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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' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

[AMENDED VERSION PURSUANT TO MARCH 29, 2012 ORDER]

Hearing Date: April 5, 2012
Time: 2:00 p.m.
Courtroom: 2, 4th Floor
Judge: Hon. Claudia Wilken

Complaint filed January 7, 2009

PUBLIC REDACTED VERSION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES & RULES

OTHER AUTHORITIES

INTRODUCTION

Class certification is appropriate in this action seeking injunctive and declaratory relief to remedy Defendants' failures to fulfill legal obligations owed to the class, as set forth in Defendants' own regulations and the U.S. Constitution. In their Opposition, Defendants suggest that the class is too big to be certified. But that is only because their human test programs spanned many decades and involved many tens of thousands of service members. If anything, the sheer number of veterans who were affected by those tests underscores the fact that, absent class treatment, Defendants' actions and failures likely will remain unremedied.

In their Opposition, Defendants focus almost exclusively on merits arguments. But these would only turn class certification into a "mini-trial" of the sort that the Ninth Circuit recently cautioned against in *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011). Defendants also try to revive previously unsuccessful arguments—including that the regulations and directives, that this Court has held establish the basis of a duty, cannot form the basis of a legally enforceable obligation, and that Plaintiffs' due process bias claim against the Department of Veterans Affairs ("DVA") is barred by 38 U.S.C. § 511. This Court has already addressed—and rejected—those arguments.

Defendants also assert that because the proposed class representatives have some information about their exposures, and may no longer feel strictly bound by secrecy oaths, they do not have standing to bring their claims. Taken to their logical conclusion, Defendants' arguments would mean that *no test participant* would ever have standing to bring these claims, because the very nature of bringing an action in federal court requires both information and willingness to come forward despite a secrecy obligation. As this Court has already held, the injuries that Plaintiffs allege are redressable by the relief Plaintiffs seek.

When Defendants finally reach the issue of whether certification of a class is appropriate (at page 24 of their brief), they conflate the standard for class certification under Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3), arguing that Plaintiffs must show that common issues predominate and asserting that Plaintiffs "cannot establish a single common question." (Defendants' Opposition to Motion for Class Certification ("Opposition" or "Opp'n") at 38, 27.)

Defendants' contentions are supported neither by the facts nor by the law. As demonstrated in Plaintiffs' Opening Memorandum ("Op. Mem."), there are numerous legal and factual issues common to members of the class that make class treatment the most effective and efficient way to adjudicate these claims. Defendants have for decades been treating class members as a cohesive group: by sending uniform outreach letters, establishing uniform regulations and procedures applicable to test participants, partially releasing class members from any secrecy oaths through a single memorandum, and, as Defendants highlight, "concluding" that there were no long-term health effects associated with the chemical and biological testing programs. (Opp'n at 16.)

ARGUMENT

I. MESSRS. JOSEPHS AND BLAZINSKI AND VVA ARE PROPER CLASS REPRESENTATIVES

A. Messrs. Josephs and Blazinski and VVA May Serve as Class Representatives

Plaintiffs propose that Vietnam Veterans of America ("VVA") serve as a class representative, along with two individual veterans, Tim Josephs and William Blazinski. (Op. Mem. at 11.) Defendants do not dispute the adequacy of VVA as a class representative. Instead, Defendants argue that "VVA [cannot] properly serve as a class representative in this case," (Opp'n at 12), because the Supreme Court's decision in *Wal-Mart v. Dukes* created a new "pronouncement" altering Ninth Circuit law that they concede previously allowed associational representation in class suits.[1] (*Id.* at 13, citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011).) Defendants misunderstand associational standing and misapply *Wal-Mart*. *Wal-Mart* did not involve organizational representatives, and did not address the issue of whether

[1] Defendants cite as *Wal-Mart*'s "pronouncement" that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (Opp'n at 12, 13.) But that is not a new statement of law; it is merely a direct quotation from *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977), and does not address whether associations can serve as class representatives. As a result, Defendants' suggestion that Swords to Plowshares is no longer a proper plaintiff in light of this "pronouncement" (Opp'n at 12 n.20) is without merit.

an organization has standing to represent its members in a class action. Thus, VVA is a proper class representative.[2]

Defendants also contend that Plaintiffs failed to identify Mr. Josephs or Mr. Blazinski as potential class representatives in the Complaint (Third Amended Complaint ("TAC"), Docket No. 180). Yet Plaintiffs explicitly stated in the Complaint that they may seek court approval for Messrs. Josephs and Blazinski to serve as class representatives. (TAC ¶ 222.) Plaintiffs have identified three proper class representatives: Tim Josephs, William Blazinski, and VVA.

B. The Proposed Class Representatives Have Standing

Defendants do not dispute the proposed class representatives' standing with respect to Plaintiffs' constitutional claims against the DOD and Army. They challenge standing only with regard to Plaintiffs' claims for equitable relief under the APA for Defendants' failures to fulfill legal duties to provide Notice[3] and medical care, the claims related to secrecy obligations, and the DVA bias claim. Defendants argue that Plaintiffs do not have standing to assert their APA claims

[2] Defendants cite *Black Coal. v. Portland Sch. Dist. No. 1*, 484 F.2d 1040, 1043 (9th Cir. 1973), for the proposition that associational standing is limited to cases in which there is a "compelling need to grant [the association] standing in order that the constitutional rights of persons not immediately before the court might be vindicated." (Opp'n at 13.) After *Black*, the Supreme Court articulated a three-prong test for whether associations have standing: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 333 (1977) (citation omitted); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000). VVA meets all three requirements: 1) its members include veterans who participated in the testing programs (Op. Mem. at 21-22); 2) the interests at stake are germane to VVA's purpose of improving the conditions of veterans (Declaration of Bernard Edelman ("Edelman Decl.") ¶ 3); and 3) since Plaintiffs seek declaratory and injunctive relief, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *See Warth v. Seldin*, 422 U.S. 490, 515 (1975). Nonetheless, even if it were necessary to establish "compelling need," VVA would meet this standard. Many of the putative class members are elderly, suffer from disabilities, and lack the ability to navigate the complex regulations and regulatory procedures. (Edelman Decl. ¶ 4c.) These facts, combined with the secrecy oaths under which they are bound and the lack of Notice provided by Defendants, render much of the affected population unable to assert the claims of the class.

[3] As set forth in the Opening Memorandum, the term "Notice" is defined to include notification regarding the substances to which each test participant was exposed, the doses to which he or she was exposed, the route of exposure (*e.g.*, inhalation, injection, dermal, etc.), and the potential health effects associated with those exposures or with participation in the tests.

because the DOD and Army have no legal obligations to Plaintiffs, but to the extent that Defendants do have any legal obligations, those obligations have been fulfilled as to the proposed class representatives, and that Defendants have "released" the proposed class representatives from any secrecy oaths. (Opp'n at 15-21.) The Supreme Court has made clear that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth*, 422 U.S. at 500; *see also Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) ("The jurisdictional question of standing precedes, and does not require, analysis of the merits.") (internal quotations omitted). Plaintiffs need not prove that they *will win their claim* in order to establish standing.

This Court has previously stated what the standing inquiry entails:

> a plaintiff must establish "the three elements of Article III standing: (1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1225 (9th Cir. 2008).

(Docket No. 59 at 10.) "[I]njuries [sufficient to establish standing] can stem from a failure to take action as well as from affirmative conduct." *Armstrong v. Davis*, 275 F.3d 849, 863 (9th Cir. 2001). In order to establish standing for prospective injunctive relief, a plaintiff "must demonstrate that he is realistically threatened by a repetition of [the violation]," which can be done by showing "that the harm is part of a pattern of officially sanctioned . . . behavior, violative of the plaintiffs' [federal] rights." *Id.* at 860-61. And as this Court has explained, "[i]n the context of declaratory relief, a plaintiff demonstrates redressability if the court's statement would require the defendant to 'act in any way' that would redress past injuries or prevent future harm." (Jan. 19, 2010 Order at 10 (quoting *Mayfield v. United States*, 588 F.3d 1252, 1260 (9th Cir. 2009), *superseded by* 599 F.3d 964, 972 (9th Cir. 2010)).) The proposed class representatives satisfy these standing requirements for each of Plaintiffs' claims.[4]

[4] Defendants argue that Plaintiffs "improperly" seek forms of relief that are not specifically pled in the Complaint. (Opp'n at 9-10.) Even assuming that Plaintiffs seek relief not specifically pled in the Complaint, this is not improper. Federal Rule of Civil Procedure 54(c) states that a "final judgment should grant the relief to which each party is entitled, *even if the party has not*

1. The Proposed Class Representatives Have Standing To Assert Plaintiffs' Claims for Equitable Relief Relating to Notice

Mr. Josephs, Mr. Blazinski, and VVA's members have been injured by the DOD's and Army's failures to fulfill their legal obligations to provide Notice to members of the Proposed Class. These failures are part of a pattern of officially sanctioned behavior (underscored by the fact that the DOD and Army deny they have any legal obligation to the class members), sufficient to establish that the injury is likely to recur, making injunctive relief appropriate.[5] *Armstrong*, 275 F.3d at 860-61, 863. Further, injunctive and declaratory relief requiring the DOD and Army to provide Notice would redress Plaintiffs' injuries.

Defendants argue that the class representatives lack standing because they have received some information about their participation in the testing programs. Defendants suggest that the fact that Messrs. Blazinski, Josephs, and VVA members David Dufrane and REDACTED requested and received test files from DOD, and that DVA—not the DOD or Army—sent outreach ("notice") letters to Mr. Josephs and Mr. Blazinski,[6] means that the proposed class representatives already have received the Notice sought through this action, and thus cannot

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demanded that relief in its pleadings." Fed. R. Civ. P. 54(c) (emphasis added); *see also* 10 James W. Moore *et al., Moore's Federal Practice* § 54.72[1][a] (Matthew Bender 3d ed. 2012) ("The available relief is determined by the proof, not by the pleadings."). Moreover, Defendants' assertion that Plaintiffs failed to plead due process claims is belied by the Complaint itself, which alleges violations of the First and Fifth Amendments to the Constitution (TAC ¶¶ 22, 184a, 186), and specifically cites violations of the due process clause of the Fifth Amendment by depriving Plaintiffs of liberty and property interests without due process of law. (TAC ¶¶ 184a, 186.)

This Court explained that it believes Plaintiffs "do have constitutional claims" against the Department of Defense ("DOD") and the Army. (Sprenkel Reply Decl. ¶ 2, Ex. 75 at 18:6-7.) Magistrate Judge Corley agreed, rejecting Defendants' contention that Plaintiffs' Administrative Procedure Act ("APA") claims are the only claims pending against the DOD and Army, because "the Third Amended Complaint alleges both constitutional and APA violations and the district court has not limited Plaintiffs' claims against the DOD." (Docket No. 294 at 9-10.)

[5] Defendants do acknowledge that they have a duty to identify all test participants under Section 709 of the National Defense Authorization Act. (Opp'n at 6.)

[6] Notably, Mr. Blazinski did not receive such a letter from DVA until after his deposition in this case. (Declaration of William Blazinski ("Blazinski Decl.") ¶¶ 2, 3; Sprenkel Reply Decl. ¶ 3, Ex. 76 at 112:4-113:10; ¶ 4, Ex. 77 at PLTF 006296.) The Ninth Circuit has rejected such attempts to "pick off" named plaintiffs, by attempting to moot their claims during the litigation and avoid class certification before the motion to certify has been filed. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011). Thus, any implied mootness arguments in Defendants' Opposition should be rejected, consistent with Ninth Circuit law.

demonstrate that they have a redressable injury. (Opp'n at 15-17.) This argument not only disregards the Notice issues defined by Plaintiffs, but also improperly seeks to invade the merits, as Defendants are essentially attempting to establish that they have fulfilled their duties as to the proposed class representatives.

To follow Defendants' argument to its logical conclusion would mean that a class representative with knowledge of participation could never have standing to seek notice on behalf of class members *without* knowledge. This would effectively preclude class claims for notice. In *Barth v. Firestone Tire & Rubber Co.*, 661 F. Supp. 193, 204 (N.D. Cal. 1987), the court rejected a similar argument—that a plaintiff's knowledge should preclude him from bringing a putative class action for equitable relief seeking exposure information for class members—as "disingenuous," noting that "[t]he interests of the class can only be protected by someone who possesses knowledge of the alleged exposure." *Id.* Otherwise, "the plaintiff and the class [would be placed] in an untenable 'Catch 22' situation—only a person with knowledge can bring suit and only someone without knowledge will have the necessary standing." *Id.* Accordingly, the *Barth* Court allowed the plaintiff's claim for equitable relief to go forward, finding that it "cannot preclude the putative class from seeking the relief it desires on the ground that the named plaintiff already possesses the knowledge that underlies the class remedy." *Id.* at 204; *see also Heart of Am. Nw. v. Westinghouse Hanford Co.*, 820 F. Supp. 1265, 1273 (E.D. Wash. 1993).

But here, the proposed class representatives *have not* received the Notice sought, and thus their injuries are, in fact, redressable by the requested relief. For instance, Mr. Josephs still does not know the identity of the nerve agents to which he was exposed, and he was never advised of the long-term health effects of several of the substances to which he was exposed. (Declaration of Tim Josephs ("Josephs Decl.") ¶ 2;[7] Sprenkel Reply Decl. ¶ 5, Ex. 78 at 104:9-12, 186:10-187:10.) The historical test files upon which Defendants rely (Opp'n at 16)—which are only provided if a test veteran knows to affirmatively request them—contain raw scientific and

[7] The proposed class representatives have submitted declarations in order to correct any misimpressions created by Defendants' assertions in their Opposition.

technical information that would be difficult for a layperson to understand, and that do not provide significant information regarding long-term health effects. (*See, e.g.*, Herb Decl., Exs. 19, 49, 80; Sprenkel Reply Decl. ¶ 6, Ex. 79 at 81:15-82:10 ("Have you ever received documents identifying the substances you were tested with? . . . Yeah. But not anything that the average person could understand. . . ."). Many of the substances are listed in test files only by internally-used code numbers (*e.g.*, REDACTED) or agent numbers. (*See, e.g.*, Herb Decl., Ex. 19 at VET034_11065; Ex. 80 at PLTF 000087-89, 107-109, 131.) Indeed, VVA member Mr. Dufrane has expressed his frustration with still not knowing what he was exposed to because of the code numbers. (Sprenkel Reply Decl. ¶ 6, Ex. 79 at 141:1-142:13 ("I don't understand most of them in laymen's terms, you know. . . . It needs to be out in the open so we know what it was so if we do go to seek medical help we can say this is what we were exposed to.").)[8] And Defendants do not dispute that the purported "notice" letters sent by DVA are generic and do not contain individualized information regarding substances, doses, or possible health effects. (*See* Herb Decl., Exs. 33, 34.)

Here, an order requiring the DOD and Army to provide Notice would have real consequences for the proposed class representatives and all members of the Proposed Class, redressing their ongoing injuries. Notice would assist Plaintiffs in obtaining medical care, as their doctors would have more information to assess their conditions and prescribe treatment. This

[8] With respect to VVA members REDACTED Defendants argue that none of the three was a test participant, construing their participation as "equipment tests" or "training." (Opp'n at 15 n.25.) Defendants do not otherwise dispute their standing, except with respect to secrecy oath claims against the CIA. (Opp'n at 21.) Defendants' argument is related to the definition of "testing programs," however, not standing. Service members exposed to nerve agents or other chemical substances during "equipment tests" are part of the proposed class. And with regard to proposed class members who participated in the Testing Programs but received only placebos or were told they were only testing "equipment," these individuals would still be entitled to Notice and medical care, as there are mental health effects resulting from mere participation in testing, even without exposure. (*See* Sprenkel Reply Decl. ¶ 7, Ex. 80 at 3, 16-17 ("Health Effects of Perceived Exposure to Biochemical Warfare Agents"). For example, such class members would be entitled to Notice that "[l]ong term psychological consequences . . . are possible from the trauma associated with being a test subject." (Sprenkel Decl. ¶ 51, Ex. 49 at VET001_015608; ¶ 3, Ex. 1 at VET001_015694 ("A significant body of literature suggests that the mere act of participating in military experiments can lead to long-term psychological effects."); ¶ 63, Ex. 61 at 37.)

information would also help them advance their DVA service-connected death and disability compensation ("SCDDC") claims. (Sprenkel Reply Decl. ¶ 8, Ex. 81 at 49:11-50:20, 262:13-263:23 (noting that a veteran lacking exposure information "is at a severe disadvantage" in establishing service connection).)

With respect to notice of health effects, Defendants argue that "Plaintiffs have failed to meet their burden of demonstrating an injury in fact that can be redressed by this lawsuit" because "DoD has concluded, after conducting multiple follow-up studies, that it is unaware of any general long-term health effects associated with the chemical and biological testing programs." (Opp'n at 16-17.) Yet, apart from proving that the DOD views these issues as common to the entire class, this assertion is contradicted by Defendants' own internal documents. For instance, DVA's Information Letter to its clinicians admits that "[l]ong-term psychological consequences . . . are possible from the trauma associated with being a test subject." (Sprenkel Decl. ¶ 51, Ex. 49 at VET001_015608; *see also* Sprenkel Decl. ¶ 3, Ex. 1 at VET001_015694-97.) Furthermore, the Fact Sheet relied upon by the DOD, which represents that "the three-volume IOM study . . . 'did not detect any significant long-term health effects in Edgewood Arsenal volunteers,'" (Opp'n at 17), is inaccurate and misleading. DVA's own expert in chemical agent exposures—Mark Brown—stated that the Fact Sheet contains "significant inaccuracies," such as its characterization of scientific studies as denying adverse health effects and its representation that doses received during the testing were "low." (Sprenkel Decl. ¶ 54, Ex. 52 at DVA052 000113 ("To say that there were *no effects is clearly not correct* and easily refutable.") (emphasis added).)[9]

Thus, Messrs. Josephs, Blazinski, and members of VVA have concrete, ongoing injuries caused by Defendants' officially sanctioned behavior, violative of Plaintiffs' rights. Those injuries can be redressed by a Court order requiring Defendants to comply with their duties to provide Notice. Accordingly, the Court should find that the class representatives have standing.

[9] The DOD also has access to information collected by Battelle Memorial Institute ("Battelle") regarding testing program substances and health effects. (Sprenkel Reply Decl. ¶ 9, Ex. 82 at Battelle 0000032629, 0000032635; ¶ 10, Ex. 83 at 19:24 - 20:21, 301:8-22.) This information could decode the testing substances listed by EA number for test veterans and their doctors, and provide valuable information relevant to health effects and medical treatment decisions.

2. The Proposed Class Representatives Have Standing To Assert Equitable Claims Related to Medical Care

It is undisputed that the DOD and Army are not currently providing the proposed class representatives with any medical care related to their exposures. (*See* Op. Mem. at 14-15; Opp'n at 17-18.) If the Court finds on the merits that the DOD and Army have a duty to provide medical care, as Plaintiffs allege, then Plaintiffs have suffered an injury that is redressable by a declaration that such a duty exists, and by a Court order requiring the DOD and Army to establish policies and procedures to ensure that they comply with their duties.

Defendants suggest that Messrs. Josephs and Blazinski cannot establish standing to the extent that they have not directly sought medical care from the DOD and Army prior to this litigation. (Opp'n at 18.) That they may not have done so is not surprising, as Defendants have taken the position that there are no adverse health effects, and have failed to set up any process for providing care to casualties. TRICARE medical treatment based on test participation is simply not available. (*See* Sprenkel Decl. ¶ 63, Ex. 61 at 5, 6.) Even under Defendants' theory, however, VVA has standing through its member Mr. Dufrane, who has sought medical care *from the Army* without success. (Sprenkel Reply Decl. ¶ 6, Ex. 79 at 77:2-12, 77:25-79:9.) Nor does the fact that Mr. Josephs recently began to receive *some* medical care *from DVA* (not from the DOD) as a result of a grant of service-connection for other reasons (not Chem-Bio exposures) (Herb Decl. Ex. 20 at 59:3-8), defeat his standing. He still pays private doctors for most of his medical care. (Josephs Decl. ¶¶ 19, 20.)

It is the DOD's and Army's duty to provide medical care to test participants, and the DOD and Army are not doing so. As Defendants admit (Opp'n at 18 n.28), Mr. Blazinski is not even eligible for any medical care from DVA. (*See also* Sprenkel Reply Decl. ¶ 3, Ex. 76 at 57:5-21.) Mr. Blazinski thus clearly has standing for his medical care claims against the DOD and Army, even under Defendants' theory of standing.[10]

[10] Defendants cite *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986), for the proposition that an "[i]njury consisting *solely* of a government's alleged failure to act in accordance with law" does not amount to injury in fact for standing. (Opp'n at 17.) In *Dimond*, the plaintiff alleged injury arising from the City Council's failure to follow its procedure to have a

Defendants also argue that Plaintiffs must show "that a particular medical condition is actually a result of the test program" in order to obtain medical care from either the DOD or DVA, and that Plaintiffs have not alleged why "they would be more likely to successfully make that showing in front of DoD . . . as opposed to VA." (Opp'n at 18.) This is irrelevant to the DOD's duty to provide medical care. Moreover, Defendants cannot show that the applicable substantive and procedural standards are the same or that the quality of DVA health care is comparable to TRICARE, which is generally accepted to be superior in quality. (Sprenkel Reply Decl. ¶ 11, Ex. 84.) And the Court has not yet ruled on the scope of Defendants' obligations to provide medical care, such that the assumption can be made that the same standard for establishing entitlement to care that applies at DVA would apply for the DOD or Army.

In sum, because the DOD and Army claim to have *no duty* (Opp'n at 3) and do not dispute that they are not providing medical care to members of the Proposed Class, Mr. Josephs, Mr. Blazinski, and VVA's members are currently being injured by a pattern of officially sanctioned behavior violating their rights. *See Armstrong*, 275 F.3d at 861. Accordingly, a declaration that the DOD and Army in fact have a duty and explaining the scope of that duty, and an injunction requiring policies and procedures to ensure that Defendants fulfill that duty, would benefit Plaintiffs, providing a mechanism by which they could seek medical care from the DOD and Army, who are uniquely positioned to provide care for such injuries.

While Plaintiffs have stated generally that their equitable claims relate to "medical care," Plaintiffs do not seek a declaration or injunction requiring that any particular medical care be provided to any particular member of the Proposed Class, or even that the Proposed Class is entitled to medical care. Rather, Plaintiffs seek a declaration by the Court establishing that the

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particular bill read twice. *Id.* at 190-91. The court found no causal connection between the failure to re-read the bill and the plaintiffs' injury resulting from the substantive content of the Act. *Id.* at 191. By contrast, Plaintiffs are being injured by the DOD's and Army's official denial of any duty to provide them with medical care for casualties. *See Armstrong*, 275 F.3d at 867; *see also LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir. 1985); *Dominguez v. Schwarzenegger*, 270 F.R.D. 477, 484 (N.D. Cal. 2010) (rejecting defendants' argument against standing that plaintiffs were merely claiming "'fears, beliefs, and suppositions that their IHSS providers might leave them if the wages are reduced'" and finding that the plaintiffs had standing).

DOD and Army do have a legal obligation under their own directives and regulations, and the U.S. Constitution, to provide medical care for casualties arising from the testing, delineating the scope of that legal duty, and an injunction establishing the appropriate policies and procedures to ensure that Defendants comply with their duty as defined by the Court. Defendants now suggest that by referring to this claim as one for "medical care," Plaintiffs have acknowledged that their "claim for medical care is in essence a claim for money damages," (Opp'n at 18), and that Plaintiffs' claim is thus not cognizable under the APA, is barred by sovereign immunity, and is unsuitable for treatment under Rule 23(b)(2). (Opp'n at 19.) However, the vitality of a claim is not determined by a label, but rather by the substance of the claim and the relief sought.[11]

Defendants cite two cases for the proposition that Plaintiffs' claims are improper. In addition to being non-binding, both cases are distinguishable in the nature of the relief sought. In *Schism*, the plaintiffs requested that lifetime healthcare be paid to Army retirees as a form of deferred compensation. *Schism v. United States*, 316 F.3d 1259, 1273 (Fed. Cir. 2002). And in *Jaffee*, the plaintiffs sought either medical care for the class, or payment for medical services, which the court characterized as "a traditional form of damages in tort compensation," noting that a payment of money would have fully satisfied the allegedly "equitable" claim. *Jaffe v. United States*, 592 F.2d 712, 715 (3d Cir. 1979). Here, by contrast, the remedies Plaintiffs seek are equitable in nature, not compensatory. Thus, the APA's waiver of sovereign immunity applies to these claims (as the Court already has held), and certification under Rule 23(b)(2) is appropriate.

[11] Not one of the issues Defendants raise is anything but common to the class. And at issue in this motion is whether certification of a class is proper. The contours of the appropriate remedies in this case are left to the Court to decide at a later stage. This Court has already held that Plaintiffs' claim for medical care is brought properly under the APA and that the APA's waiver of sovereign immunity applies to this claim. (Docket No. 59 at 7.) Plaintiffs are unaware of any authority in the Ninth Circuit that stands for the proposition that claims that relate in some way to medical care are not cognizable under the APA. Defendants' suggestion that Plaintiffs' claims are unsuitable for treatment under Rule 23(b)(2) is based on their flawed conception of the remedy that Plaintiffs seek.

3. The Proposed Class Representatives Have Standing To Assert the Claim Related to Secrecy Obligations

Defendants primarily argue that the proposed class representatives lack standing because they do "not currently feel constrained by a secrecy oath." (Opp'n at 20.) Once again, Defendants' theory of standing places Plaintiffs in a Catch-22. Under Defendants' theory, the only test participants who would have standing to represent the class are those who feel completely constrained by the secrecy oath, and thus would not come forward to bring suit. Under this theory, similar to the situation in *Barth*, no named plaintiff could ever bring such a claim or represent a putative class, even if every other class member was completely inhibited from speaking up because of the secrecy oath. *See Barth*, 661 F. Supp. at 204. While a party has to "establish standing personally before obtaining class certification, it is not irrelevant that he [seeks] to represent broader interests than his own." *Hawkins v. Comparet–Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001) (citing *LaDuke*, 762 F.2d at 1325). The Court should therefore reject Defendants' argument.

The proposed class representatives have injuries that can be redressed by the relief sought. Mr. Dufrane testified that he still feels that the secrecy oath prohibits him in some way from speaking out. (Herb Decl., Ex. 51 at 93:13-20 ("[I]f I wanted to talk to somebody about some of what happened during the experiments or whatever, I think I'm still prohibited from doing that . . .").) Thus, even under Defendants' theory, VVA would have standing through its members. And it goes without saying that VVA does not possess information concerning the effects of the secrecy obligation on its members, particularly since some may regard the secrecy oath as a barrier to communicating even with VVA. (Edelman Decl. ¶ 4.a; Sprenkel Decl. ¶ 3, Ex. 1 at VET001_015682 ("'there may be many exposed veterans and workers who took an oath of secrecy . . . and remain true to that oath even today (NAS 1993)'").)

Moreover, while the class representatives have come forward to some extent in filing this Complaint, that does not resolve the issue of continuing effects of the oaths upon them or fear of prosecution associated with the particular partial disclosures they may have made. (*See* Sprenkel Reply Decl. ¶ 7, Ex. 80 at 14 ("[S]ome participants were compelled to take an oath of secrecy and

were subject to criminal prosecution if they disclosed their participation. Such participants had a higher rate of PTSD.").) And the past injuries associated with the secrecy obligation remain. (*See, e.g.*, TAC ¶¶ 207, 221; Sprenkel Decl. ¶ 14, Ex. 12 at 32:1-8 ("Have you ever spoken to your doctors or physicians about your time at Edgewood? Not till recently . . . Within the last five years."); Sprenkel Reply Decl. ¶ 3, Ex. 76 at 104:15-105:7 (Mr. Blazinski did not feel comfortable discussing Edgewood until the "National Institute of Health" survey); ¶ 6, Ex. 79 at 85:15-18 ("Had you told your prior wife . . . about your experience at Edgewood? No.").) Given Plaintiffs' past and continuing injuries from Defendants' officially sanctioned refusal to fully release and notify all test participants of that release, the class representatives have established standing to bring this claim for equitable relief.

Defendants also argue that the class representatives "have already been released from their secrecy oaths" via the post-litigation 2011 Memo and, therefore, lack standing. (Opp'n at 19-20.) Because the earlier Perry Memo purported to release test subjects who participated prior to 1968 (Opp'n at 20), Messrs. Josephs and Blazinski, who participated in testing after 1968, were not "released" until the 2011 Memo. (Sprenkel Decl. ¶ 22, Ex. 20; ¶ 37, Ex. 35; ¶ 35, Ex. 33; ¶ 66, Ex. 64; ¶ 64, Ex. 62.) Defendants' attempt to "pick off" the named Plaintiffs' secrecy oath claims by issuing the 2011 Memo should be rejected. *See Pitts*, 653 F.3d at 1091-92; *see also Oster v. Lightbourne*, No. C 09-4668 CW, 2012 U.S. Dist. LEXIS 28123, at *17 (N.D. Cal. Mar. 2, 2012) (declining to find subclass's claims moot based on a declaration that the subclass would be exempt from a benefits reduction, where "[the] declaration was given for purposes of litigation and does not appear to be binding on Defendants"). Questions also remain concerning the scope of the DOD's releases[12] and their effectiveness, and neither release has been communicated to all members of the Proposed Class. (Op. Mem. at 15.) A declaration that the secrecy oaths are invalid would redress continuing injuries, including fear of repercussions resulting from lack of knowledge of the releases or confusion about their scope and applicability.

[12] The 2011 Memo—apparently drafted in response to this litigation since it was copied to lead counsel for Defendants—purports to release *all* test participants, but is qualified, allowing participants to speak only to health care providers and only about some aspects of testing. (Sprenkel Decl. ¶ 35, Ex. 33 at VET021-000001; ¶ 64, Ex. 62.)

With respect to the CIA, it once again argues that Plaintiffs lack standing because "Plaintiffs' 3AC contains not a single allegation that the CIA was involved in the administration of secrecy oaths or that any of the named Plaintiffs or VVA members believes he has a secrecy oath with the CIA." (Opp'n at 21.) But the Court previously rejected this same argument in its September 2, 2011 Order, finding that Plaintiffs' "allegations, construed in Plaintiffs' favor, suggest that the challenged secrecy oath could be traced fairly to the CIA and that a court order directed at the CIA could redress Plaintiffs' alleged injuries." (Docket No. 281 at 6.) Accordingly, the Court concluded that "[b]ased on their pleadings, Plaintiffs have standing to bring claims against the CIA regarding the secrecy oath." *Id.*

Thus, Defendants' attempts to "release" the Proposed Class from secrecy oaths fail to provide all the relief sought on behalf of the putative class. Continuing injuries resulting from the secrecy oaths, including fear of repercussions, hesitancy to talk to one's doctor, and increased difficulties in coping with the testing experience, would be redressed by such relief. (*See* Jan. 19, 2010 Order at 12-13 (finding that "a declaration that the oaths were unlawful would allow the individual Plaintiffs to speak freely about their experiences" and "such relief would avoid potential future litigation by clarifying whether the veterans may discuss their experiences without facing consequences").) The proposed class representatives have standing.

4. The Proposed Class Representatives Have Standing To Assert the DVA Bias Claim

Defendants suggest that the proposed class representatives must demonstrate that their claims were denied improperly due to bias in order to have standing to assert their due process claim against DVA.[13] (Opp'n at 21.) According to Defendants, Plaintiffs once again face the proverbial Catch-22, because in order to make such a finding, this Court would have to examine decisions in individual claims, and the Court is barred by 38 U.S.C. Section 511 from doing so. (Opp'n at 21-22.) This argument misconstrues not only the nature of Plaintiffs' injury but also the nature of a due process claim.

[13] To be clear, Defendants do not dispute that Mr. Blazinski's claim for compensation was denied by DVA, nor do they dispute that Mr. Josephs received only a

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(Opp'n at 22-23.)

This Court has already held that "Section 511 does not bar Plaintiffs' claim under the Fifth Amendment." (Docket No. 177 at 11.) As the Court explained:

> The crux of [Plaintiffs'] claim is that, because the DVA allegedly was involved in the testing programs at issue, the agency is incapable of making neutral, unbiased benefits determinations for veterans who were test participants. This bias, according to Plaintiffs, renders the benefits determination process constitutionally defective as to them and other class members.

(*Id.*) Contrary to Defendants' assertion, the proposed class representatives need not demonstrate that the outcome in their claim would have been different but for the alleged bias in order to establish an injury. Every claimant is entitled to a fair process, and the lack of a neutral adjudicator is *itself* unconstitutional. The success of an applicant's due process claim does "not turn on the merits" of his underlying claim, but rather on whether the applicant received the process he was due. *Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("[T]he right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions . . . "); *Stivers v. Pierce*, 71 F.3d 732, 748 (9th Cir. 1995) (holding bias of member of tribunal violates due process and plaintiff need not show that the bias affected the tribunal's ultimate decision on his claim); *Kuck v. Danaher*, 600 F.3d 159, 165 (2d Cir. 2010). Thus, to the extent that Plaintiffs prove that DVA is a biased adjudicator (a question which Defendants do not dispute is common to the class), the injury is established.

The Court need not determine whether Mr. Josephs would have been granted more than REDACTED had he received a fair adjudication, nor whether Mr. Blazinski might have further pursued his administrative remedies had he believed he would receive a fair adjudication. All members of the Proposed Class are either past or potential future claimants, and all are entitled to a neutral adjudicator. As this Court has noted, the question here is whether DVA's bias "renders the benefits determination process constitutionally defective." (Docket No. 177 at 11.) The Court need not examine any decision in any individual veteran's claim for benefits; thus—as this Court already has concluded—Section 511 does not bar jurisdiction over Plaintiffs' due process claim against DVA.[14]

[14] Defendants suggest that Plaintiffs seek a determination that DVA's policies and procedures are illegal. (Opp'n at 23-24.) While Plaintiffs may rely on DVA's policies and procedures as

II. THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF RULE 23(a)

Defendants do not dispute that the Proposed Class meets the requirements of numerosity and adequacy, but suggest that the Proposed Class cannot be certified for three reasons. First, Defendants argue that the Proposed Class is unascertainable. Second, Defendants contend that Plaintiffs "cannot establish a single common question." (Opp'n at 27.) And third, Defendants contend that Plaintiffs cannot establish typicality. As set forth below, Defendants are wrong.

A. The Proposed Class Is Ascertainable

Defendants contend that Plaintiffs' Proposed Class definition is overbroad, and that this overbreadth is "fatal" to the Proposed Class. (Opp'n at 25-26.) Defendants raise three issues with the Proposed Class definition: 1) it could include veterans allegedly tested at DVA facilities in "tests unrelated to those that are the subject of this lawsuit" or individuals who "participated in a CIA test program and served in the military at any point before or after their participation"; 2) it does not define "testing program," so some exposures (such as in basic training) would be inappropriately captured; and 3) it includes individuals who have never applied for DVA benefits or who currently receive DVA benefits. (Opp'n at 25-27.)

In order for a class definition to be adequately precise, it must simply provide the court with "tangible and practicable standards for determining who is and who is not a member of the class." 5 James W. Moore *et al., Moore's Federal Practice* § 23.21[1] (Matthew Bender 3d ed. 2012). District courts enjoy "broad discretion" to consider whether class definitions are adequate, and this adequacy depends on the particular facts of the case. *Id.* at § 23.21[4].

The notion that Defendants are not certain who would be included in Plaintiffs' Proposed Class, or what "testing programs" refers to, is belied by Defendants' own proposed definition. (Sprenkel Reply Decl. ¶ 12, Ex. 85 at 2.) Two of the concerns raised by Defendants can be resolved by simply incorporating Defendants' own proposed definition of "testing programs" (*see id.*) into the class definition and by limiting the class to participation in testing programs during

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evidence of DVA's bias, this Court has already held that a challenge to DVA's informal policies and procedures cannot be brought under the APA. (Docket No. 177 at 12-13.)

service in the military. Thus, Plaintiffs propose the following revised definition of the Proposed Class:

> All current or former members of the armed forces, or in the case of deceased members, the personal representatives of their estates, who, while serving in the armed forces, were test subjects in any human Testing Program that was sponsored, overseen, directed, funded, and/or conducted by the Department of Defense or any branch thereof, including but not limited to the Department of the Army and the Department of the Navy, and/or the Central Intelligence Agency, between the inception of the Testing Programs in approximately 1922 and the present. For the purposes of this definition, "Testing Program" refers to a program in which any person was exposed to a chemical or biological substance for the purpose of studying or observing the effects of such exposure.[15]

This revised definition clarifies that class members must have been participants in a testing program while in service and defines "testing program" as Defendants defined it themselves. (*Id*.) This definition provides the Court with tangible and practicable standards to determine who is in the class.[16]

Defendants' third argument, that the class is overbroad in that it includes individuals who have never applied for DVA benefits or who currently receive DVA benefits, is based on Defendants' mischaracterization of this claim. As the Court has recognized, Plaintiffs' claim against DVA is that DVA's bias "renders the benefits determination process constitutionally defective as to them and other class members." (Docket No. 177 at 11.) All members of the Proposed Class are past or potential future claimants and are entitled to a neutral adjudicator—essentially to a fair process. As set forth in Section I.B.4 above, this entitlement to fair process is not dependent on the outcome of any particular veteran's claim. Those who are receiving benefits now, and those who may apply in the future, are all entitled to a constitutionally adequate procedure that includes a neutral adjudicator. Thus, Plaintiffs' Proposed Class definition is not overbroad as to the claim that DVA is a biased adjudicator.

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[15] The Proposed Class does not include persons who were exclusively test participants in Project 112/SHAD ("Shipboard Hazard and Defense").

[16] However, to the extent that the Court disagrees, the Court may exercise its discretion to fashion a different definition. *Am. Council of the Blind v. Astrue*, No. C 05-04696 WHA, 2008 U.S. Dist. LEXIS 123376 (N.D. Cal. Sept. 11, 2008) (where proposed class consisted of three million individuals, the court narrowed the class definition, rather than denying class certification).

B. There Are Numerous Questions of Law and Fact Common to the Class

As a preliminary matter, Defendants incorrectly suggest that in order to certify a class under Rule 23(b)(2), the Court must find that common issues predominate. (Opp'n at 38.) Yet, as the Supreme Court made clear in *Wal-Mart*, even a single common question can suffice to establish commonality. *Wal-Mart*, 131 S. Ct. at 2556. Perhaps because Defendants realize that even a single common question is enough, they suggest that Plaintiffs "cannot establish a single common question." (Opp'n at 27.) As demonstrated in the Opening Memorandum, however, there are numerous common issues of law and fact that bind the Proposed Class.

1. Plaintiffs' Claims for Equitable Relief Related to Notice and Medical Care Present Common Issues with Common Answers

In the Opening Memorandum, Plaintiffs showed that their claims for declaratory and injunctive relief related to Notice and medical care are based on common contentions: (1) that the U.S. Constitution as well as the DOD's and Army's own rules, regulations, and directives impose a legal duty to provide members of the Proposed Class with Notice and with medical care for conditions arising out of their participation in Defendants' testing programs; and (2) that the DOD and Army have not fulfilled that duty. (Op. Mem. at 13-17.) Defendants' arguments to the contrary are without merit.

Relying on *Wal-Mart*, Defendants argue that Plaintiffs cannot establish commonality because there is no common source of duty applicable to members of the Proposed Class and they did not suffer violations of the "same provision of law." (*See* Opp'n at 27-28, citing *Wal-Mart*, 131 S. Ct. at 2551.) But Defendants misstate the commonality inquiry. The test under *Wal-Mart* is whether members of the Proposed Class "have suffered the same injury." *See Wal-Mart*, 131 S. Ct. at 2551. As articulated in the Opening Memorandum, the members of the Proposed Class have indeed suffered the same injury: Defendants have refused to provide them with Notice and medical care for conditions arising out of their participation in the testing programs. (Op. Mem. at 14-15.) This is enough to satisfy Plaintiffs' "limited burden" to show there are questions of law and fact common to the class. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012).

Defendants argue that AR 70-25 and the other Army and DOD regulations cannot be the source of a duty to provide Notice and medical care to test subjects. (Opp'n at 3, 28, 32.) Notably, the Court has already *twice* rejected that argument. (*See* Docket Nos. 59 at 14-17; 233 at 8-10.) Defendants also argue that Plaintiffs have identified no duty to members of the Proposed Class who were test participants prior to 1953.[17] (Opp'n at 28, 32.) That argument has no merit for several reasons.

As an initial matter, though Defendants argue that Plaintiffs have failed to show a "common source of duty," Defendants have failed substantively to respond to Plaintiffs' claim that the First and Fifth Amendments of the U.S. Constitution impose a common duty to provide proper procedures to test participants, including fundamental fairness, proper notice, opportunity to consent, and other basic due process requirements. (*See* Op. Mem. at 16-18.) Instead, Defendants devote one paragraph to these constitutional claims and simply reference their commonality and typicality arguments against Plaintiffs' APA claims. (Opp'n at 37-38.) Notice and medical care to all members of the Proposed Class are elements of relief for constitutional violations, regardless of the date of the tests.[18] Indeed, the constitutional and statutory claims are themselves interrelated as the regulations embody some of the basic principles of procedural due process.

Regardless, though the evolving legal regime governing the testing programs implicates updated versions of regulations, commonality exists because the same duties to provide Notice

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[17] In the Opening Memorandum, Plaintiffs argue that the DOD's and Army's regulations require the DOD and the Army to provide to all members of the Proposed Class "Notice regarding their participation in the testing (where unknown)." (Op. Mem. at 14.) Defendants misconstrue this statement as an admission that the DOD's and Army's "duty does not attach if participation is known." (Opp'n at 28.) The plain purpose of the "where unknown" language was to highlight that some of the testing was unwitting, not to limit the DOD's and Army's duties to only unwitting test participants. Indeed, such an interpretation conflicts with the definition of the Proposed Class. (*See* Op. Mem. at 1-2.)

[18] To the extent Defendants suggest that biological testing is distinct and therefore defeats commonality for veterans exposed to biological substances (Opp'n at 5, 31), Defendants' own document suggests that the programs were interrelated and biological testing did take place at Edgewood Arsenal. (Sprenkel Decl. ¶ 8, Ex. 6 at 131.) During the initial years, biological and chemical tests were both done at Edgewood; only later were biological tests handed off to Fort Detrick. Many service personnel were tested at both facilities.

and medical care for casualties flow from each version. (Op. Mem. at 13-14.) For decades, Defendants' own policies and regulations have explicitly recognized their duty to provide Notice and medical care for casualties to all test participants. (*Id.* at 6-7.) DOD's Wilson Directive required that test participants be informed of "all inconveniences and hazards reasonably to be expected; and the effects upon [their] health or person which may possibly come from [their] participation in the experiment." (Sprenkel Decl. ¶ 28, Ex. 26 at C001-002.) Further, Army Chief of Staff Memorandum CS:385 promised that "[m]edical treatment and hospitalization *will be provided* for all casualties of the experimentation as required." (Sprenkel Decl. ¶ 29, Ex. 27 at VVA 024544 (emphasis added).)

Successive iterations of Army Regulation 70-25 only more formally codified these duties. As the Court has recognized, the 1962 version of AR 70-25 "suggests that Defendants had a non-discretionary duty to warn" the volunteers about the "nature of the experiments." (*See* Docket No. 59 at 16.) The Court also already recognized that the regulation accords a right to medical care for all "casualties" of the experiments and "[t]he fact that symptoms appear after the experiment ends does not obviate the need to provide medical care." (*Id.* at 16-17.)[19]

The 1990 version of AR 70-25 is the clearest acknowledgment by the Army of its duties to test participants. As they have done twice before, Defendants argue this regulation cannot apply retroactively to testing prior to its enactment. (Opp'n at 28 n.36.) The Court has never accepted their argument. (*See* Docket Nos. 59, 233.) In any event, their argument misses the point. The regulation's express terms state forward-looking obligations to all test participants regardless of the date of their testing. For example, the regulation explicitly states that the "duty to warn" is an obligation that "exists even after the individual volunteer has completed his or her participation in research." (Sprenkel Decl. ¶ 31, Ex. 29 at Chapter 3-2(h).) That duty requires the Army to inform test subjects of the "risks involved with their participation" and "provide them with any newly acquired information that may affect their well-being." (*Id.*) It also requires the

[19] Defendants argue that the Appendix to this regulation "make[s] clear" that it "does not confer any substantive rights to health care." (Opp'n at 3 n.7.) The Court has already rejected this exact argument and should do so again. (*See* Docket No. 233 at 8-10.)

Army to create and maintain a "volunteer data base" to "ensure that the command can exercise its 'duty to warn,'" (*id.* at Appendix H), a provision that would have no meaning or purpose if it did not operate as to past tests since Defendants have asserted that the test programs ended in the mid-to-late 1970s. With respect to medical care, the regulation 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." (*Id.* at Chapter 3-1(k).) This medical care guarantee is tied to the broad duty to warn and the volunteer database, as the regulation requires medical follow-up on research subjects "to ensure that any long-range problems are detected and treated." (*Id.* at Chapter 2-5(j).) Thus, similar to the duties imposed by the Constitution (discussed above), AR 70-25 (1990) imposes a duty to provide Notice and medical care for casualties to all members of the Proposed Class, regardless of the date of their testing. At the very least, whether AR 70-25 (1990) imposes these duties is itself a common question capable of resolution on a class-wide basis.

Defendants have also argued that common issues of law do not exist with respect to the period before the issuance of the Army regulations and Wilson Memorandum in the early 1950s because of the absence of rules governing the conduct of the tests and their obligations toward participants. (Opp'n at 28.) Again, Defendants completely ignore the fact that Plaintiffs' constitutional claims encompass the entire time period. While the regulations governing the program changed from time to time, the constitutional issues are immutable. Indeed, a human testing program that has no rules is a more egregious violation of the constitutional rights of test subjects than a program that has some rules, however flawed and suspect. Likewise, Defendants' claim that there were no rules in the pre-1950s era simply does not square with the facts, as Defendants have produced the authority under which the initial testing program of mustard gas, lewisite, and other substances proceeded during this early period.[20]

[20] The early tests were conducted pursuant to the May 8, 1942 approval of the Acting Secretary of the Navy based upon an application from the Chairman of the Committee on Medical Research, which was conditioned upon approval of the Surgeon General. (Sprenkel Reply Decl. ¶ 13, Ex. 86 at VET017-000695-96). The application sought approval for the use of military personnel to test "war gases," later called "vesicant gases," based upon several key limitations and conditions. First, tests of "limited numbers" of volunteers, defined as no more than fifty in a group, would be

In *Rodriguez v. Hayes*, the Ninth Circuit recently addressed an argument similar to that made by Defendants here. 591 F.3d 1105 (9th Cir. 2010). The defendants there challenged the commonality of class members' claims, arguing that the class members suffered detention under the authority of different statutes and that there were individual, divergent questions of statutory interpretation as to different groups among the class. *Id.* at 1122. The Ninth Circuit rejected this argument, explaining that "the commonality requirement asks us to look only for some shared legal issue or a common core of facts." *Id.* The court found that although "the nature of the particular statute authorizing the detention of individual class members will play some role in determining whether class members are entitled to relief," there were common issues at the heart of each class member's claims, as is the case here. *Id*. at 1123. Following *Rodriguez*, this Court should find that the evolving nature of the applicable legal regime does not defeat commonality.

Defendants also argue that because "class members have received a wide variety of notices regarding the test programs" from various sources, the notice claim lacks commonality. (Opp'n at 30-31.) But Defendants do not argue that they actually provided Notice to members of the Proposed Class, as that term is defined in the Opening Memorandum. (*See* Op. Mem. at 2.)[21] The Ninth Circuit has recently rejected a similar attempt to defeat Rule 23(a)(2) commonality, holding that variations among the knowledge of class members did not defeat commonality. *Mazza*, 666 F.3d at 589. But here there is no dispute that Defendants have not provided the Notice to which Plaintiffs claim they are entitled.

Defendants also argue that the Court cannot determine whether the DOD and Army actually fulfilled their duty without inquiring "into the varied purported health effects of hundreds

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"carefully supervised," and extend for a limited period of time (a maximum of ten days). The test plan would be subject to advance approval of the Surgeon General, and tests were to be "performed under the supervision of a medical officer." *Id.*

[21] Defendants themselves acknowledge that only approximately 4,000 individuals (out of the many tens of thousands in the class) received DVA "outreach" letters or some other form of information about testing. (Opp'n at 39.) Of the approximately 60,000 veterans who participated in mustard gas testing, only 321 were sent notice letters. Despite this, DVA considers the effort complete. (Sprenkel Decl. ¶ 42, Ex. 40 at DVA004-014451; ¶ 41, Ex. 39 at 4; ¶ 58, Ex. 56 at 11 ("VA has completed outreach efforts to Project 112/SHAD and MG participants.").)

of substances."[22] (Opp'n at 31.) But this simply is not the case. As Plaintiffs argued in their Opening Memorandum, neither the DOD nor the Army has informed members of the Proposed Class of the potential health effects from their participation in tests. (Op. Mem. at 14.) Further, the remedy Plaintiffs seek would not require the Court to inquire into the health effects of each substance individually. Rather, the Court could readily determine that the types of substances tested create increased risks of adverse health effects,[23] and could simply order the DOD and Army to determine the health effects of each substance, or to review the scientific literature regarding the effects of each substance, and order Defendants to notify members of the Proposed Class of the health effects they find. Thus, whether the DOD and Army have fulfilled their duties is a common question capable of class-wide resolution.

2. The Secrecy Oath Claim Presents Common Issues with Common Answers

In the Opening Memorandum, Plaintiffs established that the secrecy oath claim raises numerous common questions with common answers. The fundamental questions—common to the class—are whether secrecy oaths are valid, and whether members of the Proposed Class should be unconditionally released from any such oaths (and notified that they are so released).

Defendants suggest that these are individualized inquiries because of the various kinds of secrecy oaths, and because there is a lack of commonality with regard to "any purported continuing obligation to maintain secrecy." (Opp'n at 34.) Yet Defendants conveniently note their belief that there *were no written secrecy oaths* (Opp'n at 8), that they have found no

[22] Defendants also argue that under Plaintiffs' definition of Notice, "an individual who suffered no health effects would not need to be notified of any health effects." (Opp'n at 31.) As an example, they cite test participants who "only received placebos" or were "exposed to drugs for which there are no known health effects." (*Id.* at 31 n.41.) Defendants misstate Plaintiffs' position. Plaintiffs' definition of Notice includes "potential health effects associated with . . . participation in the tests," (Op. Mem. at 2) and as Defendants have admitted, *mere participation* in testing programs can cause long-term psychological effects. (Sprenkel Decl. ¶ 63, Ex. 61 at 37.)

[23] The substances tested were, after all, chemical or biological weapons, which have the underlying purpose to kill or incapacitate people. (Sprenkel Reply Decl. ¶ 15, Ex. 88 at 441:19-25; 445:4-23.)

evidence of any CIA secrecy oaths (Opp'n at 33), and that regardless, DOD has released the members of the Proposed Class from their secrecy oaths (Opp'n at 34). These contentions are inconsistent with any suggestion that these issues are anything but common to the class.

Moreover, the nature of the obligation (*i.e.*, whether written or oral) and whether or not obligations have been violated are immaterial to the relief Plaintiffs request: that the secrecy oaths be declared invalid. Defendants admit DVA recently "expressed concerns that veterans may still be reluctant to talk to health care providers." (Opp'n at 8.) Reports indicate that "[a]lmost to a man, [test participants] kept this secret for the next 40 or more years." (Herb Decl. Ex. 2 at 1.) This is precisely one of Plaintiffs' concerns. Not only are the questions common—but the answers are common as well: either the secrecy oaths are valid or they are not, and either the class should be released from those oaths or should not. The other issues Defendants raise with regard to secrecy oaths go to the merits of Plaintiffs' claims, not to the question of whether common issues exist.

Defendants also suggest that the potential affirmative defense of statute of limitations defeats commonality as to the secrecy oath claim,[24] (Opp'n at 36), primarily citing to *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004), and *Sprague v. Gen. Motors Corp.*, 133 F.3d 388 (6th Cir. 1998). But the secrecy oaths here are a continuing problem, and the statute of limitations should not apply. Indeed, the Court has already recognized that "given that the individual Plaintiffs took an oath not to discuss the testing program which presumably delayed their filing of this action, Defendants may be equitably estopped from asserting a statute of limitations defense." (Docket No. 59 at 19 n.6). Equitable estoppel exists to prevent the government from benefitting from its own misconduct. *Ramírez-Carlo v. United States*, 496 F.3d 41, 48-50 (1st Cir. 2007). After threatening test participants with repercussions and imposing

[24] The Court denied Defendants' Alternative Motion for Summary Judgment based upon the statute of limitations despite the voluminous exhibits and declarations they submitted to support that portion of their motion. (Docket No. 59 at 19.) Defendants also identify *res judicata* as an affirmative defense that they argue defeats commonality. (Opp'n at 36-37.) However, Defendants can only identify a handful of previously litigated cases among tens of thousands of proposed class members, and those earlier cases involved a different remedy (monetary damages) than the remedies sought here.

secrecy oaths, Defendants should not now be allowed to claim the benefit of the statute of limitations.

Furthermore, Defendants' cases are inapposite. In *Sprague*, cited by Defendants for the proposition that individualized determinations have the potential to defeat commonality, earlier court rulings had already eliminated the common issues that were present, such that the *only remaining issues* involved individualized inquiries. 133 F.3d at 397-98. In contrast, here, Plaintiffs' claims present many common issues. And in *In re Monumental*, the court actually found class treatment was appropriate even though certain individuals' recovery was barred due to the statute of limitations. 365 F.3d at 421. Plaintiffs seek certification under 23(b)(2), not 23(b)(3), and have shown that common issues exist for each claim under the "permissive" standard of 23(a)(2). *See Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998). Defendants' assertion that statue of limitations issues somehow defeat commonality in this case is unsupported by the authority on which they rely and should be rejected.[25]

C. Messrs. Josephs's and Blazinski's and VVA's Members' Claims Are Typical of Those of the Proposed Class

Defendants suggest that the proposed class representatives' claims are not typical for four reasons. First, Defendants suggest that because Messrs. Blazinski and Josephs participated in testing in 1968, their claims are not typical of members of the Proposed Class who participated in earlier phases of the testing program conducted between 1922 and 1952. (Opp'n at 28, n.37.)[26] Second, with regard to Plaintiffs' secrecy oath claim, Defendants suggest that the claims of Messrs. Josephs and Blazinski are not typical of any pre-1968 claimants, who, according to

[25] Defendants do not dispute commonality with regard to survivors, nor do they otherwise challenge their inclusion in the Proposed Class. To the extent Defendants suggest that the proposed class representatives' claims are not typical of the claims of survivors (Opp'n at 28 n.37), as explained in Plaintiffs' Reply in Support of Administrative Motion to Substitute, the claims that deceased veterans' representatives assert *are the claims* of those deceased veterans. (Docket No. 374 at 2-3). Their claims are not distinct. Thus, the proposed class representatives are typical of the claims of survivors.

[26] Defendants do not dispute that Messrs. Josephs's and Blazinski's claims related to Notice and medical care are typical of all post-1952 test participants.

Defendants, were partially released from secrecy oaths by the Perry Memo. (Opp'n at 35, n.44.) Third, Defendants suggest that Messrs. Josephs and Blazinski are not typical of the members of the Proposed Class because, according to Defendants, neither felt "inhibited" by secrecy oaths. (Opp'n at 35, n.45.) And finally, Defendants argue that typicality is defeated as a result of affirmative defenses applicable to the claims of Messrs. Josephs and Blazinski. (Opp'n at 36-37.)

The typicality requirement is satisfied when "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendants' liability." *Rodriguez*, 591 F.3d at 1124 (citing *Armstrong*, 275 F.3d at 868). "Like the commonality requirement, the typicality requirement is 'permissive' and requires only that the representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantively identical.'" *Id.* (citing *Hanlon*, 150 F.3d at 1020). As set forth in the Opening Memorandum, the injuries suffered by Messrs. Josephs and Blazinski are "reasonably co-extensive" with the injuries suffered by the entire class. (Op. Mem. at 20-21.)

Defendants suggest that the timing of the testing program in which the proposed class representatives participated is dispositive of typicality. However, differences in facts such as the timing or location of the testing do not defeat typicality. Defendants are essentially arguing that typicality is defeated because different members of the proposed class may have participated in testing when different versions of directives and regulations were in effect. Again, Defendants ignore Plaintiffs' unitary constitutional claims rooted in due process. Moreover, the Ninth Circuit rejected such an argument in *Rodriguez*, finding that the fact that "Petitioner and some of the other members of the proposed class [were] detained under different statutes and are at different points in the removal process and hence do not raise identical claims" did not defeat typicality. 591 F.3d at 1124. On the contrary, the Ninth Circuit found that where all of the class members raised similar constitutionally-based arguments, and were alleged victims of the same practices by the defendants, the fact that the plaintiff did not have a legal claim identical to the claims of the entire class did not defeat typicality. *Id.*; *see also Armstrong*, 275 F.3d at 869. The court's reasoning is equally applicable here. The year in which a Plaintiff participated in testing does not defeat typicality because the "same or similar course of conduct" that Plaintiffs challenge was

consistent throughout the testing programs. *Montanez v. Gerber Childrenswear, LLC*, No. CV 09-7420 DSF(DTBx), 2011 U.S. Dist. LEXIS 150942, at *10 (C.D. Cal. Dec. 15, 2011).[27]

As to Defendants' argument that Messrs. Josephs and Blazinski are not typical class representatives because they do not feel "inhibited" by the secrecy oaths—Defendants understate the *in terrorem* effects of the secrecy obligations and misconstrue Plaintiffs' claim. First, the essence of Plaintiffs' claim is that the oaths administered decades ago were invalid, and that all members of the Proposed Class should now be unconditionally released from any secrecy oaths (and notified of such release). (Op. Mem. at 15.) Variation among the class members regarding their understanding of the secrecy oath, and the extent to which they may have made limited disclosures for limited purposes (*e.g.*, talking to spouses or responding to government surveys), does not mean that they did not feel inhibited in any way, or that they do not feel threatened by potential repercussions as a result of speaking out. More important, these variations are immaterial to the issue of whether the secrecy oaths themselves are invalid. Both Messrs. Josephs and Blazinski felt constrained by secrecy oaths, such that they did not discuss their Edgewood test participation with doctors for decades, which is the essence of Plaintiffs' secrecy oath claim. (Sprenkel Reply Decl. ¶ 5, Ex. 78 at 160:3-10, 32:1-8; ¶ 3, Ex. 76 at 104:15-105:10.) Slight variations in their willingness to speak about the testing do not render their claims atypical.

Finally, Defendants argue that the secrecy oath claims of Messrs. Blazinski and Josephs[28] may be time-barred and are thus not "typical" of the Proposed Class. (Opp'n at 36-37.) Defendants are mistaken. As set forth above in Section II.B.2., the secrecy oath is a continuing problem, and Defendants should not now be able to claim the benefit of the statute of limitations.

[27] With regard to Defendants' second typicality argument—that Messrs. Josephs and Blazinski cannot establish typicality for the secrecy oath claim because they were tested in 1968, and are not typical of those who may have been "released" by the Perry Memo—Defendants fail to note that VVA member David Dufrane participated in testing in 1965. (Herb Decl., Ex. 80 at PLTF 000087.) To the extent the Court concludes that the issue of whether a proposed class representative is covered by the Perry Memo is sufficient to defeat typicality—and Plaintiffs contend that it is not—VVA can establish typicality based on its member David Dufrane.

[28] Defendants raise the statute of limitations issue *only* with regard to Plaintiffs' secrecy oath claim. (Opp'n at 36.)

But even if the Court ultimately determines that the statute of limitations applies (which is more appropriately considered at the merits stage of litigation), affirmative defenses defeat typicality "only where they 'threaten to become the focus of the litigation.'" *Rodriguez*, 591 F.3d at 1124 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Here, there is no such threat. *See, e.g.*, *Ralston v. Mortg. Investors Grp.*, No. 5:08-cv-00536-JF(PSG), 2012 U.S. Dist. LEXIS 24324, at *20-21 (N.D. Cal. Feb. 27, 2012) (finding typicality where no evidence that a unique defense would preoccupy the class representative at the expense of the class or that he had "lost interest" in the action); *Schramm v. JPMorgan Chase Bank, N.A.*, No. LA CV09-09442 JAK(FFMx), 2011 U.S. Dist. LEXIS 122440, at *16-17 (C.D. Cal. Oct. 19, 2011) (same); *McDonough v. Toys R Us, Inc.*, 638 F. Supp. 2d 461, 476 (E.D. Pa. 2009) (finding typicality where statute of limitations could bar class representatives' claims because it did "not affect the presentation of the liability issues" and it was unlikely to be a significant issue at trial).

Finally, Defendants do not argue that VVA's claim is barred by the statute of limitations. Thus, potential statute of limitations issues do not defeat typicality.

III. THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF RULE 23(b)

A. Class Certification Is Appropriate Under Rule 23(b)(2)

In the Opening Memorandum, Plaintiffs established that class certification is appropriate under Rule 23(b)(2) because Defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Defendants suggest that Rule 23(b)(2) certification is not appropriate for three reasons: 1) because different versions of directives or regulations applied throughout the class period; 2) because DVA (which the Court has ruled had no legal obligation to send notice) sent outreach letters to approximately 4,000 veterans out of many tens of thousands in the class; and 3) because—according to Defendants—Plaintiffs' "medical care" claim is "one essentially for money damages." (Opp'n at 38-39.)

The Ninth Circuit rejected Defendants' first argument in *Rodriguez*, holding that while "[t]he particular statutes controlling class members' detention may impact the viability of their individual claims for relief, [they] do not alter the fact that relief from a single practice is

requested by all class members." *Rodriguez*, 591 F.3d at 1126. Here, as in *Rodriguez*, the members of the class seek the same relief—a declaration establishing the scope of Defendants' legal duties, an injunction requiring Defendants to provide Notice, an injunction establishing policies and procedures to ensure that Defendants provide medical care where appropriate, and a neutral adjudicator of Plaintiffs' claims for compensation from DVA.

Nor do the approximately 4,000 outreach letters sent by DVA render certification under 23(b)(2) improper. The DOD's Rule 30(b)(6) witness explicitly testified that it was "the DVA's notice," and the DOD merely offered comments. (Sprenkel Reply Decl. ¶ 15, Ex. 88 at 518:8-519:16.) Thus, the DOD has disavowed and cannot rely on anything DVA did to provide notice to test subjects. Further, putting aside the false or misleading statements in DVA's outreach letter, Defendants do not even contend—nor could they—that those letters constitute "Notice" as defined for the purposes of this motion, for the outreach letter was generic, offered no information regarding specific substances, doses, or method of administration, and not only did not disclose known or suspected health effects, but also denied their very existence.[29] And finally, as discussed in Section II.B.2., Plaintiffs do not seek relief that is compensatory in nature, and thus, Plaintiffs' "medical care" claim is not a claim for money damages. Certification under Rule 23(b)(2) is appropriate.

B. Class Certification Is Appropriate Under Rule 23(b)(1)(A)

The Proposed Class satisfies Rule 23(b)(1)(A) because 1) Plaintiffs seek injunctive and declaratory relief, and 2) separate actions brought by individual members of the Proposed Class would create a risk of establishing incompatible standards of conduct for Defendants. (Op. Mem. at 25.) In their Opposition, Defendants cite to *McDonnell-Douglas Corp. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975), for the proposition that class certification under Rule 23(b)(1)(A) is inappropriate because "(b)(1)(A) was not intended to permit class

[29] Indeed, the FAQs enclosed with the outreach letter affirmatively misrepresent the health effects experienced by test subjects exposed to LSD, stating that the volunteer records did not show test subjects experienced flashbacks, when in fact they did. (Sprenkel Reply Decl. ¶ 15, Ex. 88 at 659:7-662:25.)

actions simply when separate actions would raise the same question of law." (Opp'n at 40.) But Defendants omit a crucial detail that makes the *McDonnell-Douglas* holding inapplicable here—the claims at issue were for damages, and not for injunctive relief. *See id.* at 1085-86. As the court noted, claims for damages are generally inappropriate for certification under Rule 23(b)(1)(A) because the defendant could "act consistently" by paying a judgment to one plaintiff and not paying another. *Id.* at 1086. That is not the case as to the relief Plaintiffs seek here because Defendants have the same duties to all members of the Proposed Class, and Plaintiffs seek equitable relief. Without class treatment, separate actions brought by individual members of the Proposed Class would create a risk of establishing incompatible standards of conduct for Defendants, such that they could owe a duty to one test participant but not another.[30] Thus, certification of the Proposed Class under Rule 23(b)(1)(A) is proper.

CONCLUSION

For the reasons set forth in the Opening Memorandum and herein, Plaintiffs respectfully request that the Court certify the Proposed Class, designate William Blazinski, Tim Josephs, and VVA as the Representatives of the Proposed Class, and appoint their attorneys as class counsel.

Dated: March 22, 2012

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[30] Relying on *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir. 2001), Defendants claim "the Ninth Circuit has ruled that a claim seeking service connection for an ailment" is a claim for damages. (Opp'n at 40.) *Zinser*, a products liability case, contains no such holding.