

1 IAN HEATH GERSHENGORN
 Deputy Assistant Attorney General
 2 MELINDA L. HAAG
 United States Attorney
 3 VINCENT M. GARVEY
 Deputy Director
 4 PAUL G. FREEBORNE
 Virginia Bar No. 33024
 5 RYAN B. PARKER
 Utah Bar No. 11742
 6 U.S. Department of Justice
 Civil Division
 7 Federal Programs Branch
 P.O. Box 883
 8 Washington, D.C. 20044
 Telephone: (202) 353-0543
 9 Facsimile: (202) 616-8460
 E-mail: paul.freeborne@ usdoj.gov

10 Attorneys for Federal Defendants

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

14 MICHAEL D. ALMY, ANTHONY J.
 LOVERDE, and JASON D. KNIGHT,

16 Plaintiffs,

17 v.

18 UNITED STATES DEPARTMENT OF
 DEFENSE, ROBERT M. GATES, Secretary of
 19 Defense; DEPARTMENT OF THE AIR FORCE;
 MICHAEL B. DONLEY, Secretary, Department
 20 of the Air Force; DEPARTMENT OF THE
 NAVY; and RAY MABUS, Secretary,
 21 Department of the Navy,

22 Defendants.

)
) Case No. 3:10-cv-5627 (RS)
)
) FEDERAL DEFENDANTS' REPLY
) IN SUPPORT OF MOTION TO
) TRANSFER ACTION TO UNITED
) STATES COURT OF FEDERAL
) CLAIMS, OR, IN THE ALTERNATIVE,
) TO DISMISS ACTION

)
) Hearing Date: Thursday, May 5, 2011
)
) Time: 1:30 P.M.
)
) Courtroom: San Francisco Courthouse,
) Courtroom 3 - 17th Floor 450 Golden
) Gate Avenue, San Francisco, CA 94102

1 **INTRODUCTION**

2 Because the Court of Federal Claims is the only court with both jurisdiction and the
3 statutory authority to afford a wholesale, adequate remedy for the claims Plaintiffs intend to
4 pursue for their alleged wrongful discharge, this case should be transferred to the Court of
5 Federal Claims. In the alternative, given Plaintiffs’ intention to seek what are undeniably
6 claims for money damages—promotion, back pay, allowances, and benefits—for their alleged
7 wrongful discharge, the case should be dismissed because there is no jurisdiction under the
8 Administrative Procedure Act (APA) that would permit this case to proceed in this Court.

9 While Plaintiffs continue to state that they only seek reinstatement and retirement credit,
10 they have reserved the right to seek promotion and have refused to clearly and expressly waive
11 any claims for back pay, allowances, and benefits. All are claims for money damages that can
12 only be heard in the Court of Federal Claims under the Tucker Act. Plaintiffs may not plead
13 their way around Tucker Act jurisdiction by attempting to cast their complaint here as seeking
14 declaratory and injunctive relief, when they intend to make subsequent claims for money
15 damages in the Court of Federal Claims; the waiver of sovereign immunity in the APA is
16 conditioned upon the lack of an “adequate remedy” under another statute. Because the Tucker
17 Act will provide Plaintiffs an adequate, wholesale remedy for the relief they seek, there is not
18 APA jurisdiction that would permit this case to proceed in this Court.

19 Plaintiffs may only proceed in this Court if they (1) clearly and expressly waive any
20 money damages both now and prospectively, or, (2) clearly and expressly waive money claims
21 over \$10,000 and proceed under the Little Tucker Act. But given Plaintiffs’ repeated refusal to
22 make the required waiver and election, the case should be transferred to the Court of Federal
23 Claims. In the alternative, the Court should dismiss the case pursuant to Fed. R. Civ. P.
24 12(b)(1) because the Court lacks subject-matter jurisdiction to hear Plaintiffs’ claims.¹

25 _____
26 ¹ Should the Court permit Plaintiffs to proceed in this Court, Defendants would oppose any
27 subsequent attempt by Plaintiffs to bring a claim for money in the Court of Federal Claims based
28 on the same operative facts. Moreover, both in this Court and in the Court of Federal Claims,
Defendants believe there are substantial grounds for dispositive motions that would result in
dismissal of some or all of Plaintiffs’ claims in advance of trial. Accordingly, although

1 **ARGUMENT**

2 **I. Notwithstanding Plaintiffs’ Attempts at Creative Pleading, This Is a Wrongful**
3 **Discharge Case Governed by the Tucker Act**

4 Plaintiffs principally argue in their opposition that (1) they only seek reinstatement and
5 service credit for time they would have served but for their discharge, Plfs’ Opp’n to Defs’ Mot.
6 2:27-32, Doc. 32, and (2) that the “premise” of Defendants’ motion was that Plaintiffs’ request
7 for service credit constitutes a claim for money damages that is subject to the Tucker Act, *id.* at
8 1:13-14. But neither point is true: Plaintiffs’ original complaint included Mr. Almy’s
9 promotion claim (Compl. For Declaratory and Injunctive Relief 19:24 - 20:2, Doc. 1), which is
10 undeniably a claim for money damages governed by the Tucker Act. *See e.g., Dysart v. United*
11 *States*, 369 F.3d 1303, 1315 (Fed. Cir. 2004). Plaintiffs have also refused to clearly and
12 expressly waive now and prospectively any claim for back pay, allowances, or benefits
13 purportedly resulting from their wrongful discharge. Because the Tucker Act was specifically
14 amended in 28 U.S.C. § 1491(a)(2) to provide the Court of Federal Claims with jurisdiction to
15 hear Plaintiffs’ claims for money damages, as well as Plaintiffs’ declaratory and injunctive
16 claims, Defendants moved to transfer this action to the Court of Federal Claims.

17 Plaintiffs’ argument that they are not seeking money for their alleged discharge,
18 moreover, is contradictory. On the one hand, Plaintiffs argue in their opposition that they are
19 not seeking money. *See e.g.,* Opp’n 3:23-24 (“The fact is, of course, that Plaintiffs complaint
20 does not seek the payment of any money whatsoever.”). On the other hand, Plaintiffs state that
21 “the mere fact that a plaintiff has requested money does not mean that a suit is an action for
22 money damages to which the broad waiver of sovereign immunity set forth in 5 U.S.C. § 702
23 does not apply.” *See* Opp’n 4:3-4, citing *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

24 In any event, Plaintiffs make claims for money damages that are governed by the Tucker
25 Act. Had Plaintiffs served in the military and not received the credit they now claim that they

26 _____
27 jurisdiction is appropriate only in the Court of Federal Claims and not in this Court, nothing in
28 this filing should be read to suggest that Plaintiffs’ claims would survive Defendants’ anticipated
Motion to Dismiss or a Motion for Summary Judgment in either forum.

1 were due based upon their actual service, their claims for credit would be claims for specific
2 relief; they would be seeking the very thing they were entitled to. *See Hubbard v. EPA*, 982
3 F.2d 531, 534 n. 4 (D.C. Cir.1992). But Plaintiffs are seeking credit for time they did not serve
4 in the military in an apparent attempt to seek compensation for monetary benefits that they were
5 deprived of earning because of their alleged wrongful discharge. *See id.* at 534. “Damages are
6 given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not
7 substitute remedies at all, but attempt to give the plaintiff the very thing to which he was
8 entitled.” *Bowen*, 487 U.S. at 895 (quoting *School Comm. of Burlington v. Dep't of Educ. of*
9 *Mass.*, 471 U.S. 359, 370-371 (1985)). Perhaps recognizing this, Plaintiffs acknowledge that
10 Mr. Almy’s claim for promotion is a claim for money damages; that is why Plaintiffs now
11 attempt to reserve the right to pursue that claim in the Court of Federal Claims. Opp’n 9 n.1.
12 Plaintiffs also recognize that claims for back pay, allowances, and benefits also constitute
13 claims for money damages. *Id.* at 6:26-7:7 (acknowledging cases cited by Defendants in
14 opening memorandum of law establish that request for back pay is claim for money damages).

15 The cases Plaintiffs cite do not support their attempt to proceed in this Court. This case
16 is unlike *Poole v. Rourke*, 779 F. Supp. 1546, 1556 (E.D. Cal. 1991), which Plaintiffs rely upon
17 throughout their opposition. There, “Plaintiff . . . never requested money; he merely wanted his
18 job back.” *Id.* at 1556 (quoted at Opp’n 5:17-24). The Plaintiffs here, by contrast, have clearly
19 and expressly stated their intention to seek promotion, and by failing to clearly and expressly
20 waive any right to back pay, allowances, or benefits both now and in any subsequent Court of
21 Federal Claims proceeding, Plaintiffs appear to be seeking such money relief here as well.

22 This case also differs significantly from *James v. Caldera*, which Plaintiffs rely upon.
23 *See* Opp’n 6-7. As an initial matter, the *James v. Caldera* judgment Plaintiffs cite in their
24 Opposition, Opp’n 6:5, has been vacated. *James v. Caldera*, No. C-76-1779-VRW, 2000 WL
25 970557 (N.D. Cal. June 30, 2000) (vacating the Court’s Nov. 24, 1999 judgment). The opinion
26 issued by the Federal Circuit does not support Plaintiffs’ attempt to proceed here. In that action,
27 the Court explained that “if a Tucker Act suit in the Court of Federal Claims provides an
28 adequate remedy, APA review in the district court is not available.” *James v. Caldera*, 159 F.3d

1 573, 579 (Fed. Cir. 1988). The Court then noted that enlisted service members who are
2 wrongfully discharged before the end of their terms of enlistment can bring claims in the Court
3 of Federal Claims under Section 204 of the Military Pay Act, 37 U.S.C. § 204. *Caldera*, 159
4 F.3d at 581. The plaintiff in *Caldera* was not discharged before the end of his term of service
5 and, therefore, could not bring claims under Section 204. *Id.* Some of the Plaintiffs in this case
6 allege that they were discharged before the end of their terms of service, *see* Opp’n 2:21-22
7 (alleging that certain Plaintiffs would have remained on active duty but for discharge), and
8 could seek relief in the Court of Federal Claims.

9 *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), which Plaintiffs also rely upon, *see*
10 Opp’n at 6:7-13, does not support their position either. In their Opposition, Plaintiffs cite to
11 *Beller*, and describe it as a case “where plaintiff sought back pay, as well as injunctive relief to
12 prevent his discharge.” *Id.* at 6:8-9. Yet the named plaintiff in *Beller* did not seek back pay at
13 all. As the Court explained, Beller “requested damages only with regard to his action brought
14 under the Privacy Act, 5 U.S.C. s 552a.” *Beller*, 632 F.2d at 798. He also asked the Court for
15 an injunction prohibiting the Navy from discharging him and ordering it to expunge mentions of
16 his sexual orientation from his service records. *Id.* at 799. Beller was allowed to proceed in
17 district court because the Privacy Act contained a waiver of sovereign immunity for his
18 damages claim, and the APA waived sovereign immunity for his equitable claims. The APA did
19 not provide a waiver of sovereign immunity for the named plaintiff’s money claim in *Beller* and
20 it does not provide a waiver of sovereign immunity for the Plaintiffs’ money claims in this case.

21 Lastly, Plaintiffs appear to believe that they can avoid the exclusive jurisdiction
22 Congress created in Section 1491(a)(2) by simply carving up their claims and pleading their
23 equitable claims now in district court and their money claims later in the Court of Federal
24 Claims. But “this kind of litigation should be understood for what it is”—not by how it is framed
25 in the complaint. *Suburban Mort. Assoc. v. Dep’t of Housing and Urban Dev.*, 480 F.3d 1116,
26 1118 (Fed. Cir. 2007); *see also Consol. Edison Co. v. Dep’t of Energy*, 247 F.3d 1378, 1385
27 (Fed. Cir. 2001). The Ninth Circuit has recognized that “the exclusive jurisdiction of the court
28 of claims [now the Court of Federal Claims] over non-tort claims exceeding \$10,000 cannot be

1 evaded or avoided [as here] by framing a district court complaint to appear to seek only
2 injunctive, mandatory or declaratory relief against government officials or the government
3 itself.” *Bakersfield City School Dist. of Kern Cnty. v. Boyer*, 610 F.2d 621, 628 (9th Cir. 1979)
4 (citations omitted). As demonstrated here, litigants will attempt to “craft suits, ultimately
5 seeking money from the Government, as suits for declaratory or injunctive relief without
6 mentioning the money” so they can attempt to stay in district court. *Suburban Mortg. Assoc.*,
7 480 F.3d at 1124. But the Federal Circuit has “cautioned litigants that dressing up a claim for
8 money as one for equitable relief” is not enough to negate the exclusive jurisdiction of the Court
9 of Federal Claims or trigger APA jurisdiction. *Id.*

10 **II. Because the Tucker Act Provides an Adequate Remedy for the Relief Plaintiffs**
11 **Seek, the Court of Federal Claims is the Only Proper Forum**

12 Plaintiffs may proceed in this Court under the APA only after showing that “there is no
13 other adequate remedy” under any other statute. 5 U.S.C. § 704. If the Court of Federal Claims
14 “can provide an adequate remedy—if a money judgment will give the plaintiff essentially the
15 remedy he seeks—then the proper forum for resolution of the dispute is not a district court under
16 the APA but the Court of Federal Claims under the Tucker Act.” *Suburban Mort. Assoc.*, 480
17 F.3d at 1126. Because of the “dispositive” nature of the “adequate remedy” inquiry, the Federal
18 Circuit begins the jurisdictional analysis with this question as it often will dispose of cases such
19 as this one. *Id.* at 1127. Beginning and disposing of cases in this manner also avoids “linguistic
20 manipulation and consequent opportunity for forum shopping,” *id.* at 1125, preventing plaintiffs
21 from characterizing their relief as declaratory and injunctive, when the totality of the relief that
22 they seek includes claims for money damages.

23 As Defendants have explained, to ensure complete relief could be provided in wrongful
24 discharge cases such as this, Congress, in 1972, amended the Tucker Act to allow the Court of
25 Federal Claims:

26 “To provide an entire remedy and to complete the relief afforded by the
27 judgment, the [Court of Federal Claims] may, as an incident of and collateral to
28 any such 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.”

1 28 U.S.C. § 1491(a)(2) (emphasis added). Thus, the Court of Federal Claims could provide the
2 money relief Plaintiffs apparently will seek (*e.g.*, promotion, back pay, allowances, and
3 benefits) as well as declaratory and injunctive relief.

4 Even though Federal Circuit precedent would govern any interlocutory appeal of any
5 ruling upon Defendants' motion, *see* 28 U.S.C. § 1292(d)(4), *see also Suburban Mort. Assoc.*,
6 480 F.3d at 1123-24, 1128, Plaintiffs fail to address *Suburban Mort. Assoc.* and this rule of law
7 in their opposition.

8 Plaintiffs' only attempt to address Section 1491(a)(2) is to posit that the Court of Federal
9 Claims lacks jurisdiction under Section 1491(a)(2) here because the "heart" of Plaintiffs'
10 complaint is reinstatement and that the money relief that they intend to seek is merely incidental
11 to the declaratory and injunctive relief that they seek. Opp'n 8:17-9:18. But, as explained,
12 Plaintiffs' characterization of their claim does not control this question. As to Plaintiffs'
13 assertion that the Court of Federal Claims would lack jurisdiction to hear their constitutional
14 challenge to the "Don't Ask, Don't Tell" policy (DADT) and award them declaratory and
15 injunctive relief, they fail to account for the fact that the Court of Federal Claims has
16 adjudicated such claims in the past pursuant to Section 1491(a)(2). *See e.g., Loomis v. United*
17 *States*, 68 Fed. Cl. 503, 508 (2005) (finding jurisdiction based upon Section 1491(a)(2) to hear
18 both claims for money damages and request for declaratory and injunctive relief); *see also*
19 *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (adjudicating constitutional
20 challenge to the policy that proceeded DADT seeking reinstatement to active duty and back
21 pay). Given that Section 1491(a)(2) provides Plaintiffs an adequate remedy, "the proper forum
22 for resolution of the dispute is not a district court under the APA but the Court of Federal
23 Claims under the Tucker Act." *Suburban Mort. Assoc.*, 480 F.3d at 1124. Section 1491(a)(2)
24 accordingly controls and there is "no basis to refuse transferring both the monetary and
25 equitable claims to the Claims Court." *Smith v. Orr*, 855 F.2d 1544, 1553 (Fed. Cir. 1988).

1 **III. Plaintiffs’ Motion for Leave to File an Amended Complaint Should be Denied as**
2 **Futile, And the Case Should be Transferred to the Court of Federal Claims**

3 Plaintiffs’ proposed amended complaint does not cure the jurisdictional deficiency in
4 this case. Opp’n 9:19-10:9. By seeking claims for money damages, Plaintiffs must proceed
5 under the Tucker Act. As in their motion for leave to file an amended complaint, Plaintiffs rely
6 upon *Rowe v. United States*, 633 F.2d 799, 802 (9th Cir. 1980) for their purported right to split
7 their claim and proceed in two different courts for piecemeal relief. In *Rowe*, however, the
8 Tucker Act failed to provide an adequate remedy for the claims presented by Plaintiff. There, a
9 dissatisfied bidder sought to bring an APA action in district court challenging a Department of
10 Interior decision to award oil and gas leases to another bidder and sought both contract damages
11 exceeding \$10,000 and an order compelling the Secretary to award the oil and gas leases to
12 plaintiffs. *Id.* at 800-01. The Ninth Circuit found that plaintiffs could proceed in district court
13 for the injunction because the Court of Claims lacked the authority to grant the equitable relief
14 sought in the complaint that would “compel the Secretary of the Interior to award the oil and
15 gas leases to the plaintiffs, pursuant to their agency appeal.” *Id.* at 802. It was thus the lack of
16 an adequate remedy at law under the Tucker Act that permitted plaintiffs to proceed in district
17 court in *Rowe*. The Ninth Circuit has distinguished *Rowe* on this basis. *See Cape Fox Corp. v.*
18 *United States*, 646 F.2d 399, 402 (9th Cir. 1981) (recognizing that the “Court of Claims could
19 not have awarded all the relief requested” in *Rowe*). Because Congress specifically amended
20 the Tucker Act in section 1491(a)(2) to allow the Court of Federal Claims to provide both
21 money and equitable relief in wrongful discharge cases, Plaintiffs can obtain an adequate,
22 wholesale remedy in one court.

23 Plaintiffs can make a clear and express waiver of damages and stay in this Court. In
24 *McCann v. United States*, for example, a retired service member brought suit against the
25 government in the Federal District of Hawaii seeking both equitable and money damages. 12
26 Cl. Ct. 286 (1987). The District Court transferred the case to the Claims Court, where the
27 plaintiff brought a motion to amend his complaint to clarify that he was only seeking equitable
28 relief and asked the Court to transfer the case back to the District Court. *Id.* The Court

1 ultimately granted the plaintiff's motion and transferred the case back to the District Court
2 based on the binding and prospective nature of plaintiff's waiver of his money claims: "By
3 deleting all requests for monetary damages from its pleadings, **now and prospectively**, plaintiff
4 has effectively precluded this court from any authority to hear and decide the suit." *Id.* at 289
5 (emphasis added).

6 CONCLUSION

7 Plaintiffs can proceed in this Court by (1) clearly and expressly waiving now and
8 prospectively any claims for money damages as was done in *McCann*, or (2) clearly and
9 expressly limiting any claims for money damages exceeding \$10,000 (and proceed under the
10 Little Tucker Act). Because Plaintiffs have opted not to do so, the only waiver of sovereign
11 immunity that could apply to Plaintiffs' claims is the Tucker Act, and the Court of Federal
12 Claims is the only court with jurisdiction to adjudicate Plaintiffs' Tucker Act claims. This
13 action should be transferred to the Court of Federal Claims pursuant to 28 U.S.C. § 1631.

14 In the alternative, the action should be dismissed for lack of jurisdiction pursuant to Fed.
15 R. Civ. P. 12(b)(1). Plaintiffs bear the burden of establishing jurisdiction. *See Lujan v.*
16 *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Dismissal is therefore required; without
17 subject-matter jurisdiction, the Court must dismiss those claims before reaching the merits of
18 this case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *see also Ex parte*
19 *McCardle*, 7 Wall. 506, 514 (1868) ("Jurisdiction is power to declare the law, and when it
20 ceases to exist, the only function remaining to the court is that of announcing the fact and
21 dismissing the cause.").

1 DATED: April 21, 2011

Respectfully submitted,

2 IAN HEATH GERSHENGORN
3 Deputy Assistant Attorney General,
4 Civil Division

5 MELINDA L. HAAG
6 United States Attorney

7 VINCENT M. GARVEY
8 Deputy Director

9 /s/ Paul G. Freeborne
10 PAUL G. FREEBORNE
11 RYAN B. PARKER
12 U.S. Department of Justice
13 Civil Division

14 *Attorneys for the Federal Defendants*

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