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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.	Civil Action No. C 09-0037 CW DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS FIRST AMENDED COMPLAINT Motion Date and Time: November 12, 2009 2:00 p.m.

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INTRODUCTION

Defendants' opening memorandum explains that Plaintiffs' claims are outside the Court's subject matter jurisdiction due to lack of an applicable waiver of the United States' sovereign immunity, operation of the applicable statute of limitations, and failure to satisfy Article III's case or controversy requirement. Defendants further argue that because the Constitution assigns supervisory authority over the military to Congress and the Executive and because those Branches are actively exercising that authority with respect to the testing that occurred at Edgewood Arsenal and elsewhere, the Court should decline to exercise jurisdiction over Plaintiffs' claims under the Declaratory Judgment Act ("DJA"). Defendants argue that Plaintiffs' claims for notice, information, medical care and their request that the Court declare the *Feres* doctrine unconstitutional fail to state a claim upon which relief can be granted. Finally, Defendants explain that venue is not proper because no Plaintiff with standing resides in this district and no Defendant resides here.

In response, Plaintiffs contend that their claims should not be dismissed for lack of subject matter jurisdiction because: the Administrative Procedure Act ("APA") supplies a waiver of sovereign immunity as they claim an unlawful failure to act or unreasonable delay in acting; the statute of limitations is not jurisdictional and, based on equitable tolling and equitable estoppel principles, does not bar their claims; and their claims are justiciable. Plaintiffs maintain that their claims state a basis upon which relief can be granted and that venue is proper in this district.

In this reply, Defendants explain that even if Plaintiffs' claims for medical care, notification and information are characterized as claims for failure to act or unreasonable delay, they do not fall within the APA's waiver of sovereign immunity because the claims are not supported by any legal requirement by Defendants to take the action that Plaintiffs seek. The applicable statute of limitations, 28 U.S.C. § 2401(a), is properly viewed as a condition of the Court's subject matter jurisdiction in light of recent Supreme Court authority. But even if it is not and the limitations period is subject to the doctrines of equitable tolling and equitable estoppel, the disability claims of at least four individual Plaintiffs to the Department of Veterans Affairs ("VA") preclude application of those equitable doctrines to their claims. Plaintiffs' claims concerning the testing itself and associated consent forms are not justiciable because there is no redress that the Court could properly

award. None of Plaintiffs' claims are justiciable to the extent that they are asserted by Swords to Plowshares: Veterans Rights Organization ("Swords") because Swords lacks organizational standing. Plaintiffs' claims for declaratory judgment concerning the testing and consent forms would require this Court to conduct an inquiry that the Supreme Court has held would intrude improperly into military affairs. For that reason and in light of the Executive's ongoing efforts to investigate and address the testing, the Court should exercise its discretion under the DJA not to consider those claims. Plaintiffs' challenge to the *Feres* doctrine is barred by sovereign immunity, seeks an improper advisory opinion, and fails to state a claim upon which relief can be granted. Plaintiffs also fail to state a claim upon which relief can be granted in seeking an order that they are entitled to notice, information or medical care. Finally, Plaintiffs' opposition memorandum makes clear that their claim to venue is based solely on the inclusion of Swords as a Plaintiff. Because Swords is not properly before the Court on any claim upon which relief can be granted, there is no basis for venue in this district.

Plaintiffs' opposition, like the First Amended Complaint, accuses the government of utter disregard and neglect of veterans who participated in testing by the military. The materials referenced in First Amended Complaint show quite the opposite. They show that Congress, the Department of Defense ("DoD") and the VA have been actively investigating the testing and considering, developing and implementing means of providing assistance to the veterans affected. Consistent with direction from Congress, the Executive has made a great deal of information about the tests available publicly, the VA has sent notification letters to many Edgewood test participants, and DoD has stated that it is constructing a registry of all test participants that will allow for them to be notified and provided with information about the tests. These measures taken by the Executive Branch under oversight by the Legislative Branch provide not only avenues for relief but the avenues that are consistent with the Constitution's separation of powers.[1]

[1] Plaintiffs charge that Defendants misrepresent Plaintiffs' allegations and claims, improperly assume facts not alleged, and fail to recite or analyze the factual allegations of the First Amended Complaint. Defendants dispute Plaintiffs' assertions and submit that review of the opening memorandum in comparison to the First Amended Complaint shows Plaintiffs' charges to be unfounded.

ARGUMENT

Plaintiffs' claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(3) and 12(b)(6) for the following reasons as well as those set forth in Defendants' opening memorandum.

I. Plaintiffs Cannot Establish an APA Waiver of Sovereign Immunity by Claiming Failure to Act or Unreasonable Delay.

Plaintiffs argue that they are entitled to the APA's waiver of sovereign immunity for their claims for medical care, notice and information because they base their APA claims on what they assert is Defendants' failure to act or unreasonable delay in acting concerning medical care, notification and information. (Pls.' Opp'n at 5.) The problem with this characterization is that Plaintiffs' claims do not satisfy the requirements of a claim for failure to act or unreasonable delay under the APA. Contrary to Plaintiffs' assertion, the Amended Complaint does not identify any legal obligation that supports their claims and provides a corresponding waiver of sovereign immunity.

While the APA authorizes reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take," *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 64 (2004) (emphasis in original). An agency's failure to act or delay in acting "cannot be unreasonable with respect to action that is not required." *SUWA*, 542 U.S. at 63 n.1. This limitation "rules out judicial direction of even discrete agency action that is not demanded by law." *Id.* at 65. Nor can a finding of failure to act or unreasonable delay be based on an action "committed to agency discretion by law." *E.g.*, *Heckler v. Chaney*, 470 U.S. 821, 828-30 (1984).[2] Judicial intervention under section 706(1) is warranted only "[w]hen agency recalcitrance is in the face of clear statutory [or regulatory] duty or is of such a magnitude that it amounts to an abdication of statutory [or regulatory] responsibility." *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1137 (9th Cir. 1998) (internal citations omitted).

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[2] Review of a claim under 5 U.S.C. § 706(1) is analogous to review of a claim for the extraordinary remedy of mandamus. *See, e.g.*, *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065 (9th Cir. 1997). Mandamus relief may be granted only when "(1) the plaintiff's claim is clear and certain; (2) the defendant official's duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." *Idaho Watersheds v. Hahn*, 307 F.3d 815, 832 (9th Cir. 2002).

A. In support of their claim to medical care, Plaintiffs identify the 1962 version of Army Regulation 70-25, the current version of that regulation and a confidential Army memorandum not attached the Amended Complaint but, as alleged by Plaintiffs, is consistent with the 1962 regulation as to medical care. (Pls.' Opp'n at 6.) Neither version of Army Regulation 70-25 can supply a duty to provide the medical care that Plaintiffs seek.[3] A requirement that the Army provide medical care over the course of test participants' lifetimes would conflict with 10 U.S.C. § 1074, which authorizes the Army to provide medical care to servicemembers only if they are on active duty, in the Reserves, or have retired based on length of service or disability.[4] *Accord* Army Reg. 40-400, ch. 3 (2008) ("Persons Eligible for Care in Army [military treatment facilities] and Care Authorized") (Attach. 1). Veterans like Plaintiffs may seek medical care as provided by the Veterans Benefit Act, 38 U.S.C. §§ 1701 *et seq.*; *see also* 38 C.F.R. pt. 17, as at least some individual Plaintiffs have, (*see* Pls.' Opp'n at 2). We nevertheless address the regulatory provisions on which Plaintiffs rely.

> The 1962 version of Army Regulation 70-25 provided with respect to medical care:
>
> **Additional safeguards.** As added protection for volunteers, the following safeguards will be provided:
>
> a. A physician approved by The Surgeon General will be responsible for the medical care of volunteers. The physician may or may not be the project leader but will have authority to terminate the experiment at any time that he believes death, injury, or bodily harm is likely to result.
>
> b. All apparatus and instruments necessary to deal with likely emergency situations will be available.
>
> c. Required medical treatment and hospitalization will be provided for all casualties.
>
> d. The physician in charge will have consultants available to him on short notice throughout the experiment who are competent to advise or assist with complications which can be anticipated.

Army Reg. 70-25 ¶ 5 (1962) (Attach. 2). Subsection (c)'s provision for medical treatment and hospitalization plainly contemplates such care as an "additional safeguard" available to address a medical need arising during an experiment rather than care over the course of a test participant's

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[3] The confidential memorandum on its own would not constitute a "legally binding commitment enforceable under § 706(1)." *SUWA*, 542 U.S. at 72.

[4] No individual Plaintiffs alleges that he retired from the Army for length of service or disability.

lifetime. This is clear from the provision's inclusion among a list of other "safeguards" that were to be in place while experiments were conducted. *See, e.g.*, *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396, 1404 (2008) (under rule of interpretation *ejusdem generis*, "when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.").

The current version of Army Regulation 70-25, issued in 1990, cannot be applied retroactively to create legal obligations arising from tests that took place more than 20 years earlier. There is a presumption against retroactive application of the law and regulations, and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also INS v. St. Cyr*, 533 U.S. 289, 321 (2001) ("A statute has retroactive effect when it . . . creates a new obligation, imposes a new duty . . . in respect to transactions or considerations already past . . ."). (internal quotations marks omitted). Only "unambiguous direction" in statutory or regulatory language will satisfy the "demanding" standard for retroactive application. *St. Cyr*, 533 U.S. at 316 (recognizing that "[c]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation") (internal quotation marks omitted). The language of the current version of Army Regulation 70-25 does not clearly and unambiguously establish a retroactive application to impose a duty with respect to tests that were conducted before its effective date.

Apart from the absence of retroactivity, the current version of Army Regulation 70-25 does not supply a legal obligation to provide the medical care that Plaintiffs claim. Plaintiffs rely on paragraph 2-5(j), which states that "[t]he Surgeon General (TSG) will . . . [d]irect medical followup, *when appropriate*, on research subjects to ensure that any long-range problems are detected and treated." Army Reg. 70-25 ¶ 2-5(j) (1990) (emphasis added) (Attach. 3.). The provision gives no guidance on how to determine when medical follow-up is "appropriate" and thus commits the decision to the discretion of the Surgeon General. *See Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) (regulation that authorizes an agency official to take action for any reason the official "considers appropriate" commits decision to official's discretion); *see also Legal Services of N.*

California, Inc. v. Arnett, 114 F. 3d 135, 140 (9th Cir. 1997) (statutory provision for legal services to senior citizens "to the maximum extent feasible in accordance with their need" left federal court "ill-equipped" to determine how that could be accomplished). Plaintiffs also cite paragraph 3-1(k), which states that "[v]olunteers *are authorized* all necessary medical care for injury or disease that is a proximate result of their participation in research." Army Reg. 70-25 ¶ 3-1(k) (1990) (emphasis added) (Attach. 3). That paragraph cannot be construed to apply to individuals, like Plaintiffs, to whom Congress has not authorized the Army to provide medical care. *See* 10 U.S.C. § 1074; Army Reg. 40-400, ch. 3 (2008); discussed *supra* at 4.

B. Plaintiffs also rely on Army Regulation 70-25 – the 1962 and the current versions – to support their claim to notification and information.[5] The 1962 version of the regulation contains no provision for notification and information such as Plaintiffs claim. *See* Army Reg. 70-25 (1962) (Attach. 2.) The current regulation imposes a duty on commanders "to ensure research volunteers are adequately informed concerning the risks associated with their participation, and provide them with any newly acquired information that may affect their well-being when that information becomes available." Army Reg. 70-25, ¶ 2-8c (1990) (Attach. 3). The current regulation set forth a new duty to warn in 1990, but its plain language does not apply retroactively to cover individuals who volunteered in the 1960s. *See, e.g.*, *St. Cyr*, 533 U.S. at 316; *Bowen*, 488 U.S. at 208. Therefore, the Army has not failed to act in accordance with the 1962 or 1990 regulations.

Even if the current version of the regulation had retroactive effect, it would not supply a basis for finding of failure to act. The provision explains how the duty to warn must be accomplished:

> To accomplish this [duty to warn], the [Major Army Command] or agency conducting or sponsoring research must establish a system which will permit the identification of volunteers who have participated in research conducted or sponsored

[5] The other materials that Plaintiffs reference – statements to Congress, a Department of Justice opinion letter and a Central Intelligence Agency ("CIA") legal opinion, (*see* Am. Compl. ¶¶ 11-15, cited in Pls.' Opp'n at 6) – establish no "legally binding commitment enforceable under § 706(1)." *SUWA*, 542 U.S. at 72. Because Plaintiffs do not identify any regulation or other legal obligation on the part of the CIA or the Defendants other than the Army and DoD, on that ground alone those other Defendants should be dismissed vis-a-vis the claims for notice, information and medical care.

> by that command or agency, and take actions to notify volunteers of newly acquired information.

Army Reg. 70-25, ¶ 3-2(h) (1990) (Attach. 3). DoD has stated, and Plaintiffs have not disputed, that it is developing such a system that can be utilized to identify and notify test participants, provide information about chemical exposure, including identifying the chemicals to which a given participant was exposed, and provide necessary treatment, with completion expected by 2011. Force Health Protection and Readiness, http://fhp.osd.mil/CBexposures/ (cited in Am. Compl. ¶ 13 and last accessed Oct. 20, 2009). Plaintiffs argue that the time DoD has estimated for completion of the system is unreasonable and justifies Court intervention. However, that DoD's work on developing the system, which again is under congressional oversight, is ongoing and is expected to be complete within approximately two years precludes a finding of "agency recalcitrance [] in the face of clear [] duty or [] of such a magnitude that it amounts to an abdication [] responsibility," *ONRC Action*., 150 F.3d at 1137 (internal citations omitted).[6]

C. Plaintiffs reference this Court's decision in *Liang v. Attorney General*, No. C-07-2349 CW, 2007 WL 3225441 (N.D. Cal. Oct. 30, 2007), in support of their claim to the APA's sovereign immunity waiver. *Liang*, however, recognized the important distinction for section 706(1) purposes between *whether* an agency complies with its duties and *how* it complies. *Liang*, 2007 WL 3225441, at *4. Here, assuming that there is a duty to provide notice and information (which Defendants do not concede), because DoD is in the process of developing and implementing a system that will enable test participants to receive notice and information, Plaintiffs necessarily are asking the Court to decide *how* DoD should complete a process that is already the subject of congressional oversight.

II. The Statute of Limitations is Jurisdictional and Bars Plaintiffs' Claims.

In response to Defendants' argument that Plaintiffs' claims are time-barred, Plaintiffs contend that 28 U.S.C. § 2401(a) is not a condition of the Court's subject matter jurisdiction, does not apply

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[6] It is not reasonable for Plaintiffs to suggest that this litigation could result in an earlier completion date given the time associated with proceedings before this Court and the possibility of additional proceedings on appeal. Under these circumstances, nothing would be gained by a ruling that DoD or other Defendants have unreasonably delayed in providing notification and information.

to failure-to-act claims and claims of continuing violation, and should be tolled under principles of equitable tolling and equitable estoppel. The Court should reject each of those arguments.

A. In arguing that 28 U.S.C. § 2401(a) should not be considered jurisdictional, Plaintiffs rely on the Ninth Circuit's holding to that effect in the 1997 decision *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997). As referenced in Defendants' opening brief, the Supreme Court's recent holding in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), that the analogous statute of limitations 28 U.S.C. § 2501 is a jurisdictional prerequisite for claims under the Tucker Act casts substantial doubt on the continued validity of the *Cedars-Sinai* holding. Defendants therefore respectfully submit *Cedars-Sinai* should be found to no longer govern interpretation of 28 U.S.C. § 2401(a) with respect to whether the statute is jurisdictional.[7]

The language of 28 U.S.C. § 2501 parallels that of 28 U.S.C. § 2401(a). *Compare* 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.") *with* 28 U.S.C. § 2401(a) ("Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."). One court has found the "highly similar" and "nearly identical" language of sections 2501 and 2401(a) persuasive in concluding that 28 U.S.C. § 2401(a) is jurisdictional and not subject to equitable tolling or equitable estoppel. *West Virginia Highlands Conservancy v. Johnson*, 540 F. Supp. 125, 142 (D.D.C. 2008) (relying on *John R. Sand & Gravel*); *accord Georgalis v. U.S. Patent and Trademark Office*, No. 2008-1260, 2008 WL 4488939, at *2 (Fed. Oct. 7, 2008). While we recognize that other judges in this district have not found *John R. Sand & Gravel* to indicate that 28 U.S.C. § 2401(a) is jurisdictional, *e.g.*, *Sierra Club v. Johnson*, No. 08-1409, 2009 WL 482248, *9 (N.D. Cal. 2009) (Alsup, J.), we respectfully submit that in light of the similarity of language

[7] If the Court concludes that it nevertheless is bound to follow *Cedars-Sinai*, Defendants hereby preserve for appeal their argument concerning whether 28 U.S.C. § 2401(a) is jurisdictional.

between section 2501 and section 2401(a), the *Cedar-Sinai* rule does not survive *John R. Sand & Gravel*.

B. Even if the Court disagrees and finds that 28 U.S.C. § 2401(a) is not jurisdictional and is subject to the doctrines of equitable tolling and equitable estoppel, four of the individual Plaintiffs cannot rely on those doctrines because, more than six years before the commencement of this action, they asserted injuries which they claimed were caused by Edgewood testing in support of VA disability claims. (*See* Defs.' Opening Mem. at 11 & n.9; Defs.' Mot. to Dismiss, Exs. A-D & Attachs. thereto.) Plaintiffs argue that a VA disability claimant need not prove the cause of a condition and that, consequently, those four Plaintiffs' VA claims do not show that those Plaintiffs knew the cause of the injuries that they now allege. (Pls.' Opp'n at 2 n.2.) Plaintiffs' conclusion is unwarranted. The standard of proof applicable to VA disability claims does not impact the fact that, regardless of whether statements of causation were required, those Plaintiffs affirmatively stated in support of their VA in their claims that their injuries were caused by tests at Edgewood – not just that they had served there, as Plaintiffs suggest. (*See* Defs.' Mot. to Dismiss, Exs. A-D & Attachs. thereto.) In spite of what Plaintiffs assert was government secrecy and concealment, those Plaintiffs plainly were aware more than six years before filing this suit of both the injury that they now claim and the cause that they allege. That awareness precludes application of equitable tolling or equitable estoppel. *See Lukovsky v. San Francisco*, 535 F.3d 1044, 1051 (9th Cir. 2008) ("Equitable tolling focuses on whether there was excusable delay by the plaintiff: If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs. Equitable estoppel, on the other hand, focuses primarily on actions taken by the defendant to prevent a plaintiff from filing suit, sometimes referred to as fraudulent concealment.") (internal quotation marks omitted).

Plaintiffs separately assert that 28 U.S.C. § 2401(a) does not apply to their APA claims because they are based on alleged failures to act and assert continuing violations. (Pls.' Opp'n at 12-

13.) For the reasons set forth above, Plaintiffs do not establish the legal obligations necessary to bring those claims within the APA's waiver of sovereign immunity. *See supra* at 3-7.

III. Redressability is Missing for Claims that the Testing and Consent Forms Were Unlawful.

Defendants' opening memorandum explains that because the testing that is the subject of the Amended Complaint ended more than 30 years ago, no injunctive relief is possible on Plaintiffs' claims that the tests and related consent forms were illegal.[8] (Defs.' Opening Mem. at 14.) Plaintiffs argue that the Court nevertheless should address the claims to afford testing participants vindication and further educate the public about the testing and "core principles underlying informed consent." (Pls.' Opp'n at 16.) Plaintiffs maintain that the claims are redressable in this way. Their argument is undermined by the Constitution's assignment of responsibility for supervising the military.

As Plaintiffs emphasize, the Ninth Circuit and other courts have recognized that declaratory relief may be appropriate when "sending a message" and providing educational information is in the public interest. *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1112 (9th Cir. 1987); *Bilbrey v. Brown*, 738 F.2d 1462, 1470-71 (9th Cir. 1984). Here, however, the public interest is furthered by deference to the considered judgment of the Legislative and Executive Branches regarding investigation and development of appropriate government responses to the testing of servicemembers at Edgewood Arsenal and other military facilities.[9] Article I assigns those Branches of government supervisory authority over the military, which necessarily encompasses determinations

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[8] The Amended Complaint does not allege that any Plaintiff is presently the subject of testing and indeed cites a General Accounting Office report that states that the testing ended over 30 years ago. (Am. Compl. ¶ 160, citing 1993 GAO Report "Veterans Disability: Information from the Military May Help VA Assess Claims Related to Secret Tests," at 1, available at http://archive.gao.gov/d37t11/148642.pdf (last accessed Oct. 22, 2009).) Accordingly, there is no need for Defendants to submit a declaration that the testing has ended, as Plaintiffs suggest. (*See* Pls.' Opp'n at 15 n.14.) Plaintiffs are likewise incorrect in suggesting that Defendants have challenged the redressablity of claims other than those concerning the testing itself and consent forms. (*See id.* at 16.)

[9] Given the extent of Congress and the Executive's efforts to investigate and provide appropriate remedies to veterans who participated in testing, (*see* sources cited in Defs.' Op. Mem. at 4 & nn.2-4), Plaintiffs' suggestion that Defendants' emphasis of those efforts is a "farce," (Pls.' Opp'n at 23 n.22), is wholly unwarranted.

of how to afford appropriate vindication and to educate the public in connection with military matters. *See, e.g.*, *United States v. Stanley*, 483 U.S. 669, 681-82 (1987). Accordingly, neither Plaintiffs' asserted interest in vindication nor the public interest provide a basis on which to conclude that Plaintiffs' claims concerning the testing itself and consent forms are redressable by this Court.

IV. Swords' Claim to Organizational Standing is Insufficient.

Plaintiffs maintain that the Amended Complaint alleges injury to Swords that is sufficient to establish that that organization has Article III standing for the first and second claims for relief. (Pls.' Opp'n at 17.) The argument fails because the Amended Complaint does not allege any concrete injury to Swords itself with respect to those claims.

"[A]n organization may satisfy the Article III requirement of injury in fact if it can demonstrate: (1) frustration of its organizational mission; and (2) diversion of its resources to combat the particular [problem] in question." *Smith v. Pacific Properties and Dvp. Corp*., 358 F.3d 1097, 1105 (9th Cir. 2004) (citing *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir.2002)). Regardless of whether Swords might satisfy the first criterion, it does not satisfy the second.

The First Amended Complaint asserts that "organizations like Swords" have diverted resources as a result of what Plaintiffs argue is Defendants' actions and failures to act. (Am. Compl. ¶ 26; *accord* Pls.' Opp'n at 17.) The cases on which Plaintiffs rely, by contrast, involve allegations that the plaintiff organizations themselves had diverted resources. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (allegation that organization had to "devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices" alleged concrete injury); *Smith v. Pacific Properties and Dvp. Corp*., 358 F.3d 1097, 1105-06 (9th Cir. 2004) (allegation that real estate developer's discriminatory actions caused organization "to divert its scarce resources from other efforts" was sufficient establish standing for rule 12(b)(6) purposes); and other cases cited in Pls.' Opp'n at 17-18.

The Amended Complaint does not allege that Swords itself has diverted any resources because of Defendants' actions or inactions. To establish standing sufficient to survive a motion to dismiss, Swords must allege an injury that is "concrete" and "imminent." *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560 (1992). The Amended Complaint does not allege such an injury, and Swords therefore lacks standing for the first and second claims.[10]

V. Because Plaintiffs' Claims for Declaratory Relief Require Improper Judicial Inquiry into Military Matters, the Court Should Exercise Its Discretion to Decline to Review Them.

In response to Defendants' argument that the Court should not exercise jurisdiction over their claims under the DJA, Plaintiffs first emphasize an interest in vindication and public education as they did in response to Defendants' redressability argument. (Pls.' Opp'n at 20.) As set forth above, the Constitution's separation of powers envisions that the Legislative and Executive Branches, rather than the Judiciary, will address those interests in the course of their supervision of the military, which again those Branches are actively exercising. The public interest therefore counsels against rather than in favor of exercising jurisdiction under the DJA.

Plaintiffs' second argument is that they have joined APA claims for injunctive relief with their claims for declaratory relief and exercise of jurisdiction over the declaratory relief claims is therefore appropriate. (Pls.' Opp'n at 20.) However, Plaintiffs fail to establish jurisdiction under the APA for their claims to notice, information and medical care, even by construing them as claims for failure to act or unreasonable delay. *See supra* at 3-7.

In their third argument, Plaintiffs contend that the Supreme Court's decision in *Stanley*, which concluded that constitutional separation of powers counseled strongly against consideration of damages claims stemming from tests at Edgewood Arsenal, weighs in favor of rather than against consideration of their claims here. Contrary to Plaintiffs' suggestion, that *Stanley* involved claims for damages does not sufficiently distinguish the case so as to warrant a different ultimate conclusion in this case with respect to Plaintiffs' claims for declaratory relief. The Supreme Court's reasoning is largely independent of the fact that the plaintiff there sought damages. *Stanley* emphasizes, and Plaintiffs do not dispute, that the Constitution through multiple provisions assigns supervision of the

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[10] Plaintiffs request leave to amend their complaint if the Court concludes that their allegations are insufficient to establish standing on the part of Swords. Defendants oppose a second amendment of the Complaint because, for all of the reasons set forth in Defendants' opening memorandum and this reply, Plaintiffs' claims should not proceed.

military to Congress and the Executive rather than the Judiciary. *Stanley*, 483 U.S. at 681-82. The Court also emphasized that the judicial inquiry into military discipline and decisionmaking necessary for resolution of the plaintiff's claims – which, similar to this case, included constitutional claims for "failure to warn, monitor or treat" following testing at Edgewood Arsenal – would constitute a "congressionally uninvited intrusion into military affairs by the judiciary [that] is inappropriate." *Id.* at 682-83. While Plaintiffs disavow any intention of an intrusive examination of military officials' decisionmaking, (Pls.' Opp'n at 23), the nature of their allegations makes intrusion unavoidable. For example, Plaintiffs' claim that servicemembers' consent to the testing was obtained by improper inducements and threats by military commanders, (*id.* at 2, citing Am. Compl. ¶¶ 28, 51-52, 61, 71), calls into question military discipline and decisionmaking, precisely the sort of judicial inquiry that *Stanley* describes as impermissible intrusion into military matters. (*See also* Joint Case Management Statement ¶ 8.A.2, "Plaintiffs anticipate that they will require a substantial expansion of the interrogatories permitted pursuant to Rule 33 and depositions permitted pursuant to Rule 30.").

Plaintiffs are correct that courts regularly entertain military servicemembers' constitutional challenges seeking equitable relief. (Pls.' Opp'n at 22). Those cases, however, involve claims for equitable relief in the form of cessation of alleged ongoing constitutional deprivation.[11] Review of claims seeking such relief is consistent with *Stanley*'s elucidation that when the Supreme Court stated in *Chappel v. Wallace*, 462 U.S. 296 (1983), that it had "never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service,'" *Chappel*, 462 U.S. at 304, the Court was "referr[ing] to *redress designed to halt or prevent the constitutional violation* . . ." *Stanley*, 483 U.S. at 683 (emphasis supplied). Unlike the cases on which Plaintiffs rely, Plaintiffs' claims that the tests at Edgewood and

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[11] *See Wilkins v. United States*, 279 F.3d 782 (9th Cir. 2002) (plaintiff sought termination of religious discrimination allegedly occurring in Navy chaplaincy); *Wigginton v. Centracchio*, 205 F.3d 504 (1st Cir. 2000) (terminated National Guard member sought reinstatement as remedy for alleged due process violation); *Walden v. Bartlett*, 840 F.2d 771 (10th Cir. 1988) (incarcerated former Army servicemember who had been discharged through court-martial sought restoration of good time credits and other injunctive relief as remedy for alleged due process violations in connection with court-martial and incarceration) (cited in Pls.' Opp'n at 22).

associated consent forms violated their constitutional rights do not seek equitable relief that would end any ongoing constitutional violation. Like the plaintiff in *Stanley*, Plaintiffs here no longer are in the military and do not allege that they are the subject of military testing in the present.

In light of the constitutional assignment of supervision over the military to Congress and the Executive and the ongoing active exercise of that authority by those Branches, the Court should decline to exercise jurisdiction over Plaintiffs' claims for declaratory relief.

VI. Plaintiffs' Challenge to the *Feres* Doctrine is Outside the Court's Subject Matter Jurisdiction and Fails to State a Claim upon which Relief can be Granted.

Defendants' opening memorandum explains that Plaintiffs' challenge to the *Feres* doctrine – the Supreme Court's interpretation of the scope of the Federal Tort Claims Act (FTCA) – is outside this Court's subject matter jurisdiction because (I) no waiver of sovereign immunity covers it, (ii) it is time-barred, (iii) it seeks an improper advisory opinion, and (iv) this Court cannot overturn the Supreme Court's interpretation of law. Plaintiffs argue that the APA's waiver of sovereign immunity covers the claim even in the absence of final agency action because it asserts a constitutional violation. (Pls.' Opp'n at 7-9.) They rely on *Presbyterian Church v. United States*, 870 F.2d 518, 524 (9th Cir. 1989). (Pls.' Opp'n at 8-9.) However, as the Ninth Circuit recognized in *Gros Ventre Tribe v. United States*, 469 F.3d 801, 809 (9th Cir. 2006), *Presbyterian Church* is in conflict with the more recent *Gallo Cattle Co. v. Dep't of Agr.*, 159 F.3d 1194, 1198 (9th Cir. 1998), which provides that final agency action is a prerequisite to application of the APA. This case does not require resolution of the conflict because of the other independent reasons why Plaintiffs' challenge fails.[12]

Plaintiffs do not respond to Defendants' argument that their challenge to the *Feres* doctrine is untimely under 28 U.S.C. § 2401(a), (*see* Defs.' Opening Mem. at 12), and the claim should be dismissed on that ground alone. Plaintiffs maintain that the claim does not seek an advisory opinion even though they have not asserted a tort claim in this action and the *Feres* doctrine therefore does not apply to the substance of their claims. Regardless of whether *Feres* is viewed as in the nature of

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[12] Defendants nevertheless observe that *Gallo Cattle* is consistent with the Supreme Court's recognition that "[w]hen . . . review is sought not pursuant to specific authorization in the substantive statute, but only the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'" *Lujan v. Defenders of Wildlife Fed'n*, 497 U.S. 871, 882 (1990).

an affirmative defense or a jurisdictional bar to an FTCA claim, the critical point here is that the doctrine has no bearing on the substantive redress that Plaintiffs seek through this lawsuit. The substance of their claims presents no actual controversy with respect to the *Feres* doctrine. Plaintiffs' third claim therefore seeks an improper advisory opinion.

Finally, Plaintiffs acknowledge that Defendants "may be right" that this Court lacks power to declare the *Feres* doctrine to be unconstitutional. (Pls.' Opp'n at 24.) Nevertheless, they in effect ask the Court to overturn Supreme Court precedent. For the reasons set in Defendants' opening memorandum, this the Court cannot do. (*See* Defs.' Opening Mem. at 15.)

VII. Plaintiffs' Claims for Notice, Information or Medical Care Should Be Dismissed Under Fed. R. Civ. P. 12(b)(6).

In response to Defendants' argument that their claims for notice, information and medical care fail to state a claim upon which relief can be granted, Plaintiffs assert that they have properly asserted a claim under the APA's provision for judicial review of an alleged failure to act or unreasonable delay in acting. For the reasons discussed above, the Army regulation on which Plaintiffs rely does not entitle any of the plaintiffs to the notice, information and medical care that they claim. *See supra* at 4-7. It therefore could not support a claim under the APA.

VIII. Because Swords is not Properly before the Court, there is No Basis for Venue.

Plaintiffs' claim to venue in this district is based solely on the inclusion of Swords as a Plaintiff. Swords should be dismissed for lack of standing with respect to claims one and two, and claim three fails for the multiple reasons detailed above and in Defendants' opening memorandum. *See supra* at 11-12; Defs.' Opening Mem. at 14-15. Swords therefore is not properly this Court on any claim upon which the Court can grant relief. Accordingly, Plaintiffs lack any basis on which to claim that this case may proceed in this district.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' opening memorandum, the Court should dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(3) and 12(b)(6).

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Respectfully submitted,

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