STUART F. DELERY
Assistant Attorney General
MELINDA HAAG
United States Attorney
ALEX TSE
Chief, Civil Division
ANTHONY J. COPPOLINO
Deputy Branch Director
CAROLINE LEWIS WOLVERTON
District of Columbia Bar No. 496433
Senior Counsel
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 514-0265
Facsimile: (202) 616-8470
E-mail: caroline.lewis-wolverton@usdoj.gov

Attorneys for Defendant CHUCK HAGEL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

CHUCK HAGEL, Secretary of Defense,

Defendant.

Case No. C 12-06005 EMC

NOTICE OF MOTION AND DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURSDICTION AND MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES

Date: March 13, 2014
Time: 1:30 p.m.
Courtroom 5, 17th floor

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(s)**

CONSTITUTION, STATUTES , RULES AND LEGISLATIVE MATERIALS

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on March 13, 2014, at 1:30 p.m. in Courtroom 5, 17th floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Edward M. Chen, United States District Judge, or as soon thereafter as counsel may be heard by the Court, Defendant Chuck Hagel, Secretary of Defense ("the Secretary"), by and through his attorneys, will move this Court for an order dismissing the Amended Complaint (ECF No. 18) for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. This motion is based on this Notice, the accompanying Memorandum of Points and Authorities, Declaration of Juliet M. Beyler, Director, Officer and Enlisted Personnel Management, Department of Defense ("DoD") and attachments thereto (Exhibit A to this Motion), the Court's files and records in this matter and/or other matters of which the Court takes judicial notice, and any oral argument that may be presented to the Court.

RELIEF REQUESTED

The Secretary seeks an order dismissing the Amended Complaint for lack of subject matter jurisdiction because it presents a claim that is not ripe.

MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES

INTRODUCTION

On January 24, 2013, in an historic change of military personnel policy, the Secretary and the Chairman of the Joint Chiefs of Staff ("Chairman") rescinded DoD's Direct Ground Combat Definition and Assignment Rule ("DGCDAR"), which restricted women from certain units and positions whose primary mission is to engage in direct combat on the ground. The Secretary and Chairman directed that all units and positions currently closed to women be opened consistent with guiding principles developed by the Joint Chiefs of Staff and specified that any request for a continued closure must be narrowly tailored, based on a rigorous analysis of the knowledge, skills and abilities required for the unit or position, and personally approved by both the Chairman and the Secretary. The Military Services (Army, Navy, Air Force and

Marine Corps) and the U.S. Special Operations Command ("SOCOM") (referred to collectively hereinafter as the "Services") are now in the process of reviewing and validating the physical standards for all assignments closed to women and are on track to meet the Secretary's and Chairman's deadline of January 1, 2016, for implementation of the rescission of the former DGCDAR .

Plaintiffs seek to challenge the constitutionality of DoD's post-rescission policy and practice concerning direct ground combat assignments before DoD and the Military Services have finished implementing the rescission of the DGCDAR and thereby finalized the new assignment policy. Plaintiffs' challenge is not ripe and is therefore outside this Court's subject matter jurisdiction.

Plaintiffs originally brought this suit to challenge the DGCDAR on equal protection grounds. Following the January 2013 rescission of that rule, Plaintiffs amended their complaint to claim that the Secretary is still in violation of equal protection requirements because DoD continues to maintain a policy and practice of closing certain direct ground combat assignments to women. All of those closures are now under review, however, and the Secretary and the Chairman have directed that no gender-based closures will continue after January 1, 2016, unless the Services request and they then personally determine that a continued closure meets the high standard of being narrowly tailored and based on rigorous analysis of operational requirements.

Until the Services have completed the steps necessary to implement the January 2013 rescission of the DGCDAR , including determining whether to request any exceptions so as to keep any positions or units closed to women, and until the Secretary and the Chairman have personally considered and decided whether to approve any requested exceptions, DoD's post-rescission policy on direct ground combat assignment will not be finalized. Judicial review in the interim consequently would be based on an underdeveloped set of facts.

In addition, litigation about post-rescission policy and practice, while implementation of the rescission is ongoing, would interfere with the Services' review of current closures, review and validation of physical standards, opening of units and positions, and other steps to

implement the Secretary's and Chairman's January 2013 directive. It also would deprive the Services, the Chairman and the Secretary of the opportunity to apply their military expertise to finalize post-rescission policy and to fully develop post-rescission practice, subject to active congressional oversight, before that policy and practice come under judicial review. Premature judicial review therefore would be inconsistent with the Constitution's delegation of primary control over the military to the Executive and Congress. Further, that the Court is called upon to render a constitutional determination, indeed one of first impression, heightens the importance of allowing the military to finalize post-rescission policy and practice before judicial review. Lastly, while the Amended Complaint alleges hardship because certain units and positions remain closed to women during implementation of the rescission of the DGCDAR, the importance of allowing the military to complete implementation directs the conclusion that this matter is not ripe for judicial review.

Because Plaintiffs' equal protection claim is not ripe, it lies outside this Court's subject matter jurisdiction. Dismissal pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure is therefore warranted.

STATEMENT OF FACTS

I. Original Complaint

Plaintiffs filed this action on November 27, 2012, claiming that DoD's 1994 DGCDAR violated the Fifth Amendment equal protection requirement. Compl., ECF No. 1. The 1994 rule restricted women from certain direct ground combat assignments and has since been rescinded, as described in more detail immediately below.

II. 1994 Direct Ground Combat Definition and Assignment Rule

Prior to January 2013, DoD policy restricted women from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground, with the exception that the Military Departments were authorized to assign women to certain positions in

select direct ground combat units at the battalion level.[1] *See* DoD, Report to Congress on Women in the Services Review (July 2013) (hereinafter "July 2013 Report"), App. A (1994 DGCDAR) (Attach. 1 to Decl. of Juliet M. Beyler). That policy—the DGCDAR —was issued in 1994 and modified in February 2012. As issued in 1994, the assignment component of the policy restricted women from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground. *Id.* The DGCDAR additionally gave the individual Military Services discretion to restrict women from assignments where the costs of appropriate berthing and privacy arrangements were prohibitive, where units and positions were required to physically collocate with direct ground combat units closed to women, where units were engaged in long-range reconnaissance operations or Special Operations Forces missions, or where job-related physical requirements would necessarily exclude the vast majority of women. *Id.*

In February 2012, the Secretary modified the DGCDAR (i) to grant an exception allowing Military Departments to assign women to certain direct ground combat units at the battalion level and (ii) to rescind authorization for discretionary assignment restrictions based on physical co-location. *See id.* at 2. The Secretary made the February 2012 modifications in response to individual Service requests for authority to assign women to certain battalion-level direct ground combat units and in recognition of today's general operational environment where "the dynamics of the modern-day battlefield are non-linear, meaning there are no clearly defined front line and safer rear area where combat support operations are performed within a low-risk environment." DoD, Report to Congress on the Review of Laws, Policies and Regulations Restricting the Service of Female Members in the U.S. Armed Forces at 3–5 (Feb. 2012), available at http://www.defense.gov/news/WISR_Report_to_Congress.pdf.

[1] In the Army, for example, a battalion is one operational unit level below a brigade and is comprised of between approximately 500 and 600 soldiers, whereas a brigade is comprised of between approximately 3,000 and 5,000 soldiers. Three or more battalions comprise a brigade. The Army's website provides a diagram that illustrates the organization of Army operational units. http://www.army.mil/info/organization/unitsandcommands/oud/.

III. January 2013 Rescission of 1994 Direct Ground Combat Definition and Assignment Rule

On January 24, 2013, based on the proposal of the Joint Chiefs of Staff to "fully integrate women" into direct ground combat assignments, the Secretary and Chairman rescinded the 1994 DGCDAR "effective immediately." *Id.*, App. C (Mem. of Jan. 24, 2013 from Secretary and Chairman for Secretaries of the Military Departments, Acting Under Secretary of Defense for Personnel and Readiness, Chiefs of the Military Services) ("Jan. 2013 Directive"). The Secretary and Chairman directed that "[c]urrently closed units and positions will be opened by each relevant Service, consistent with [] guiding principles set forth in the attached memorandum [from the Chairman] and after the development and implementation of validated, gender-neutral occupational standards and the required notifications to Congress."[2] *Id.* The Chairman's memorandum, dated January 9, 2013, sets forth the guiding principles for successfully opening currently closed positions as follows:

- Ensuring the success of our Nation's warfighting forces by preserving unit readiness, cohesion, and morale.
- Ensuring all Service men and women are given the opportunity to succeed and are set up for success with viable career paths.
- Retaining the trust and confidence of the American people to defend this Nation by promoting policies that maintain the best quality and most qualified people.
- Validating occupational performance standards, both physical and mental, for all military occupational specialties (MOSs), specifically those that remain closed to women.
- Eligibility for training and development within designated occupational fields should consist of qualitative and quantifiable standards reflecting the knowledge, skills, and abilities necessary for each occupation. For

[2] Pursuant to 10 U.S.C. § 652(a), "[i]f the Secretary of Defense proposes to make any change to the ground combat exclusion policy [with respect to units or positions closed or open to female Service members] . . . the Secretary shall, before any such change is implemented, submit to Congress a report providing notice of the proposed change. Such a change may then be implemented only after the end of a period of 30 days of continuous session of Congress (excluding any day on which either House of Congress is not in session) following the date on which the report is received."

> occupational specialties open to women, the occupational performance standards must be gender-neutral as required by Public Law 103-160, Section [543] (1993).
>
> - Ensuring that a sufficient cadre of midgrade/senior women enlisted and officers are assigned to commands at the point of introduction to ensure success in the long run. This may require an adjustment to our recruiting efforts, assignment processes, and personnel policies. Assimilation of women into heretofore "closed units"' will be informed by continual in-stride assessments and pilot efforts.

Id. (attached to Jan. 2013 Directive). The Chairman's memorandum explains that "[t]o implement these initiatives successfully and without sacrificing our warfighting capability or the trust of the American people, we will need time to get it right." *Id.* It sets forth five "goals and milestones" as a "deliberate approach to reducing gender-based barriers to women's service [that] will provide the time necessary to institutionalize these important changes and to integrate women into occupational fields in a climate where they can succeed and flourish":

- Services will expand the number of units and number of women assigned to those units based on [the exception to the DGCDAR authorized in February 2012]---and provide periodic updates on progress each quarter beginning in 3rd quarter, FY 2013.

- The Navy will continue to assign women to afloat units as: (1) technical changes and modifications for reasonable female privacy and appropriate female berthing arrangements are completed; (2) female officer and enlisted leadership assignments can be implemented; and (3) ships' schedules permit. Integration will be expeditiously implemented considering good order and judicious use of fiscal resources.

- Services will continue to develop, review, and validate individual occupational standards.

- Validated gender-neutral occupational standards will be used to assess and assign Service members not later than September 2015.

- The Services and U.S. Special Operations Command (USSOCOM) will proceed in a deliberate, measured and responsible way to assign women to currently closed MOSs as physical standards and operational assessments are completed and as it becomes possible to introduce cadres as described above. The Services and USSOCOM must complete all studies by 1st quarter, FY 2016, and provide periodic updates each quarter beginning in 3rd quarter, FY 2013.

- If we find that the assignment of women to a specific position or occupational specialty is in conflict with our stated principles, we will request an exception to policy.

Id.

The January 2013 directive specified that "[i]ntegration of women into newly opened positions and units will occur as expeditiously as possible, considering good order and judicious use of fiscal resources, but must be completed no later than January 1, 2016," and instructed the Military Services to submit plans for implementation of the directive to the Secretary by May 15, 2013. *Id.* The directive provides that the Services may request an exception to the directive so as to keep an occupational specialty or unit closed to women. *Id.* Any such recommendation, however, must be personally approved first by the Chairman and then by the Secretary. *Id.* The authority to approve an exception may not be delegated. *Id.* Any exception to the requirement that all units and position be opened to women must be "narrowly tailored and based on a rigorous analysis of factual data regarding the knowledge, skills and abilities needed for the position." *Id.*

IV. Implementation of Rescission

In July 2013, DoD reported to Congress on the status of implementation of the January 2013 rescission of the 1994 DGCDAR. July 2013 Report. The July 2013 Report explains that, as of that time and consistent with the Military Services' implementation plans submitted to the Secretary in May 2013, the Services were in the process of, *inter alia*, reviewing and validating physical standards for occupations and units closed to women as a result of the former DGCDAR "to ensure that they are current, directly tied to an operational requirement, and applied gender-neutrally." *See id.* at 5, 10–11. Although the January 2013 directive provided that review and validation be completed by September 2015, most of the Services' implementation plans project earlier completion dates, with the Marine Corps projecting completion before the end of the third quarter of 2014 (June 2014), SOCOM projecting completion in the beginning of the third quarter of 2015 (April 2015), Army projecting completion by the end of the third quarter of 2015 (June 2015), *id.* at 9 (Figure 1), and Air Force

projecting completion by July 31, 2015, *id.* at 68 (App. G to July 2013 Report, Air Force Implementation Plan).[3]

In addition to review and validation of occupational standards, the Army's Training and Doctrine Command is "examining the institutional and cultural barriers related to integrating women into closed military occupational specialties and units in order to facilitate the successful integration of women." *Id.* at 5. The Marine Corps' Training and Education Command is seeking assistance from the Center for Naval Analysis in "the assessment of the force to gain insight into what may be required for the successful integration of women into closed units and occupations, as well as developing a physical screening test to assess the propensity for success in physically demanding military occupational specialties." *Id.* The Center for Special Operations Studies and Research Command is preparing to research and analyze "the social science impacts of integrating women into small, elite teams that operate in remote, austere environments." *Id.* at 11.

DoD's July 2013 Report concludes that careful implementation of the rescission is critical to protecting the safety of individual service members and the nation's security:

> The Department is proceeding in a measured, deliberate, and responsible manner to implement changes that enable Service members to serve in any capacity based on their ability and qualifications, unconstrained by gender-restrictive policies. Over time, these steady changes will ensure that opening positions will not negatively impact our Service members, nor the readiness and combat effectiveness of our military. The standards set for both men and women must be uncompromising, established for the task of defending our Nation, rooted in carefully analyzed requirements in order to field the very best qualified volunteer men and women that America has to offer.

Id. at 14.

Since July 2013, the Services have continued executing their implementation plans and proceeded with opening positions that previously were closed to women, as explained in the Declaration of Juliet M. Beyler, the Director, Officer and Enlisted Personnel Management, DoD,

[3] The Services' detailed implementation plans, which include additional decision point dates, are attached to the July 2013 Report as Appendices E–H.

Exhibit A hereto.[4] The Army has opened 3,400 positions within the field artillery military occupational specialty ("MOS"). Beyler Decl. ¶ 8. DoD has notified Congress of the Navy's intent to open 220 Marine Corps officer and staff noncommissioned officer positions and 37 Navy officer and senior petty officer positions in MOSs already open to women in the following Marine Corps reserve component units: artillery battalions, tank battalions, amphibious assault battalions, combat engineer battalions, and Air Naval Gunfire Liaison Companies ("ANGLICO"). *Id.* ¶ 9. DoD also has notified Congress of the Navy's intent to open three corpsmen positions in the ANGLICO that were unintentionally omitted in an earlier notification. *Id.* And DoD has notified Congress of the Navy's intent to open 267 positions (riverine patrol boat operator/crewman, riverine small craft maritime interdiction operations, and fleet patrol craft and force protection officers) in the Coastal Riverine Force. *Id.* DoD anticipates that all of these positions will be open to women in mid- to late- March 2014, depending on the congressional calendar. *Id.*

Ms. Beyler explains that the experience gained through opening previously closed positions and the lessons of the past decade of combat experience are providing the military with "valuable insights on best practices and actions necessary to support the successful opening of more positions," and that additional recommendations to open positions are presently in the staffing and review process. *Id.* ¶ 10. During the fourth quarter of fiscal year 2013, the Marine Corps began allowing women to voluntarily attend the Infantry Training Battalion course of instruction, with the intention of using data from their performance to inform future policy decisions on the assignment of female Marines to infantry units. *Id.* ¶ 11. Also, SOCOM began

[4] In April 2013, DoD notified Congress of its intention to open: 4,600 active and reserve component positions within the Army's brigade combat teams (in the fields of: field artillery, communications, intelligence, engineer, human resources, religious services, logistics, medical, chemical, biological, radiation, nuclear, and supply); 1,520 positions within the Army's 160th Special Operations Aviation Regiment (in open occupational fields of: helicopter pilot, helicopter maintenance/repair, and flight engineering); 36 active component positions within the Marine Corps' air naval gunfire liaison companies (in open occupational fields of: administration, communications, logistics, supply, and transportation); and 56 Marine Corps ground intelligence positions (a previous closed military occupational specialty). Beyler Decl. ¶ 6. The congressional notification period for these openings concluded in June 2013. *Id.*

recruiting and assessing women for aviation positions in the 160th Special Operations Aviation Regiment, and the first female candidate is scheduled to enter training during the summer of 2014. *Id.* To date, none of the Services has identified any position for which they will request an exemption from the requirement that all assignments be opened to women. *Id.*

Congress is actively monitoring implementation of the rescission of the DGCDAR. On July 24, 2013, the House Subcommittee on Military Personnel conducted a hearing concerning the Services' implementation plans during which Ms. Beyler and a representative from each Service gave testimony and answered questions about details of implementation of the rescission of the DGCDAR. *Women in Services Review: Hearing Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 113th Cong. 50 (2013). The pending National Defense Authorization Act for Fiscal Year 2014 includes a "sense of Congress" concerning implementation that agrees with the two key deadlines established by the Secretary's and Chairman's January 2013 directive: September 2015 for development, review, and validation of individual occupational standards; and January 1, 2016 for completion of all assessments necessary for implementation. *See* National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. (Dec. 12, 2013). And as referenced above, DoD must provide Congress notice 30 days of continuous session of Congress before opening a unit or position to women. *See* 10 U.S.C. § 652(a) (quoted *supra* at 5 n.2); *see also National Defense Authorization Act for Fiscal Year 1994*, Pub. L. No. 103-60 § 543, *codified at* 10 U.S.C. § 113 note (Nov. 30, 1993) (requiring gender-neutral qualification standards for all military occupational career fields open to both men and women, and requiring notification of changes to standards expected to result in an increase or decrease of 10 percent or more of female service members in such occupational fields). *See also* Beyler Decl. ¶¶ 13–16 (describing Congress' role during implementation).

DoD is implementing the rescission of the DGCDAR in a "measured, deliberate, and responsible manner" with the aim of "enable[ing] all service members to serve in any capacity based on their ability and qualifications while ensuring the current and future readiness and combat effectiveness of our All-Volunteer Force." *Id.* ¶ 12. The litigation concerning post-

rescission assignments that Plaintiffs seek to pursue now will likely interfere with, impede or weaken the ongoing implementation process. *Id.* ¶ 17. For example, many of the document requests that Plaintiffs recently served seek information about decisions that have not yet been made—much of which is undoubtedly deliberative. *Id.* DoD's declaration explains that litigation while implementation is ongoing could "chill the deliberative process":

> [M]any of the critical decisions regarding implementation have yet to be made. Full and frank discourse among senior military and civilian leaders, seasoned by years of combat and peacetime experience and informed by scientific evidence, is essential to implementing policies that maximize the qualifications of our service members and our national defense. In my experience, the pendency of litigation can color and chill advisors and decisionmakers. Given the significant interests at stake here—including protecting the long-term health of service members; preserving unit readiness, cohesion, and morale; ensuring current and future combat effectiveness; and, maintaining the trust and confidence of our service members and the public—impairing the decision making process could have the gravest of consequences to national security.

Id. ¶ 18. Ms. Beyler also describes the collaborative environment in which the Services prepared their implementation plans and explains that subjecting the Services' implementation efforts to the scrutiny of litigation while they are ongoing presents "an almost certain risk that the largely collegial atmosphere among the Services that currently exists will disappear, to the detriment of the DoD and all Service members." *Id.* ¶ 19. In addition, DoD's litigation obligations could conflict with its obligations to Congress and require the military to divert resources from ongoing policy implementation efforts and core military functions. *Id.* ¶ 20.[5]

[5] The Secretary intends to move for a protective order staying discovery until the Court rules on his Rule 12(b)(1) motion.

V. Amended Complaint

On October 31, 2013, Plaintiffs filed an Amended Complaint claiming that, despite the rescission of the DGCDAR and ongoing implementation of that rescission, DoD maintains a policy and practice of discriminating against women in direct ground combat assignments in violation of Fifth Amendment equal protection principles. Am. Compl. (ECF No. 18). The Amended Complaint seeks a declaratory judgment that the alleged policy and practice are illegal and unconstitutional as well as injunctive relief enjoining the Secretary from enforcing them. *Id.*

ARGUMENT

The claim that Plaintiffs seek to bring—that the Secretary maintains a policy and practice of discriminating against women in direct ground combat assignments in violation of Fifth Amendment equal protection requirements—is not ripe because DoD is still in the process of implementing the Secretary's and Chairman's rescission of the DGCDAR and finalizing post-rescission assignment policy. This action therefore should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

I. Rule 12(b)(1) Legal Standard

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (internal citations omitted); *accord, e.g., K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 102 (9th Cir. 2011). In deciding a motion to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure the Court may consider declarations and other evidence properly before it. *See, e.g., Colwell v. Dep't of HHS*, 558 F.3d 1112, 1121 (9th Cir. 2009). Where a defendant submits such evidence in support of a Rule 12(b)(1) motion, the plaintiff bears the burden of presenting evidence to establish that subject matter jurisdiction is proper. *See id.* A complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) where the plaintiff fails to meet its burden of establishing the Court's subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1); *Kokkonen*, 511 U.S. at 377.

II. Plaintiffs' Equal Protection Claim is Not Ripe.

A. Ripeness Legal Standard

"Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807–08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–149 (1967), and citing *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 732–733 (1998)). The ripeness doctrine "rests, in part, on the Article III requirement that federal courts decide only cases and controversies and in part on prudential concerns." *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir. 2010) (citing *Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir. 2009); *W. Oil & Gas Ass'n v. Sonoma Cnty.*, 905 F.2d 1287, 1290 (9th Cir. 1990)); *see also Nat'l Park Hospitality Ass'n*, 538 U.S. at 808 ("The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'") (quoting *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)). In the context of claims for injunctive and declaratory relief like the Amended Complaint presents, because "[t]he injunctive and declaratory judgment remedies are discretionary . . . courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." *Abbott Labs.*, 387 U.S. at 148.

Courts consider two factors to determine whether a case is ripe from a prudential perspective: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808 (citing *Abbott Labs.*, 387 U.S. at 149); *accord, e.g.*, *Addington*, 606 F.3d at 1179. Where a claim is not ripe, the court lacks subject matter jurisdiction and must dismiss the claim. *Addington*, 606 F.3d at 1179 (citing *S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 502 (9th Cir. 1990)). The

plaintiff bears the burden of establishing ripeness. *Colwell*, 558 F.3d 1121 (citing *Renee v. Geary*, 501 U.S. 312, 316 (1991)).

B. Plaintiffs' Challenge to Post-Rescission Direct Ground Combat Assignment Policy and Practice is Premature and Not Fit for Judicial Decision.

The Amended Complaint seeks to challenge on equal protection grounds DoD's post-rescission direct ground combat assignment policy and practice before DoD has finished implementing that policy. That claim is not fit for judicial decision because (i) the facts pertinent to the equal protection analysis are not yet developed, (ii) litigating the equal protection claim now will interfere with the Military Services' and DoD's implementation of the post-rescission assignment policy based on their military expertise, and (iii) the claim presents a sensitive constitutional issue of first impression.

1. The Pertinent Facts About Post-Rescission Assignments Are Not Yet Developed.

The "fitness" component of the ripeness inquiry addresses whether delaying consideration of an issue until the pertinent facts have been well-developed would aid the court's consideration. *In re Coleman*, 560 F.3d 1000, 1009 (9th Cir. 2009) (citing *Nat'l Park Hospitality Ass'n*, 538 U.S. at 807–08); *see also Nat'l Park Hospitality Ass'n*, 538 U.S. at 812 (finding lack of ripeness where, even though the case presented a purely legal question and involved a final agency action, "further factual development would significantly advance [the court's] ability to deal with the legal issues presented") (internal quotation marks omitted). Here, the facts pertinent to an equal protection analysis of post-rescission assignment policy and practice will not be well-developed until the Military Services' and DoD's implementation of the rescission of the DGCDAR is complete.

The Amended Complaint asserts that DoD's "existing policy and practice" unconstitutionally excludes women from certain direct ground combat MOSs, positions, schools and courses. Am. Compl. ¶¶ 82–85. But that allegation is not accurate; DoD and the Services are in the process of reviewing and validating occupational standards and opening assignments to women after the required notifications to Congress, as directed in the Secretary's and

Chairman's January 24, 2013 memorandum, and DoD's post-rescission direct ground combat policy has not yet been finalized. Consequently, the facts pertinent to an equal protection analysis of post-rescission assignment policy and practice are not yet developed. The Court's consideration of Plaintiffs' equal protection claim before the post-rescission direct ground combat policy is finalized therefore would be based on an underdeveloped, incomplete set of facts and circumstances. And not only would the facts available to this Court and any reviewing court be incomplete, they would be subject to change and likely would change while this action is pending as DoD proceeds with implementing the rescission of the DGCDAR.

To decide Plaintiffs' equal protection challenge to post-rescission ground combat policy and practice, the Court would need to consider whether the closure of any position or other opportunity to women serves important government objectives and is substantially related to those objectives, affording deference to the Executive and Congress with respect to matters of military expertise. *See, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 70–83 (1981); *see also United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (equal protection standard outside of military expertise context).[6] Thus, the facts pertinent to the equal protection analysis are (i) what positions, units or other opportunities, if any, are closed to women and (ii) what government objectives do any closures serve, i.e., what are DoD's reasons for any closures. Because the Services are in the process of implementing the Secretary's and the Chairman's January 2013 directive, neither set of facts is yet resolved.

a. First, at this time it is not known what closures, if any, will remain once implementation is complete. The closures that exist now are under review and must be opened by January 2016 unless an exception is requested. As implementation proceeds, direct ground

[6] "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. . . . [The Supreme] Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (citations and internal quotations marks omitted).

combat positions and other opportunities are opening to women on a rolling basis.[7] DoD has explained that the process of implementing the rescission is "dynamic" and "evolving," as discussed above. Beyler Decl. ¶ 12. The Military Services have not reached the point in their implementation processes where they will decide whether to request an exception to the requirement that closed positions and units be opened to women. *Id.* ¶ 11. Thus, as implementation proceeds, the set of closed units and positions will change. It therefore is entirely uncertain what set of closures the Court would be examining if the Court were to undertake an equal protection analysis before implementation is completed. Before the Services and DoD have completed implementation, any set of closures that the Court would be examining would not be the final set, if indeed any closures remain after implementation.

Because of the rolling basis of openings, if this action were to proceed now it is likely that the set of closed units and positions will change during the course of litigation. It is also possible that after the Court has taken the equal protection claim under submission based on a given set of closures the Services will open some or all of the closures as implementation proceeds. It is equally possible that by the time this action came before a reviewing court the set of closures would have changed again and thus differ from the set of closures that this Court would have addressed. And it is possible that additional changes could occur while the matter is under submission in the reviewing court. Until the Services have completed implementation, including deciding whether to request any exceptions, and until the Chairman and the Secretary have personally considered and decided whether any requested exceptions satisfy their rigorous standard, it is not possible to know what closures will exist at any given point in time or whether any closures will remain after implementation is complete.

In *Ohio Forestry*, the Supreme Court recognized that judicial review of a U.S. Forest Service plan that contemplated logging before the agency had completed the steps necessary to

[7] As referenced above, DoD has explained that implementation of the January 2013 directive must be "measured, deliberate, and responsible" so as to "not negatively impact our Service members, nor the readiness and combat effectiveness of our military." July 2013 Report at 14; *accord* Beyler Decl. ¶ 12.

implement the plan and permit any logging would be premature because the facts pertinent to such a review were not yet developed. *Ohio Forestry*, 523 U.S. at 735–36. The Court observed that it was possible that the agency would revise the plan and that "the possibility that further consideration will actually occur before the [p]lan is implemented is not theoretical, but real." *Id.* at 735. It also recognized, *inter alia*, that "of course, depending upon the agency's future actions to revise the [p]lan or modify the expected methods of implementation, review [before the plan was to be implemented] may turn out to have been unnecessary." *Id.* at 736. The Supreme Court concluded that "further factual development would significantly advance our ability to deal with the legal issues presented and would aid us in their resolution." *Id.* at 737 (internal quotation marks omitted).

Similarly here, because implementation of rescission is presently underway and the set of gender-based closures is expected to change as implementation proceeds, awaiting completion of implementation would greatly advance the Court's, and any reviewing courts', ability to deal with the equal protection issue presented. And also as in *Ohio Forestry*, depending on whether any of the Services request any exceptions and whether any are approved, "review now may turn out to have been unnecessary." *Id.* at 736; *see also Nat'l Treasury Employees Org. v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996) (recognizing "the usually unspoken element of the rationale underlying the ripeness doctrine: [i]f we do not decide it now, we may never need to," and explaining "[n]ot only does this rationale protect the expenditure of judicial resources, but it comports with our theoretical role as the governmental branch of last resort[;] Article III courts should not make decisions unless they have to"); *Sierra Club v. U.S. Nuclear Regulatory Comm'n*, 825 F.2d 1356, 1362 (9th Cir. 1987) ("We will not entertain a petition where pending administrative proceedings or further agency action might render the case moot and judicial review completely unnecessary.").

b. Second, because no exceptions to the requirement that all units and positions be opened to women have been requested and thus no decisions on any exceptions have been reached, DoD has not identified the government objectives on which any final closure decisions

will be based. Again, the Secretary and the Chairman have mandated that any exceptions "must be narrowly tailored, and based on a rigorous analysis of factual data regarding the knowledge, skills and abilities needed for the position." Jan. 2013 Directive. Judicial review before DoD has had the time it needs to complete its review of all closed units and positions and to identify any reasons that any should continue to be closed following implementation thus would leave the Court without pertinent facts relating to the important government objective component of the equal protection analysis.

In *Toilet Goods Ass'n v. Gardner*, the Supreme Court concluded that a challenge to a regulation authorizing certain inspections was not ripe, even though the regulation was final, because "[a]t this juncture [the Court] ha[s] no idea whether or when such an inspection will be ordered and what reasons [the agency] will give to justify [its] order," and the legality of the regulation depended in part on an understanding of the reasons the agency might have for conducting inspections. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163–64 (1967). *See also US W. Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999) (deeming challenge to interim telecommunication rates not fit for judicial decision where proceeding to determine permanent rates was still underway). Similarly here, equal protection analysis of any closed units and positions will depend heavily upon an examination of DoD's reasons for determining that any such closures are necessary. *See Rostker*, 453 U.S. at 70–83. Analysis after DoD has completed its review of existing closures and has determined whether there are reasons for any to continue would be "likely to stand on a much surer footing," *Toilet Goods Ass'n*, 387 U.S. at 164, than analysis prior to that determination. *See also Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 342 (1961) (recognizing in the mootness context that because "declaratory judgment is a remedy committed to judicial discretion," "sound discretion withholds the remedy where it appears that a challenged 'continuing practice' is, at the moment

adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted").[8]

2. Continued Litigation Would Interfere with the Implementation Process and Deprive the Political Branches of the Opportunity to Finalize Post-Rescission Assignment Policy.

As referenced above, the ripeness doctrine serves in part "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 807–08 (quoting *Abbott Labs.*, 387 U.S. at 148–149); *accord, e.g., Ohio Forestry Assn., Inc.*, 523 U.S. at 732–733. Indeed, "[j]udicial intervention in uncompleted administrative proceedings, absent a statutory mandate is strongly disfavored." *Sierra Club*, 825 F.2d at 1362 (internal quotation marks omitted). Premature adjudication of agency action denies the agency the opportunity to apply its expertise and correct any mistakes. *See Fed. Trade Comm'n v. Standard Oil of Cal.*, 449 U.S. 232, 242 (1980). In undertaking the "pragmatic" inquiry as to the finality of agency action, "[a] court looks to whether the agency action represents the final administrative word to insure that judicial review will not interfere with the agency's decision-making process." *State of Cal. v. Bennett*, 833 F.2d 827, 833 (9th Cir. 1987).

a. DoD's Declaration explains that the continued litigation of this action will likely interfere with, impede or weaken the ongoing implementation process. It will likely chill the deliberative process, damage the current collaborative environment in which the Services are proceeding with implementation, potentially conflict with DoD's obligations to Congress, and impose significant burdens that require the military to divert resources away from implementation as well as its primary warfighting functions. Beyler Decl. ¶¶ 17–21 (discussed *supra* at 10–11).

[8] "Ripeness is a close cousin to mootness." *Sea-Land Serv., Inc. (Pac. Div.) v. Int'l Longshoremen's Union*, 939 F.2d 866, 870 (9th Cir. 1991) (citing *Fortson v. Toombs*, 379 U.S. 621, 631 (1965)).

In *Ohio Forestry*, as referenced above, the Supreme Court recognized that judicial review before the logging plan at issue there was finalized could hinder the Forest Service's ability to refine its logging policy where there was a "real" possibility that the agency would give the policy further consideration before implementing it. 523 U.S. at 735. Here, judicial review before DoD's post-rescission assignment policy is finalized not only could hinder the military's implementation of the rescission, as in *Ohio Forestry*, but *likely would* hinder the implementation. *See* Beyler Decl.

b. The ripeness doctrine in the context of administrative agencies reflects the principle that "judicial action should be restrained when other political branches have acted or will act." *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 670 (9th Cir. 2004). That principle is of particular importance here given the Constitution's explicit grant of control over the composition of military troops to the political branches.

The Constitution assigns to Congress and the President the responsibility to establish the Nation's armed forces and to employ them for the protection of the Nation's security. U.S. Const. art. I, § 8, cls. 12–14 & art. II, § 2, cl. 1. "[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise[, and] the responsibility for determining how best our Armed Forces shall attend to that business rests with Congress [] and with the President." *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975); *accord, e.g., Orloff v. Willoughby*, 345 U.S. 83, 93–95 (1953). Accordingly, it is well-established that Congress and the Executive are entitled to substantial deference in areas of military expertise, including where Service members' constitutional rights are implicated. *E.g., Solorio v. United States*, 483 U.S. 435, 448 (1987) ("we have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated") (citing cases); *Rostker*, 453 U.S. at 70 ("[J]udicial deference to [] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."). The Supreme Court has explained:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the

> composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (emphases supplied); *see also Thomasson v. Perry*, 80 F.3d 915, 925 (4th Cir. 1996) ("Aside from the Constitution itself, the need for deference also arises from the unique role that national defense plays in a democracy. Because our nation's very preservation hinges on decisions regarding war and preparation for war, the nation collectively, as expressed through its elected officials, faces 'the delicate task of balancing the rights of servicemen against the needs of the military.'") (quoting *Weiss v. United States*, 510 U.S. 163, 177 (1994), and *Solorio*, 483 U.S. 447–48).

The equal protection claim presented in the Amended Complaint implicates important military interests bearing on national security. Beyler Decl. ¶ 18. Allowing the military to apply its expertise in determining how those assignments should be made, subject to active congressional oversight, before judicial review comports with the Constitution's delegation of control over the military to the Executive and Congress and is consistent with the deference the political branches are due in military affairs. Deferring judicial review until the military has completed the steps of implementation it deems necessary also recognizes the importance of proceeding with as much information as possible, deliberation and care where individual service members' safety and the nation's security are implicated. *See* July 2013 Report at 14; Beyler Decl. ¶¶ 12, 18 (discussed *supra* at 7–8 and 10–11, respectively).

3. The Court Should Not Issue a Constitutional Determination of First Impression Prematurely.

Withholding judicial review until post-rescission direct ground combat assignment policy is finalized is of particular additional importance because the Court is called upon to make a constitutional determination. "[T]he importance of avoiding premature adjudication of constitutional questions" is well-established. *E.g.*, *Clinton v. Jones*, 520 U.S. 681, 691 (1997) (citing cases). Thus, "'[t]he ripeness principles . . . bear heightened importance when . . . the potentially unripe question presented for review is a constitutional question.'" *Conn. v. Duncan*,

612 F.3d 107, 113 n.3 (2d Cir. 2010) (quoting *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 492 F.3d 89, 114 (2d Cir. 2007) (Leval, J., concurring)); *accord Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003) ("Prudential ripeness is . . . a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial.").

The Amended Complaint's equal protection claim not only calls for a constitutional adjudication, it calls for adjudication of a constitutional issue of first impression. That no court has addressed the constitutionality of gender-based restrictions in military combat assignments further heightens the importance of allowing the military, and Congress in its oversight role, to complete implementation of the rescission of the former assignment rule before the courts undertake judicial review of post-rescission policy and practice. *See Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1020 (D.C. Cir. 1991) (recognizing in applying doctrine of prudential mootness that the court was "faced with a constitutional issue of first impression" that the Supreme Court had signaled a reluctance to decide and concluding that "[w]e should wait to decide this issue until it is squarely presented").

C. The Interests Served By Postponing Judicial Review Until Implementation is Complete Outweigh Any Limited Hardship to Plaintiffs.

The ripeness doctrine calls upon courts to determine the appropriate timing of judicial review by balancing the interests served by awaiting final agency determination before undertaking review against the hardship that postponing review causes the plaintiff. *See, e.g.*, *US W. Commc'ns*, 193 F.3d at 1118 ("The primary focus of the ripeness doctrine as applied to judicial review of agency action has been a prudential attempt to time review in a way that balances the petitioner's interest in prompt consideration of allegedly unlawful agency action against the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting.") (quoting *Miss. Valley Gas Co. v. Fed. Energy Regulatory Comm'n*, 68 F.3d 503, 508 (D.C. Cir. 1995)). In this case, while the Amended Complaint alleges that Plaintiffs

suffer hardship during implementation, the interests served by allowing the Services and DoD, subject to congressional oversight, to finish implementation before judicial review outweigh any associated hardship.

The allegations of harm at issue in the Amended Complaint largely occurred before the Secretary and the Chairman rescinded the DGCDAR. *See* Am. Compl. ¶¶ 14–46. With respect to post-rescission assignments, Plaintiffs allege that they 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. *See id.* But, as discussed, DoD and the Services are in the process of reviewing those closures and opening positions and units to women so that by January 2016 either they will have been opened to women or the respective Service will have requested an exception that must satisfy the rigorous standard for continued closure established by the Secretary and the Chairman. While the closures that continue during implementation may impact Plaintiffs, implementation may also resolve their claims by or before January 1, 2016. And in any event, the interests of allowing DoD to finish implementing the policy change without interference are paramount.

* * *

Postponing judicial review until implementation is completed and thereby confining such review to any closures that remain (*viz.*, closures that the Chairman and the Secretary both personally determine are "narrowly tailored and based on a rigorous analysis of factual data regarding the knowledge, skills and abilities needed for the position," Jan. 2013 Directive), serve the important interests in (i) allowing the military, subject to the active congressional oversight described above, to apply its expertise to finalize post-rescission direct ground combat assignment policy and to fully develop the facts pertinent to the equal protection analysis and (ii) ensuring that judicial review of a sensitive constitutional question of first impression is undertaken only insofar as it is necessary. These important interests outweigh any hardship to Plaintiffs in the interim.

The Amended Complaint's equal protection claim therefore is not ripe. *See, e.g., US W. Commc'ns*, 193 F.3d at 1118. It should be dismissed for lack of subject matter jurisdiction. *See, e.g., Addington*, 606 F.3d at 1179.

CONCLUSION

For the foregoing reasons, this action should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Dated: December 19, 2013

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General
MELINDA HAAG
United States Attorney
ALEX TSE
Chief, Civil Division
ANTHONY J. COPPOLINO
Deputy Branch Director

/s/ Caroline Lewis Wolverton

CAROLINE LEWIS WOLVERTON
District of Columbia Bar No. 496433
Senior Counsel
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 514-0265
Facsimile: (202) 616-8470
E-mail: caroline.lewis-wolverton@usdoj.gov

Attorneys for Defendant CHUCK HAGEL