Nos. 13-17430, 14-15108

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIETNAM VETERANS OF AMERICA et al.,

Plaintiffs-Appellants,

v.

CENTRAL INTELLIGENCE AGENCY, et al.

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EMERGENCY MOTION FOR STAY AND EXPEDITED REVIEW UNDER CIRCUIT RULE 27-3

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CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

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(2) Facts showing the existence and nature of the emergency

As set forth more fully below, the district court has entered an injunction under Section 706(1) of the Administrative Procedure Act requiring the Army to provide veterans involved in pre-1976 tests of chemical and biological agents with newly-acquired information about the tests and their potential impact on veterans' health. Although the court did not identify any information within the Army's possession

concerning effects on the well-being test participants that has not already been made available to veterans through prior outreach efforts, the court required the Army to file a report within 90 days (by February 18, 2014) describing the efforts it has made to locate new information and commit to transmitting any such information to class members within 120 days (by March 19, 2014). Both plaintiffs and the government have appealed aspects of the final decision providing the basis for the district court's injunction and this Court has expedited briefing on those appeals, which will be completed by April 21, 2014.

(3) When and how counsel notified

The undersigned counsel notified counsel for Appellants/Cross-Appellees plaintiffs by email dated February 6, 2014 of the government's intent to file this motion. Service will be effected through the CM/ECF system.

(4) Submissions to the district court

The Army requested a stay pending appeal from the district court on January 22, 2014. The district denied that motion on February 5, 2014.

s/ Charles W. Scarborough
CHARLES W. SCARBOROUGH

INTRODUCTION

The Secretary of the Army respectfully seeks an emergency stay pending appeal of the district court's injunction requiring the Army to undertake additional efforts, on an ongoing basis, to locate new information concerning possible adverse health effects that could arise from pre-1976 tests of chemical and biological agents and to transmit any "newly-acquired" information to past test participants. It is undisputed that the Army (in conjunction with the Department of Veterans Affairs) has already provided notice letters to all test participants for whom it could find contact information, created a public website with pertinent studies regarding health effects from testing programs, set up a 1-800 number to answer questions from individual test participants, and provided service member test files to veterans upon request. The district court made no finding that there is any significant new information regarding adverse health effects from testing programs terminated long ago that has not already been made available to veterans through these extensive prior outreach efforts. Nevertheless, the court ordered the Army to file a report within 90 days (that is, by February 18, 2014, as February 17 is a federal holiday) describing what it plans to do to locate new information and to commit to transmitting any newly-acquired information to class members within 120 days (*i.e.*, March 19, 2014), and to continue to do so indefinitely in the future pursuant to ongoing judicial oversight.

The district court's injunction is legally unsound, and it imposes substantial burdens on the Army that will cause irreparable harm unless stayed. As explained

below, both plaintiffs and the Army have appealed aspects of the final decision providing the basis for the court's injunction and this Court has expedited briefing on those appeals, which will be completed by April 21, 2014. A modest stay pending the resolution of those appeals is thus warranted to maintain the status quo and avoid the unnecessary diversion of limited government resources required to comply with a legally infirm injunction that will likely be vacated or modified on appeal.

The Army has a strong likelihood of success on appeal. At a minimum, it has raised serious questions regarding the propriety of the injunction. For example, the Army Regulation (AR 70-25) that the district court found imposed a forward-looking "duty to warn" does not clearly apply to participants in the testing programs at issue in this case. The district court acknowledged that the regulation was ambiguous on this point. That ambiguity should have precluded the court from ordering action under Section 706(1) of the Administrative Procedure Act, which applies only when an agency has "failed to take a *discrete* action that it is *required to take*," *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphases in the original).

The balance of harms also counsels strongly in favor of a stay of the court's injunction pending the resolution of the parties' expedited appeals. As explained in detail below, compliance with the initial deadlines in the court's injunction will require a considerable expenditure of the Army's manpower, time, and money, which will need to be diverted from other priorities. The Army will be required to expend these resources even though there is no indication that it will discover any new information

to provide to veterans who participated in these testing programs. On the other hand, a modest stay pending this Court's expedited consideration of this appeal will not prejudice or burden the plaintiffs, who have never previously sought emergency or expedited relief at any point in this case.

The district court denied the government's motion for a stay pending appeal on February 5, 2014. In view of the imminent deadlines in the injunction, we respectfully request that this Court act on this motion no later than February 18, 2014, or, in the alternative, grant an administrative stay pending its resolution of the government's stay motion.

STATEMENT

1. Background. Between World War II and 1976, the Department of Defense (DoD) conducted tests that exposed thousands of volunteer members of the armed forces to chemical and biological agents. The purpose of these tests was to develop new weapons and protective measures against such weapons. Test participants were exposed to a broad range of substances, including caffeine, Ritalin, LSD, mustard agents, nerve agents, and lewisite. DoD stopped testing live agents on human subjects in 1976.

In the four decades since testing on human subjects was terminated, the government has undertaken substantial efforts to identify, contact, and provide notice to test participants where feasible and appropriate, and has followed-up with participants to assess their health over time. Both DoD and the Department of

Veterans Affairs (VA) conducted or contracted for several studies and DoD independently sought to identify all test participants. In 2005, the VA (acting in conjunction with DoD) sent approximately 300 letters to World War II-era veterans explaining that they had been exposed to mustard agents or lewisite and providing information about how to seek free medical care from the VA. In 2006, the VA sent letters to approximately 3,300 Cold War-era test participants. These letters described the testing programs in general terms and explained how to contact DoD to request additional information and how to seek both a free medical exam from the VA and how to obtain further medical care from the VA.

In addition to the notice letters, fact sheets, and Frequently Asked Questions prepared by the VA and DoD, the government has engaged in many other outreach efforts. For example, DoD maintains a public web site with links to relevant materials such as GAO reports, Institute of Medicine (IOM) reports, congressional testimony, and DoD briefings and reports. *See* http://mcm.fhpr.osd.mil/cb_exposures/cb_exposures_home.aspx. The DoD web site contains frequently asked questions and provides both a phone number and an address so that veterans may verify information or obtain copies of their test files. Likewise, the VA maintains a web site with information about the WWII-era and Cold War-era test programs. *See* http://www.warrelatedillness.va.gov/. Both DoD and the VA have also held public briefings for veterans service organizations, including the lead plaintiff in this case, Vietnam Veterans of America.

2. Prior Proceedings. In 2009, several individual veterans and two veterans' organizations filed this suit against DoD, the Army, and other agencies allegedly involved in the testing programs. The plaintiffs sought to represent a class of all veterans who had been exposed to chemical and biological agents and asserted a variety of constitutional and statutory claims. Although the district court certified two classes, it granted summary judgment in the government's favor on nearly all of plaintiffs' claims. However, the court granted summary judgment against the government on plaintiffs' claim that the Army has an ongoing duty to provide class members with additional information about their involvement in testing programs and associated risks to their health. 11/19/13 Op., at 21-44 (Attachment A)

The district court concluded that Army Regulation 70-25, which governs the use of volunteers as research subjects, imposes a broad and ongoing "duty to warn" past participants in any Army testing programs of any new information that could affect their well-being. The relevant section of the 1990 version of AR 70-25, which is still in effect, provides that "Commanders have an obligation to ensure that research volunteers are adequately informed concerning the risks involved with their participation in research, and to provide them with any newly acquired information that may affect their well-being when that information becomes available." AR 70-25 (1990) § 3-2.h. The district court held that AR 70-25 imposes a legally binding duty that is enforceable under 5 U.S.C. § 706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed."

The district court first held that AR 70-25 is a substantive rule with the "force of law." Attach A, at 22-30. The court then held that the regulation's "duty to warn" applies to participants in tests conducted before AR 70-25 was adopted. The court acknowledged that nothing in AR 70-25 "clearly requires that these provisions apply to those who became volunteers before [the regulations] were created," and that the Army interpreted that regulation to apply only to tests conducted after the effective date of the regulation. Attach A, at 33. The court declined to defer to the Army's interpretation, however, characterizing it as a "convenient litigation position." *Id.* at 35. The court ultimately concluded that plaintiffs' interpretation was "more persuasive" and that the "duty to warn" in AR 70-25 encompasses past test participants such as the plaintiffs. *Id.* at 36-40.

The court next held that the Army had failed to carry out its obligations under AR 70-25 and that this failure could be remedied under Section 706(1) of the APA. The court acknowledged that plaintiffs could not challenge the adequacy of the 2005 and 2006 letters sent to test participants because this would be an impermissible challenge to "how Defendants carried out their duty, not whether they did so at all." *Id.* at 43. Nevertheless, the court held that plaintiffs could properly challenge what it characterized as "the *refusal* of the Army to carry out its ongoing duty to warn, that is after [the 2006 letters] and in the future." *Id.* (emphasis added). The court stated that there "is no material dispute of fact that the Army is not [providing notice] on an ongoing basis" and concluded that this aspect of plaintiffs' claim was thus permissible

under Section 706(1) because it was not a prohibited challenge to the sufficiency of agency action. *Id.* Thus, while granting "summary judgment in favor of the Army to the extent that Plaintiffs seek to challenge its original notice efforts," the court held that the Army has an "ongoing duty to warn." *Id.* at 44.

The court entered a permanent injunction directing the Army to provide class members with information it acquired after June 2006, the date when the VA began sending letters to Cold War-era test participants. Injunction, at 2 (Attachment B). Specifically, the injunction orders the Army to "provide each test subject with any new information it has acquired with regard to (a) The nature, duration, and purpose of the testing undergone by that particular test subject; (b) The method and means by which the testing was conducted; (c) The inconveniences and hazards reasonably to be expected by that test subject as a result of participation in the testing; and (d) The effects upon their health which may possibly come from such participation." *Id.* The injunction further requires the Army to file a report with the district court within 90 days (February 18, 2014) describing the steps it has taken to locate such information and commit to provide it to class members within 120 days (March 19, 2014). *Id.* at 2-3. The report must also set forth plans and policies for "periodically collecting and transmitting" any information the Army acquires in the future and providing status reports to the court regarding these efforts. *Id.* at 3. The district court also retained jurisdiction to enforce its order.

Plaintiffs appealed the district court's final judgment and the Army filed a cross-appeal. This Court granted plaintiffs' motion to expedite consideration of those appeals and has entered a streamlined cross-appeal briefing schedule under which the final brief will be filed by April 21, 2014. The government requested a stay pending appeal from the district court, but the court denied that motion on February 5, 2014. While assuming that the Army had established that substantial questions exist concerning the propriety of its injunction, the court found that the Army had not shown irreparable injury or that a stay is in the public interest. Attachment D, at 4.

DISCUSSION

This Court considers four factors in determining whether to grant a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). This Court has explained the relationship between these factors by grouping them into "'two interrelated legal tests' that 'represent the outer reaches of a single continuum.'" *Id.* (quoting *Lopez v. Heckler*, 713 F2d 1432, 1435 (9th Cir. 1983)). "At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury . . . At the other end of the continuum, the moving

party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id.* (citations and internal quotations omitted). A stay is required in this case under either formulation.

I. The District Court's "Notice" Injunction Should Be Reversed.

The district court erred in holding that AR 70-25 imposes a prospective duty on the Army to locate and provide new information regarding possible adverse health effects to veterans arising from their participation in chemical and biological testing programs conducted by the Army many years ago that is sufficiently "discrete and mandatory" to be enforceable in an action to compel agency action unlawfully withheld or unreasonably delayed under 5 U.S.C. § 706(1).

As an initial matter, whatever "duty to warn" the 1990 version of AR 70-25 might contain does not clearly apply to veterans who participated in testing programs long before the current version of that regulation was issued. Indeed, the district court itself conceded that it is not clear "whether this ongoing duty is owed to individuals who participated in experiments before 1988 or whether it is limited to only those who might have done so after AR 70-25 was revised in 1988." Attach. A, at 33. The Army reasonably interprets AR 70-25 *not* to impose such a duty, and the district court erred in not deferring to the Army's interpretation of its own regulation. *See Auer v. Robbins*, 519 U.S. 452 (1997).

The court declared that the Army's interpretation was not entitled to deference because it was advanced for the first time in litigation. Attach. A, at 36-37. But this

Court has long recognized that the rule that "post hoc rationalizations" are not entitled to deference does not apply with the same force in cases under Section 706(1), where agencies by definition have no occasion or opportunity to interpret regulations prior to litigation. *See Independence Mining Co. v. Babbitt*, 105 F.3d 502, 511–12 (9th Cir. 1997). *See also Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880–81 (2011); *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2264, 2264 (2011). Rather than deferring to the Army's construction of AR 70-25, a regulation the Army is free to rescind or modify at any time – the district court held that plaintiffs' broad conception of the obligations imposed by that regulation was "more persuasive." Attach A, at 39. Even on its own terms, that ruling was erroneous,[1] but the court plainly had no authority to construe an ambiguous regulation to impose legal duties enforceable under Section 706(1) of the APA.

In holding that AR 70-25 imposed a broad and ongoing duty to notify pre-1976 test participants of new information regarding health effects possibly flowing from testing programs terminated long ago, the district court exceeded the narrow scope of

[1] The court concluded that the 1990 version of AR 70-25 must extend to pre-1976 testing participants primarily because it refers to research involving the exposure of human subjects to chemical and biological agents. Attach A, at 39-40 (citing AR 70-25 § 1.4d(4). Because DoD stopped such testing in 1976, the court reasoned that this provision would be superfluous unless it referred to past testing programs. *Id.* at 40. But the court erred in finding that a broad construction of AR 70-25 was needed to avoid rendering this provision superfluous. Although DoD terminated all programs involving human exposure to chemical and biological agents in 1976, it continued to perform tests on human subjects involving defensive measures against such agents, such as the anthrax vaccine. In short, that provision remains applicable in some cases.

its authority under Section 706(1). While courts may "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1), the Supreme Court has made clear that Section 706(1) does not allow plaintiffs to challenge an agency's "compliance with broad statutory mandates." *Norton v. Southern Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55, 66 (2004). In *SUWA*, the Court held that "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*." *Id.* at 64 (emphases in original). As the district court's own analysis make clear, whatever "duty to warn" AR 70-25 might be thought to impose is not sufficiently clear to be enforceable under Section 706(1), which applies only where "the agency's legal obligation is so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Hells Canyon Pres. Council v. U.S. Forest Serv.,* 593 F.3d 923, 932 (9th Cir. 2010).

Moreover, even if AR 70-25 did clearly apply to the testing programs at issue in this case, the scope of the action required turns on discretionary scientific and medical judgments about what constitutes new information that "may affect" the well-being of former test participants. For example, the complicated question of what type of scientific evidence is required to trigger some form of notice, let alone what form such notice should take, requires policy judgments about whether and under what circumstances "new" information is significant enough to warrant sending new notices to veterans that may unnecessarily alarm them. *See* Declaration of Dee Dodson Morris ¶ 19 (Attachment C). Likewise, whether the Army must actively seek

out studies or scientific research concerning the various test substances, and from what sources they must search, involves a host of discretionary judgments about resource allocation and the significance of the information likely to be collected. These are not the sorts of discrete and mandatory duties properly enforceable under the mandamus-like standards of Section 706(1). The district court thus erred in issuing an injunction that is likely to embroil the court in the day-to-day minutiae and administration of Army programs, determining things like what medical journals the Army must scour for new information, how often the Army must conduct such searches, and when information of questionable relevance or value must nevertheless be provided to test participants.

The district court also erred in allowing a challenge to the sufficiency of the Army's notification efforts. As this Court has explained, Section 706(1) does not permit "plaintiffs to evade the [APA's final agency action] requirement with complaints about the sufficiency of an agency action dressed up as an agency's failure to act." *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999). The district court properly recognized that this principle precluded plaintiffs from challenging the sufficiency of the notice provided in the 2005 and 2006 letters to testing participants. Attach A, at 43. In limiting its grant of relief to information the Army has acquired since 2006, the court purported to solely be allowing a challenge to "the Army's failure to act," *id.*, but the Army's efforts to provide appropriate notice and information to veterans did not cease in 2006. It is undisputed that both DoD

and the VA continue to maintain public websites and telephone hotlines to provide information to World War II and Cold War-era test participants and respond as needed to requests from individual veterans seeking their test files. The district court apparently believed those efforts were inadequate, but this only confirms that the claims in this case challenge the *sufficiency* of the Army's actions "dressed up as an agency's failure to act" in a way that is forbidden under Section 706(1).

The injunction must also be reversed because the district court did not make the requisite finding that the Army failed to take any "discrete agency action" that it was required to take. *SUWA*, 542 U.S. at 64. Specifically, the court did not find that the Army has acquired any significant new information regarding possible effects on the health and well-being of test participants that it has not disclosed. Nor is there any reason to believe any such information exists, given the comprehensive studies conducted long ago on all the substances used in these testing programs. The court faulted the Army for not sending "any updated information to test subjects" and "not acknowledg[ing] any intent or duty to do so," Attach A, at 43. But it is undisputed that DoD has provided information in the form it believes is most appropriate and continues to make relevant information available to veterans in a variety of different ways, including the operation of a public website for veterans which contains, among other things, long-term studies concerning testing program and identifies a 1-800 number allowing veterans to obtain their service member test files containing the information that DoD has about various tests. In the absence of any record evidence

that the Army has acquired any new information regarding adverse health effects from any testing programs since 2006, there is simply no factual predicate for concluding that the Army failed to do something it had a "discrete and mandatory" duty to do, particularly where the district court itself recognized that *how* the Army notifies test participants is beyond the court's reach. Attach. A, at 42-44.

Finally, the district court's injunction must be reversed because it imposes wide-ranging, prospective obligations and continuous judicial oversight on the Army for an indefinite future period of time. These features of the injunction are fundamentally incompatible with the limited scope of the court's authority to compel discrete agency action under Section 706(1). *See SUWA*, 542 U.S. at 66 (stating that judicial review to compel agency action is carefully circumscribed "to protect agencies from undue judicial influence with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreement which courts lack both expertise and information to solve"). Moreover, the district court not only ordered the Army to provide veterans with information currently in the agency's possession, but also directed it to adopt policies and procedures for the collection and dissemination of such information in the future. *See* Injunc. at 2-3 (directing Army to formulate a plan for gathering information and distributing it to test participants). These elements of the court's order underscore the extent to which it concerns not a discrete duty but the kind of programmatic oversight precluded under Section 706(1).

For all these reasons, the district court's "notice" injunction must be reversed. At a minimum, the foregoing discussion demonstrates that the Army has a substantial likelihood of prevailing in its cross-appeal challenging that injunction and is therefore entitled to a stay pending appeal of that injunction.

II. The Balance of Harms Warrants A Stay Pending Appeal.

The balance of harms also favors maintenance of the status quo pending this Court's expedited consideration of plaintiffs' appeal and the Army's cross-appeal.

As outlined in the declaration of Dee Dodson Morris, compliance with the injunction would impose substantial burdens on the Army. Although those burdens are difficult to quantify with precision given the lack of clarity as to precisely what the injunction requires the Army to do, even a minimal level of compliance will impose substantial monetary and manpower burdens on the Army. *See* Morris Decl. ¶ 5 (Attachment C). One way the Army could comply with the injunction would be to contract with the Institute of Medicine (IOM), or some other private contractor, to conduct new literature searches for relevant test substances and compare the results of such searches to those previously conducted by the IOM to evaluate whether there are any material developments in the scientific literature. *Id.* ¶ 9. The IOM has informally estimated that the total cost for such analysis could be as much as $8.8 million and take five years to complete. *Id.* ¶ 12. Moreover, these estimates do not include the effort necessary for the Army to evaluate the IOM's findings, conduct any necessary follow-up analysis, and update those results as necessary. *Id.*

Likewise, if the Army were to conduct its own analysis rather than contracting with the IOM or a similar entity, the costs and burdens would also be substantial. For example, new literature reviews and the analysis of the results of such reviews for just the dozen or so biological substances and vaccines used in the relevant testing programs are estimated to cost approximately $860,000. *Id.* ¶ 16. These costs and burdens would be much higher if the analysis was expanded to the hundreds of substances used in various testing programs. *Id.* ¶ 18. The time and money required to compare the results of specific conditions experienced by class members – such as comparisons of dose and mode of administration – and assess whether there is an increased risk in adverse health effects would also be substantial. *Id.* ¶ 17.

Under either option under consideration, substantial time, energy and resources would be required to determine whether any information found through such additional analysis might affect the well-being of test participants and, if so, how best to communicate that information. *Id.* ¶ 19. To minimize the possibility of causing veterans undue anxiety, the Army would also need to carefully develop an appropriate risk communication plan for any information provided to test participants – a delicate and labor-intensive process that took approximately five months to complete when DoD and the VA previously sent notice letters. *Id.* ¶ 20. To the extent different exposures result in different health effects, "providing a number of different notices based upon possible different health risks associated with a wide variety of different substances would necessarily require substantially more time at additional cost and use

of manpower." *Id.* ¶ 21. More fundamentally, absent a stay, compliance with the injunction is likely to cause considerable confusion and uncertainty among test participants, as the Army seeks to conduct additional notification efforts in an uncertain legal landscape. Such confusion will only be heightened if proceedings on appeal alter that landscape (*e.g.*, by reversing the district court or otherwise reaching a different result concerning the notice claim).

In short, the substantial time, manpower, and costs necessary to comply with the notice injunction would result in a significant diversion of the Army's limited resources that could not be undone if this Court were to vacate or narrow that injunction on appeal. In denying the Army's stay motion, the district court dismissed these substantial burdens on the ground that they did not qualify as irreparable harm. Attachment D, at 5-6. Among other things, the court noted that the Army's estimates of financial costs "are for continuing and complete compliance," and asserted that these costs are irrelevant because, if the Army were to win on appeal, it "will be able to stop [its] effort to comply with the injunction." *Id.* at 5. But the likely monetary harms cannot so easily be discounted. Particularly if the Army enters a contract with an outside entity such as the IOM, it will not be able to terminate that contract without serious legal and financial consequences. And, although monetary harm does not constitute irreparable harm in some circumstances, that is "because such injury can be remedied by a damage award." *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). But the Army plainly has no

damages remedy against the plaintiffs in this case that would allow it later to recover the costs of compliance with the injunction.

In any event, the harms from the injunction extend beyond the unnecessary expenditure of money. Most notably, the diversion of limited military resources that would be necessary to even begin complying with the injunction constitutes irreparable harm, and the risk of "unnecessarily alarming past test participants with additional notifications of minimal value to them," Morris Decl. ¶ 5 (Attach. C), is likewise a serious concern. The district court discounted both these considerations because it believed they were "speculative," Attach D, at 6, but predicting the likely effects of an injunction is, by definition, always "speculative" to some extent, and the court identified no reason to question the Army's judgment on these issues. What is truly "speculative" in this case is that there is any information that has become available since 2006 that has any bearing on the health and well-being of test participants, much less information of such significance that a court may properly direct the Army to develop an entirely new program to gather such hypothetical information and convey it to test participants.

In light of the substantial burdens imposed by the injunction, and the absence of any showing that it will actually provide any meaningful benefit to veterans, plaintiffs had an especially high burden to show they would be irreparably harmed by a modest stay pending appeal. They made no such showing. As noted above, this Court has expedited briefing on the parties' appeals, and plaintiffs have never sought

emergency or expedited relief at any point since they filed this case in 2009. Moreover, each of the named plaintiffs, and many other class members, already have their service member test files, which contain all the information the Army has concerning that individual's participation in any testing program. In holding that the balance of hardships tips in plaintiffs' favor, the district court asserted that there is a "very real possibility that the aging and adversely affected test subjects will not learn about health effects that could be mitigated if known." Attach D, at 6. But this, too, is sheer speculation. Indeed, neither plaintiffs nor the district court have ever identified any relevant new information that could now be acquired, or the Army has allegedly withheld, that would affect the well-being class members.

Finally, the public interest also favors a stay because it would further the efficient adjudication of this case in one package and conserve scarce governmental resources. *See Drakes Bay Oyster Co. v. Jewell*, __ F.3d __, 2014 WL 114699, at *14 (9th Cir. Jan. 14, 2014) (observing that the interests of the government and the public typically merge). Because compliance with the injunction would require the Army to divert substantial resources that may be unnecessary should this Court vacate or modify that injunction on appeal, preservation of the status quo will serve to promote the public interest by considering both the parties' and the courts' resources. A stay pending appeal "simply suspend[s] judicial alteration of the status quo," *Nken v. Holder*, 556 U.S. 418, 429 (2009), and such action is warranted here.

CONCLUSION

For the foregoing reasons, the Court should stay the district court's injunction pending resolution of the expedited appeals in this case. In the alternative, this Court should enter an administrative stay no later than February 18, 2014 pending its resolution of the government's stay motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2014, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Charles Scarborough
CHARLES SCARBOROUGH

ADDENDUM

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Attachment C
Declaration of Dee Dodson Morris

Attachment D
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