the test subjects about the substances to which they were exposed and the risks involved with their participation in research. (*Id.* ¶¶ 11-15.) This duty was memorialized in Defendants' internal memoranda, in the CIA's promises to Congress, and today is cemented as an obligatory duty in Defendants' own regulations. (*Id.*) Those regulations explicitly state that the duty to warn is an *obligation* that "exists even after the individual volunteer has completed his or her participation in research." (*Id.* ¶ 15 (quoting AR 70-25).) Despite these clear mandates, Defendants have failed to fulfill their duty to identify test subjects and to provide information concerning health risks caused by Defendants' testing programs. (*Id.* ¶¶ 14, 16, 18, 88.)

There is no question that the waiver of sovereign immunity in § 702 of the APA applies to Plaintiffs' claims under § 706(1), which seek to compel Defendants' compliance with their legal duties to Plaintiffs and other test subjects.[5] Sovereign immunity does not bar these claims.

[5] Section 702 explicitly waives sovereign immunity for claims asserting that an agency "failed to act." 5 U.S.C. § 702.

Defendants suggest that Plaintiffs' claim for medical follow up and care is "excluded from the APA's waiver of sovereign immunity" because it is based on "an alleged contractual obligation of the United States." (Mot. 7-8.) Defendants again misconstrue the Complaint: Plaintiffs' claims invoke the APA based on Defendants' failure to meet their obligatory duties; they are not based on Defendants' "contractual" promises at the time of the testing. Thus, the Tucker Act's prohibition on "declaratory and injunctive relief" for contract claims is inapposite.

Defendants also argue that, because Plaintiffs do not challenge "final agency action," Plaintiffs' request that the Court compel Defendants to identify and provide information to test subjects does not qualify for the APA's sovereign immunity waiver. (Mot. 8.) Once again, Defendants mischaracterize Plaintiffs' claim: it is based on Defendants' *failure to act* in accordance with their legal duties, not a challenge to Defendants' final actions. For that reason, Defendants' assertion that this claim is insufficient because Plaintiffs do not "seek review of an agency's action" under the Freedom of Information Act ("FOIA") or the Privacy Act, *see* Mot. 8-9, must fail. Moreover, because Plaintiffs' § 706(1) claims are not based on Defendants' failure to meet deadlines under the Privacy Act or FOIA, those statutes do not provide an "adequate remedy in court" precluding review under the APA. *See, e.g., Radack v. U.S. Dep't of Justice*, 402 F. Supp. 2d 99, 104 (D.D.C. 2005) (Privacy Act not adequate alternative remedy for APA claim that agency violated internal policies); *Nat'l Ass'n of Waterfront Employers v. Chao*, 587 F. Supp. 2d 90, 98 (D.D.C. 2008) (FOIA not adequate alternative remedy where it does not address plaintiffs' claims); *see also Laroche v. SEC*, No. C. 05-4760, 2006 WL 2868972, at *4 (N.D. Cal. Oct. 6, 2006) (allegation that agency violated APA by missing FOIA deadlines).[6]

2. The APA's Sovereign Immunity Waiver Covers Plaintiffs' Constitutional Claims.

Defendants argue that Plaintiffs' constitutional challenge to *Feres* is barred by sovereign immunity because Plaintiffs do not challenge "final agency action." (Mot. 9.) That argument,

[6] Defendants say they are "in the process of constructing a registry of the veterans" to comply with the Bob Stump Act. (Mot. 5, 8.) Although Defendants' acknowledgement that they have a duty to identify test subjects is noteworthy, their recent efforts to satisfy the Stump Act do not obviate Defendants' other non-discretionary duties to provide notice, warning, and health care.

however, misleadingly omits on-point Ninth Circuit authority establishing that the APA's waiver of sovereign immunity broadly applies to constitutional claims seeking non-monetary relief — regardless of whether those claims satisfy the substantive elements of the APA. *See Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989).

In 1976, Congress amended the APA to explicitly waive sovereign immunity for suits seeking "relief other than money damages." *See* 5 U.S.C. § 702. "[I]t is undisputed that the 1976 amendment to § 702 was intended to broaden the avenues for judicial review of agency action" and to remove sovereign immunity as a "technical" obstacle to accessing federal court. *Bowen v. Mass.*, 487 U.S. 879, 891-92, 896 (1988). The APA's sovereign immunity waiver applies broadly to all claims for equitable relief. *See Presbyterian Church*, 870 F.2d at 524; *see also Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 793 (9th Cir. 1986).

Plaintiffs' constitutional claims need not satisfy the substantive elements of the APA, thus Plaintiffs need not allege "final agency action," as Defendants argue. *See, e.g.*, *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 187 (D.C. Cir. 2006) ("[T]he waiver [in § 702] is not limited to APA cases -- and hence [] it applies regardless of whether the elements of an APA cause of action are satisfied."). As the Ninth Circuit explained in *Presbyterian Church*:

> [O]n its face, the 1976 amendment to § 702 waives sovereign immunity in all actions seeking relief from official misconduct except for money damages. The [government agency's] attempt to restrict the waiver of sovereign immunity to actions challenging 'agency action' as technically defined in § 551(13) offends the plain meaning of the amendment.

870 F.2d at 525. Defendants ignore *Presbyterian Church*, the most relevant case, and instead assert that another case — *Gallo Cattle Co. v. U.S. Department of Agriculture*, 159 F.3d 1194 (9th Cir. 1998) — requires Plaintiffs to meet the APA's substantive requirements to benefit from § 702's sovereign immunity waiver. Defendants' analysis is faulty.[7]

[7] Other Circuit courts, including the D.C. Circuit, agree with *Presbyterian Church*'s interpretation of the expansive scope of § 702's sovereign immunity waiver. *See, e.g.*, *Trudeau*, 456 F.3d at 187 (§ 702 waiver applies "regardless of whether [the challenged act] constitutes 'final agency action'"); *Red Lake Bank of Chippewa Indians. v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) (§ 702 waiver "is not dependent on application of the procedures and review standards of the APA"); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549-50 (10th Cir. 2001); *Johnsrud v. Carter*, 620 F.2d 29, 30-31 (3d Cir. 1980).

In *Presbyterian Church*, which involved only constitutional claims, the Ninth Circuit held that § 702 waived sovereign immunity for the churches' claims for non-monetary relief:

> It would be anomalous -- inexplicable in terms of the structure of the APA, and in evident conflict with the plain language and legislative history of the amendment to § 702 -- to read § 702 as preserving sovereign immunity in claims for equitable relief against government investigations alleged to violate First and Fourth Amendment rights.

Id. at 526. The *Gallo Cattle* panel took a position that might seem, at first glance, at odds with *Presbyterian Church*, stating that "the APA's waiver of sovereign immunity contains several limitations" including "§ 704, which provides that only 'agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review.'" *Gallo Cattle*, 159 F.3d at 1198 (quoting 5 U.S.C. § 704). But *Gallo Cattle*, unlike *Presbyterian Church*, involved a substantive APA claim, *not* a constitutional claim; it did not need to distinguish between the APA's sovereign immunity waiver and the elements for a claim under the APA.[8] Defendants also cite *Lujan v. Defenders of Wildlife Federation*, 497 U.S. 871 (1990), but *Lujan* merely discusses the requirements for a claim under the APA, not the scope or application of § 702's sovereign immunity waiver. *Id.* at 882.

Here, Defendants fail to recognize the distinction between Plaintiffs' constitutional claim challenging the *Feres* doctrine and Plaintiffs' claims brought under the APA. Straying from *Presbyterian Church* would render § 702's sovereign immunity waiver ineffective for a wide class of constitutional claims, and would be inconsistent with the broad waiver Congress intended in § 702. For these reasons, Plaintiffs need not challenge "final agency action" to rely on § 702's sovereign immunity waiver, and Plaintiffs' constitutional claim regarding the *Feres* doctrine is not barred by sovereign immunity.[9]

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[8] In *Gros Ventre Tribe v. United States*, 469 F.3d 801, 809 (9th Cir. 2006), the court noted in dicta that it saw "no way to distinguish" *Presbyterian Church* from *Gallo Cattle*, but the cases are reconciled by recognizing that § 702 waives sovereign immunity for *constitutional* claims that do not state an independent APA claim. *But see Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1058 (N.D. Cal. 2008) ("plaintiffs must challenge an 'agency action' to establish a valid waiver of sovereign immunity"), *appeal pending*, No. 08-16728 (9th Cir. filed July 25, 2008).

[9] Defendants do not challenge Plaintiffs' other constitutional claims (such as the request for a declaration that Defendants' testing programs violated Plaintiffs' constitutional rights) on sovereign immunity grounds. (Mot. 7:16-19.) Nor could they under *Presbyterian Church.*

B. The Statute Of Limitations Is Not A Bar To Any Of Plaintiffs Claims, All Of Which Are Limited To Declaratory And Injunctive Relief.

Defendants argue that the Court lacks subject matter jurisdiction because Plaintiffs' claims are outside the statue of limitations found in 28 U.S.C. § 2401(a). Therefore, Defendants urge the Court to consider extrinsic evidence concerning four of the Individual Plaintiffs and to dismiss the Complaint pursuant to Rule 12(b)(1). Defendants are wrong on the law and the result they seek is procedurally improper. Section 2401(a) is *not* jurisdictional in nature. Because the Complaint alleges facts demonstrating that Plaintiffs' claims are timely under principles of equitable tolling and the continuing violations doctrine, and because § 2401(a) does not apply to Plaintiffs' APA claims based on Defendants' failures to act, the Court should reject Defendants' invitation to prematurely dismiss this action on statute of limitations grounds.

1. Section 2401(a) Is Not Jurisdictional And Defendants' Motion To Dismiss Under Rule 12(b)(1) On Statute Of Limitations Grounds Is Improper.

The Ninth Circuit squarely has held "that § 2401(a)'s six-year statute of limitations is not jurisdictional." *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997). Defendants, however, ask the Court to disregard *Cedars-Sinai* based on the Supreme Court's holding in *John R. Sand & Gravel Co. v. U.S.*, 128 S. Ct. 750 (2008), that a *different* statute of limitations (28 U.S.C. § 2501) with "similar" language is jurisdictional in nature. (Mot. 10 n.8.) The Court should reject the request to disregard the Ninth Circuit's holding in *Cedars-Sinai*.[10]

As this court recently recognized, it is bound to follow Ninth Circuit precedent unless a subsequent Supreme Court decision is "clearly irreconcilable" with the Ninth Circuit's decision. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 632 F. Supp. 2d. 968, 975-76, 978 (N.D. Cal. 2009). *Sand* is not at all irreconcilable with *Cedars-Sinai* — to the contrary, numerous courts in this District already have rejected Defendants' argument that *Cedars-Sinai* is no longer valid after *Sand*. *See Sierra Club v. Johnson*, No. C 08-01409, 2009 WL 482248, at *9 (N.D.

[10] If the Court decides to reject *Cedars-Sinai* and to consider Defendants' statute of limitations argument under Rule 12(b)(1), Plaintiffs request the opportunity to present evidence refuting the declarations offered by Defendants with respect to four of the six Individual Plaintiffs.

Cal. Feb. 25, 2009) (Alsup, J.) ("[t]his order declines to find that *Sand* alters the Ninth Circuit's pronouncement that Section 2401(a) is not jurisdictional"); *Public Citizen, Inc. v. Mukasey*, No. C 08-0833, 2008 WL 4532540, at *8 (N.D. Cal. Oct. 9, 2008) (Patel, J.) (rejecting argument because "*Sand* is distinguishable on multiple grounds"); *see also Crosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n*, No. 3:06-cv-00657, 2008 WL 5111036, at *5 (D. Nev. Dec. 3, 2008) ("this court declines to read [*Sand*] as altering the Ninth Circuit's previous conclusion that § 2401(a) is not jurisdictional"). As those courts recognized, *Sand* concerned only a "special statute of limitations governing the Court of Federal Claims." *Public Citizen*, 2008 WL 4532540, at *8; *Crosby Lodge*, 2008 WL 5111036, at *5. As such, *Sand* provides no basis to upset the Ninth Circuit's teaching that because "§ 2401(a) makes no mention of jurisdiction" it "erects only a procedural bar" and is *not* jurisdictional. *Cedars-Sinai*, 125 F.3d at 770; *see Citizens for Better Forestry*, 632 F. Supp. 2d at 979 (following Ninth Circuit even though subsequent Supreme Court case "cast[] doubt" on Ninth Circuit holding, because cases were not "clearly irreconcilable").[11]

Because the timeliness of Plaintiffs' claims under § 2401(a) is not a jurisdictional question, it must be "raised through a 12(b)(6) motion to dismiss for failure to state a claim, not a Rule 12(b)(1) motion to dismiss for lack of jurisdiction." *See Supermail Cargo, Inc. v. U.S.*, 68 F.3d 1204, 1206 n.2 (9th Cir. 1995). "A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by the applicable statute of limitations only when 'the running of the statute is apparent on the face of the complaint.'" *Von Saher v. Norton Simon Museum of Art*, __ F.3d __, 2009 WL 2516336, at *13 (9th Cir. 2009) (quoting *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006)). "[A] complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Id.* (citing *Supermail*, 68 F.3d at 1206). Moreover, the Court cannot consider matters outside the pleadings without converting the motion into one for summary judgment, and it must disregard

[11] Moreover, the decision in *Sand* was grounded in *stare decisis*; in reviewing the statute governing actions in the Court of Claims, the court declined to overrule longstanding cases treating that statute of limitations as jurisdictional. *Sand*, 128 S. Ct. at 754-55. *Stare decisis* cuts the other way here: the Ninth Circuit has held that § 2401(a) is *not* jurisdictional in nature.

the declarations submitted in support of Defendants' Motion and rely on the Complaint's allegations. *See, e.g.*, Fed. R. Civ. P. 12(d); *Von Saher*, 2009 WL 2516336, at *13 ("the Museum fails to point to any authority which holds that a motion to dismiss based on a statute of limitations may be granted on the basis of facts judicially noticed, rather than facts apparent on the face of the complaint").[12]

2. Plaintiffs' Claims Under the Administrative Procedure Act Survive Any Statute of Limitations Attack.

Plaintiffs' APA claims are grounded in § 706(1) based on Defendants' failures to act. *See supra* at 5-7. Numerous courts have held that § 2401(a) *does not apply* to claims based on an agency's failure to act. *See, e.g., Wilderness Soc'y v. Norton*, 434 F.3d 584, 588 (D.C. Cir. 2006) ("this court has repeatedly refused to hold that actions seeking relief under 5 U.S.C. § 706(1) to 'compel agency action unlawfully withheld or unreasonably delayed' are time-barred if initiated more than six years after an agency fails to meet a statutory deadline"); *Am. Canoe Ass'n v. U.S. E.P.A.*, 30 F. Supp. 2d 908, 925 (E.D. Va.1998) ("application of a statute of limitations to a claim of unreasonable delay is grossly inappropriate"); *see also Inst. for Wildlife Protection v. U.S. Fish & Wildlife Serv.*, No. 07-CV-358-PK, 2007 WL 4117978, at *6 (D. Or. Nov. 16, 2007) (collecting cases). Otherwise, an agency could "avoid judicial oversight by merely delaying too long," and § 2401(a)'s statute of limitations would act to eviscerate the agency's ongoing obligations. *See Public Citizen*, 2008 WL 4532540, at *9-10; *Inst. for Wildlife Protection*, 2007 WL 4117978, at *5. Accordingly, even if the statute of limitations in § 2401(a) is

[12] The procedural posture is not a distinction without a difference: all of the cases Defendants cite in support of their statute of limitations argument are inapposite because they were decided on an evidentiary record rather than on the pleadings. *See DirectTV, Inc. v. Webb*, 545 F.3d 837, 852-53 (9th Cir. 2008) (deciding when claim accrued based on district court's findings following bench trial); *Bishop v. United States*, 574 F. Supp. 66, 66-67 (D.D.C. 1983) (granting motion to dismiss or in alternative for summary judgment based on exhibits made part of record and because "the undisputed facts" made clear that plaintiff knew of harm and "who inflicted the injury"); *Sweet v. United States*, 528 F. Supp. 1068, 1077 (D.S.D. 1981) (entering judgment after considering extensive testimony and issuing findings of fact and conclusions of law), *aff'd*, 687 F.2d 246 (8th Cir. 1982); *Kronisch v. United States*, 150 F.3d 112, 116 (2d Cir. 1998) (reviewing grant of summary judgment).

jurisdictional — and it is not — it would not apply to bar Plaintiffs' APA claims brought under § 706(1) to compel agency action unlawfully withheld or unreasonably delayed.

In addition, "[t]he continuing violations doctrine serves to bar the application of the statute of limitations defense when a single violation exists that is 'continuing' in nature." *Public Citizen*, 2008 WL 4532540, at *9-10. "Under the continuing violations doctrine, the court can consider as timely all relevant violations including those that would otherwise be time barred." *Id.*; *see Sierra Club*, 2009 WL 482248, at *9 (same). For Plaintiffs' §706(1) claims based on Defendants' failures to comply with their duty to warn and to provide health care, each day that Defendants fail to act constitutes a new and separate violation of those duties. Therefore, to the extent that the Court determines that § 2401(a)'s statute of limitations applies to Plaintiffs' § 706(1) claims, those claims are not time barred. *See, e.g.*, *Sierra Club*, 2009 WL 482248, at *9 ("failure to publish" required notice "is a continuing violation, and thus the action is timely"); *Public Citizen*, 2008 WL 4532540, at *10 ("[F]ailure to perform a nondiscretionary duty is a continuing violation. The present action is therefore timely.").

3. The Statute of Limitations Is Tolled For Plaintiffs' Other Claims.

Because § 2401(a) is not jurisdictional, its statute of limitations is subject to tolling. *See, e.g.*, *Crosby Lodge*, 2008 WL 5111036, at *5; *see also Sand*, 552 U.S. at 753 (recognizing that non-jurisdictional statute of limitations "typically permit courts to toll the limitations period in light of special equitable considerations"). Plaintiffs here have alleged sufficient facts (which must be accepted as true) showing that this is exactly the type of case in which the statute of limitations should not bar Plaintiffs' claims, under at least two theories.

Equitable Tolling. Many of the test subjects, including the Individual Plaintiffs, were duped into "volunteering" at Edgewood for "non-hazardous" tests of chemical warfare equipment and instead were secretly given nerve gas, psychochemicals, incapacitating agents and hundreds of other drugs. (*E.g.*, Compl. ¶¶ 51, 61, 152, 154.) Defendants knew of health problems linked directly to the testing but withheld that information from the "volunteers." (*Id.* ¶ 153.) And, with the specific intent to cover their tracks after the fact, Defendants destroyed evidence regarding the programs. (*See, e.g., id.* ¶ 136.) Courts have consistently applied equitable tolling under similar

circumstances. *See, e.g., Bowen v. New York*, 476 U.S. 467, 481-12 (1986) (applying equitable tolling against government where secretive policy prevented plaintiffs from learning of violation of their rights); *Hohri v. U.S.*, 782 F.2d 227, 250-52 (D.C. Cir. 1986), *judgment vacated on other grounds*, 482 U.S. 64 (1987) (applying equitable tolling where government fraudulently concealed facts concerning military necessity for Japanese internment program).

Equitable Estoppel. Defendants forced the Individual Plaintiffs and other test subjects to take secrecy oaths, which not only interfered with the subjects' ability to obtain health care, but also to seek redress or assert claims over time. (Compl. ¶¶ 48, 57, 67, 148-50.) Indeed, Defendants threatened to punish test subjects who disclosed information related to the testing. (*Id*. ¶¶ 42, 48, 64, 67.) When test subjects, including the Individual Plaintiffs, attempted to learn more about the experiments and their exposure, Defendants intentionally redacted and withheld records, in some cases denying that the test subjects were exposed to harmful agents. (*Id*. ¶¶ 17, 68.) The CIA even promised Congress that it would locate and assist the subjects of Defendants' testing programs. (*Id*. ¶ 11-13.) Indeed, Defendants' own regulations required them to do so. Yet, Defendants' victims — over thirty years later — still are waiting (and dying) as Defendants continue to fail to meet their obligations — even while Defendants claim to be "working on it." (*Id.* ¶ 13; Mot. 5-8.) Equitable estoppel exists to prevent the government from benefitting from such affirmative misconduct; the Court should not permit Defendants to claim benefit of the statute of limitations to avoid Plaintiffs' claims here. *See, e.g., Ramirez-Carlo v. U.S.*, 496 F.3d 41, 48-50 (1st Cir. 2007) (applying equitable estoppel to toll plaintiff's FTCA claim based on government's misrepresentations); *Watkins v.U.S. Army*, 875 F.2d 699, 707-11 (9th Cir. 1989) (equitably estopping government based on misrepresentations to plaintiff in repeated violation of regulations).[13]

[13] Defendants' statute of limitations cases are readily distinguishable; none considered the impact of secrecy oaths or addressed the doctrines of equitable tolling or equitable estoppel. Moreover, given the fact-laden nature of the timeliness inquiry, each decided key statute of limitations issues (such as accrual) based upon an evidentiary record rather than on the pleadings. *See supra* at n. 12. The Court should permit development of the record on these issues here as well.

C. Plaintiffs' Claims Are Justiciable.

Defendants argue that certain of Plaintiffs' claims are non-justiciable because: (1) Claim One, which seeks declaratory and injunctive relief concerning tests that are not ongoing, is not redressable; (2) the Organizational Plaintiffs lack standing to Pursue Claims One and Two; and (3) Claim Three seeks an improper advisory opinion under the DJA. Defendants' arguments do not apply to Plaintiffs' APA claims under § 706(1). Even with respect to Plaintiffs' remaining claims, however, Defendants' arguments have no merit.

1. Plaintiffs' Claims for Declaratory Relief Concerning Defendants' Testing Programs Are Redressable.

Defendants claim that because the tests at issue "are not ongoing," neither an injunction nor a declaration that the tests violated Plaintiffs' constitutional rights can "redress any of the injuries that Plaintiffs allege." (Mot. 13-14.)[14] Defendants take far too narrow a view of the purpose and reach of the DJA. The Ninth Circuit has made clear that declaratory judgment delineates important rights and responsibilities and is "a message not only to the parties but also to the public and has significant educational and lasting importance." *Bilbrey v. Brown*, 738 F.2d 1462, 1471 (9th Cir. 1984). For that reason, declaratory relief can be appropriate even where it concerns past actions for which no other liability attaches. *Id.*; *Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1112-13 (9th Cir. 1987).

In *Bilbrey*, for example, the parents of two students sought damages for allegedly improper searches by school officials. The plaintiffs also sought a declaration that the searches were unconstitutional. The district court held that because damages were barred by qualified immunity, a declaratory judgment "would serve no useful purpose." 738 F.2d at 1470. Even though the searches were in the past and the two students no longer attended the school, the Ninth Circuit reversed, holding that that it was improper for the district court to deny declaratory relief. *Id.* at 1471. As the Ninth Circuit has explained, the district court in *Bilbrey* improperly examined the "usefulness of the declaration only from the defendants' point of view" and "ignored the fact

[14] Defendants offer no declaration to support their factual assertion that the testing has ended.

that plaintiffs had been wronged and deserved to have their position vindicated even if damages were unavailable." *Zolin*, 812 F.2d at 1112-13. In addition, a declaration was necessary to further "the public-education function that a declaration can serve." *Id.* at 1113. Other courts have recognized that declaratory relief is appropriate "as a vindication of plaintiffs' position" and as a message "to the public [with] significant educational and lasting importance." *Id.*; *Bilbrey*, 738 F.2d at 1471; *ICR Graduate Sch. v. Honig*, 758 F. Supp. 1350, 1356 (S.D. Cal. 1991).

Here, Defendants' testing programs flew in the face of principles of informed consent, violated due process, Plaintiffs' constitutional rights, Defendants' own directives, and international law. (*See, e.g.*, Compl. ¶¶ 10, 174-80.) Even if the Court assumes that improper testing programs have ceased, Plaintiffs are entitled to vindication through a declaration that the testing programs violated Plaintiffs' constitutional rights and were contrary to Defendants' regulations and principles of international law. *See, e.g.*, *Bilbrey*, 738 F.2d at 1471. Such a declaration also will further educate the public about this dark chapter in America's history and of the core principles underlying informed consent, resulting in a significant step along the road of protecting constitutional rights. *See id.*; *Zolin*, 812 F.2d at 1113; *ICR*, 758 F. Supp. at 1356.

Plaintiffs also are entitled to declaratory and injunctive relief to remedy *ongoing* harm stemming from Defendants' acts and failures to act. For example, the Court should issue a declaration that Plaintiffs no longer are bound by the improper "secrecy oaths," so that Plaintiffs can seek and receive appropriate treatment and counseling for the harm they have endured. *See, e.g.*, *NW Envtl. Defense Ctr. v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988) ("where the violation complained of may have caused continuing harm and where the court can still act to remedy such harm by limiting its future adverse effects" a claim is not moot). The Court also should enjoin continuing violations of Defendants' directives and international law in connection with human testing programs, to the extent violations have continued. (Compl. ¶ 180(e).)[15]

[15] The potential need for such relief is underscored by recent findings that government human testing programs do not comply with rules designed to ensure that informed consent is obtained from test subjects. *See, e.g.*, VA Office of Inspector General, "Review of Informed Consent in the Department of Veterans Affairs Human Subjects Research," Rep. No. 08-02725-127 (May 15, 2009) (finding that 31% of research subject consent forms on file were noncompliant).

2. The Organizational Plaintiffs Have Standing.

Swords Has Organizational Standing. Defendants argue that because Swords does not have "representational standing," it is "not properly before the Court as a Plaintiff with respect to the first and second claims for relief." (Mot. 14.) Defendants' argument is a decoy: Swords is a *service* organization, not a *member-based* organization, and it alleges organizational standing on its own behalf, not representational standing on behalf of its members. (Compl. ¶¶ 25-26.)

An organization has standing "in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Am. Fed'n of Gov't Employees Local 1 v. Stone*, 502 F.3d 1027, 1032 (9th Cir. 2007) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Accordingly, where an organization alleges a redressable "injury in fact" fairly traceable to defendants' actions, the organization has standing in it its own right to seek relief — even if it does not have representational standing to sue on behalf of members. *See id.* at 1032-33; *Presbyterian Church*, 870 F.2d at 521 & n.5. For example, an organization alleges standing where a defendant's actions frustrate the organization's purpose or cause the diversion and depletion of organizational resources. *See, e.g., Presbyterian Church*, 870 F.3d at 521-23; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004). That is exactly what Swords alleges here.

Defendants' failure to comply with their duty to provide health care has left test veterans to seek additional services and assistance from service organizations like Swords, causing those organizations to divert already scarce resources to those veterans. Similarly, Defendants' failure to comply with their duty to warn has impeded the ability of test veterans to receive adequate health care from other sources, which again leads test veterans to seek additional services and assistance from organizations like Swords at the expense of other efforts and priorities. Defendants' actions have caused precisely the type of harm sufficient for organizational standing. *See, e.g.*, *Havens*, 455 U.S. at 379 (confirming standing where defendants' actions impaired organization's ability to provide services, with a "consequent drain on the organization's resources"); *Smith*, 358 F.3d at 1105-06 (overruling dismissal on standing grounds where defendants' actions caused organization to "divert its scarce resources from other efforts");

Presbyterian Church, 870 F.2d at 521-22 (allegation that defendants' actions caused "diversion of clergy energy from pastoral duties" and otherwise "interfered with the churches' ability to carry out their religious mission" sufficient to ground standing); *Comm. for Immigrant Rights of Sonoma County v. County of Sonoma*, __ F. Supp. 2d __, 2009 WL 2382689, at *11 (N.D. Cal. 2009) (allegation that organization "diverted resources to combat defendants' policies" sufficient to ground standing). This Court can remedy the harm caused by Defendants' actions and failures to act by requiring Defendants' to comply with their duties to warn and to provide health care.[16]

VVA Has Representational Standing. Defendants do not contest — nor could they — that VVA has representational standing to pursue Claims One and Two on behalf of its members. (Mot. 14-15.) Instead, Defendants argue that VVA does not have standing to seek relief on behalf of non-members. (*Id.*) Defendants overlook a critical point: VVA alleges claims on behalf of its members *and* on behalf of a proposed class including all veterans involved in Defendants' testing programs. (Compl. ¶¶ 22-24, 165-66.) If the Court certifies an appropriate class and appoints VVA as a class representative, VVA will have standing (and a duty) to seek relief on behalf of non-members included in the defined class.[17]

3. Claim Three Does Not Seek An Advisory Opinion.

Relying on *Calderon v. Ashmus*, 523 U.S. 740 (1998), Defendants argue that Claim Three, which seeks a declaration that the *Feres* doctrine is unconstitutional, presents no Article III "case or controversy," because it only seeks "an advisory opinion concerning a defense to a tort claim that has not been asserted in this action." (Mot. 15.) Defendants misconstrue the *Feres* doctrine, and the teaching of *Calderon* does not apply here.

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[16] Plaintiffs believe that they have sufficiently alleged organizational standing on behalf of Swords. *See, e.g.*, *Smith*, 358 F. 3d at 1105-06 (at the pleading stage, "we presume that 'general allegations embrace those specific facts that are necessary to support a claim'" (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). If the Court finds those allegations insufficient, Plaintiffs request leave to amend. *See id.* (overruling denial of leave to amend with regard to organizational standing).

[17] Defendants do not challenge the standing of VVA or Swords with respect to Claim Three, and any such challenge would be futile. The Complaint clearly alleges facts establishing that both have organizational standing to pursue Claim Three. (Compl. ¶¶ 184-85.) VVA also has representational standing to pursue that claim. (*Id.* ¶ 183.)

In *Calderon*, a state prisoner sought a declaratory judgment about whether California could benefit from a shortened statute of limitations for federal habeas corpus proceedings. 523 U.S. at 743-44. The Supreme Court held that the issue did not present a sufficient case or controversy because the prisoner sought only to obtain "an advance ruling on an affirmative defense" that the "State may, or may not, raise" in future habeas proceedings. *Id.* at 747. Unlike the statute of limitations in *Calderon*, the *Feres* doctrine is not merely a "defense to a tort claim," as Defendants suggest. Rather, *Feres* applies to divest courts of subject matter jurisdiction even to entertain certain tort claims against the government. *See, e.g.*, *Stauber v. Cline*, 837 F.2d 395, 399 (9th Cir. 1988); *Broudy v. United States*, 661 F.2d 125, 128 n.5 (9th Cir. 1981). Because it is jurisdictional, the *Feres* doctrine is not an affirmative defense and is not waived if defendants fail to assert it. *See Stauber*, 837 F.2d at 399 (because it is jurisdictional, "the *Feres* defense was not waived when defendants failed to raise it until after trial"); *Ordahl v. United States*, 646 F. Supp. 4, 6 (D. Mont. 1985) (granting reconsideration on *Feres* grounds, noting: "There is no question that subject matter jurisdiction is not waivable."). Moreover, a court has a "continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction," even if the parties *never* raise subject matter jurisdiction. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); s*ee also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *McColm v. Pan Asia Venture Capital*, No. C 02-05352, 2003 WL 715907, at *1 (N.D. Cal. Feb. 25, 2003) ("Even if no party questions the court's subject matter jurisdiction, the court is under a duty to raise it *sua sponte*.").[18]

Plaintiffs do not seek an "advisory ruling" about an anticipated affirmative defense, and the Court need not guess about whether the government will raise *Feres* as a defense in court: *Feres* bars *every* tort claim to which it applies, regardless of whether or not the government raises

[18] Defendants also cite *Citizens for Honesty & Integrity in Regional Planning v. County of San Diego*, 399 F.3d 1067 (9th Cir 2005). (Mot. 15.) In that case, the petitioner, before applying for a permit, requested a declaration concerning the definition of "wetlands" in a local permitting scheme. 399 F.3d at 1068. As in *Calderon*, the court held that a declaratory judgment was not proper because "there [wa]s nothing to suggest that even if a new permit application were pending, the wetlands definition would determine the success of the application." *Id.* In contrast, *Feres* bars *all* tort claims arising from harm incident to military service.

it as a defense. Indeed, this has resulted in the precise harm about which the Organizational Plaintiffs complain. (*See* Compl. ¶¶ 183-85.) Because *Feres* bars every tort claim against the government for injuries incident to military service, the Organizational Plaintiffs have been forced — and will continue to be forced — to devote scarce time and resources to: (a) aiding those veterans who are unable to seek redress in the courts; and (b) seeking to overturn or limit the scope of the *Feres* doctrine. (*Id*.) The Organizational Plaintiffs seek relief to redress the harm they have suffered — and continue to suffer — as a result of the *Feres* doctrine; they do not seek an advisory opinion. Accordingly, Claim Three presents an actual case or controversy.[19]

II. THE COURT SHOULD NOT REFUSE TO ADJUDICATE PLAINTIFFS' CLAIMS FOR DECLARATORY RELIEF.

Defendants argue that the Court should forgo the "normal principle that federal courts should adjudicate claims within their jurisdiction" and should, in its discretion, decline to hear Plaintiffs' claims for declaratory relief. (Mot. 15-19.) This argument does not dispute the Court's power to adjudicate Plaintiffs' claims for declaratory relief, and concedes that the Court could do so if it wanted. Instead, it merely invites the Court to decline to exercise its jurisdiction over those claims. Defendants offer several arguments to persuade the Court to accept that invitation. Each is unpersuasive. Irrespective of those arguments, however, there are two reasons why the Court should not refuse to adjudicate Plaintiffs' claims for declaratory relief.

First, as demonstrated above, a key function of the DJA is to vindicate those who have suffered constitutional harms and to further public awareness of important constitutional rights. *See supra* at 15-16. Accordingly, a court must not consider declaratory relief only from a defendant's point of view, but also must consider the harm to plaintiffs, their right to vindication,

[19] In addition, unlike the prisoner in *Calderon* or the petitioner in *Citizens for Honesty*, the Organizational Plaintiffs are unable to bring suit directly to challenge *Feres*. The *Feres* doctrine is an exception to the waiver of sovereign immunity established by the Federal Tort Claims Act ("FTCA"); it bars military personnel from seeking recovery in tort for an injury incident to service. Because the Organizational Plaintiffs are not — and could never be — members of the military, they are unable to challenge *Feres* by filing an FTCA claim. A declaratory judgment action is the only means for the Organizational Plaintiffs to seek redress for the harm they continue to suffer as a result of the *Feres* doctrine.

and the public interest. *See, e.g.*, *Zolin*, 812 F.2d at 1112-13; *Bilbrey*, 738 F.2d at 1471. Defendants completely ignore these fundamental considerations, each of which strongly counsels in favor of exercising jurisdiction over Plaintiffs' claims for declaratory relief. For that reason alone, the Court should reject Defendants' invitation to decline its discretionary jurisdiction.

Second, although a district court "is authorized, in the sound exercise of its discretion" to decline jurisdiction over a declaratory judgment action, "a district court should not refuse to adjudicate a declaratory judgment claim when other federal claims are joined in the action." *Google, Inc. v. Affinity Engines, Inc.*, No. C. 05-0598, 2005 WL 2007888, at *6 (N.D. Cal. Aug. 12, 2005) (citing *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (en banc)); *Co-Investor, AG v. Fonjax, Inc.*, No. C 08-01812, 2008 WL 4344581, at *3 (N.D. Cal. Sept. 22, 2008); *Behrens v. Donnelly IV*, 236 F.R.D. 509, 516 (D. Haw. 2006). The reason is plain: where a court necessarily will consider issues relevant to a DJA claim in adjudicating other claims over which it has jurisdiction, "no considerations of practicality and wise judicial administration" counsel dismissing the DJA claim. *Google*, 2005 WL 2007888, at *7. Here, the Court has jurisdiction over Plaintiffs' APA claims seeking injunctive relief. *See supra* at 5-7. In addressing those claims, the Court necessarily will determine issues concerning Defendants' actions and failures to act with respect to the testing programs. Therefore, the Court "should not refuse to adjudicate" Plaintiffs' claims for declaratory relief. *Google*, 2005 WL 2007888, at *7.

A. *Stanley* Supports The Exercise Of Jurisdiction To Adjudicate Plaintiffs' Claims For Declaratory Relief.

Relying on Justice Scalia's opinion in *United States v. Stanley*, 483 U.S. 669 (1987), Defendants argue that the Court should decline to adjudicate Plaintiffs' claims for declaratory relief because they will require to Court to intrude impermissibly into military affairs (Mot. 16-18.) *Stanley*, however, is distinguishable — and even supports the exercise of jurisdiction here.

In *Stanley*, the Court relied on *Feres* and its progeny to decline to infer a judicial *damages* remedy against the United States for injuries from "activity incident to [military] service." 483 U.S. at 684. The Court, however, recognized that under *Chappell v. Wallace*, 462 U.S. 296 (1983), military personnel are not precluded "from all redress in civilian courts for constitutional

wrongs suffered in the course of military service." *Stanley*, 483 U.S. at 683. Therefore, "traditional forms of relief" other than damages (*e.g.*, declaratory and injunctive relief) still are available, notwithstanding the Court's decision not to imply a *Bivins* damages remedy. *See id.* at 683-84 (*citing Chappell*, 462 U.S. at 305 n.2); *Walden, II v. Bartlett*, 840 F.2d 771, 774-75 (10th Cir. 1988).[20] This makes sense: "The threat of personal liability for damages poses a unique deterrent to vigorous decision-making" — a threat not presented by declaratory relief. *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99, 110 (3d Cir. 1986) (Becker, J.). Because *Feres* appears to bar damages to redress Defendants' wrongs, it is critical that the Court hear Plaintiffs' claims for declaratory relief — the "traditional form of relief" that *Stanley* recognized provides redress for "constitutional wrongs suffered in the course of military service." 483 U.S. at 683-84.[21]

Defendants also ignore that courts (in this circuit and elsewhere) regularly "entertain[] servicemembers' constitutional challenges" seeking equitable, rather than monetary, relief. *See, e.g.*, *Wilkins v. United States*, 279 F.3d 782, 788 (9th Cir. 2002); *Wigginton v. Centracchio*, 205 F.3d 504, 512 (1st Cir. 2000) ("intramilitary suits alleging constitutional violations but not seeking monetary damages are justiciable"); *Walden*, 840 F.2d at 774 ("the rationales supporting *Feres* are not implicated by an action for injunctive and declaratory relief"). Defendants do not argue that the Court *cannot* choose to hear Plaintiffs' DJA claims; Defendants argue that the Court *should not*. Because Plaintiffs' DJA claims are precisely the type that courts regularly review, however, the Court should reject Defendants' invitation to decline jurisdiction here.

Defendants violated due process and fundamental constitutional rights (and binding regulations) by subjecting Plaintiffs to testing without informed consent and by failing to provide

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[20] Indeed, Justice Scalia took no issue with this statement from Justice Brennan's dissent: "Of course, experimentation with unconsenting soldiers, like any constitutional violation, may be enjoined *if* and when discovered." *Stanley*, 483 U.S. at 690.

[21] The rationale behind *Feres* and *Stanley* does not apply to Plaintiffs' § 706(1) claims, which concern independent *post-discharge* duties owed to Plaintiffs. Even damages claims based on such duties are not barred by *Feres*. *See, e.g.*, *Persons v. United States*, 925 F.2d 292, 297-99 (9th Cir. 1991); *Broudy v. United States*, 722 F.2d 566, 570 (9th Cir. 1983). Thus, even though Plaintiffs' § 706(1) claims seek declaratory relief, *Stanley* provides no reason for the Court to decline jurisdiction to hear them.

follow-up information and health care. *See, e.g.*, *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 813 (S.D. Ohio 1995); *Stanley*, 483 U.S. at 690 (Brennan, J. dissenting). The constitutionality of Defendants' actions cannot be judged in any administrative proceeding available to Plaintiffs; a DJA action is the only (and the appropriate) vehicle to vindicate Plaintiffs' rights. *See Wilkins*, 279 F.3d at 789. Plaintiffs' interest in having the Court hear their claims could not be higher: they continue to suffer from mental and physical harm caused by Defendants' actions and failures to act, and Defendants' victims are aging and dying. (Compl. ¶ 2.) Moreover, reviewing Defendants' compliance with their own regulations in conducting the testing programs and in providing mandated follow-up will not require the Court to interfere unduly with military functions or to intrude into areas of military expertise. *See, e.g.*, *Glenn v. Rumsfeld*, No. C. 05-01787, 2006 WL 515626, at *5 (N.D. Cal. Feb. 28, 2006).[22]

B. Neither FOIA Nor The VBA Justify Declining To Adjudicate Plaintiffs' Claims For Declaratory Relief.

Defendants argue that the compensation scheme set forth in the Veterans' Benefit Act ("VBA") and the right to public records granted by the FOIA "counsels strongly against the requested declaratory relief" concerning medical care, documents, and information. (Mot. 18-19.) As explained above, however, Plaintiffs' claims do not invoke FOIA or the VBA. Plaintiffs seek declaratory relief compelling Defendants to comply with their own affirmative regulations and independent duties. *See supra* at 5-7. Neither FOIA nor the VBA provide a vehicle for adjudicating Defendants' compliance with those specific duties, and neither scheme can provide the specific relief that Plaintiffs seek. Accordingly, neither Act justifies declining to adjudicate Plaintiffs' claims for declaratory relief under the APA.[23]

[22] Defendants also ask the Court to decline jurisdiction because the "political branches are better equipped" to investigate, especially "given the substantial passage of time since the tests occurred." (Mot. 18.) This argument is a farce. The "substantial passage of time" illustrates the *inadequacy* of the political branches to remedy the harm caused by Defendants or require Defendants to comply with their duties and regulations. This is just the scenario when it is appropriate for an Article III court to intervene. *See* 5 U.S.C. § 706(1).

[23] Defendants' cases support this conclusion. For example, in *Katzenbach v. McClung*, 379 U.S. 294 (1964), plaintiffs sought a declaration concerning the application of Title II of the Civil Rights Act, even though Title II itself provided a proceeding for determining rights and duties

(Footnote continues on next page.)

C. The Court Should Adjudicate Claim Three.

Defendants' argument that the Court should decline jurisdiction over Claim Three is nothing more than a repetition of their argument that Claim Three should be dismissed under Rule 12(b)(6). (*See* Mot. 19, 20.) As such, it provides no basis for abandoning the "normal principle that federal courts should adjudicate claims within their jurisdiction," especially because there are numerous other federal claims over which the Court will exercise jurisdiction here. *See, e.g.*, *Google*, 2005 WL 2007888, at *7.

III. PLAINTIFFS' CLAIMS SATISFY RULE 12(b)(6).

Defendants argue that Plaintiffs' request for information concerning Defendants' testing programs and the health effects of those tests should be dismissed because Plaintiffs have not satisfied FOIA and because there is no constitutional right to government information. (Mot. 20.) Plaintiffs, however, do not seek relief based on FOIA or a "constitutional right to information." Rather, Plaintiffs assert a proper claim for relief requiring Defendants' to provide information as required by their own duties and regulations. *See supra* at 5-7. That claim should go forward.

Similarly, Defendants argue that "Plaintiffs' claim that the government is contractually obligated" to provide medical care should be dismissed. (Mot. 20.) As noted above, however, Plaintiffs' claim for medical care is not based on contract; it is based on Defendants' obligation to provide medical care as required by their own duties and regulations. *See supra* at 6-7.

Finally, Defendants argue that this Court cannot declare the *Feres* doctrine to be unconstitutional. As a matter of *stare decisis*, they may be right. (*See* Compl. ¶ 189.) As explained above, however, the Organizational Plaintiffs have suffered — and continue to

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under the act. *Id.* at 295. Here, Plaintiffs' do not seek a declaration concerning Defendants' duties under FOIA or the VBA, and neither scheme has procedures for determining Defendants' compliance with the regulations and duties at issue. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977) held only that, under *Feres*, the availability of VBA relief counseled against allowing *tort* recovery under the FTCA. *Id.* at 674. The rationale underlying *Feres* does not apply to declaratory relief, however. *See supra* at 18-20. In *Edmonds Inst. v. U.S. Dep't of Interior*, 383 F. Supp. 2d 105 (D.D.C. 2005), the plaintiff sought a declaration that an agency violated the APA *by missing FOIA deadlines*. *Id.* at 111. Here, Plaintiffs do not invoke FOIA; they seek declarations concerning Defendants' clear and non-discretionary obligations under their own regulations, not FOIA.

suffer — harm as a direct result of the *Feres* doctrine, which they believe to be unconstitutional for the many reasons identified by numerous Justices and Judges. (*Id*. ¶ 186.) Given this ongoing harm, and because they have no other means to challenge the *Feres* doctrine, the Organizational Plaintiffs respectfully request that the Court adopt the reasoning of the many learned Judges cited in the Amended Complaint, and declare the *Feres* doctrine to be unconstitutional. *See, e.g.*, *Costco v. United States*, 248 F.3d 863, 869-70 (9th Cir. 2001) (Ferguson, J., dissenting).

IV. THE COMPLAINT ALLEGES SUFFICIENT FACTS TO ESTABLISH VENUE.

Defendants' last-ditch effort to dismiss the Complaint is to argue that Plaintiffs have not established venue in this District. This contention is without merit and need not detain the Court long. Venue is established "in any judicial district in which . . . the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e). Here, Swords' principal administrative office is located in San Francisco, *see* Compl. ¶ 25, which is located in the Northern District. Defendants argue, in conclusory and cavalier fashion, that Swords' residence does not establish venue because Swords lacks standing. But, as discussed at length above, Swords has standing *in its own* right to carry this action forward. See *supra* at 17-18. Defendants' venue argument fails.

CONCLUSION

For these reasons, Plaintiffs respectfully ask the Court to deny Defendants' Motion.

Dated: October 2, 2009

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