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14
 15 **THE UNITED STATES DISTRICT COURT**
 16 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
 17

18 HELEN GRACE JAMES,
 19 Plaintiff,

20 v.

21 HEATHER WILSON,
 22 Secretary of the Air Force,
 23 Defendant.
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Case No.

COMPLAINT

Case No.

COMPLAINT

1 **COMPLAINT**

2 Plaintiff Helen Grace James, a veteran of the United States Air Force and a resident of
3 Clovis, California, hereby alleges:

4 **INTRODUCTION**

5 In 1955, Ms. James was forced to leave the United States Air Force and Air Force
6 Reserves and denied an honorable discharge for only one reason: she is lesbian. Ms. James is
7 now 90 years old, and she has petitioned the Air Force to upgrade her “general under honorable
8 conditions” discharge to “honorable,” to reflect her dedicated military service to our country and
9 to right a wrong committed against her. The Air Force has failed to act on Ms. James’ petition
10 within the statutorily required 18 months and thus Ms. James seeks an order from the Court
11 requiring the Air Force to promptly upgrade her discharge status to “honorable.”

12 **JURISDICTION AND VENUE**

13 1. This action arises under the Fifth Amendment to the U.S. Constitution and the
14 Administrative Procedure Act, 5 U.S.C. §§ 702, 706. This Court has jurisdiction under 28
15 U.S.C. §§ 1331, 1361, and 1651.

16 2. Venue is proper in the Eastern District of California pursuant to 28 U.S.C.
17 § 1391(e)(1) because Plaintiff resides in Clovis, California, no real property is involved in this
18 action, and Defendant Heather Wilson is sued in her official capacity as an officer of the United
19 States.

20 **PARTIES**

21 3. Plaintiff Helen Grace James is a veteran of the United States Air Force. She is a
22 citizen of the United States and resides in Clovis, California.

23 4. Defendant Heather Wilson, Secretary of the Air Force, is sued in her official
24 capacity. Defendant has the power to act through the Air Force Board for Correction of Military
25 Records (“AFBCMR”) to change any record of a former member of the Air Force when
26 necessary to correct an error or to remove an injustice.

FACTUAL ALLEGATIONS

5. Helen Grace James was born on January 30, 1927 in Scranton, Pennsylvania.

6. Ms. James' father was a World War I veteran and he inspired her to enlist in the Air Force. After earning a Bachelor of Science degree in Health Education at East Stroudsburg State College in Pennsylvania and teaching for several years, Ms. James enlisted in the Air Force in 1952, when she was 25 years old. She was concurrently enlisted in the Air Force Reserves.

7. Ms. James completed her basic training at Lackland Air Force Base in San Antonio, Texas. She was then assigned to Kessler Air Force Base in Biloxi, Mississippi where she trained as a radio operator. Following training, she was stationed at Roslyn Air Force Base in New York. At Roslyn, Ms. James continued to work as a radio operator, helping to ensure that our borders along the Atlantic were secure. She also played on and coached softball and basketball teams with other airmen. Ms. James loved the new experiences and challenges she experienced in the military.

8. Ms. James consistently received positive performance evaluations and had no disciplinary problems. She was promoted from radio operator to crew chief and had achieved the rank of Airman Second Class at the time of her discharge. During her time at Roslyn, she was also commissioned as a Second Lieutenant in the Reserves.

9. About a year after she was stationed at Roslyn, Ms. James learned that gay and lesbian service members were considered by the military to be a threat to national security. The Office of Special Investigations ("OSI") investigated airmen who were rumored to be homosexual, and Ms. James soon learned that OSI investigators had already arrived at her base.

10. Ms. James' life in the military abruptly changed. She became fearful, anxious and depressed. She also had a lot of trouble sleeping, and she used alcohol to cope with her escalating fears.

1 11. Before long, OSI began to investigate Ms. James. They searched her room,
2 including her personal files and letters. They followed her both on and off base, suddenly
3 appearing to ask her questions when she was using the base latrine or eating a sandwich with a
4 friend at a local sandwich shop or even while dancing at a nightclub in New York City called
5 Bagatelles. The constant surveillance and harassment were extremely stressful.

6 12. One night, a fellow airman offered her liquor and they drank a bottle together.
7 The next day, Ms. James could not recall what happened, but her symptoms were consistent with
8 those of a victim of sexual assault. In fact, the U.S. Department of Veterans Affairs (VA)
9 recently diagnosed Ms. James with a 70 percent service-connected disability rating for Post
10 Traumatic Stress Disorder due to military sexual trauma and other injuries she incurred during
11 her military service.

12 13. Soon after, Ms. James and two other lesbian Air Force members were arrested in
13 their barracks, taken to separate buildings and interrogated by OSI investigators for hours. Ms.
14 James was asked demeaning questions about her mother, sister, and friends. The OSI
15 investigator told her that she had been followed, her personal files and letters read, and her
16 movements closely watched for some time. She was shamed for being homosexual and told that
17 she was a danger to national security. The investigator then threatened to tell Ms. James' family
18 and friends that she was gay.

19 14. Ms. James decided she had had enough. She had grown up in a small farming
20 town where everyone knew each other. Nobody, not even her family, knew that she was gay. It
21 simply was not discussed in those days. She told the OSI investigator that he could write down
22 anything he wanted and she would sign it. She never even read what she signed.

23 15. It took two weeks to process out of the Air Force. During this time, Ms. James
24 was harassed and ridiculed by her fellow airmen and her buttons were cut off her uniform. She
25 was given no severance pay, no insurance or any other benefits. Ms. James was expelled from
26 the Air Force with an "undesirable" discharge on March 3, 1955, after three years of military
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1 service. She was also stripped of her commission in the Air Force Reserves with an
2 “undesirable” discharge on August 17, 1955.

3 16. Ms. James went back home, but she never told anyone about what had happened
4 to her in the military. She felt ashamed. The school where she had worked as a teacher before
5 entering the Air Force offered her the opportunity to return to a full-time teaching position, but
6 the school required that she provide a copy of her discharge papers before she could be rehired.
7 She knew that the school would never take her back if they saw what was in her military records.
8 Instead, she went to work on a tobacco farm.

9 17. Later, Ms. James decided to go back to school to get a degree in physical therapy.
10 She attended the University of Pennsylvania. Other students in her program were also veterans,
11 but they were able to pay for their studies with benefits received under the GI Bill. With an
12 “undesirable” discharge, Ms. James was not eligible for such benefits. She had to borrow money
13 and work nights as an usher in a theatre to pay for her education. During this time, she felt
14 depressed, angry, and alone. She had trouble sleeping and suffered nightmares and flashbacks
15 from her days in the military.

16 18. After graduating from the program in 1956, Ms. James moved far away from
17 everybody and everything in her past. She moved to Los Angeles, California and worked as a
18 physical therapist. After about ten years, Ms. James again went back to school, this time on a
19 scholarship, to earn an advanced degree in physical therapy at Stanford University.

20 19. While at Stanford, a friend of Ms. James, who was also an attorney, helped her
21 appeal her “undesirable” discharge to the AFBCMR. In 1968, the AFBCMR upgraded Ms.
22 James’ discharge status to “general under honorable conditions” for her military service in both
23 the Air Force and Reserves. (Copies of Ms. James’ certificates of military service reflecting her
24 “general” discharge are attached hereto as Exh. A.)

25 20. In 1969, Ms. James graduated from Stanford University with a master’s degree in
26 physical therapy. In 1972, she was offered a faculty position at the California State University at
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1 Fresno, which was initiating a new bachelor's degree program in physical therapy. Ms. James
2 taught in the program for 15 years and was awarded the honor of Professor Emeritus in Physical
3 Therapy in 1989. She then went into private practice.

4 21. Despite these successes, Ms. James continues to be haunted by what happened to
5 her in the military. She still struggles to cope with the fears and anxieties that have been with her
6 since her first interaction with OSI. Ms. James still suffers from depression, shame, and thoughts
7 of suicide. She continues to have trouble sleeping, and grapples with nightmares, flashbacks, and
8 hypervigilance. Although she is currently in therapy (and has been on and off since she left the
9 military), she is still traumatized by the military investigation and interrogation that occurred
10 over 62 years ago.

11 22. As her 90th birthday approached, Ms. James decided that this ordeal had been
12 going on for long enough. On April 8, 2016, she applied to the AFBCMR to upgrade her
13 discharge status to "honorable."

14 23. On March 31, 2017, the National Personnel Records Center sent a letter to Ms.
15 James notifying her that it was unable to locate her military personnel records. The National
16 Personnel Center concluded that Ms. James' records were most likely destroyed in a 1973 fire at
17 the Center's facility in St. Louis, Missouri. (A copy of that letter is attached hereto as Exh. B.)

18 24. By statute, the AFBCMR must take final action on all discharge applications
19 within 18 months of receipt. 10 U.S. C. § 1557(b).

20 25. On October 11, 2017—three days *after* the expiration of the 18-month deadline
21 for final action—the AFBCMR sent Ms. James a letter notifying her that her case would be
22 prepared for consideration. (A copy of that letter is attached hereto as Exh. C.)

23 26. Included with the AFBCMR's October 11, 2017 letter was a separate advisory
24 opinion from the Air Force Military Retirements and Separations Section of the Headquarters
25 Air Force Personnel Center ("AFMRS"), which stated that it could offer no recommendation on
26 Ms. James' application to upgrade her discharge status because Ms. James' records had been
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1 destroyed in the 1973 fire. The AFMRS stated that because of the lack of records, it lacked
2 documentary evidence demonstrating that Ms. James had been discharged based solely on her
3 sexual orientation as she claimed in her application.

4 27. In its October 11, 2017 letter, the AFBCMR required Ms. James to respond to the
5 letter within 30 days, and Ms. James did so in a reply mailed on November 9, 2017.

6 28. The Air Force has not attempted to and cannot rebut the fact that Ms. James was
7 discharged solely because she is lesbian. There is no evidence of any aggravating factors on the
8 record that would otherwise explain Ms. James' discharge, and the destruction of her records
9 cannot be held against her.

10 29. On November 27, 2017, the Case Management Office of the AFBCMR confirmed
11 in an email to one of Ms. James' attorneys, Chris Megaw, that the Board had reached a decision
12 in Ms. James' case. The Case Management Office explained that it could not release that
13 decision, however, until it was reviewed and signed by the AFBCMR's Executive Director. The
14 Case Management Office refused to estimate when the decision would be finalized and sent to
15 Ms. James.

16 30. That same day, Ms. James (through counsel) notified the AFBCMR that she
17 intended to file suit no later than January 2, 2018 to seek judicial intervention to compel the
18 AFBCMR to act.

19 31. The Case Management Office of the AFBCMR continues to refuse to provide any
20 estimate of when it will finalize its decision, despite repeated requests from Ms. James' counsel.

21 32. Ms. James is a 90-year-old disabled veteran, anxious to receive a decision on her
22 application for a discharge upgrade. For over 60 years, her less than honorable discharge has
23 made her feel like a second-class citizen and not a true veteran. It has also prevented her from
24 receiving benefits she rightfully earned, including education, insurance, and retirement benefits.
25 Her less than honorable discharge will also prevent her from being buried in a National
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1 Cemetery with full military funeral honors like other service members. Before she passes, Ms.
2 James would like these injustices to be corrected.

3 **STATUTORY AND REGULATORY BACKGROUND**

4 33. The Air Force discharged Ms. James on March 11, 1955 and the Air Force
5 Reserves on August 17, 1955. At the time, Chapter 2, Section B of Air Force Manual 39-12
6 governed discharges based on homosexuality.

7 34. Pursuant to AFM 39-12, homosexuality was grounds for an “undesirable”
8 discharge, otherwise known as discharge “by reason of undesirable habits and traits of
9 character.”

10 35. A veteran’s discharge status affects eligibility for various benefits and support
11 services administered by the VA as well as by private organizations that provide services to
12 veterans. Veterans without an “honorable” discharge status are generally ineligible to receive
13 disability, employment, housing, education, burial and other benefits.

14 36. Congress has authorized the Secretary of the Air Force, acting through the
15 AFBCMR, to correct the discharge of any former member of the Air Force. 10 U.S.C. § 1552.

16 37. An Air Force veteran may request a discharge upgrade from the AFBCMR to
17 correct an error or injustice in her discharge characterization. 32 C.F.R. § 865.2. The application
18 ordinarily must be made within three years of discovery of the injustice, but the AFBCMR may
19 waive the limitations period “in the interest of justice.” *Id.* at § 865.3.

20 38. In the 1994 National Defense Authorization Act, Congress prohibited, for the first
21 time, discrimination against closeted homosexual members of the Armed Services and prohibited
22 the questioning of service members regarding their sexuality. Pub. L. No. 103-160, § 571, 107
23 Stat. 1547 (1994). This policy was often called “Don’t Ask, Don’t Tell” (DADT).

24 39. Between 1994 and 2010, federal law stated: “The prohibition against homosexual
25 conduct is a longstanding element of military law that continues to be necessary in the unique
26 circumstances of military service.” 10 U.S.C. § 654(a)(13)(2000).

1 40. In 2010, Congress passed the Don't Ask, Don't Tell Repeal Act, which allowed
2 gays, lesbians, and bisexuals to serve openly in the United States Armed Forces. Pub. L. No.
3 111-321, 124 Stat. 3515 (2010).

4 41. In accordance with the repeal of DADT, the Under Secretary of Defense directed
5 the boards for correction of military records to “normally grant requests” for discharge upgrades
6 or changes to narrative reasons for discharge “when the following conditions are met: (1) the
7 original discharge was based solely on DADT or a similar policy in place prior to enactment of
8 DADT and (2) there were no aggravating factors in the record, such as misconduct.”

9 Memorandum from Under Secretary of Defense Clifford L. Stanley, to the Secretaries of the
10 Military Departments, re: Correction of Military Records Following Repeal of Section 654 of
11 Title 10, United States Code (Sept. 20, 2011) (DADT Memo) (copy attached hereto as Exh. D).

12 42. The Under Secretary of Defense further explained that “the award of an honorable
13 or general discharge”—such as the one Ms. James received in 1968—“should normally be
14 considered to indicate the absence of aggravating factors.” *Id.*

15 43. To apply for a discharge upgrade before the AFBCMR, the applicant must
16 complete a form DD 149, which should include, at least, “(1) The name under which the member
17 served. (2) The member’s social security number or Air Force service number. (3) The
18 applicant’s current mailing address. (4) The specific records correction being requested. (5)
19 Proof of proper interest if requesting correction of another person’s records. (6) The applicant’s
20 original signature.” 32 U.S. C. § 865.3.

21 44. Since at least 1968—five years prior to the National Personnel Records Center
22 fire—the Air Force has had an obligation to “make and preserve records containing adequate and
23 proper documentation of the organization, functions, policies, decisions, procedures, and
24 essential transactions of the agency and designed to furnish the information *necessary to protect*
25 *the legal and financial rights of . . . persons directly affected by the agency’s activities.*” 44
26 U.S.C. § 3101 (emphasis added).

1 45. An individual aggrieved by agency action may seek judicial review in a United
2 States District Court pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702, 706.

3 46. This Court has jurisdiction to issue a writ of mandamus under 28 U.S.C. § 1651 to
4 compel an agency to take a discrete action that is legally required under 5 U.S.C. § 706(1) and
5 unlawfully withheld. *See Norton v. Southern Utah Wildlife Alliance*, 542 U.S. 55, 63 (2004).

6 **CLAIMS FOR RELIEF**

7 **FIRST CLAIM FOR RELIEF**

8 **Administrative Procedure Act, 5 U.S.C. § 706**

9 **Agency Action Unlawfully Withheld or Unreasonably Delayed**

10 47. The allegations of the preceding paragraphs are incorporated by reference as if
11 fully set forth herein.

12 48. Under the APA, a federal agency is required to act “within a reasonable time . . .
13 to conclude a matter presented to it.” 5 U.S.C. § 555(b). Congress authorized U.S. District
14 Courts to compel agency action that is “unlawfully withheld or unreasonably delayed.” 5 U.S.C.
15 § 706(1).

16 49. By statute, the AFBCMR was required to reach a decision on Ms. James’
17 application within 18 months of receipt. 10 U.S. C. § 1557(b).

18 50. It has been more than 18 months since Ms. James filed her application to upgrade
19 her discharge to “honorable” (mailed on April 8, 2016).

20 51. To the extent Defendant, through the AFBCMR, is still reviewing Ms. James’
21 April 2016 application, she has unlawfully withheld or unreasonably delayed adjudication of a
22 matter that was first brought before it over 18 months ago, does not involve an overly lengthy or
23 voluminous record, and concerns a 90-year-old disabled veteran.

24 52. Defendant, through the AFBCMR, has unlawfully withheld or unreasonably
25 delayed a decision in adjudicating Ms. James’ application in violation of 10 U.S. C. § 1557(b)
26 and the Administrative Procedure Act, 5 U.S.C. § 706.

SECOND CLAIM FOR RELIEF

Fifth Amendment to the U.S. Constitution

Violation of Procedural Due Process

53. The allegations of the preceding paragraphs are incorporated by reference as if fully set forth herein.

54. The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires federal agencies to conduct adjudications in a fair manner. It also requires agencies to follow their own rules, procedures and deadlines.

55. The failure of the Defendant, through the AFBCMR, to issue a decision on Ms. James' application to upgrade her discharge status to "honorable" after 18 months violates U.S.C. § 1557 and deprives Ms. James of the fundamental fairness in administrative adjudications guaranteed by the Due Process Clause of the Fifth Amendment.

THIRD CLAIM FOR RELIEF

Writ of Mandamus, 28 U.S.C. § 1651

56. The allegations of the preceding paragraphs are incorporated by reference as if fully set forth herein.

57. This Court may issue a writ of mandamus pursuant to 28 U.S.C. § 1651 to compel Defendant, through the AFBCMR, to take an action it is legally required to take.

58. Defendant, through the AFBCMR, failed to make a final decision on Ms. James' application within 18 months of submission, an action it was legally required to take under U.S.C. § 1557(b) and continues to unlawfully withhold with no indication of when it will be completed.

59. Ms. James is entitled to a writ of mandamus pursuant to 28 U.S.C. § 1651 compelling Defendant to make a final decision on her application.

PRAYER FOR RELIEF

Plaintiff respectfully requests that this Court grant the following relief:

1 (1) Order the Defendant, through the AFBCMR, to upgrade Ms. James' discharge
2 status to "honorable" and to correct the narrative reasons for separation;

3 (2) In the alternative, order Defendant, through the AFBCMR, to complete its
4 consideration of Ms. James' 2016 application within fourteen days under 5 U.S.C. § 706 of the
5 Administrative Procedure Act;

6 (3) In the alternative, issue a writ of mandamus ordering Defendant, through the
7 AFBCMR, to complete its consideration of Ms. James' 2016 application within fourteen days
8 under 28 U.S.C. § 1651.

9 (4) Award reasonable attorneys' fees and costs; and

10 (5) Grant such other and further relief this Court deems just and proper.

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Dated: January 2, 2018

Respectfully Submitted,

By: /s/ J. Cacilia Kim
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