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12 **UNITED STATES DISTRICT COURT**  
 13 **NORTHERN DISTRICT OF CALIFORNIA**

14	MICHAEL D. ALMY, ANTHONY J.	)	Case No. 3:10-cv-5627 (RS)
15	LOVERDE, and JASON D. KNIGHT,	)	
16		)	FEDERAL DEFENDANTS'
17	Plaintiffs,	)	MEMORANDUM IN SUPPORT OF
18	v.	)	MOTION TO TRANSFER ACTION TO
19	UNITED STATES DEPARTMENT OF	)	UNITED STATES COURT OF
20	DEFENSE, ROBERT M. GATES, Secretary of	)	FEDERAL CLAIMS, OR, IN THE
21	Defense; DEPARTMENT OF THE AIR FORCE;	)	ALTERNATIVE, TO DISMISS
22	MICHAEL B. DONLEY, Secretary, Department	)	ACTION
23	of the Air Force; DEPARTMENT OF THE	)	Hearing Date: Thursday, April 28, 2011
24	NAVY; and RAY MABUS, Secretary,	)	Time: 1:30 P.M.
25	Department of the Navy,	)	Courtroom: San Francisco Courthouse,
26	Defendants.	)	Courtroom 3 - 17th Floor 450 Golden
27		)	Gate Avenue, San Francisco, CA 94102
28		)	

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1 **INTRODUCTION**

2 Plaintiffs, Michael D. Almy, Anthony J. Loverde, and Jason D. Knight filed this action  
3 against the Federal Defendants. Plaintiffs have brought claims under the First Amendment,  
4 Fifth Amendment, and Administrative Procedure Act (“APA”), seeking relief arising from their  
5 alleged wrongful discharge from the military under 10 U.S.C. § 654 (commonly known as  
6 “Don't Ask, Don't Tell”, or “DADT”).<sup>1</sup> This action should be transferred to the Court of  
7 Federal Claims or, in the alternative, dismissed for lack of subject-matter jurisdiction.

8 Because a portion of the relief Plaintiffs seek constitutes a claim for “money damages,”  
9 this action must be litigated in the United States Court of Federal Claims. In the Tucker Act,  
10 28 U.S.C. § 1491, Congress has directed claims against the United States for money damages  
11 exceeding \$10,000 to the Court of Federal Claims. Although Plaintiffs have captioned their  
12 complaint as one that seeks declaratory and injunctive relief, and assert that they are not seeking  
13 “lost wages,” *see* Complaint, Doc. 1 ¶¶ 35, 47, 58, Plaintiffs’ complaint seeks recovery of  
14 “money damages” that must be litigated in the Court of Federal Claims.

15 Plaintiffs’ complaint, at bottom, is a claim asserting the military wrongfully discharged  
16 them. Wrongful discharge claims are routinely heard in the Court of Federal Claims. Plaintiffs’  
17 complaint is no different. Plaintiffs’ request for reinstatement, and the benefits that directly  
18 flow from retroactive reinstatement, *i.e.* credit for time that they would have served, promotion,  
19 retirement credits, when coupled with their failure to disavow other monetary benefits, such as  
20 allowances and health care reimbursements, make clear that each seeks money damages that are  
21 typical in wrongful discharge claims and is relief that can only be awarded by the Court of  
22 Federal Claims under the Tucker Act, 28 U.S.C. § 1491.

23 \_\_\_\_\_  
24 <sup>1</sup> After Plaintiffs filed the complaint in this case, Congress enacted the Don’t Ask, Don’t Tell  
25 Repeal Act of 2010, Pub. L. No. 111-321 (Repeal Act). Section 2(f) of the Repeal Act provides  
26 that, upon the effective date established by Section 2(b), the DADT statute (10 U.S.C. § 654)  
27 shall be stricken from the Code. And Section 2(b) states that the repeal shall take effect 60 days  
28 after the date on which the President transmits to Congress a certification by the President,  
Secretary of Defense, and the Chairman of the Joint Chiefs of Staff that the requirements for a  
successful and orderly repeal have been met.

1 By merely disclaiming “lost wages,” moreover, Plaintiffs have failed to clearly and  
2 expressly waive any claim for money damages that would permit them to proceed in district  
3 court. *See Waters v. Rumsfeld*, 320 F.3d 265, 271-72 (D.C. Cir. 2003) (to proceed in district  
4 court, a waiver of potential damages must be “clearly and adequately expressed.”). In military  
5 wrongful discharge cases, plaintiffs typically seek back pay, retirement credit, allowances (*e.g.*,  
6 housing credits and rations), and benefits (*e.g.*, medical care reimbursement). *See, e.g., Roth v.*  
7 *United States*, 378 F. 3d 1371, 1379 (Fed. Cir. 2004) (service member challenged his discharge  
8 seeking reinstatement, back pay, allowances, and benefits); *King v. United States*, 53 Fed.  
9 Appx. 930, 932 (Fed. Cir. 2002) (same). Plaintiffs’ waiver of only “lost wages” thus lacks the  
10 requisite clarity to waive retirement credit, allowances, medical care reimbursement, and any  
11 other type of financial benefit (sometimes referred to collectively as “back pay”) that might  
12 flow from credit for time not served. Because the Tucker Act’s waiver of sovereign immunity  
13 and the exclusive jurisdiction of the Court of Federal Claims cannot be avoided by creative  
14 pleading, this action should be transferred to the Court of Federal Claims pursuant to 28 U.S.C.  
15 § 1631.

16 Absent a clear and express waiver by Plaintiffs of such money damages, this action must  
17 be transferred to the Court of Federal Claims pursuant to 28 U.S.C. § 1631. In the alternative,  
18 because Plaintiffs have failed to carry their burden of establishing that this Court has subject-  
19 matter jurisdiction under the terms of the APA or Little Tucker Act, this action should be  
20 dismissed.

## 21 ARGUMENT

### 22 **I. Plaintiffs must identify a proper waiver of sovereign immunity.**

23 “Absent a waiver, sovereign immunity shields the Federal Government and its agencies  
24 from suit.” *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994). ““Consequently, a  
25 person attempting to sue a federal agency or officer must demonstrate that the claim being  
26 asserted is covered by a specific statutory authorization to sue the United States.”” *Weber v.*  
27 *Dep’t of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008) (quoting 14 Charles Alan

1 Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3655 (3d ed.  
2 1998)). “A waiver of the Federal Government’s sovereign immunity must be unequivocally  
3 expressed in statutory text and will not be implied.” *Lane v. Pena*, 518 U.S. 187, 192 (1996)  
4 (citations omitted). It is equally well-established that “a waiver of the Government’s sovereign  
5 immunity will be strictly construed, in terms of its scope, in favor of the sovereign.” *Id.*

6 Based on Plaintiffs’ claims, there are three potential waivers of sovereign immunity: the  
7 APA, 5 U.S.C. § 551 *et seq.*; the Little Tucker Act, 28 U.S.C. § 1346(a)(2); and the Tucker Act,  
8 28 U.S.C. § 1491. As discussed below, the Tucker Act is the only potentially applicable waiver  
9 of sovereign immunity here, and requires transfer of this action to the Court of Federal Claims.  
10 In the alternative, this action must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of  
11 jurisdiction.

12 **II. The APA’s waiver of sovereign immunity does not apply to Plaintiffs’ claims.**

13 Plaintiffs claim that this Court has jurisdiction over this action pursuant to the APA.  
14 Complaint, Doc. 1, ¶ 15. The APA provides a waiver of sovereign immunity for persons  
15 “adversely affected or aggrieved by agency action within the meaning of a relevant statute.”  
16 5 U.S.C. § 702. But the APA’s waiver of sovereign immunity can only apply to Plaintiffs’  
17 claims where all three of the following conditions are satisfied: (1) the claims are not for  
18 “money damages;” (2) an adequate remedy for the claims is not available elsewhere; and (3) the  
19 claims do not seek relief expressly or impliedly forbidden by another statute. *United States v.*  
20 *Park Place Assoc., Ltd.*, 563 F.3d 907, 929 (9th Cir. 2009); *Tucson Airport Auth. v. Gen.*  
21 *Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998). Because the claims and relief set forth in  
22 the Complaint do not satisfy these three conditions, the APA’s waiver of sovereign immunity  
23 does not apply and does not confer subject-matter jurisdiction upon this Court.

24 **A. Plaintiffs seek money damages**

25 As a threshold matter, for the APA’s waiver of sovereign immunity to apply, Plaintiffs  
26 must be “seeking relief other than money damages.” 5 U.S.C. § 702. Under this provision, the  
27 APA’s waiver of sovereign immunity applies to claims against the government for specific  
28



1 relief, but does not apply to claims for money damages. *See Bowen v. Mass.* 487 U.S. 879, 893  
2 - 901 (1998); *Park Place Assoc.*, 563 F.3d at 930. While Plaintiffs have styled their complaint  
3 as one for “declaratory and injunctive relief,” *see* Complaint, Doc. 1, the Federal Circuit has  
4 “cautioned litigants that dressing up a claim for money as one for equitable relief” is not enough  
5 to trigger the APA’s waiver of sovereign immunity. *Suburban Mortg. Assoc., Inc. v. U.S. Dep’t*  
6 *of Hous. and Urban Dev.*, 480 F.3d 1116, 1124 (Fed. Cir. 2007).

7 Here, the plain terms of the complaint demonstrate that Plaintiffs seek “money  
8 damages” as that term is used in the APA. Plaintiffs specifically seek retroactive credit for time  
9 they would have served in the military had they not been discharged, *see* Complaint, Doc. 1,  
10 Prayer for Relief, ¶¶ C, E, and G, and have failed to waive any recovery of back pay,  
11 allowances, and benefits that they were forced to forego because of their alleged unlawful  
12 discharge. As pled, therefore, Plaintiffs seek money damages, not solely specific relief. Had  
13 Plaintiffs served in the military and not received the credit they now claim that they were due  
14 based upon their actual service, their claims for credit would be claims for specific relief; they  
15 would be seeking the very thing they were entitled to. *See Hubbard v. EPA*, 982 F.2d 531, 534  
16 n. 4 (D.C. Cir. 1992). But Plaintiffs are seeking credit for time they did not serve in the military  
17 in an apparent attempt to seek compensation for monetary benefits that they were deprived of  
18 earning because of their alleged wrongful discharge. *See id.* at 534. “Damages are given to the  
19 plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies  
20 at all, but attempt to give the plaintiff the very thing to which he was entitled.” *Bowen*, 487  
21 U.S. at 895 (quoting *Maryland Dep’t of Human Res. V. Dep’t of Health and Human Serv.*, 763  
22 F.2d 1441, 1446 (D.C. Cir. 1985)). As pled, therefore, Plaintiffs are seeking the recovery of  
23 money damages.

24 A District Court in the District of Washington recently examined this very situation in  
25 another DADT case. In *Witt v. United States Department of the Air Force*, a service member  
26 also challenged her discharge under the DADT statute, and also sought credit for time she  
27 would have served had she not been discharged under the DADT statute in the form of

1 retirement credits and back pay. *Witt v. Dep't of the Air Force*, No. 06-5195, 2010 WL  
2 3522519, at \*1 (Sept. 7, 2010, W.D. Wash.). The *Witt* Court examined the Supreme Court's  
3 decision in *Bowen* and concluded that plaintiff was seeking money damages: "The back pay and  
4 retirement credits she was prevented from earning by virtue of her discharge from the military  
5 are subject to compensation in the form of money damages as a substitute for the actual loss  
6 (the opportunity to serve and thereby earn employment benefits) she suffered." *Id.* at \*1-2.

7 Other courts also have recognized that claims for the recovery of back pay and  
8 retirement credit claims for time not served are claims for damages. *See, e.g., Weber v. Dep't. of*  
9 *Veterans Affairs*, 521 F.3d 1061, 1066 (9th Cir. 2008) ("[B]ack pay as a claim for money  
10 damages falls outside the scope of the APA"); *Hubbard*, 982 F.2d at 534 ("[B]ack pay  
11 essentially pays the plaintiff for the economic losses suffered as a result of the employer's  
12 wrong; it does not return to the plaintiff anything which was rightfully his in the first place.");  
13 *Larsen v. United States Navy*, 346 F. Supp. 2d 122, 129 (D.D.C. 2004) (concluding that  
14 "[c]onstructive and retirement credit would therefore amount to little more than compensation  
15 for loss of income"). As Plaintiffs are seeking money damages to substitute for their alleged  
16 losses, they cannot satisfy the first requirement of APA jurisdiction.

17 **B. The Tucker Act provides an adequate remedy for Plaintiffs' claims.**

18 The APA's waiver of sovereign immunity is further limited to claims "for which there is  
19 no other adequate remedy in a court. . . ." 5 U.S.C. § 704 (emphasis added). The Tucker Act,  
20 28 U.S.C. § 1491, waives the federal government's sovereign immunity and grants the Court of  
21 Federal Claims exclusive jurisdiction to render judgment against the United States for damages  
22 of \$10,000 or more on various types of claims, including any non-tort claim founded on the  
23 Constitution, a statute, or an executive department regulation. *See Smith v. Sec'y of Army*, 384  
24 F.3d 1288, 1292 (Fed. Cir. 2004). Thus, a case cannot proceed in district court under the APA  
25 when there is an adequate remedy at law in the Court of Federal Claims under the Tucker Act.

1 To ensure complete relief could be provided in wrongful discharge cases such as this,  
2 Congress, in 1972, amended the Tucker Act to allow the Court of Federal Claims:

3 To provide an entire remedy and to complete the relief afforded by the judgment,  
4 the [Court of Federal Claims] may, as an incident of and collateral to any such  
5 judgment, issue orders directing restoration to office or position, placement in  
appropriate duty or retirement status, and correction of applicable records, and  
such orders may be issued to any appropriate official of the United States.

6 28 U.S.C. § 1491(a)(2). Congress accordingly amended the Tucker Act to provide an “adequate  
7 remedy” in wrongful military discharge cases such as this action. The Ninth Circuit has  
8 examined the passage of the 1972 Amendment to the Tucker Act and concluded that “[t]he  
9 legislative history indicates that Congress intended to cover military discharge cases by this  
10 amendment.” *Denton v. Schlesinger*, 605 F.2d 484, 487 (9th Cir. 1979); *see also Doe v.*  
11 *Civiletti*, 635 F.2d 88, 95 n.17 (2d Cir. 1980) (noting that amendment to Tucker Act was  
12 intended to benefit military personnel); *Melvin v. Laird*, 365 F.Supp. 511, 518-19 (E.D.N.Y.  
13 1973) (same).

14 Regardless of whether the plaintiff in a military discharge case “characterizes his  
15 complaint as a claim for ‘money damages’ or ‘specific relief,’ his type of case has traditionally  
16 invoked Claims Court jurisdiction.” *Mitchell v. United States*, 930 F.2d 893, 897 (Fed. Cir.  
17 1991). Congress has specifically authorized the Court of Federal Claims to provide Plaintiffs  
18 with an adequate remedy at law. And when, as here, “an adequate remedy is available under  
19 the Tucker Act in the Court of Federal Claims, [a] case cannot proceed in the district court  
20 under the APA.” *See Suburban Mortg. Assoc.*, 480 F.3d at 1128.

21 The adequacy of the remedy is not affected by the Court of Federal Claims’ lack of  
22 authority to award purely equitable relief. It is well-established that the “*availability* of an  
23 action for money damages under the Tucker Act . . . is presumptively an ‘adequate remedy’ for  
24 [Section] 704 purposes.” *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1349 (Fed. Cir. 2005)  
25 (emphasis added) (citing *Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1327-29  
26 (Fed. Cir. 2005); *Consol. Edison Co. of N.Y. v. United States*, 247 F.3d 1378, 1382-84 (Fed. Cir.

1 2001); *Martinez v. United States*, 333 F.3d 1295, 1320 (Fed. Cir. 2003) (en banc)). Nor is the  
2 adequacy of the remedy Congress provided in the Tucker Act affected by the constitutional  
3 challenge advanced in this case; the Tucker Act grants the Court of Federal Claims exclusive  
4 jurisdiction to render judgment against the United States for money damages of \$10,000 or  
5 more on various types of claims, including any non-tort claim founded on the Constitution. 28  
6 U.S.C. § 1491.<sup>2</sup>

7 **C. Finding a waiver under the APA would undermine the Tucker Act.**

8 The APA further clarifies that it does not confer “authority to grant relief if any other  
9 statute that grants consent to suit expressly or impliedly forbids the relief which is sought.”  
10 5 U.S.C. § 702. As explained above, Congress had military discharge cases in mind when it  
11 amended the Tucker Act to allow the Court of Federal Claims to provide an “entire remedy” to  
12 a prevailing party in wrongful discharge cases. *Denton*, 605 F.2d at 487. And while Plaintiffs’  
13 action is premised upon an alleged constitutional violation, the Tucker Act, 28 U.S.C. § 1491,  
14 was specifically designed to waive the federal government’s sovereign immunity for non-tort  
15 money-damages claims founded upon, among other things, the Constitution. Plaintiffs,  
16 accordingly, cannot avail themselves of the APA’s waiver of sovereign immunity in this case.  
17 Permitting Plaintiffs to proceed in district court would be contrary to the intent of Congress.

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23 <sup>2</sup> Plaintiffs’ facial challenge to the statute also does not impact Tucker Act jurisdiction.  
24 Because Plaintiffs already have been discharged, and thus are under no imminent threat of harm  
25 under the statute or implementing regulations, they lack standing to seek an order enjoining the  
26 statute or implementing regulations prospectively. *Summers v. Earth Island Inst.*, \_\_U.S.\_\_129  
S. Ct. 1142, 1148-49 (2009). Plaintiffs’ facial challenge, like Plaintiffs’ as-applied challenge, is  
instead brought to obtain the money damages and reinstatement requested in the complaint.

1 **III. The Little Tucker Act’s waiver of sovereign immunity does not apply to Plaintiffs’**  
2 **claims.**

3 The Little Tucker Act provides a waiver of sovereign immunity and for concurrent  
4 jurisdiction in United States District Court and the Court of Federal Claims over:

5 [a]ny ... civil action or claim against the United States, not exceeding \$10,000 in  
6 amount, founded either upon the Constitution, or any Act of Congress, or any  
7 regulation of an executive department, or upon any express or implied contract  
with the United States, or for liquidated or unliquidated damages in cases not  
sounding in tort.

8 28 U.S.C. § 1346(a)(2); see *McGuire v. U.S.*, 550 F.3d 903, 910 (9th Cir. 2008). Because the  
9 Court of Appeals for the Federal Circuit has exclusive jurisdiction over claims brought under  
10 the Little Tucker Act, 28 U.S.C. § 1295(a)(2), the substantive law of the Federal Circuit, not the  
11 circuit law in which a district court sits, controls. See *Golan v. Pingel Enterprise, Inc.*, 310 F.3d  
12 1360, 1368 (Fed. Cir. 2002) (“Federal Circuit law applies to causes of action within the  
13 exclusive jurisdiction of the Federal Circuit.”). Accord *Doe v. Goss*, 2007 WL 106523, \*10  
14 n.16 (D.D.C. 2007); *Jarrett v. White*, 2002 WL 1348304, \*4 n.4 (D. Del. 2002); *Ward v. Aspin*,  
15 1993 WL 379181, \*4 n.4 (E.D. Pa. 1993).

16 Plaintiffs, however, have chosen not to avail themselves of the Little Tucker Act’s  
17 waiver of sovereign immunity here. “Parties may waive their right to receive more than  
18 \$10,000 in order to satisfy the Little Tucker Act and obtain jurisdiction in the district court.”  
19 *Park Place Assoc.*, 563 F.3d at 927. But such a waiver “must be clearly and adequately  
20 expressed.” *Waters*, 320 F.3d at 271-72 (internal quotation omitted). Without such a waiver  
21 the Tucker Act applies and permits suit only in the Court of Federal Claims. The Tucker Act  
22 provides both a waiver of sovereign immunity and a basis for jurisdiction; this is a “package  
23 deal,” and jurisdiction cannot lie in district court absent an affirmative waiver of damages  
24 exceeding \$10,000. *Park Place Assoc.*, 563 F.3d at 927. Plaintiffs have made no such waiver  
25 here.

1 **IV. This action should be transferred to the Court of Federal Claims.**

2 This action should be transferred to the Court of Federal Claims. Under 28 U.S.C.  
3 § 1631, a court can transfer a civil action if three conditions are met: “(1) the transferee court  
4 would have been able to exercise its jurisdiction on the date the action was misfiled; (2) the  
5 transferor court lacks jurisdiction; and (3) the transfer serves the interest of justice.” *Garcia de*  
6 *Rincon v. Dep't of Homeland Sec.*, 539 F.3d 1133, 1140 (9th Cir. 2008) (internal quotation  
7 marks omitted). The first and second of these factors are satisfied because this Court lacks  
8 jurisdiction to decide this action, as the Tucker Act is the only potential waiver of sovereign  
9 immunity that could apply to Plaintiffs’ damages claims against the government as pled, and  
10 Tucker Act claims can only be heard by the Court of Federal Claims. The third factor is also  
11 satisfied: transferring this case to the Court of Federal Claims would serve the interests of  
12 justice by allowing Plaintiffs’ claims to be litigated in the court that Congress specifically has  
13 vested with authority to provide complete and adequate relief in wrongful discharge cases.

14 **V. In the alternative, this action should be dismissed for lack of jurisdiction.**

15 To the extent the Court does not transfer this case, it should dismiss this action for lack  
16 of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Plaintiffs bear the burden of  
17 establishing jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It is  
18 “presume[d] that federal courts lack jurisdiction unless the contrary appears affirmatively from  
19 the record.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (internal quotation  
20 marks omitted). As discussed, Plaintiffs’ complaint, as pled, seeks money damages that this  
21 Court lacks the power to award. Dismissal is therefore required; without subject-matter  
22 jurisdiction, the Court must dismiss those claims before reaching the merits of this case. *Steel*  
23 *Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998); *see also Ex parte McCardle*, 74  
24 U.S. 506, 514 (1868) (“Jurisdiction is power to declare the law, and when it ceases to exist, the  
25 only function remaining to the court is that of announcing the fact and dismissing the cause.”).

1 **CONCLUSION**

2 Because the only waiver of sovereign immunity that could apply to Plaintiffs' claims is  
3 the Tucker Act, and the Court of Federal Claims is the only court with jurisdiction to adjudicate  
4 Tucker Act claims, this action should be transferred to the Court of Federal Claims pursuant to  
5 28 U.S.C. § 1631.<sup>3</sup> In the alternative, the action should be dismissed for lack of jurisdiction  
6 pursuant to Fed. R. Civ. P. 12(b)(1).

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8 DATED: February 11, 2011

Respectfully submitted,

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<sup>3</sup> Pursuant to 28 U.S.C. § 1292(d)(4)(B), no further proceedings shall be taken in the district  
27 court until 60 days after the Court has ruled upon the Federal Defendants' motion for a transfer  
28 and, if an appeal is taken from the Court's grant or denial of the motion, proceedings shall be  
further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit.