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10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA  
 12 OAKLAND DIVISION

13 VIETNAM VETERANS OF AMERICA, ) Civil Action No. C 09-0037 CW  
*et al.*, )  
 14 Plaintiffs, ) Noticed Motion Date and Time:  
 15 vs. ) October 29, 2009  
 2:00 p.m.

16 CENTRAL INTELLIGENCE AGENCY, ) DEFENDANTS' MOTION TO DISMISS  
 17 *et al.*, ) FIRST AMENDED COMPLAINT  
 18 Defendants. )

19 **NOTICE OF MOTION AND DEFENDANTS' MOTION TO DISMISS**  
 20 **FIRST AMENDED COMPLAINT**

21 PLEASE TAKE NOTICE THAT on October 29, 2009, at 2:00 p.m., before the Honorable  
 22 Claudia Wilken, Courtroom No. 2, 4th floor, 1301 Clay Street, Oakland, California, 94612, or as  
 23 soon thereafter as counsel may be heard by the Court, Defendants, by and through their attorneys,  
 24 will and hereby do move to dismiss the First Amended Complaint pursuant to Rules 12(b)(1),  
 25 12(b)(3) and 12(b)(6) of the Federal Rules of Civil Procedure.

26 Defendants seek dismissal of this action in its entirety. Defendants' Motion is based on this  
 27 Notice, the accompanying Memorandum of Points and Authorities, the Declarations of Kimberly  
 28

1 J. Albers, Paul Weiss, Ena Lima and Clyde Bennett and attachments thereto, the pleadings on file  
2 in this matter, and on such oral argument as the Court may permit.

3 Dated: August 14, 2009

4 Respectfully submitted,

5 IAN GERSHENGORN  
6 Deputy Assistant Attorney General  
7 JOSEPH P. RUSSONIELLO  
8 United States Attorney  
9 VINCENT M. GARVEY  
10 Deputy Branch Director

11 /s/ Caroline Lewis Wolverton  
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**GENERAL ORDER 45 ATTESTATION**

I, Caroline Lewis Wolverton, am the ECF User filing this Motion to Dismiss. In compliance with General Order 45, X.B, I hereby attest that Kimberly J. Albers, Paul Weiss, Ena Lima and Clyde Bennett each have concurred in the filing of his/her Declaration.

Dated: August 14, 2009

/s/ Caroline Lewis Wolverton  
Caroline Lewis Wolverton  
Attorney for Defendants

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13 VIETNAM VETERANS OF AMERICA, )  
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 14 Plaintiffs, )  
 15 vs. )  
 16 CENTRAL INTELLIGENCE AGENCY, )  
*et al.*, )  
 17 Defendants. )  
 18 \_\_\_\_\_ )

Civil Action No. C 09-0037 CW

Noticed Motion Date and Time:  
October 29, 2009  
2:00 p.m.

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS  
FIRST AMENDED COMPLAINT

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28

**TABLE OF CONTENTS**

INTRODUCTION AND STATEMENT OF ISSUES TO BE DECIDED. . . . . 1

FACTUAL BACKGROUND. . . . . 3

ARGUMENT. . . . . 5

I. Subject Matter Jurisdiction is Lacking. . . . . 5

    A. The United States’ Sovereign Immunity Precludes Plaintiffs’ Claims. . . . . 6

        1. The Administrative Procedure Act Does Not Authorize Plaintiffs’  
           Claims for Notification, Production of Information and Medical Care,  
           or their Challenge to the *Feres* Doctrine. . . . . 7

        2. All of Plaintiffs’ Claims are Time-Barred. . . . . 9

    B. Much of the First Amended Complaint is Not Justiciable. . . . . 12

        1. Plaintiffs Lack Standing for their Claims under the Constitution,  
           Military and Executive Directives and International Law Because  
           The Claims are Not Redressable. . . . . 13

        2. Representational Standing is Absent vis-a-vis Swords to Plowshares and to  
           the Extent that the Organizational Plaintiffs Seek Relief on Behalf of Non-  
           Members. . . . . 14

        3. The Organizational Plaintiffs’ Challenge to the *Feres* Doctrine Does  
           Not Meet Article III’s Case or Controversy Requirement. . . . . 15

    C. Pursuant to Its Discretion Under the Declaratory Judgment Act, the Court  
        Should Decline Jurisdiction Over Plaintiffs’ Claims. . . . . 15

II. Plaintiffs’ Claims for Documents and Other Information, for Medical Care, and  
their Challenge to the *Feres* Doctrine Should Be Dismissed for Failure to State  
a Claim Under which Relief can be Granted. . . . . 20

III. Venue is Not Proper. . . . . 21

CONCLUSION. . . . . 22

**TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGE(S)</b>
<u>Allen v. Wright</u> , 468 U.S. 737 (1984).....	13
<u>Arakaki v. Lingle</u> , 477 F.3d 1048 (9th Cir. 2007).....	13
<u>Baker v. United States</u> , 817 F.2d 560 (9th Cir. 1987).....	6
<u>Bell Atl. Corp. v. Twombly</u> , 550 U.S. 544 (2007).....	20
<u>Bennett v. Spear</u> , 520 U.S. 154 (1997).....	8
<u>Bishop v. United States</u> , 574 F. Supp. 66 (D.D.C. 1983).....	10, 11, 12
<u>Bivens v. Six Unknown Named Agencies of the Fed. Bureau of Narcotics</u> , 403 U.S. 388 (1971).....	17
<u>United States v. Nordic Village, Inc.</u> , 503 U.S. 30 (1992).....	6
<u>Calderon v. Ashmus</u> , 523 U.S. 740 (1998).....	15
<u>Cedars-Sinai Med. Ctr. v. Shalala</u> , 125 F.3d 765 (9th Cir. 1997).....	10
<u>Citizens for Honesty and Integrity in Regional Planning v. Cty. of San Diego</u> ., 399 F.3d 1067(9th Cir. 2005).....	15
<u>Costo v. United States</u> , 248 F.3d 863 (9th Cir. 2001).....	20
<u>Ctr. for Nat’l Sec. Studies v. DOJ</u> , 331 F.3d 918 (D.C. Cir. 2003).....	9, 19, 20
<u>Davis v. Astrue</u> , 513 F. Supp. 2d 1137 (N.D. Cal. 2007).....	8
<u>Department of the Army v. Blue Fox, Inc.</u> , 525 U.S. 255 (1999).....	7
<u>DirectTV, Inc. v. Webb</u> , 545 F.3d 837 (9th Cir. 2008).....	10, 12
<u>Edmonds Inst. v. Dep’t of Interior</u> , 383 F. Supp. 2d 105 (D.D.C. 2005).....	19

1	<u>Feres v. United States,</u> 340 U.S. 135 (1950).....	passim
2		
3	<u>Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,</u> 528 U.S. 167 (2000).....	14, 15
4	<u>Gallo Cattle Co. v. Dep't of Agr.,</u> 159 F.3d 1194 (9th Cir. 1998).....	7, 8, 9
5		
6	<u>Gomez-Perez v. Potter,</u> U.S., 128 S. Ct. 1931 (2008).....	6
7	<u>Haase v. Sessions,</u> 893 F.2d 370 (D.C. Cir. 1990).....	8, 9
8		
9	<u>Hewitt v. Grabicki,</u> 794 F.2d 1373 (9th Cir. 1986).....	9, 19
10	<u>Houchins v. KQED, Inc.,</u> 438 U.S. 1 (1978).....	9, 19
11		
12	<u>John R. Sand &amp; Gravel Co. v. United States,</u> 552 U.S. 130 (2008).....	10
13	<u>Katzenbach v. McClung,</u> 379 U.S. 294 (1964).....	18
14		
15	<u>Kendall v. Army Bd. for Correction of Mil. Records,</u> 996 F.2d 362 (D.C. Cir. 1993).....	9, 10
16	<u>King v. Russell,</u> 963 F.2d 1301 (9th Cir. 1992).....	22
17		
18	<u>Koohi v. United States.,</u> 976 F.2d 1328 (9th Cir. 1992).....	18
19	<u>Kronisch v. United States,</u> 150 F.3d 112 (2d Cir. 1998).....	11
20		
21	<u>Labash v. Dep't of Army,</u> 668 F.2d 1153 (10th Cir. 1982).....	20
22	<u>Lamont v. Haig,</u> 590 F.2d 1124 (D.D.C. 1978). ....	21
23		
24	<u>Lujan v. Defenders of Wildlife,</u> 497 U.S. 871 (1990).....	7, 8, 9
25	<u>Lujan v. Defenders of Wildlife,</u> 504 U.S. 555 (1992).....	13
26		
27	<u>Marley v. United States,</u> 567 F.3d 1030 (9th Cir. 2009).....	10
28		

1	<u>Misko v. United States,</u> 77 F.R.D. 425 (D.D.C. 1978).....	21
2		
3	<u>Muirhead v. Mecham,</u> 427 F.3d 14 (1st Cir. 2005). ....	7, 8
4	<u>North Star Alaska v. United States,</u> 9 F.3d 1430 (9th Cir. 1993).....	8
5		
6	<u>Oregon v. Legal Serv. Corp.,</u> 552 F.3d 965 (9th Cir. 2009).....	13
7	<u>Public Serv. Commission of Utah v. Wycoff Co., Inc.,</u> 344 U.S. 237 (1952).....	19
8		
9	<u>Rostker v. Goldberg,</u> 453 U.S. 57 (1981).....	16
10	<u>Schism v. United States,</u> 316 F.3d 1259 (Fed. Cir. 2002). ....	16
11		
12	<u>Smith v. Pacific Prop. and Dvp. Corp.,</u> 358 F.3d 1097 (9th Cir. 2004).....	14, 15
13	<u>Stanley v. CIA,</u> 574 F. Supp. 474 (S.D. Fla. 1983).....	16
14		
15	<u>Steel Co. v. Citizens for a Better Envt.,</u> 523 U.S. 83 (1998).....	6
16	<u>In re Steele,</u> 799 F.2d 461 (9th Cir. 1986).....	19
17		
18	<u>Stencel Aero Eng'g Corp. v. United States,</u> 431 U.S. 666 (1977).....	19
19	<u>Stock W., Inc. v. Confederated Tribes,</u> 873 F.2d 1221 (9th Cir. 1989).....	6
20		
21	<u>Sweet v. United States,</u> 528 F. Supp. 1068 (D.S.D. 1981). ....	11, 12
22	<u>Tucson Airport Auth. v. General Dynamics Corp.,</u> 136 F.3d 641, 646 (9th Cir. 1998).....	7, 8
23		
24	<u>United States v. Johnson,</u> 481 U.S. 681 (1987). ....	12, 15
25	<u>United States v. Kubrick,</u> 444 U.S. 111 (1979).....	9, 10
26		
27	<u>United States v. Mitchell,</u> 445 U.S. 535 (1980).....	6
28		

1 United States v. Nordic Village, Inc.,  
503 U.S. 30 (1992)..... 6

2

3 United States v. Park Place Assoc., Ltd.,  
454 U.S. 464 (1982)..... 7, 8

4 United States v. Sherwood,  
312 U.S. 584 (1941)..... 6

5

6 United States v. Stanley,  
483 U.S. 669 (1987)..... 16, 17

7 Valley Forge Christian College v. Americans United for Separation of Church & State,  
454 U.S. 464 (1982)..... 12

8

9 Veterans for Common Sense v. Peake,  
563 F. Supp. 2d 1049 (N.D. Cal. 2008)..... 7

10 Warth v. Seldin,  
422 U.S. 490 (1975)..... 13

11

12 Wilton v. Seven Falls Co.,  
515 U.S. 277 (1995)..... 16, 18

13 Wolfe v. Strankman,  
392 F.3d 358 (9th Cir. 2004)..... 6

14

15 Zucco Partners, LLC v. Digimarc Corp.,  
552 F.3d 981 (9th Cir. 2009)..... 20

**STATUTES & REGULATIONS**

17 5 U.S.C. § 552 ..... 9, 19

18 5 U.S.C. § 552a. .... 9, 19

19 5 U.S.C. § 702..... 7

20 5 U.S.C. § 704 ..... 7

21 28 U.S.C. §§ 1391(e)..... 21, 22

22 28 U.S.C. § 1402. .... 21, 22

23 28 U.S.C. § 1406(a)..... 3, 21, 22

24 28 U.S.C. § 2201(a)..... 15

25 28 U.S.C. § 2401(a)..... 2, 9

26 28 U.S.C. § 2501. .... 10

27 38 U.S.C. §§ 1701 *et seq.* ..... 19

28

1 41 U.S.C. § 602. . . . . 9

2 38 C.F.R. pt. 17. . . . . 19

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 4 116 Stat. 2458. . . . . 5

**MISCELLANEOUS**

6 Wright, Miller and Cooper, *Federal Practice and Procedure* §§ 3814, 3815 (3d ed. 2007). . . 21

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1                   **INTRODUCTION AND STATEMENT OF ISSUES TO BE DECIDED**

2                   Plaintiffs Vietnam Veterans of America (“VVA”), Swords to Plowshares: Veterans Rights  
3 Organization (“Swords to Plowshares”) and six U.S. Army veterans bring claims stemming from  
4 chemical testing by the Army and the Central Intelligence Agency (“CIA”) during the Cold War era.  
5 Plaintiffs style their First Amended Complaint as a class action.

6                   The Amended Complaint alleges that the individual Plaintiffs and other Army service  
7 members were injured when they participated in tests at Edgewood Arsenal, a U.S. Army research  
8 facility in Maryland, that administered or exposed them to chemical agents. Bringing their claims  
9 under the Declaratory Judgment Act (“DJA”) and the Administrative Procedure Act (“APA”),  
10 Plaintiffs assert violations of the Constitution, executive and military directives, and international  
11 law. They seek declaratory and injunctive relief requiring Defendants to notify them and all military  
12 test participants of the details of the tests and of associated health risks; to search for and provide all  
13 participants with all available documentation concerning the tests; to provide all participants with  
14 medical examinations and care which Plaintiffs allege that they and other test participants were  
15 promised in return for undergoing the tests. Plaintiffs further request a declaration that consent  
16 forms that testing participants signed are invalid and that the participants are released from “secrecy  
17 oaths” related to the testing. They also seek a declaration that the “*Feres doctrine*” – the Supreme  
18 Court’s interpretation of the Federal Torts Claims Act (“FTCA”) to bar tort suits against the  
19 government for injuries arising out of or incident to military service, first articulated in *Feres v.*  
20 *United States*, 340 U.S. 135 (1950) – is unconstitutional. Plaintiffs do not, however, assert a claim  
21 under the FTCA or seek money damages.

22                   The United States has neither denied that it conducted chemical testing at Edgewood Arsenal  
23 and other locations nor ignored the consequences of the tests. Rather, the tests have been and  
24 continue to be the focus of substantial attention by both Congress and the Executive Branch.  
25 Congress, the Department of Defense (“DoD”) and the Department of Veterans Affairs (“VA”) have  
26 been actively investigating the tests — which ended more than 30 years ago — and considering,  
27 developing and implementing means of providing assistance to the veterans affected.

28

1 Plaintiffs' claims are not properly before the Court because they do not fall within its Article  
2 III subject matter jurisdiction. First, they are barred by the United States' sovereign immunity.  
3 There is no waiver of sovereign immunity applicable to Plaintiffs' claims that the government must  
4 provide notification and medical care and produce documents and other information to all test  
5 participants; there is no final agency action, as is required by the APA because the government's  
6 notification efforts are ongoing. Similarly, there is no final agency action applicable to their claim  
7 that the *Feres* doctrine is invalid. Separately, all of Plaintiffs' claims are time-barred under the  
8 applicable statute of limitations, 28 U.S.C. § 2401(a). The claims accrued immediately or shortly  
9 after the alleged testing participation, and at least four of the individual Plaintiffs filed claims with  
10 the VA based on alleged injury from Edgewood tests more than six years before this action was filed.  
11 Second, Article III's case-or-controversy requirement bars those of Plaintiffs' claims that are no  
12 longer redressable given that the testing at Edgewood ended long ago. Representational standing  
13 is lacking vis-a-vis Plaintiff Swords to Plowshares and to the extent that the organizational Plaintiffs  
14 seek relief on behalf of non-members. And Article III precludes Plaintiffs' challenge to the *Feres*  
15 doctrine as it seeks an improper advisory opinion.

16 Even if there were subject matter jurisdiction over Plaintiffs' claims, in recognition of  
17 Congress' and the Executive's supervisory authority over the military the Court should decline to  
18 exercise jurisdiction based on its discretion under the DJA. Especially in light of the amount of time  
19 that has passed since the tests ended, those Branches are better positioned than the courts to  
20 investigate and address the testing that occurred at Edgewood Arsenal.

21 In addition, the Court should dismiss for failure to state a claim upon which relief can be  
22 granted Plaintiffs' requests for declaratory judgment in the form of an order that the government  
23 produce documents and other information about the tests, a declaration that it must provide medical  
24 care, and a declaration that the *Feres* doctrine is unconstitutional. Plaintiffs have no constitutional  
25 right to government information, and the Freedom of Information Act ("FOIA") and the Privacy Act  
26 – whose remedies Plaintiffs have not exhausted – preempt any common-law right. Medical care for  
27 military personnel is governed by statute and may not determined by contract. And this Court cannot  
28



1 and military medals or commendations. Plaintiffs allege debilitating injuries — physical and  
2 emotional — as a result of the tests. Four of the individual Plaintiffs have been found disabled by  
3 the VA. (Am. Compl. ¶ 38 (Bruce Price at a disability rating of 100%) ¶ 57 (Frank Rochelle at  
4 80%), ¶ 78 (David Dufrane at 60%), and ¶ 84 (Wray Forrest at 100%).)

5 Tests on Army service members at Edgewood Arsenal ended by 1975.<sup>1</sup> As early as 1975,  
6 Congress began investigating chemical testing by the government, including under the CIA’s  
7 MKULTRA project referenced in the Amended Complaint.<sup>2</sup> More recently, Congress, DoD and the  
8 VA have focused investigative efforts on the testing at Edgewood Arsenal and elsewhere.<sup>3</sup> A great  
9 deal of information about the tests is available publicly.<sup>4</sup>

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11 <sup>1</sup> See, e.g., 1993 GAO Report to Chairman, S. Comm. on Veterans’ Affairs, “Veterans Disability:  
12 Information from the Military May Help VA Assess Claims Related to Secret Tests,” at 1 (Feb.  
13 1993), available at <http://archive.gao.gov/d37t11/148642.pdf> (last accessed Aug. 14, 2009) (cited  
14 in Am. Compl. ¶ 160).

15 <sup>2</sup> See Project MKULTRA, the CIA’s Program of Research in Behavioral Modification, Joint Hr’g  
16 Before the S. Select Comm. on Intelligence and the Subcomm. on Health and Scientific Research  
17 of the Comm. on Human Resources, 95th Cong. (Aug. 3, 1977) (cited in Am. Compl. ¶ 11).

18 <sup>3</sup> See, e.g., Military Operations Aspects of SHAD and Project 112, Hr’g Before Subcomm. on Health,  
19 H. Comm. on Veterans’ Affairs, 107th Cong. (2002), available at  
20 <http://fhp.osd.mil/CBexposures/pdfs/oct9h02.pdf>; GAO Report to Congressional Requesters,  
21 “Chemical and Biological Defense, DoD and VA Need to Improve Efforts to Identify and Notify  
22 Individually Potentially Exposed During Chemical and Biological Tests” (Feb. 2008), available at  
23 <http://www.gao.gov/new.items/d08366.pdf>; GAO, “Chemical and Biological Defense: DOD Needs  
24 to Continue to Collect and Provide Information on Tests and Potentially Exposed Personnel,” GAO-  
25 04-410 (Washington, D.C.: May 14, 2004), available at [www.gao.gov/new.items/d04410.pdf](http://www.gao.gov/new.items/d04410.pdf); DoD,  
26 2003 Report to Congress, Disclosure of Information on Project 112 to the Department of Veterans  
27 Affairs, available at [http://armedservices.house.gov/comdocs/reports/2003exereports/03-08-  
12disclosure.pdf](http://armedservices.house.gov/comdocs/reports/2003exereports/03-08-12disclosure.pdf); Department of Veterans Affairs, Chemical and Biological Warfare Testing (Oct.  
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27 <sup>4</sup> See, e.g., Force Health Protection and Readiness, Chemical-Biological Warfare Exposures,  
28 <http://fhp.osd.mil/CBexposures> (cited in Am. Compl. ¶ 13 and last accessed Aug. 14, 2009)  
(information about tests, links to GAO and other reports, Institute of Medicine reports, and DoD  
briefings and reports, and FAQs) & sources cited at n.3, *supra*.

1 In 2002, Congress directed DoD to develop “a comprehensive plan for the review,  
2 declassification, and submittal to the [VA] of all records and information of [DoD] on Project 112  
3 [of which the Edgewood Arsenal tests were part] that are relevant to the provision of benefits by the  
4 Secretary of Veterans Affairs to members of the Armed Forces who participated in that project.”  
5 Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. 107-314, § 709(a),  
6 116 Stat. 2458 (codified at 10 U.S.C. § 1074 note). Congress specified that DoD must give the VA  
7 records that permit identification of service members who were or may have been exposed to  
8 chemical or biological agents, and required GAO and DoD to report to Congress on the plan and its  
9 implementation. *Id.* § 709(b), (d)-(e).

10 Consistent with Congress’ direction, the VA sent letters to Edgewood test participants in  
11 2006, as the Amended Complaint recognizes. (Am. Compl. ¶ 151.) In addition to informing  
12 participants that notwithstanding any nondisclosure obligations they can provide details about their  
13 tests to health care providers, the letters offered clinical examinations by VA physicians, encouraged  
14 the veterans to apply for VA health care benefits if they were not already enrolled in the VA health  
15 care program, and provided information about filing a claim for VA disability benefits if they  
16 believed that they suffer from chronic health problems. While Plaintiffs allege that not all  
17 participants have been notified, they recognize that DoD has publicly stated that it is constructing  
18 a registry of test participants with completion expected in 2011. (*Id.* ¶ 13.)

19 Plaintiffs filed this action on January 7, 2009. On July 24, 2009, after Defendants moved to  
20 dismiss, Plaintiffs amended their complaint. Defendants again move for dismissal.

## 21 ARGUMENT

22 Even as amended, Plaintiffs’ claims fall outside the Court’s subject matter jurisdiction, and  
23 several fail to state a claim upon which relief can be granted, and venue is not proper. The Amended  
24 Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(3) and 12(b)(6).

### 25 **I. Subject Matter Jurisdiction is Lacking.**

26 Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is  
27 power to declare the law, and when it ceases to exist, the only function remaining to  
28 the court is that of announcing the fact and dismissing the cause.

1 *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCordle*, 74 U.S.  
2 506, 514 (1868)). “A federal court is presumed to lack jurisdiction in a particular case unless the  
3 contrary affirmatively appears.” *Stock W. v. Conf’d Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

4 When presented with a motion to dismiss for lack of subject matter jurisdiction pursuant to  
5 Fed. R. Civ. P. 12(b)(1), the Court accepts the well-pled allegations of the complaint as true except  
6 where the moving party presents factual evidence in support of its argument, in which case the  
7 opposing party must come forward with evidence to satisfy its burden of establishing subject matter  
8 jurisdiction. *E.g.*, *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Here, subject matter  
9 jurisdiction is lacking because Plaintiffs’ claims are barred by sovereign immunity and, in part, are  
10 nonjusticiable for failure to meet Article III’s case-or-controversy requirement. Even if the Court  
11 had jurisdiction, it should decline to exercise it in recognition of Congress’ and the Executive’s  
12 supervisory authority over the military.

13 **A. The United States’ Sovereign Immunity Precludes Plaintiffs’ Claims.**

14 “It is elementary that ‘[t]he United States, as sovereign, is immune from suit save as it  
15 consents to be sued . . . and the terms of its consent to be sued in any court define that court’s  
16 jurisdiction to entertain the suit.” *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting  
17 *United States v. Sherwood*, 312 U.S. 584, 586 [1941]); accord, *e.g.*, *Gomez-Perez v. Potter*, \_ U.S.  
18 \_, 128 S. Ct. 1931, 1942 (2008) (“[a] waiver of the Federal Government’s sovereign immunity must  
19 be unequivocally expressed in statutory text’ and ‘will be strictly construed, in terms of its scope, in  
20 favor of the sovereign’”) (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996) (alteration in original)).  
21 Only Congress can waive the United States’ sovereign immunity, and any waiver, “to be effective,  
22 must be ‘unequivocally expressed.’” *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992)  
23 (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) (quoting cases)). Waivers  
24 of sovereign immunity “are not generally to be ‘liberally construed.’” *Id.* at 34. Absent a clear  
25 waiver by Congress, courts are without jurisdiction to entertain a suit against the United States.  
26 *Mitchell*, 445 U.S. at 538. A plaintiff suing the United States bears the burden of showing an  
27 unequivocal waiver of sovereign immunity. *E.g.*, *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir.  
28 1995) (citing *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987)).

1                   **1. The Administrative Procedure Act Does Not Authorize Plaintiffs' Claims**  
2                   **for Notification, Production of Information and Medical Care, or their**  
3                   **Challenge to the *Feres* Doctrine.**

4                   Plaintiffs appear to rely on the APA as the waiver of sovereign immunity necessary for their  
5                   claims.<sup>5</sup> (See Am. Compl. ¶ 20.) Although the APA waives sovereign immunity for certain suits  
6                   seeking judicial review of final government action, 5 U.S.C. § 702, its waiver of sovereign immunity,  
7                   like other such waivers, must be “strictly construed, in terms of its scope, in favor of the sovereign.”  
8                   *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999).

9                   The APA expressly excludes from the scope of its waiver claims for relief “if any other statute  
10                  that grants consent to suit expressly or impliedly forbids the relief which is sought.” 5 U.S.C. § 702.  
11                  The scope of the APA’s waiver is also limited by its provision that only “[a]gency action made  
12                  reviewable by statute and final agency action for which there is no other adequate remedy in a court,  
13                  are subject to judicial review,” 5 U.S.C. § 704. *E.g.*, *Lujan v. Defenders of Wildlife Fed’n*, 497 U.S.  
14                  871, 882 (1990) (“When . . . review is sought not pursuant to specific authorization in the substantive  
15                  statute, but only the general review provisions of the APA, the ‘agency action’ in question must be  
16                  ‘final agency action.’”); *Gallo Cattle Co. v. Dep’t of Agr.*, 159 F.3d 1194, 1198 (9th Cir. 1998);  
17                  *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1058 (N.D. Cal. 2008). These  
18                  provisions preclude an APA waiver of sovereign immunity for Plaintiffs’ claims for medical  
19                  examinations and care, notification and documents, and their claim that the *Feres* doctrine is  
20                  unconstitutional.

21                  a. Plaintiffs base their claim for declaratory and injunctive relief in the form of medical  
22                  examinations and care on their allegation that the government promised it to testing participants in  
23                  exchange for their undergoing testing. (*E.g.*, Am. Compl. ¶ 2.) This claim is thus contractual in  
24                  nature and seek specific performance. The Tucker Act, 28 U.S.C. §§ 1346(a), 1491, governs contract  
25                  claims against the United States and “‘impliedly forbids declaratory and injunctive relief’” on such  
26                  claims. *Tucson Airport Auth. v. General Dynamics Corp.*, 136 F.3d 641, 646 (9th Cir. 1998) (quoting

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27                  <sup>5</sup> Neither 28 U.S.C. § 1331 nor the DJA waives sovereign immunity. *E.g.*, *United States v. Park*  
28                  *Place Assoc., Ltd.*, 563 F.3d 907, 924 (9th Cir. 2009) (28 U.S.C. § 1331); *Muirhead v. Mecham*,  
                427 F.3d 14, 17 n.1 (1st Cir. 2005) (DJA).

1 *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1485 (9th Cir. 1985)); accord, e.g., *United States*  
2 *v. Park Place Assoc., Ltd.*, 563 F.3d 907, 931-32 (9th Cir. 2009) (citing *Tucson Airport Auth. &*  
3 *North Side Lumber Co.*); *North Star Alaska v. United States*, 9 F.3d 1430, 1432 (9th Cir. 1993) (en  
4 banc). Because Plaintiffs' claim for declaratory and injunctive relief in the form of medical  
5 examinations and care is based on an alleged contractual obligation of the United States, it is  
6 excluded from the APA's waiver of sovereign immunity. See, e.g., *Tucson Airport Auth.*, 136 F.3d  
7 at 646.

8 b. In support of their request for a declaratory ruling that Defendants must notify test  
9 participants of the details of the tests, search for and produce documents concerning the tests, and that  
10 the *Feres* doctrine is invalid, Plaintiffs reference no statute that makes their claims reviewable, nor  
11 do they challenge any final agency action. (See Am. Compl. ¶¶ 174-175, 178, 180, 182-189.) The  
12 claims therefore are not reviewable under the APA.

13 A "final agency action" is an action that "mark[s] the consummation of the agency's  
14 decisionmaking process" and "by which rights or obligations have been determined, or from which  
15 legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (internal quotation  
16 marks omitted). With respect to their claim for notification to all test participants, as set forth above,  
17 Plaintiffs recognize that in addition to the notification efforts that the government already has  
18 undertaken, DoD has announced that it is in the process of constructing a registry of the veterans who  
19 participated in testing at Edgewood Arsenal that will allow for any additional notifications that are  
20 needed. That DoD's construction of its database has not been completed necessarily precludes the  
21 possibility of final agency action. Accordingly, Plaintiffs have alleged no final agency action with  
22 respect to the claim for notification, and it is barred by sovereign immunity. See, e.g., *Lujan*, 497  
23 U.S. at 882; *Gallo Cattle Co.*, 159 F.3d at 1198.

24 Regarding Plaintiffs' request that the government be ordered to search for and produce  
25 documents, the FOIA and the Privacy Act establish procedures through which individuals may  
26 request such a search and production. Those Acts require exhaustion of their procedures as a  
27 prerequisite for judicial review. See, e.g., *Davis v. Astrue*, 513 F. Supp. 2d 1137, 1148 (N.D. Cal.  
28 2007) (citing *United States v. Steele*, 799 F.2d 461, 465 (9th Cir. 1986)) (FOIA); *Haase v. Sessions*,

1 893 F.2d 370, 373 (D.C. Cir. 1990) (Privacy Act); *Hewitt v. Grabicki*, 794 F.2d 1373, 1377-78 (9th  
2 Cir. 1986) (Privacy Act). Outside of those statutory schemes, there is no entitlement to access  
3 government documents. *See, e.g., Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 936-37 (D.C. Cir.  
4 2003) (addressing FOIA) (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 14-15 (1978)). Plaintiffs do  
5 not seek review of an agency's action on a request under the FOIA or the Privacy Act, and hence they  
6 allege no final agency action. Even if they had pursued FOIA or Privacy Act requests, those statutes  
7 provide adequate remedies in court, 5 U.S.C. § 552(a)(4)(B) (FOIA); 5 U.S.C. § 552a(g)(3)(A)  
8 (Privacy Act), thereby precluding review under the APA. *See, e.g., Lujan*, 497 U.S. at 882; *Gallo*  
9 *Cattle Co.*, 159 F.3d at 1198.<sup>6</sup>

10 With respect to their claim for a declaratory ruling that the *Feres* doctrine is unconstitutional,  
11 Plaintiffs challenge no agency determination of the doctrine's constitutionality. Accordingly, final  
12 agency action is likewise absent for that claim, and it too is barred by sovereign immunity.

## 13 2. All of Plaintiffs' Claims are Time-Barred.

14 Congress established a six-year statute of limitations for non-tort civil suits against the United  
15 States. 28 U.S.C. § 2401(a) ("Except as provided by the Contract Disputes Act of 1978,<sup>7</sup> every civil  
16 action commenced against the United States shall be barred unless the complaint is filed within six  
17 years after the right of action first accrues. . . ."). Like all statutes of limitations, 28 U.S.C. § 2401(a)  
18 serves in part to protect the United States and the courts "from having to deal with cases in which the  
19 search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance  
20 of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*,  
21 444 U.S. 111, 117 (1979). Compliance with the statute — which reflects Congress' decision to  
22 waive sovereign immunity only if suit is brought within a particular time period — is a condition of  
23 federal court jurisdiction and must be strictly observed. *See, e.g., Kendall v. Army Bd. for Correction*

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26 <sup>6</sup> It is worth noting that the government has made a large amount of information about the testing  
27 available publicly, as described above.

28 <sup>7</sup> The Contract Disputes Act of 1978 is not applicable here. *See* 41 U.S.C. § 602.

1 of *Mil. Records*, 996 F.2d 362, 366 (D.C. Cir. 1993) (citing *Soriano v. United States*, 352 U.S. 270  
2 (1957)).<sup>8</sup>

3 “Under federal law, ‘a cause of action generally accrues when a plaintiff knows or has reason  
4 to know of the injury which is the basis of his action.’” *DirectTV, Inc. v. Webb*, 545 F.3d 837, 852  
5 (9th Cir. 2008) (quoting *Stanley v. Trustees of Cal. State U.*, 433 F.3d 1129, 1136 (9th Cir. 2006));  
6 *see also Kubrick*, 444 U.S. at 122 (a statute of limitations begins to run when the plaintiff possesses  
7 “the critical facts that he has been hurt and who has inflicted the injury”). Consistent with that  
8 standard, other lawsuits concerning testing at Edgewood Arsenal and the CIA’s MKULTRA project  
9 have been dismissed on statute of limitations grounds, and those cases are instructive here.

10 In *Bishop v. United States*, 574 F. Supp. 66 (D.D.C. 1983), a U.S. Army veteran who alleged  
11 that he was injured when he participated in drug experiments at Edgewood Arsenal brought claims  
12 under the Fifth and other constitutional amendments and the FTCA. The government argued that the  
13 claims were untimely. *Id.* at 66. The court agreed and dismissed the case, explaining:

14 Plaintiff knew that he was experiencing problems since the test and that the symptoms  
15 he suffered were similar to those during and after the test. He also knew that he was  
16 involved in an experiment in which a drug was used. It appears that the only thing  
17 he did not know was that he had been given a derivative of [Quinuclidinyl Benzilate,  
18 a chemical hallucinogen]. Based on the undisputed facts, it is clear that since 1963,  
19 the plaintiff knew that he had been hurt and who inflicted the injury . . . As in  
20 *Kubrick*, the only thing really unknown to the plaintiff was the name of the drug that  
21 he had been administered and perhaps his legal rights. The Court concludes that his  
22 claims against the defendants are therefore barred as being untimely.

23 *Id.* at 67 (citing *Kubrick*, 444 U.S. at 122).

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24 <sup>8</sup> We recognize that the Ninth Circuit held in *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770  
25 (9th Cir. 1997), that 28 U.S.C. § 2401(a) is not jurisdictional. However, the recent Supreme Court  
26 decision in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), that 28 U.S.C. § 2501,  
27 which uses language very similar to § 2401(a), is jurisdictional casts significant doubt on the  
28 continued validity of the *Cedars-Sinai* holding. The Ninth Circuit recently found *John R. Sand & Gravel Co.*  
to be “instructive” in determining whether 28 U.S.C. § 2401(b)’s limitations period is  
jurisdictional while recognizing that the question of whether the *Cedar-Sinai*’s holding regarding  
28 U.S.C. § 2401(a) can survive *John R. Sand & Gravel* was not presented in the case before it.  
*Marley v. United States*, 567 F.3d 1030, 1035 & n.3 (9th Cir. 2009). We respectfully submit that  
in light of *John R. Sand & Gravel Co.*, the limitations period of 28 U.S.C. § 2401(a) should be found  
to be jurisdictional.

1 In *Sweet v. United States*, 528 F. Supp. 1068 (D.S.D. 1981), an Army veteran who  
2 participated in testing of LSD at Edgewood Arsenal alleged injury as a result of the Army's failure  
3 to advise him that he had been given LSD and to provide him with medical care following the testing.

4 The court concluded that the plaintiff's claims accrued when he believed that he had been injured  
5 and that the injury was linked to testing at Edgewood Arsenal. *Id.* at 1072. Because the plaintiff did  
6 not file suit within the limitations period that began running upon accrual his claims were time-barred  
7 despite a subsequent letter from the Army informing him that he may have been given LSD. *Id.* That  
8 letter, the court explained, "added nothing to the critical facts already in Sweet's possession  
9 concerning his injury and its alleged cause." *Id.*

10 Similarly in *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), the Second Circuit  
11 dismissed as untimely FTCA claims based on chemicals tests conducted under the CIA's MKULTRA  
12 project. The plaintiff, a non-veteran, claimed that he suffered physical and emotional injuries after  
13 the CIA surreptitiously gave him LSD. The court of appeals held that the plaintiff's claims accrued  
14 when he became aware of the basic facts of the claims, *viz.*, when he believed that he had been  
15 injured and that a CIA drug experiment was the cause. *Id.* at 121-22.

16 Here, the Amended Complaint alleges that the individual Plaintiffs knew of the injuries that  
17 they allege and linked them to participation in tests at Edgewood Arsenal either immediately or  
18 shortly after their tests ended. (*See* Am. Compl. ¶¶ 27-85.) In addition, at least four of the individual  
19 Plaintiffs filed claims with the VA in which they asserted injuries caused by testing at Edgewood  
20 Arsenal more than six years prior to the filing of the Amended Complaint. (*See* Ex. A (Decl. of  
21 Kimberly J. Albers, attaching Rochelle records showing claims beginning in 1973), Ex. B (Decl. of  
22 Paul Weiss, attaching Dufrane records showing claims beginning in 1997), Ex. C (Decl. of Ena Lima,  
23 attaching Muth records showing claims beginning in 1997), Ex. D (Decl. of Clyde Bennett, attaching  
24 Price records showing claim in 2001).)<sup>9</sup> As in *Bishop* and *Sweet*, that the individual Plaintiffs may

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25  
26 <sup>9</sup> In accordance with Civil L.R. 79-5, the individual Plaintiffs' records are submitted for filing under  
27 seal because they contain sensitive information that is covered by the Privacy Act. Defendants  
28 reserve the right to present evidence in support their statute of limitations arguments concerning  
Plaintiffs Meirow and Forrest in a future motion, if their claims continue (which Defendants submit

1 not have known what drugs they were given does not alter the key facts that they knew they had been  
2 injured and that they believed tests at Edgewood Arsenal were the cause. *See Bishop*, 547 F. Supp.  
3 at 67; *Sweet*, 528 F. Supp. at 1072. Plaintiffs also acknowledge that information about the tests has  
4 been publicly available for many years, including in testimony before Congress and reporting by the  
5 Government Accountability Office. (*E.g.*, Am. Compl. ¶ 160, citing 1994 congressional testimony  
6 on human experimentation and 1993 GAO report on veterans' disability and military information on  
7 "secret tests"). Consequently, even if the individual Plaintiffs did not know of their alleged injuries  
8 or the alleged cause prior to six years before the filing of this suit, they "ha[d] reason to know."  
9 *DirectTV, Inc.*, 545 F.3d at 852. Because the individual Plaintiffs' claims accrued more than six  
10 years before they filed suit, they are untimely under 28 U.S.C. § 2401(a).

11 With respect to the organizational Plaintiffs' claims, because information about the tests has  
12 been public for so long, the first and second claims of the Amended Complaint are also time-barred  
13 vis-a-vis the organizational Plaintiffs. Especially because they are veterans' advocacy organizations,  
14 they either "kn[ew] or ha[d] reason to know of the injury which is the basis of [their] action" well  
15 before six years prior to the filing of this suit. *DirectTV, Inc.*, 545 F.3d at 852. The third claim for  
16 relief, which challenges the *Feres* doctrine, is time-barred because the doctrine has been in existence  
17 for far more than six years prior to the filing of the Amended Complaint (or of the original Complaint  
18 if the amendment were to relate back, which it does not, *see* Fed. R. Civ. P. 15(c)). *See, e.g., United*  
19 *States v. Johnson*, 481 U.S. 681, 686-88 (1987) (recognizing consistent application of *Feres* doctrine  
20 since *Feres* was decided in 1950).

21 **B. Much of the First Amended Complaint is Not Justiciable.**

22 "The judicial power of the United States . . . is not an unconditioned authority to determine  
23 the constitutionality of . . . executive acts" but is limited by Article III of the Constitution. *Valley*  
24 *Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471  
25 (1982). "The requirements of Art. III are not satisfied merely because a party requests a court of the  
26 United States to declare its legal rights, and has couched that request for forms of relief historically

27 \_\_\_\_\_  
28 they should not for the reasons set forth herein).

1 associated with courts of law in terms that have a familiar ring to those trained in the legal process.”  
2 *Id.* Rather, Article III requires that federal courts exercise their jurisdiction only to decide actual  
3 cases and controversies. *Allen v. Wright*, 468 U.S. 737, 750 (1984). The DJA requires the same.  
4 *American States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). Absent an actual case or  
5 controversy, a court lacks jurisdiction. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975). In an  
6 effort to give meaning to Article III’s case-or-controversy requirement, courts mandate that all cases  
7 be “justiciable.” *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992).

8 Plaintiffs’ claims that the testing and associated consent forms violated the Constitution,  
9 military and executive directives and international law are not justiciable because Plaintiffs lack  
10 standing to bring them. Plaintiff Swords to Plowshares does not satisfy the requirements for  
11 representational standing. Representational standing is also absent to the extent that the  
12 organizational Plaintiffs seek relief on behalf of non-members.

13 **1. Plaintiffs Lack Standing for their Claims that the Testing and Consent**  
14 **Forms Violated the Constitution, Military and Executive Directives and**  
**International Law Because the Claims are Not Redressable.**

15 “[T]he core component of standing is an essential and unchanging part of the case-or-  
16 controversy requirement of Article III.” *Lujan*, 504 U.S. at 560. The doctrine of standing “requires  
17 careful judicial examination of a complaint’s allegations to ascertain whether the particular plaintiff  
18 is entitled to an adjudication of the particular claims asserted.” *Allen*, 468 U.S. at 752. The  
19 “irreducible constitutional minimum of standing” requires satisfaction of each of three elements:  
20 (1) “an injury in fact – an invasion of a legally-protected interest which is (a) concrete and  
21 particularized, and (b) actual or imminent, not conjectural or hypothetical”; (2) “a causal connection  
22 between the injury and the conduct complained of” such that the injury is “fairly traceable” to the  
23 defendant; and (3) a likelihood that the injury will be “redressed by a favorable decision.” *Lujan*,  
24 504 U.S. at 560-61 (internal quotation marks and citations omitted); *accord, e.g., Arakaki v. Lingle*,  
25 477 F.3d 1048, 1059 (9th Cir. 2007). A plaintiff bears the burden of establishing standing to assert  
26 a claim. *Oregon v. Legal Serv. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009) (citing *Lujan*).

27 The testing that is the subject of the Amended Complaint ended more than 30 years ago. *See,*  
28 *e.g.*, 1993 GAO Report “Veterans Disability: Information from the Military May Help VA Assess

1 Claims Related to Secret Tests,” at 1, available at <http://archive.gao.gov/d37t11/148642.pdf> (last  
2 accessed Aug. 14, 2009) (cited in Am. Compl. ¶ 160). A declaration now that the tests and associated  
3 consent forms violated Plaintiffs’ rights under the Constitution, executive and military directives and  
4 international law could not redress any of the injuries that Plaintiffs allege. Because the tests are not  
5 ongoing, no injunctive relief on those claims is possible, and the claims are not redressable. Plaintiffs  
6 therefore lack standing to bring them.

7 **2. Representational Standing is Absent vis-a-vis Swords to Plowshares and**  
8 **to the Extent that the Organizational Plaintiffs Seek Relief on Behalf of**  
9 **Non-Members.**

9 The Supreme Court explained the requirements for representational standing in *Friends of*  
10 *the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000):

11 An association has standing to bring suit on behalf of its members  
12 when its members would otherwise have standing to sue in their own  
13 right, the interests at stake are germane to the organization’s purpose,  
and neither the claim asserted nor the relief requested requires the  
participation of individual members in the lawsuit.

14 *Accord, e.g., Smith v. Pacific Prop. and Dvp. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004). An  
15 association’s “representational standing is contingent upon the standing of its members to bring suit.”  
16 *Smith*, 358 F.3d at 1101. That standard is not met with respect to Plaintiff Swords to Plowshares.  
17 Nor is representational standing established to the extent that the organizational Plaintiffs seek  
18 declaratory and injunctive relief on behalf of individuals beyond their membership.

19 While the Amended Complaint alleges that members of VVA were testing participants, it  
20 does not allege that any member of Swords to Plowshares participated in the tests that are the subject  
21 of the first and second claims for relief. (*See* Am. Compl. ¶¶ 25-26.) Because Swords to Plowshares  
22 is not alleged to have any member who “would [] have standing to sue in [his] own right,” *Friends*  
23 *of the Earth, Inc.*, 528 U.S. at 181, on those claims, it does not meet the criteria for representational  
24 standing for them. Swords to Plowshares therefore is not properly before the Court as a Plaintiff with  
25 respect to the first and second claims for relief.

26 Separately, neither organizational Plaintiff satisfies the requirements of representational  
27 standing insofar as it seeks relief on behalf of non-members who allegedly participated in chemical  
28 tests. While an organization may have standing to sue on behalf of its members, reliance on alleged

1 injuries to non-members does not satisfy the requirements for representational standing. *See Friends*  
2 *of the Earth*, 528 U.S. at 181; *Smith*, F.3d at 1101. To the extent that the organizational Plaintiffs  
3 seek relief on behalf of non-members, their claims should be dismissed for lack of standing.

4 **3. The Organizational Plaintiffs' Challenge to the *Feres* Doctrine Does Not**  
5 **Satisfy Article III's Case or Controversy Requirement.**

6 As referenced above, the Supreme Court's interpretation of the FTCA to bar tort suits against  
7 the government for injuries arising out of or incident to military service is known as the *Feres*  
8 doctrine. *E.g.*, *Johnson*, 481 U.S. at 686-88. The Amended Complaint asserts no claim under the  
9 FTCA. Its challenge to the constitutionality of the *Feres* doctrine in the third claim for relief is solely  
10 in the abstract. The claim seeks an improper advisory opinion concerning a defense to a tort claim  
11 that has not been asserted in this action. *See, e.g.*, *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998)  
12 (rejecting claim for declaratory judgment as to validity of affirmative defense not asserted in habeas  
13 proceedings) (citing *Coffman v. Breeze Corp.*, 323 U.S. 316, 322-24 (1945)); *see also, e.g.*, *Citizens*  
14 *for Honesty and Integrity in Regional Planning v. Cty. of San Diego*, 399 F.3d 1067, 1068 (9th Cir.  
15 2005) ("A declaratory judgment plaintiff may not 'carve[] out' of the potential controversy a single  
16 federal question whose answer will be declared by the federal courts ahead of time.") (quoting  
17 *Calderon*) (alteration in original). The third claim for relief therefore should be dismissed as  
18 nonjusticiable under Article III.

19 **C. Pursuant to Its Discretion Under the Declaratory Judgment Act, the Court**  
20 **Should Decline Jurisdiction Over Plaintiffs' Claims.**

21 In addition to the above-described reasons why the Court cannot exercise jurisdiction over  
22 Plaintiffs' claims, there is good reason why the Court should not. The constitutional assignment of  
23 authority over the military to the political branches of government, Congress' and the Executive  
24 Branch's active involvement in investigating and addressing government testing, the passage of time  
25 since the tests occurred, and the existence of administrative avenues for relief strongly counsel in  
26 favor of declining jurisdiction.

27 The DJA grants courts discretion on whether to exercise jurisdiction over claims brought  
28 pursuant to it. 28 U.S.C. § 2201(a) ("[i]n a case of actual controversy within its jurisdiction . . . any  
court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other

1 legal relations of any interested party seeking such declaration . . .”) (emphasis added); *accord e.g.*,  
2 *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (recognizing discretionary nature of declaratory  
3 relief). The Supreme Court explained in *Wilton*:

4 By the Declaratory Judgment Act, Congress sought to place a remedial  
5 arrow in the district court’s quiver; it created an opportunity, rather  
6 than a duty, to grant a new form of relief to qualifying litigants.  
7 Consistent with the nonobligatory nature of the remedy, a district  
8 court is authorized, in the sound exercise of its discretion, to stay or  
9 to dismiss an action seeking a declaratory judgment before trial or  
10 after all arguments have drawn to a close. In the declaratory judgment  
11 context, the normal principle that federal courts should adjudicate  
12 claims within their jurisdiction yields to considerations of practicality  
13 and wise judicial administration.

14 *Wilton*, 515 U.S. at 288. As set forth below, exercise of the Court’s discretion under the DJA to not  
15 consider Plaintiffs’ claims — even if they were properly before the Court, which Defendants maintain  
16 they are not — is warranted.

17 1. Article I of the Constitution authorizes Congress and the Executive to supervise the  
18 military. *United States v. Stanley*, 483 U.S. 669, 681-82 (1987) (citing U.S. Const., Art. I, § 8,  
19 cl. 14); *accord, e.g., Rostker v. Goldberg*, 453 U.S. 57, 66 (1981) (“The operation of a healthy  
20 deference to legislative and executive judgments in the area of military affairs is evident in several  
21 recent decisions of this Court.”) (describing cases). Consistent with that authority and as described  
22 above, Congress and DoD have been investigating the testing that is the subject of Plaintiffs’  
23 Amended Complaint, and considering, developing and implementing means of providing assistance  
24 to the veterans affected. As the Supreme Court recognized in *Stanley*, 483 U.S. at 681-683,  
25 constitutional separation of powers counsels strongly against insertion of the Judiciary into issues that  
26 at bottom are military matters.

27 Like this case, *Stanley* involved claims stemming from chemical testing at Edgewood Arsenal,  
28 including a constitutional claim based on “failure to warn, monitor or treat” the plaintiff following  
testing. *Stanley*, 483 U.S. at 672-73; *Stanley v. United States*, 574 F. Supp. 474, 476 (S.D. Fla. 1983)  
(stating that testing occurred at Edgewood Arsenal), *ultimately rev’d by Stanley*, 483 U.S. 669. The  
Supreme Court recognized that it was “confronted with an explicit constitutional authorization for  
*Congress* ‘to make Rules for the Government and Regulation of the land and naval Forces,’” as well

1 as the “insistence (evident from the number of Clauses devoted to the subject) with which the  
2 Constitution confers authority over the Army, navy, and militia upon the political branches.” *Stanley*,  
3 483 U.S. at 681-82 (quoting U.S. Const., Art. I, § 8, cl. 14) (emphasis in original). Finding that those  
4 constitutional provisions “counsel[ed] hesitation” before involving the Judiciary in review of the  
5 claims that stemmed from testing at Edgewood Arsenal, the Court refused to infer a judicial remedy  
6 of damages under *Bivens v. Six Unknown Named Agencies of the Fed. Bureau of Narcotics*, 403 U.S.  
7 388 (1971), for any injuries resulting from the tests. *Stanley*, 483 U.S. at 681-82. The Court did not  
8 “see any reason why [its] judgment in the *Bivens* context should be any less protective of military  
9 concerns than it has been with respect to FTCA suits,” where damages claims are barred by the *Feres*  
10 doctrine. *Stanley*, 483 U.S. at 681. If anything, the FTCA’s “explicit” and “unqualified”  
11 authorization for judicial involvement in tort claims against the government might have left the Court  
12 “freer to compromise military concerns” in confronting claims under that statute. *Id.* The Supreme  
13 Court found no difference in the degree of disruption to military affairs between the *Bivens* context  
14 and the FTCA context. *Id.* at 682. In both circumstances:

15 [a] test for liability that depends on the extent to which particular suits  
16 would call into question military discipline and decisionmaking would  
17 itself require judicial inquiry into, and hence intrusion upon, military  
18 matters. Whether a case implicates those concerns would often be  
19 problematic, raising the prospect of compelled depositions and trial  
20 testimony by military officers concerning the details of their military  
21 commands. Even putting aside the risk of erroneous judicial  
22 conclusions (which would becloud military decisionmaking), the mere  
23 process of arriving at correct conclusions would disrupt the military  
24 regime.

25 *Id.* at 682-83.

26 While Plaintiffs’ claims do not sound in tort, the constitutional provisions that the Supreme  
27 Court found to “counsel hesitation” in *Stanley* are equally applicable to this case. The judicial inquiry  
28 that Plaintiffs seek would be the same that the Supreme Court rejected as unacceptably intrusive and  
disruptive to the military regime in *Stanley*. Both cases concern testing at Edgewood Arsenal, and  
both implicate military decisionmaking and relations between the military and the enlisted service  
members who were the testing subjects. Indeed, Plaintiffs have already indicated that they will seek  
to compel the testimony of military officers concerning details of the testing at Edgewood that the

1 Supreme Court stated in *Stanley* would be improper. (See Joint Case Management Statement ¶ 8.A.2  
2 (“Plaintiffs anticipate that they will require a substantial expansion of the interrogatories permitted  
3 pursuant to Rule 33 and depositions permitted pursuant to Rule 30”).) The Supreme Court’s warning  
4 that “congressionally uninvited intrusion into military affairs by the judiciary is inappropriate,”  
5 *Stanley*, 483 U.S. at 683, applies fully here. Further, because Plaintiffs pursue injunctive relief that  
6 would direct the Executive’s actions in response to the testing where the government has already  
7 undertaken responsive action under Congress’ oversight, Plaintiffs’ claims seek to “draw the federal  
8 courts into conflict with the executive branch.” *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir.  
9 1992).

10 The political branches are better equipped than the courts to investigate what happened at  
11 Edgewood Arsenal and other test locations, to make factual conclusions, and to study, develop and  
12 implement appropriate remedies. Especially given the substantial passage of time since the tests  
13 occurred and consequent effect on availability of witnesses and documents, as well as the memories  
14 of those witnesses who can be found, the mechanisms of litigation and attendant strict evidentiary  
15 requirements are not suited to resolution of the issues presented.

16 Given these factors and especially Congress’ and the Executive’s ongoing investigation of  
17 the testing and development and implementation of remedies, exercise of the Court’s discretion under  
18 the DJA not to consider the claims for declaratory relief presented here would be consistent with  
19 “considerations of practicality and wise judicial administration.” *Wilton*, 515 U.S. at 288.

20 2. Separately with respect to Plaintiffs’ claims for medical care, documents and other  
21 information, the existence of statutorily created administrative schemes specific to those concerns  
22 counsels strongly against the requested declaratory relief. See, e.g., *Katzenbach v. McClung*, 379  
23 U.S. 294, 296 (1964) (“even though Rule 57 of the Federal Rules of Civil Procedure permits  
24 declaratory relief although another adequate remedy exists, it should not be granted where a special  
25 statutory proceeding has been provided”); *Public Serv. Comm’n of Utah v. Wycoff Co., Inc.*, 344 U.S.  
26 237, 241 (1952) (“the declaratory judgment procedure will not be used to preempt and prejudice  
27 issues that are committed for initial decision to an administrative body or special tribunal any more  
28 than it will be used as a substitute for statutory methods of review”); 10B Wright, Miller & Kane,

1 *Federal Practice and Procedure* § 2758, at 537 (1998) (“Declaratory relief ordinarily [] should not  
2 be granted if a special statutory proceeding has been provided for the determination of particular  
3 questions”) (citing, *inter alia*, *Katzenbach*).

4 The Veterans’ Benefits Act establishes a program through which most veterans are eligible  
5 to receive medical care, and represents the vehicle that Congress provided for veterans to receive  
6 health care from the government. *See* 38 U.S.C. §§ 1701 *et seq.*; *see also* 38 C.F.R. pt. 17. Indeed,  
7 the letters that the VA mailed to Edgewood Arsenal test participants encouraged them to apply for  
8 VA health care benefits. The DJA should not be interpreted to supply an additional remedy. *See*,  
9 *e.g.*, *Public Serv. Comm’n of Utah*, 344 U.S. at 241; *see also Stencel Aero Eng’g Corp. v. United*  
10 *States*, 431 U.S. 666, 673-74 (1977) (military compensation scheme provided by Veterans’ Benefit  
11 Act “provides an upper limit of liability for the Government as to service-connected injuries”).

12 The FOIA and the Privacy Act represent Congress’ determination of the extent to which  
13 private individuals and entities are entitled to release of government records, and establish the  
14 administrative procedures that Congress deemed the appropriate channels for requests for release.  
15 *See* 5 U.S.C. §§ 552, 552a. There is no First Amendment right to access government information,  
16 and any common-law right is preempted by the FOIA and the Privacy Act. *See, e.g., Ctr. for Nat’l*  
17 *Sec. Studies*, 331 F.3d at 936-37 (addressing FOIA) (quoting *Houchins*, 438 U.S. at 14-15). Only  
18 once the statutorily prescribed procedures have been exhausted has Congress provided for judicial  
19 involvement. *See, e.g., In re Steele*, 799 F.2d 461, 465 (9th Cir. 1986) (FOIA); *Hewitt v. Grabicki*,  
20 794 F.2d 1373, 1377-78 (9th Cir. 1986) (Privacy Act). An additional declaratory remedy for  
21 government documents is neither warranted nor appropriate. *See, e.g., Edmonds Inst. v. Dep’t of*  
22 *Interior*, 383 F. Supp. 2d 105, 111-12 (D.D.C. 2005) (“Until such time as [the plaintiff] is seeking  
23 the concrete remedy of agency action on its [FOIA] request, a declaratory judgment action is not the  
24 favored course.”).

25 3. With respect to the third claim for relief, the lack of power in this Court to declare the  
26 Supreme Court’s interpretation of the FTCA to be unconstitutional strongly counsels in favor of  
27 declining jurisdiction over Plaintiffs’ challenge to the *Feres* doctrine.

28

1 **II. Plaintiffs' Claims for Documents and Other Information and for Medical Care, and**  
2 **their Challenge to the *Feres* Doctrine Should be Dismissed for Failure to State a**  
3 **Claim upon which Relief can be Granted.**

4 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) should be granted if a plaintiff fails to  
5 plead enough facts to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*,  
6 550 U.S. 544, 570 (2007); *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir.  
7 2009). With respect to Plaintiffs' claims for documents and other information, medical care, and  
8 their challenge to the constitutionality of the *Feres* doctrine, in addition to the jurisdictional defects  
9 of those claims described above, the claims fail under the Rule 12(b)(6) standard.

10 A. As described above, Plaintiffs ask that Defendants be ordered to provide them with "all  
11 available documents and evidence concerning their exposures and known [and suspected] health  
12 effects." (Am. Compl. ¶ 174; *accord id.* ¶ 180(a)-(b).) They do not rely on the FOIA or the Privacy  
13 Act; indeed, they could not as they have not exhausted administrative remedies under those statutes.  
14 As previously discussed, Plaintiffs have no constitutional right to government information, and the  
15 FOIA and the Privacy Act preempt any common-law right. *See, e.g., Ctr. for Nat'l Sec. Studies*, 331  
16 F.3d at 934. Their claim for documents and other information therefore should be dismissed for  
17 failure to state a claim upon which relief can be granted.

18 B. Government-provided medical care for veterans is "governed exclusively by statute and  
19 therefore may not be granted by contract." *Schism v. United States*, 316 F.3d 1259, 1268 (Fed. Cir.  
20 2002). Plaintiffs' claim that the government is contractually obligated to provide them and other test  
21 participants with medical care therefore fails to state a claim upon which relief can be granted.

22 C. In essence, the third claim for relief asks this Court to issue an opinion that the Supreme  
23 Court's interpretation of the FTCA through the *Feres* doctrine is unconstitutional. However, this  
24 Court cannot declare the Supreme Court's interpretation of law to be unconstitutional. *See, e.g.,*  
25 *Labash v. Dep't of Army*, 668 F.2d 1153, 1156 (10th Cir. 1982) ("[O]nly the United States Supreme  
26 Court can overrule or modify *Feres*."); *see also, e.g., Costo v. United States*, 248 F.3d 863, 869 (9th  
27 Cir. 2001) (recognizing that doctrine is binding on lower courts). Consequently, it cannot grant relief  
28 in the form of an order that the *Feres* doctrine is unconstitutional as Plaintiffs' third claim for relief  
requests. The claim therefore should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

1 **III. Venue is Not Proper.**

2 Plaintiffs assert venue under 28 U.S.C. §§ 1391(e) and 1402(a). (Am. Compl. ¶ 21.) Neither  
3 statute, however, provides a basis for venue in this district.

4 While the Amended Complaint alleges that Swords to Plowshares resides in San Francisco,  
5 that Plaintiff is not properly before the Court because for the reasons set forth above. Because the  
6 Amended Complaint does not allege that any other Plaintiff is a resident of this district or that a  
7 substantial part of the events or omissions at issue occurred here, and because no Defendant resides  
8 in this district, venue is not proper. Because transfer would not be in the interests of justice,  
9 dismissal pursuant to 28 U.S.C. § 1406(a) and Fed. R. Civ. P. 12(b)(3) is appropriate.

10 A. Under 28 U.S.C. § 1391(e), venue is proper

11 in any judicial district in which (1) a defendant in the action resides, (2) a substantial  
12 part of the events or omissions giving rise to the claim occurred, or a substantial part  
13 of the property that is the subject of the action is situated, or (3) the plaintiff resides  
14 if no real property is involved in the action.

15 28 U.S.C. § 1391(e).

16 None of the Defendants resides in this district. The named Defendant federal agencies and  
17 officials reside, for purposes of 28 U.S.C. § 1391(e), where they perform their official duties. *See*  
18 14D Wright, Miller and Cooper, *Federal Practice and Procedure* § 3815, 371 (2007); *Lamont v.*  
19 *Haig*, 590 F.2d 1124, 1128 n.19 (D.D.C. 1978). Defendants CIA, Department of the Army and DoD  
20 reside in the Eastern District of Virginia. Defendants CIA Director Panetta, Defense Secretary Gates  
21 and Army Secretary Green, because they are sued in the official capacities, reside in the Eastern  
22 District of Virginia or the District of Columbia. Attorney General Holder, who is sued in his official  
23 capacity, resides in the District of Columbia. Venue for claims against the United States itself is  
24 governed by 28 U.S.C. § 1402, which is addressed in the next section. *See* 14D Wright, Miller and  
25 Cooper, § 3814 at 367; *Misko v. United States*, 77 F.R.D. 425, 429 n.7 (D.D.C. 1978).

26 Nor is venue proper under based on where a substantial part of the events or omissions giving  
27 rise to the claim occurred. The Amended Complaint focuses on testing at Edgewood Arsenal, which  
28 Plaintiffs recognize is in Maryland. (*See* Am. Compl. ¶ 98.)

1 Under these circumstances and because the Amended Complaint does not allege that any  
2 Plaintiff properly before the Court resides here, venue is not proper under section 1391(e).

3 B. Under 28 U.S.C. § 1402(a), in pertinent part, venue is proper

4 (1) Except as provided in paragraph (2), in the judicial district where the plaintiff  
5 resides;

6 (2) In the case of a civil action by a corporation . . . in the judicial district in which is  
7 located the principal place of business or principal office or agency of the corporation  
8 . . .

9 28 U.S.C. § 1402(a). As observed above, the Amended Complaint does not allege that any Plaintiff  
10 properly before the Court resides in this district, by virtue of principal place of business or  
11 otherwise.<sup>10</sup>

12 Under 28 U.S.C. § 1406(a), a court must dismiss a case that has been filed in the wrong  
13 district the unless interests of justice warrant transfer to a district where the case could have been  
14 brought. 28 U.S.C. § 1406(a); *accord, e.g., King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992).  
15 Even if this case were brought where venue is proper, for the reasons explained above, Plaintiffs'  
16 claims should be dismissed for lack of subject matter jurisdiction and failure to state a claim upon  
17 which relief can be granted. Transfer therefore would not be in the interests of justice. Rule 12(b)(3)  
18 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1406(a) therefore provide additional grounds  
19 for dismissal.

### 20 CONCLUSION

21 For the foregoing reasons, the Court should dismiss this action pursuant to  
22 Fed. R. Civ. P. 12(b)(1), 12(b)(3) and 12(b)(6).

23 DATED this August 14, 2009.

24 \_\_\_\_\_  
25 <sup>10</sup> The Amended Complaint does not allege the location of VVA's principal place of business,  
26 principal office or principal agency, but its website indicates that it is Silver Spring, Maryland. The  
27 home page of the VVA website lists the organization's street address as "8605 Cameron Street,  
28 Silver Spring, MD 20910." Vietnam Veterans of America, <http://www.vva.org>. Its "Directions to  
VVA" page states: "The VVA National Headquarters is conveniently located in Silver Spring,  
Maryland." Vietnam Veterans of America/Directions to VVA,  
<http://www.vva.org/directions.html>. (VVA Website last accessed Aug. 14, 2009.)

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Respectfully submitted,

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