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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

MARY JENNINGS HEGAR, JENNIFER HUNT, ALEXANDRA ZOE BEDELL, COLLEEN FARRELL, AND SERVICE WOMEN'S ACTION NETWORK,

Plaintiffs,

vs.

CHUCK HAGEL, Secretary of Defense,

Defendant.

Case No. 12-CV-06005 EMC

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER

Judge: Hon. Edward M. Chen

Date: February 27, 2014
Time: 1:30 p.m.
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I. INTRODUCTION AND SUMMARY OF ARGUMENT

On January 24, 2013, then-Secretary of Defense Leon Panetta announced the "rescission" of the 1994 Ground Combat Exclusion Policy ("1994 Policy") that barred Plaintiffs and all other servicewomen from serving in, or even applying for, many tens of thousands of combat-related positions. Dkt. No. 17. Plaintiffs' original complaint alleged that the 1994 Policy was unconstitutional under *United States v. Virginia*, 518 U.S. 515 (1996), particularly in light of modern battlefield conditions and the decades-long record of combat service by women in Iraq and Afghanistan. Despite the rescission of the 1994 Policy, the Department of Defense ("DoD") has continued its unconstitutional policy and practice of barring all women, because of their gender and regardless of their qualifications, from tens of thousands of positions, specialties, and training schools. These continuing gender-based exclusions are unconstitutional for the same reasons that the 1994 Policy was unconstitutional. On October 31, 2013, Plaintiffs filed their First Amended Complaint (Dkt. No. 18) ("FAC") to address this continuing policy and practice of the DoD.

The DoD has not filed an answer to the FAC. Instead, on December 19, 2013, the DoD filed a Motion to Dismiss the FAC under Rule 12(b)(1). Dkt. No. 19 ("MTD"). According to the DoD, although gender-based exclusions remain in effect and presently cause injury to Plaintiffs and other servicewomen, these exclusions are no longer ripe, "from a prudential perspective," because the DoD is considering whether to change them and must be able to do so free from judicial scrutiny. MTD at 13:21. On January 21, 2014, the DoD filed a motion for protective order (Dkt. No. 23) that seeks a blanket stay of all discovery in this case pending resolution of the MTD.

Neither the MTD nor the DoD's motion for protective order attempts to defend the constitutionality of the gender-based exclusions that have barred and continue to bar Plaintiffs and other servicewomen from thousands of combat-related positions. Instead, the DoD asks this Court to dismiss Plaintiffs' claims on the ground that those positions *may*, at some point in the future, be opened to women. MTD at 15-16.

Plaintiffs respectfully submit this brief in opposition to the DoD's request for a blanket stay on discovery. In this Circuit, a stay of discovery while a Rule 12(b)(1) motion is pending is "improper" if the discovery sought is "relevant to whether or not the court has subject matter jurisdiction." *Alaska Cargo Transport, Inc. v. Alaska R.R., Corp.*, 5 F.3d 378, 383 (9th Cir. 1993); *see also Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977) (holding that a district court may refuse to allow jurisdictional discovery when "it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction"). As set forth below, the DoD has not come close to meeting that heavy burden, and its motion for protective order should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

1. Plaintiffs filed the Complaint in this action on November 27, 2012. The Complaint alleged that, under the 1994 Policy, more than 200,000 combat-related positions, as well as specialties and training schools, were closed to all women. Compl. ¶ 1. The Complaint pointed out that no federal statute required this categorical exclusion. Instead, the DoD itself had chosen to close these positions, specialties, and training schools to women, solely because of their gender. *Id*. The Complaint also alleged that the DoD's policy and practice of implementing these gender-based exclusions violated the Fifth Amendment. *Id.* ¶ 5.

2. Shortly before the DoD's answer to the Complaint was due, the DoD announced that it had "rescinded" the 1994 Policy. FAC ¶ 2. Despite this "rescission," however, the DoD's policy and practice continues today, barring all women from entire occupational specialties; many all-male units, even if those units have positions in specialties that are already open to women; and numerous schools and training programs. *Id.* ¶ 3. In October 2013, Plaintiffs filed the FAC challenging these continuing and unconstitutional categorical gender-based exclusions. Dkt. No. 18.

3. On December 19, 2013, the DoD moved to dismiss the FAC under Rule 12(b)(1) on the ground that it "presents a claim that is not ripe" based on the doctrine of prudential ripeness. MTD at 1:15-16.

4. The DoD asserted in its MTD that, because it had submitted a declaration and other extrinsic evidence, Plaintiffs bore "the burden of presenting evidence to establish that subject matter jurisdiction is proper." MTD at 12:23-25.

5. In the MTD, the DoD does not deny that, under its current policy and practice, women are excluded from many positions, specialties, and training schools because of their gender. Instead, the DoD asserts repeatedly that it is "in the process" of considering whether these admittedly gender-based exclusions should be changed. MTD at 14:14-18:7. Nor does the DoD contest allegations in the FAC that, as a result of these continuing gender-based exclusions, Plaintiffs and other servicewomen "continue to suffer harm because many units and positions that engage in direct ground combat as well as related schools and other training programs are still closed to women." MTD at 23:4-13. Indeed, the DoD concedes that "the closures during implementation may impact plaintiffs . . . ." MTD at 23:12-13. The DoD contends, however, that Plaintiffs and other servicewomen should be required to endure this gender-based discrimination for several more years – if not more – because the "interests of allowing DoD to finish implementing the policy change without interference are paramount." MTD at 23:14-15.

6. As Plaintiffs will demonstrate in their opposition to the MTD, the prudential ripeness doctrine does not shield the DoD's continuing discriminatory policy and practice from review by this Court.

7. The DoD does not, however, concede that its continuing discriminatory policy and practice is enough to establish ripeness. Instead, the DoD appears to believe that the evidence it submitted in support of its MTD – the Declaration of Juliet Beyler and its exhibits – establishes that the DoD's implementation process will result in a military that is free of unconstitutional discrimination, and that this evidence is therefore enough to establish that this Court lacks jurisdiction to evaluate the

constitutionality of the DoD's current gender-based exclusions. In particular, the MTD repeatedly asserts, and asks the Court to accept as true, that the continued categorical closure of positions, specialties, and training schools to women after January 2016 will "be narrowly tailored and based on a rigorous analysis of factual data regarding the knowledge, skills and abilities needed for the position." MTD at 1:25-26; 7:11-14; 18:1-3; 23:18-20.

8. While Plaintiffs would prefer the DoD voluntarily to open all positions, specialties, and training schools to qualified women, the evidence submitted by the DoD paints a different picture. The MTD, and the declaration and exhibits submitted in support of that motion, reveal that the DoD is *not* limiting itself to a gender-neutral consideration of each servicewoman's qualifications for the positions she seeks. For example, the DoD's own evidence states that the DoD is going to take into consideration whether women, *because they are women*, will have a negative impact on the "morale" of male soldiers or impair "unit cohesion." MTD at 11:10-13 (citing Declaration of Juliet Beyler ("Beyler Decl.") ¶ 18); *see also* Beyler Decl. at Appendix F (Marine Corps Implementation Plan) (explaining that the Marine Corps will analyze the roles of "leadership" in "unit cohesion and effectiveness" in determining whether to keep occupational specialties and units closed to women); Beyler Decl. at Appendix H (United States Special Operations Command ("SOCOM") Implementation Plan) (setting forth "concerns" about the "social science impacts" of allowing women into "small, elite teams" that operate in "remote, austere environments"); Beyler Decl. at Appendix G (Air Force Implementation Plan) (warning that the Air Force may keep whole "occupational specialties or positions closed" if women would be barred from rotating in and out of the Special Forces analogues of those positions). The DoD's own evidence shows there is a substantial risk that women will only be allowed into "feasible positions and units," presumably as determined by the DOD, rather than all positions, specialties, and training schools for which they are qualified. Beyler Decl. ¶¶ 12-13.

9. As discussed in this brief, those same purported concerns about "morale" and "unit cohesion," phrased the same way, have previously been used by senior

military officers and government officials to prevent or delay the integration into the military of racial minorities, gay and lesbian people, as well as women. Plaintiffs therefore are seeking a limited amount of targeted discovery to demonstrate that the DoD's concerns about the "morale" of male soldiers and their purported inability to bond in the presence of women are, once again, being used as a synonym for, and as an effort to disguise, a discriminatory process that will lead to a discriminatory result.

10. Plaintiffs attempted to reach agreement with the DoD regarding targeted discovery that addressed the factual issues raised by the DoD in its MTD. After reviewing the MTD and supporting papers, counsel for Plaintiffs contacted counsel for the DoD in late December to discuss how Plaintiffs' previously-served document requests might be narrowed to address only the factual issues raised in the MTD. Declaration of Rosemarie T. Ring ("Ring Decl.") ¶ 4. In early January, counsel for Plaintiffs outlined a proposal under which: (1) all document requests that did not go to factual issues raised by MTD would be deferred or transformed into interrogatories; and (2) the remaining document requests, addressing topics such as "unit cohesion" and "morale" issues would be answered, but only for a limited number of custodians. Ring Decl. ¶ 5.

11. Counsel for DoD rejected Plaintiffs' proposal and stated that the DoD would seek a blanket stay on all discovery until the DoD's motion to dismiss was resolved. Ring Decl. ¶ 6. The parties then agreed on a briefing schedule for the DoD's motion for a protective order. Ring Decl. ¶ 6.

III. ARGUMENT

A. A District Court Should Allow Discovery In Connection With A Rule 12(b)(1) Motion Unless The Court Is Convinced That There Are No Disputed Factual Issues Involved.

In the Ninth Circuit, a plaintiff's request to conduct discovery in response to a Rule 12(b)(1) motion "should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (reversing district court order that refused to allow plaintiff to take jurisdictional

discovery) (quoting *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986)). *See also Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003) (holding that district court abused its discretion in denying jurisdictional discovery and noting that the Ninth Circuit has remanded where such discovery "might well demonstrate facts sufficient to constitute a basis for jurisdiction") (quoting *Wells Fargo*, 556 F.2d at 430 n.24); *Calix Networks, Inc. v. Wi-LAN, Inc.*, No. 09-6038, 2010 WL 3515759, at *3-4 (N.D. Cal. Sept. 8, 2010) (Ryu, Mag.) (allowing certain jurisdictional discovery to proceed).

The DoD's motion proposes that the Court apply a very different standard that is inconsistent with Ninth Circuit precedent. The DoD asserts that a district court has the discretion to stay discovery whenever a pending Rule 12(b) motion to dismiss "may" make discovery unnecessary. Defendant's Motion for Protective Order & Memo of Supp. P. & A. ("Mot.") at 6:20-22 (citing *Wenger v. Monroe*, 282 F.3d 1068, 1077 (9th Cir. 2002)). The *Wenger* decision actually sets out a far stricter rule. The Ninth Circuit opined in *Wenger* that "'[a] district court may . . . stay discovery *when it is convinced that the plaintiff will be unable to state a claim for relief*.'" *Wenger*, 282 F.3d at 1077 (emphasis added) (quoting *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) (per curiam)). Under *Wenger*, therefore, it is clearly insufficient for a defendant to show merely that a pending Rule 12(b) motion "may" render discovery unnecessary.

The DoD's only other case authority for the lax legal standard it posits, *Orchid Biosciences, Inc. v. St. Louis Univ.*, 198 F.R.D. 670, 672, 675 (S.D. Cal. 2001), also fails to support its position. In that case, the district court stated that courts "should allow discovery which addresses jurisdictional issues" when a Rule 12(b)(1) motion is pending and that "[d]iscovery should be denied *only* where 'it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction.'" *Id.*

(quoting *Wells Fargo*, 556 F.2d at 430 n.24 (emphasis added)).[1]

The cases cited by the parties thus set out a uniform standard for resolving Defendant's request for a blanket stay of discovery pending the hearing on its MTD. In this Circuit, a district court *should* allow discovery where facts pertinent to the jurisdictional issues are in dispute but can enter a blanket stay of discovery if the moving party establishes that it is "*clear*" that discovery "*would not*" establish jurisdiction. *Laub*, 342 F.3d at 1093 (emphasis added); *Wells Fargo*, 556 F.2d at 430 n.24 (emphasis added). As set out herein, the DoD has not met that heavy burden.

B. Jurisdictional Discovery Is Appropriate Here Because The MTD Raises Factual Questions As To Whether The Constitutionally Suspect Notions Of "Unit Cohesion" and "Morale" Are Proper Bases For The Challenged Gender-Based Exclusions.

The DoD asserts in its MTD that Plaintiffs' claims are not ripe because any decision to keep combat-related positions and schools closed to all women after January 2016 will be "based on a rigorous analysis of factual data regarding the knowledge, skills and abilities needed for the position." MTD at 1:25-26; 7:11-14; 18:1-3; 23:18-20. Elsewhere in the MTD and its associated exhibits, however, the DoD concedes that elimination of the challenged gender-based exclusions is not a certainty, and that the implementation of new physical standards and "operational requirements" is not the cause for the indefinite delay servicewomen face as they attempt to pursue their careers.[2] Instead, the DoD acknowledges that the service branches and the SOCOM have

[1] Defendant also relies upon the Wright & Miller treatise for the proposition that a stay of discovery may be "particularly salutary" in connection with Rule 12(b)(1) motions. (Mot., 6:22-23 (citing 8A Wright, Miller & Marcus, Fed. Prac. & Proc. § 2040, at 198 (3d ed. 2010)). What the treatise actually said is that staying discovery pending a motion to dismiss on jurisdictional grounds may be a "salutary principle *if it is applied sparingly*. . . ." *Id*. (emphasis added).

[2] The invocation of gender-neutral physical standards, raised in both of the DoD's pending motions, is a red herring. The FAC does not challenge any service branch's physical standards, whether gender-neutral or otherwise, and Plaintiffs' discovery requests do not address them.

undertaken "social science" research into the effects on the "morale" and "unit cohesion" of male soldiers if women were allowed entry into formerly all-male units. MTD at 8:3-13; Beyler Decl. ¶¶ 7-13. The DoD essentially argues that its lengthy "social science" studies could reveal that men will be so resistant to accepting women in combat roles that it will inhibit the military's overall effectiveness – just as white men were once thought unable to accept African-American and gay and lesbian service members in their midst.

History tells us, however, that the military's reliance on morale and unit cohesion to justify *de jure* discrimination is very likely a smokescreen for simple prejudice. In the 1940's, for example, senior military officials and members of Congress warned that allowing African-Americans to serve alongside white soldiers "would be subversive of discipline [and] subversive of morale." 86 Cong. Rec. S10890 (daily ed. Aug. 26, 1940) (statement of Sen. John Overton) (*see* Declaration of Mari Overbeck ("Overbeck Decl.") ¶ 3, Attach. B). In response to a 1941 memorandum issued by Judge William H. Hastie, the then-Civilian Aide to the Secretary of War, Army Chief of Staff George Marshall maintained that racial integration was "fraught with danger to efficiency, discipline, and morale . . . ." *See* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499, 499-502 (1991) (citing G. Ware, William Hastie: *Grace Under Pressure* (1984)) (*see* Overbeck Decl. ¶ 4, Attach. C).

The notion that racial integration would impair morale and unit cohesion and thereby hinder military readiness persisted even after World War II, when President Truman appointed top U.S. military leaders to a panel charged with studying his proposal to end the racial segregation of African-American men in the military. In a letter to the White House, Secretary of the Army Kenneth Royall cited these factors as primary reasons why the President and Congress should reassess the integration of African-American male troops into all-white units, maintaining that "the Army is not an instrument for social evolution," and reasoning that "a change in our [segregation] policy would adversely affect the morale of many Southern soldiers and other soldiers now serving." Memorandum

from Sec'y of the Army Kenneth Royall to the Honorable Clark Clifford (Mar. 29, 1949), available at http://www.trumanlibrary.org (last visited Feb. 3, 2014) (*see* Overbeck Decl. ¶ 5, Attach. D). General Omar N. Bradley, too, contended that the White House must take an "ultra conservative" approach to the integration of African-American and white troops because "complete integration" of African-American soldiers into military units "might seriously affect morale and thus affect battle efficiency," with "big problems" likely to arise "in living quarters and social gatherings." General Omar N. Bradley, Statement Before the President's Comm. on Equality of Treatment and Opportunity in the Armed Forces 2, 3, 5 (Mar. 28, 1949), available at http://www.trumanlibrary.org (last visited Feb. 3, 2014) (*see* Overbeck Decl. ¶ 6, Attach. E). Senator Richard B. Russell similarly opined that "the mandatory intermingling of the races throughout the services will be a terrific blow to the efficiency and fighting power of the armed services . . . ." Gregory Herek, Race and Sexual Orientation: Commonalities, Comparisons, and Contrasts Relevant to Military Policy, available at http://psychology.ucdavis.edu/rainbow/html/military_race_comparison.html (last visited Jan. 14, 2014) (quoting Binkin et al., *Blacks and the Military*. Washington, DC: The Brookings Institution (1982)) (*see* Overbeck Decl. ¶ 7, Attach. F).

Decades later, top military commanders made the same arguments about morale and unit cohesion when defending the exclusion of gay men and lesbians. In 1993, then-Chairman of the Joint Chiefs of Staff General Colin Powell argued that allowing gay and lesbian service members to serve openly would create sexual tension and hurt unit cohesion. *See* S. REP. NO. 103-112, 196 (1993) (statement of Gen. Powell) (*see* Overbeck Decl. ¶ 8, Attach. G). *See also* Franklin D. Jones & Ronald J. Koshes, Homosexuality and the Military, *American Journal of Psychiatry*, vol. 152, 16-21 (1995) (noting the argument that the presence of gay troops posed a threat to discipline, morale, unit cohesion, and combat effectiveness) (*see* Overbeck Decl. ¶ 9, Attach. H). The National Defense Authorization Act of 1994 stated outright that "[t]he presence in the armed forces of persons who demonstrate[d] a propensity or intent to engage in homosexual acts . . .

create[d] an unacceptable risk to . . . unit cohesion that [is] the essence of military capability." National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670 (1993) (codified at 10 U.S.C. § 654 (2000)) (*see* Overbeck Decl. ¶ 10, Attach. I).

As the Supreme Court pointed out in *Virginia*, 518 U.S. at 542-44, these same hoary phrases have been used for more than 150 years to prevent women from obtaining educational and employment opportunities. In *Virginia*, the Supreme Court rejected the district court's factual findings that the admission of women would materially change the Virginia Military Institute, dismissing Virginia's argument that women would destroy the institution, impair unit cohesion, and disrupt male bonding, observing that these sorts of doomsday predictions had been used throughout history to exclude women from other all-male institutions. *Id.* at 540-46. The Court noted that police departments had resisted women seeking careers as police officers based on similar claims that a woman's presence would "'undermine male solidarity;' deprive male partners of adequate assistance; and lead to sexual misconduct." *Id.* at 544 (citations omitted).

The DoD justified the 1994 Policy on those same grounds when it was introduced. As the Army explained at the time, the presence of women in combat-related units would inhibit "bonding and unit cohesion," which are "best developed in a single gender all male environment." *See* Carla Crandall, *The Effects of Repealing Don't Ask, Don't Tell*, 10 Geo. J. L. & Pub. Pol'y 15, 30 (2012) (quoting Valorie K. Vojdik, *The Invisibility of Gender in War*, 9 Duke J. Gender L. & Pol'y 261, 267 (2002)) (*see* Overbeck Decl. ¶ 11, Attach. J).[3]

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[3] Ten years earlier, the Commandant of the Marine Corps, Gen. Robert Barrow, had explained this institutional bias in a more colorful manner:

> "War is a man's work. Biological convergence on the battlefield would not only be dissatisfying in terms of what women could do, but it would be an enormous psychological distraction for the male who wants to think that he's fighting for that woman somewhere behind, not up there in the same foxhole with him. It tramples

(footnote continued)

Despite their repeated invocation in opposition to the integration of excluded groups, concerns over unit morale and cohesion have proven unfounded; the military was able to integrate both African-American and gay and lesbian service members without damaging its overall effectiveness or readiness. These concerns are equally misplaced with respect to women. The reality is that many women – including the individual Plaintiffs – have fought alongside men, in conditions that fit all definitions of "combat," and have done so with distinction and without impairing unit cohesion or morale. *See generally* Maj. Shelly S. McNulty, *Myth Busted: Women Are Serving in Ground Combat Positions*, 68 A.F. L. Rev. 119 (2012) (*see* Overbeck Decl. ¶ 14, Attach. M). Nevertheless, it is clear (and the DoD concedes) that those purported concerns are yet again at the center of the military's consideration of the role of women in the armed forces. It is undisputed, for example, that the DoD's recent "social science" studies have included the use of surveys that ask soldiers to "agree or disagree" with such statements as "Female soldiers expect special consideration for 'female problems'" and "My unit's ability to coordinate effectively to accomplish our goals will decrease with the integration of female infantry soldiers." Col. Ellen Haring, *Combat integration: Not bad, not good enough*, available at http://www.armytimes.com/article/20140119/NEWS01/301190003/Opinion-Combat-integration-Not-bad-not-good-enough (last visited Jan. 28, 2014) (*see* Overbeck Decl. ¶ 2, Attach. A).

Even in constitutional cases that do not apply the heightened scrutiny to which sex-based exclusions are subject, the Supreme Court has made clear that governmental agencies cannot justify discriminatory policies or practices by pointing to

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> the male ego. When you get right down to it, you have to protect the manliness of war."

Michael Wright, *The Marine Corps Faces the Future*, N.Y. Times, June 20, 1982, § 6 (Magazine), at 16 (*see* Overbeck Decl. ¶ 13, Attach. L). For a more detailed "social science" analysis of these longstanding biases, see Valorie K. Vojdik, *The Invisibility of Gender in War*, 9 Duke J. Gender L. & Pol'y 261, 266 (2002) (*see* Overbeck Decl. ¶ 12, Attach. K).

the "negative attitudes," "fear," or "irrational prejudice" of those who would be affected by integration. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 450 (1985) (holding that a city "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic"); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"). The prohibition on relying upon such prejudices is even stronger in the context of *de jure* gender-based exclusions. Whatever the social, political, popular, or, as the SOCOM implementation plan suggests, "psychological" reason for the DoD to continue categorically to exclude women from combat positions and schools (*see* Beyler Decl., Attach. 1, part 2 at 76, ¶ 4(b)), that exclusionary policy must comply with the Federal Constitution, and cannot be based upon broad generalizations about the abilities of women or on the supposedly negative attitudes of male soldiers towards them. *Virginia*, 518 U.S. at 534, 550 (claims of gender difference cannot be used "to create or perpetuate the legal, social, and economic inferiority of women").

C. Plaintiffs Are Seeking Limited Discovery Relating To The "Social Science," "Morale" And "Unit Cohesion" Issues Raised In The MTD.

As explained above and in the Ring Declaration, Plaintiffs attempted to reach agreement with the DoD regarding its response to a limited number of document requests from a limited number of custodians. Although the meet-and-confer process was suspended in early January when the DoD informed Plaintiffs of its intention to seek a blanket stay of all discovery (Ring Decl. ¶ 6), Plaintiffs remain willing to limit their discovery requests and to agree on a narrowed list of custodians whose documents should be searched and produced.

Plaintiffs believe that their claims are ripe because of the DoD's admission that gender-based exclusions are in effect today and will remain in effect for at least several more years. The DoD is, however, taking the position that this continuing discrimination is justified, and should be tolerated by women who are subject to it, because

of the *bona fides* of the implementation process. It is that factual proposition that Plaintiffs should be allowed to test through discovery.

The following document requests exemplify the kinds of discovery that Plaintiffs believe is appropriate in light of the positions taken by the DoD in the MTD and supporting papers:

(1) All documents and electronically stored information referring or relating to the actual or potential impact on "unit cohesion" if servicewomen were allowed to enter into any closed school, course or training program. *See* Bayler Decl., Attach. 2 (Doc. Req. No. 2);

(2) All documents and electronically stored information referring or relating to the "study of institutional and cultural factors" being conducted by the TRADOC Analysis Center as referred to in LOE 3 of the Army Implementation Plan. *Id*. (Doc. Req. No. 5); and

(3) All documents and electronically stored information that refer or relate to the need for any "social science assessments of the psychological and social impacts of integrating women" into Special Operations Forces units. *Id*. (Doc. Req. No. 12).

Such requests are relevant to the DoD's position that Plaintiffs' claims are not ripe because any decision to continue the gender-based exclusions currently in effect will supposedly be "based on a rigorous analysis of the knowledge, skills and abilities required for the unit or position . . ." (MTD at 1:25-26; 7:11-14), and they are also relevant to the DoD's contention that the Plaintiffs (and all other servicewomen) should continue to be barred from tens of thousands of positions while the DoD engages in "the process of reviewing and validating the physical standards" for those positions. MTD at 2:2-18.

D. <u>Defendant's Assertion That The Requested Stay Of Discovery Will Promote Efficiency And Economy Is Based On Conclusory Allegations And Lacks Merit.</u>

The DoD contends that discovery should be stayed because Plaintiffs' document requests would "require a deleterious diversion of resources," (Mot. at 9) and

would interfere with the very process of integrating women into previously closed positions that Plaintiffs seek. Mot. at 7:13-8:17. These arguments are unfounded.

First, the DoD has presented no evidence of any "undue burden or expense" that would warrant the requested blanket protective order. The DoD's allegations that a stay of discovery will "prevent undue burdens from being imposed on DoD that would result from its simultaneously working to implement new policy and responding to discovery" (Mot. at 8:26-28), is a "burden" that *any* party in the midst of litigation faces, and one that all parties are nonetheless required to undertake under the federal discovery rules – that is, responding to discovery requests while continuing the day-to-day operations of a business or agency. *See, e.g.*, *Isaac v. Shell Oil Co.*, 83 F.R.D. 428, 431 (E.D. Mich. 1979) (citing *U.S. v. Am. Optical Co.*, 39 F.R.D. 580 (N.D. Cal. 1966)) ("[G]ood cause is not established [s]olely by showing that discovery may involve inconvenience and expense."); *see also Twin City Fire Ins. Co. v. Emp'rs Ins. of Wausau*, 124 F.R.D. 652, 653 (D. Nev. 1989) ("[A] showing that discovery may involve some inconvenience and expense does not suffice to establish good cause for issuance of a protective order.").[4]

Second, neither the instant motion nor the Beyler Declaration considers, or even acknowledges, Plaintiffs' proposal to limit their requests to require production of documents addressing a limited number of topics from a limited number of custodians. The DoD's protestations about undue burden reflect only its strategic decision to cut off the meet-and-confer process and seek a blanket stay.

Finally, while Plaintiffs agree that the integration of servicewomen into previously closed positions, specialties, and training schools is a matter of great importance, the DoD has not come close to demonstrating that responding to Plaintiffs' limited jurisdictional discovery will interfere with that process. The discovery that

[4] It strains credulity to argue, as the DoD does, that the discovery requested by Plaintiffs here (even prior to Plaintiffs' offer to narrow the discovery requests) is "overwhelming, especially considering the resources available to the Secretary." *Chao v. Mazzola*, No. 04-4949, 2006 WL 2319721, at *1 (N.D. Cal. Aug. 10, 2006) (Chen, Mag.).

Plaintiffs seek, particularly in light of their proposed narrowed requests, is focused on the extent to which the constitutionally and historically suspect concepts of "morale" and "unit cohesion" – concepts that appear throughout the documentary evidence that the DoD has proffered in support of its MTD – are being used to justify the DOD's ongoing categorical exclusion of women from positions, specialties, and training schools for which all but their gender qualifies them. Shedding light on the ways in which the DoD is utilizing these discredited notions to keep women out will not "impede" or "weaken" efforts to eliminate the challenged exclusions. To the contrary, it will hasten those efforts and ensure that they do not founder on the shoals of outdated stereotypes about the "psychological" harms to "unit cohesion" of allowing women to join "small elite units." To the extent the DoD seeks to protect "full and frank discourse" in its decision-making from scrutiny regarding the use of stereotypes to justify the ongoing exclusions (Beyler Decl. ¶ 18), it is not entitled to any such protection.

E. The DoD Cannot Justify A Blanket Stay Of Discovery By Invoking The Deliberative Process Privilege.

The DoD also asserts that a blanket stay of discovery is appropriate here because, in its view, most of the documents responsive to Plaintiffs' discovery requests would be protected by the deliberative process privilege. Mot. at 10:4-9. The DoD cannot rely on any such privilege, much less the "interference" of having to assert the privilege properly, to justify a blanket stay of discovery. MTD at 9-11.

As a general matter, the deliberative process privilege "must be strictly confined within the narrowest possible limits consistent with the logic of its principles." *In re McKesson Governmental Entities Average Wholesale Price Litig.*, 264 F.R.D. 595, 601 (N.D. Cal. 2009) (quoting *K.L. v. Edgar*, 964 F. Supp. 1206, 1208 (N.D. Ill. 1997)); *accord North Pacifica LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003) (Chen, Mag.). To that end, in order to invoke the privilege, there are several basic requirements that must be met, including identifying the particular documents at issue. *In re McKesson*, 264 F.R.P. at 599 (rejecting a governmental agency's "blanket assertion of

the deliberative process privilege [as] clearly insufficient to invoke the privilege in that it failed to identify any specific documents – or even specific requests – for which [it] invoked the privilege.") The DoD has failed to establish even this elemental prerequisite.

Moreover, the DoD may not avoid the procedural steps required to invoke the deliberative process privilege by arguing that doing so would itself be unduly burdensome. *Id*. at 602 (rejecting agency's burden argument and noting that the agency "cites no authority for the proposition that a state agency can avoid its initial burden to satisfy the requirements for invoking the deliberative process privilege simply by arguing financial burden").

Additionally, the deliberative process privilege is "not absolute," and a litigant "may obtain discovery of protected material if the need for the documents outweighs the governmental interest in keeping the decision making process confidential." *In re McKesson*, 264 F.R.D. at 601. That balancing test cannot be undertaken in a vacuum. *Id*. at 602. Here, the DoD refused even to consider, or to confer about, Plaintiffs' more limited set of discovery requests. Its invocation of the privilege is therefore both premature and uninformed.[5]

In any event, the extent to which the privilege, even if properly asserted, would apply to Plaintiffs' limited requests is questionable given the posture of the case and the fact that the pending requests are directly relevant to matters raised by the DoD in its MTD. A governmental agency waives the privilege where, as here, it relies in the pending case upon factual assertions based upon the decision-making process. *Coleman v. Schwarzenegger*, No. 90-520, 2007 WL 4328476, at *8 (N.D. Cal. Dec. 6, 2007) (Moulds, Mag.). And, where an "'agency's subjective motivation'" is at issue, the privilege cannot be asserted. Jones, et al. Fed. Civ. Trials and Evidence, § 8.4137 (TRG 2014 ed.) (quoting

[5] Any concerns about public disclosure of the information Plaintiffs seek can also be alleviated by the entry of a stipulated protective order that would ensure the confidentiality and non-dissemination of any sensitive information. *See Sanchez v. Johnson*, No. 00-1593, 2001 U.S. Dist. LEXIS 25233, at *27 (N.D. Cal. Nov. 19, 2001) (protective order sufficiently protected deliberative process information disclosed during litigation).

Convertino v. U.S. Dep't of Justice, 674 F. Supp. 2d 97, 102 (D.D.C. 2009)). Here, the DoD injected its subjective intentions into this case when it responded to the FAC with a motion and factual exhibits that, on the one hand, aim to demonstrate its intention to bring its policy and practice into compliance with the Constitution, while, on the other hand, reveal that it has already begun to base its re-assessment of the current exclusions on concepts like morale and unit cohesion that have historically been used in the military context as smokescreens for relying on improper stereotypes and prejudice to justify unconstitutional exclusions. Where "there is reason to believe the documents [requested] may shed light on government misconduct," – or, as here, the improper reliance on discredited stereotypes to perpetuate an unconstitutional *de jure* classification – "the privilege is routinely denied; shielding government deliberations in this context does not satisfy the policy embodied by the privilege." *Allen v. Woodford*, No. 05-1104, 2007 WL 309945, at *5 (E.D. Cal. Jan. 30, 2007) (O'Neill, Mag.); *see also In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C.C. 1998) ("[i]f the plaintiff's cause of action is directed at the government's intent . . . it makes no sense to permit the government to use the privilege as a shield . . . it seems rather obvious to us that the privilege has no place in a Title VII action or in a constitutional claim for discrimination.") (citing *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Webster v. Doe*, 486 U.S. 592 (1988)).

For these reasons, the Court should reject the DoD's effort to invoke the deliberative process privilege as a means of shielding the DoD from jurisdictional discovery which it invited through its own motion to dismiss.

F. The DoD Has Not And Cannot Meet The *Wenger* Standard, Which Requires A "Convinc[ing]" Showing That Plaintiffs Will Be "Unable" To State A Claim For Relief.

Under the Ninth Circuit's decision in *Wenger*, a court may enter a blanket stay of discovery pending a ruling on a motion to dismiss "when it is convinced that the plaintiff will be unable to state a claim for relief." *Wenger*, 282 F.3d at 1077 (citation omitted). Although the DoD relies on *Wenger* (Mot. at 6:20-21), it has not established that

its MTD comes close to meeting the *Wenger* requirements. Even a cursory review of the case law on ripeness reveals that the ripeness doctrine does not fit the facts of this case.[6]

Ripeness comes into play where a policy's effects are not yet concretely felt by litigants. Its "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds as stated in Califano v. Sanders*, 430 U.S. 99 (1977). The key cases relied upon by Defendant in his MTD – like virtually all ripeness cases – concern policies or regulations that had not yet created actual adverse effects for anyone. *See, e.g.*, *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 803-04 (2003) (holding that litigants could not demonstrate the "hardship" necessary to establish ripeness where the challenged Park Service regulation had not created actual adverse effects for anyone and was merely a general statement of policy with no concrete impacts); *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998) (holding that "preimplementation judicial review of forest plans" that contemplated logging, but that had not yet authorized the actual cutting of trees, had not been contemplated by Congress).

The instant case could not be more different. Plaintiffs and their fellow servicewomen have suffered concrete harms due to the gender-based exclusions at issue in this case, which remain in effect today, throughout their military careers. There is nothing

[6] The cases suggest that in order to determine whether a stay is appropriate under *Wenger* or *Wells Fargo*, the district court should take a "preliminary peek" at the motion to dismiss. *See, e.g.*, *BAC Home Loan Servicing, LP v. Advanced Funding Strategies, Inc.*, No. 13-722, 2013 WL 6844766, at *5 (D. Nev. Dec. 27, 2013) (explaining that district courts facing a motion for "a blanket stay of all discovery" will take a "preliminary peek" at a pending motion to dismiss, and noting that the motion to dismiss in question "makes a number of factual rather than legal arguments, and asks for the court to take notice of matters outside the pleadings"); *Estate of Bock v. County of Sutter*, No. 11-0536, 2012 WL 94618, at *2 (E.D. Cal. Jan. 9, 2012) (denying stay of discovery after taking a "'peek' at the merits" of motion to dismiss, because, while motion to dismiss was "colorable," it "c[ould] not be said that the motion will surely be granted"); *Mlejnecky v. Olympus Imaging Am., Inc.*, No. 10-2630, 2011 WL 489743, at *6 (E.D. Cal. Feb. 7, 2011) (collecting cases).

"pre-enforcement" about these exclusions. For instance, upon her return from Afghanistan and Iraq with a Purple Heart for valor in combat, Plaintiff Staff Sgt. Hunt was not eligible to compete for the relevant Special Forces units, and, to this day, she still cannot (and does not even know when she will know whether women will ever be allowed to do so). FAC ¶¶ 20-25. The DoD's policy and practice of excluding servicewomen wholesale from service opportunities available to their male counterparts has been "enforced" for decades and persists today. The "hardship" to Plaintiffs and other servicewomen wrought by the challenged exclusions is so readily apparent and well-known that Defendant does not bother denying it, instead arguing that the hardship is "limited" because their claims "may" be "resolve[d]" in the next few years, and that the conceded hardship is "outweighed" by a claimed interest in "postponing judicial review." MTD at 22-23:4-15. Because they challenge longstanding exclusions whose real-world effects have been felt for years, Plaintiffs' claims challenging the status quo are ripe: if anything, they are long overdue.

The DoD's oft-repeated argument that the challenge is not ripe because "implementation is ongoing" (MTD at 2:6-10; 11; 12:9-14; 17:11-24), evinces a fundamental misapprehension of what Plaintiffs are challenging in this case. Plaintiffs do not challenge the DoD's announcement a year ago that it was rescinding the 1994 Policy "effective immediately," although subsequent events have called into question the Secretary's understanding of that term. Instead, Plaintiffs challenge their exclusion – and through Plaintiff SWAN, the exclusion of servicewomen generally – from positions, specialties, and schools, solely because they are women. These gender-based exclusions were "implemented" a long time ago, have been in effect throughout Plaintiffs' military careers, and remain in effect today without any guarantee that they will be eliminated in the foreseeable future. Plaintiffs' claims are ripe, and DoD's pending MTD thus does not constitute "good cause" to stay discovery.

G. <u>The Public Interest Weighs in Favor of Allowing Discovery to Proceed.</u>

The balance of interests weighs heavily in favor of denying the requested blanket stay and allowing reasonable discovery to proceed. The DoD's policy and practice

of excluding women from thousands of positions, specialties and schools remains in effect. Each day that these discriminatory exclusions remain in place wreaks constitutional damage upon the many women serving our country in uniform, as well as on the public at large, not least because the exclusions harm our ability to recruit and retain the best soldiers. *See Sammartino v. First Judicial District Court*, 303 F.3d 959, 974 (9th Cir. 2002) (discussing the public's interest in ending unconstitutional government policies and practices). Against this backdrop, Plaintiffs' desire to move this case forward is more than reasonable. By contrast, the public interest will be harmed by the DoD's requested stay, which will "impede the collection of information through the discovery process and will delay the timely resolution of the case." *Martin v. Naval Criminal Investigative Service*, No. 10-1879, 2013 WL 2896879, at *3 (S.D. Cal. June 11, 2013) (allowing discovery to proceed, subject to specific assertions of privilege, in case alleging Marine Corps misconduct).

IV. CONCLUSION

From the time they first volunteered to put their lives on the line in the defense of our Nation, the four servicewomen who are the individual Plaintiffs in this case were categorically excluded from competing for the same career opportunities as the men who joined up with them. FAC ¶¶ 3, 6. After they returned from deployments in Iraq and Afghanistan, they found that, despite their extensive experience in combat missions with Infantry and Special Forces teams, they were still prevented from continuing to serve their country to the best of their ability by being categorically excluded from a range of opportunities. The combat exclusion policy that had affected them during their deployments (FAC ¶¶ 20-42), remained in place. Entire units, career fields, courses, and schools, continued to function in "No Women Allowed" mode. This state of affairs also affected the servicewomen and women veterans whom Plaintiff SWAN works to support, defend, and empower. FAC ¶¶ 43-46. Accordingly, Plaintiffs brought this action in November 2012 challenging as unconstitutional the DoD's policy and practice of using gender to exclude women from opportunities for which they are otherwise qualified.

The DoD's "rescission" of the 1994 Policy, while a welcomed announcement, has not put an end to the gender-based exclusions challenged by Plaintiffs. Today, more than a year later, the vast majority of positions, units, and schools closed to women under the 1994 Policy, including those described in the FAC, remain closed. FAC ¶¶ 24-25, 35-37, 40-42.

As Plaintiffs will further establish in their opposition to the DoD's motion to dismiss, their claims are ripe and should proceed. There is certainly no basis under well-settled Ninth Circuit authority for the blanket prohibition on discovery that the DoD now seeks. Accordingly, the DoD's motion for a protective order should be denied.

DATED: February 4, 2014 MUNGER, TOLLES & OLSON LLP

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