CHAD A. READLER
Acting Assistant Attorney General
ANTHONY J. COPPOLINO
Deputy Branch Director
ANDREW E. CARMICHAEL
andrew.e.carmichael@usdoj.gov
Virginia Bar No. 76578
Trial Attorney
Civil Division, Federal Programs Branch
U.S. Department of Justice
20 Massachusetts Avenue, N.W., Rm. 7218
Washington, D.C. 20044
Telephone: (202) 514-3346
Facsimile: (202) 305-2685

Counsel for Defendant JAMES N. MATTIS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SERVICE WOMEN'S ACTION NETWORK, Plaintiff, v. JAMES N. MATTIS, Secretary of Defense, Defendant.	CASE NO. C 12-06005 EMC **NOTICE OF MOTION AND DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT AND MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES** Date: September 27, 2018 Time: 1:30 pm Courtroom 5, 17th floor

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on September 27, 2018 at 1:30 p.m. in Courtroom 5, 17th floor, United State Courthouse, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Edward M. Chen, United State District Judge, or as soon thereafter as counsel may be heard by the Court, Defendant James Mattis, Secretary of Defense, by and through his attorneys, will move this Court for an order dismissing the Third Amended Complaint ("TAC"), Dkt. 122, for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This motion is based on this Notice, the accompanying Memorandum of Points and Authorities, the Court's files and records in this matter and 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 Third Amended Complaint for lack of subject matter jurisdiction or in the alternative failure to state a claim.

MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES

INTRODUCTION

SWAN's Third Amended Complaint ("TAC") contains the same fundamental flaw as its Second Amended Complaint—it fails to establish standing either through allegations of a diversion of resources sufficient to establish organizational standing or associational standing, and it again fails to state any plausible equal protection claim. With respect to organizational standing, while SWAN has added some allegations to its current complaint describing where its resources are coming from and going to, it still fails to satisfy the core requirements of organizational standing. As an initial matter, SWAN's "new" allegations concerning the reallocation of resources address only the Army's Leaders First policy; SWAN's diversion of resources allegations as to the two Marine Corps policies at issue are exactly as deficient in the Third Amended Complaint as they were in the Second Amended Complaint, and at a minimum any challenge to the Marine Corps policies again must be dismissed pursuant to the Court's prior order. *See Friends of the Earth, Inc. v. Laidlaw Envtl.*

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Servs. (TOC), Inc., 528 U.S. 167, 185 (2000) ("plaintiff must demonstrate standing separately for each form of relief sought").

But even as to the Army's Leaders First policy, SWAN's added allegation regarding reallocated resources—that it conducted two "brainstorm[ing]" sessions to help service women "deal with the ramifications of the 'Leaders First' policy[,]" TAC ¶ 20—falls far short of the allegations that established standing in *Nat'l Council of La Raza v. Cegavske*, 800 F. 3d 1032 (9th Cir. 2015). *In La Raza*, the plaintiff organization alleged that because the State of Nevada refused to perform its statutory duties it was being forced to perform those duties for the state instead of its normal mission—a true diversion of resources *caused* by the state's conduct. *Id.* at 1036-37. Here, the only thing causing SWAN's alleged diversion of resources is its disagreement with Defendant's policy, making its alleged diversion "nothing more than a setback [to its] abstract social interests[.]" *Project Sentinel v. Evergreen Ridge Aparts.*, 40 F. Supp. 2d 1136, 1139 (N.D. Cal. 1999). Lastly, SWAN's attempt to establish associational standing through two unidentified members fairs no better, primarily because neither of those members alleges a present injury. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Moreover, SWAN's Third Amended Complaint fails to plausibly state an equal protection violation. Notably, its complaint attempts to rely on allegations of animus by the current administration that are implausible on their face because the policies they challenge were established by the previous administration and remain in place. And the military justifications for the policies at issue, easily satisfy the required deferential standard of review. *Trump v. Hawaii*, 138 S. Ct. 2392 (June 26, 2018); *Rostker v. Goldberg*, 453 U.S. 57, 66-67 (1981). For these reasons and the following, Plaintiff's Third Amended Complaint should be dismissed in its entirety.

STATEMENT OF FACTS

On November 27, 2012, five service members and the Service Women's Action Network ("SWAN") initiated this lawsuit to challenge as unconstitutional the military's 1994 direct ground combat definition and assignment rule ("DGCDAR"). Compl., Dkt. 1.

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On January 24, 2013, shortly after the filing of the original complaint, the Secretary of Defense ("Secretary") and the Chairman of the Joint Chiefs of Staff ("Chairman") issued a directive rescinding the DGCDAR but allowed the Military Services (Army, Navy, Air Force and Marine Corps) and the U.S. Special Operations Command ("USSOCOM") (referred to collectively as the "Military Services") to seek "narrowly tailored" exceptions to the general rescission "based on a rigorous analysis of factual data regarding the knowledge, skills and abilities needed for the position." Mem. of Jan. 24, 2013 from the Secretary and Chairman to the Military Services.[1]

On October 31, 2013, these Plaintiffs amended their original complaint to allege that despite the announced rescission of the DGCDAR, the Military Services remain in violation of equal protection requirements because previously closed billets, schools, and training programs had not immediately opened while the Military Services reviewed whether or not to seek an exception to the general rescission. *See* Plaintiffs' First Amended Complaint, Dkt. 18 ¶¶ 2-6; 71.

On December 3, 2015, the Secretary announced his "determin[ation] that no exceptions are warranted to the full implementation of the rescission of the '1994 Direct Combat Definition and Assignment Rule'" and that "[a]nyone, who can meet operationally relevant and gender neutral standards, regardless of gender, should have the opportunity to serve in any position." Mem. of Dec. 3, 2015 from Secretary to Military Services.[2] Shortly thereafter, DoD announced that it was making publicly available all of the studies on which the Secretary relied in coming to his decision.[3]

The Secretary's December 3, 2015 Memorandum directed the Secretaries of the Military Departments and the Chiefs of the Military Services to submit final, detailed implementation plans for opening all military occupational specialties, career fields, and

[1] The Secretary and Chairman's Memorandum of January 24, 2013 is available at https://www.defense.gov/news/WISRJointMemo.pdf

[2] The Secretary's Memorandum of December 3, 2015 is available at http://www.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf

[3] The studies are available at http://www.defense.gov/News/Publications/WISR-Studies

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branches for accession by women for approval no later than January 1, 2016. The Services complied with the deadline, and on March 9, 2016, the Secretary approved each of the Military Services' final implementation plans. *See* Mem. of Mar. 9, 2016 from Secretary to Military Services.[4] The final implementation plans are publicly available on DoD's website.[5]

The Services' implementation plans reflected the guiding principles articulated by the Chairman in his January 9, 2013 memorandum to the Secretary of Defense. Among those principles is to ensure "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." Mem. from Chairman, Joint Chiefs of Staff of Jan. 9, 2013 to Secretary.[6]

Since the Secretary's December 3, 2015 announcement, the parties have submitted five Case Management Statements and held five Case Management Conferences. *See* Dkt. 75; Dkt. 76; Dkt. 84; Dkt. 85; Dkt. 89; Dkt. 91; Dkt. 99; Dkt. 100; Dkt. 113; Dkt. 115. The Secretary provided information that implementation of the new policy continues apace, as combat billets continue to be opened and filled by female service members in accordance with the implementation plans approved by the Secretary on March 9, 2016. *See* Dkt. 75 at 9-17; Dkt. 84 at 7-14; Dkt. 89 at 19-22; Dkt. 99 at 19-23; Dkt. 113 at 10-16.

In the most recent Case Management Statement, the Secretary reported that the Army recently opened three additional posts and brigade combat teams to females at Forts Bliss, Campbell, and Carson in addition to those already opened at Fort Bragg and Fort Hood. Dkt. 113, Attachment 2. The Army plans to further expand integrated units to Forts Drum, Polk, and Stewart, and Joint Base Lewis-McChord in Fiscal Year 2019. *Id.* And the Army plans to phase out the Leaders First program and transition to gender neutral assignments across all career fields in June 2020. *Id.*

[4] The Secretary's Memorandum of March 9, 2016 is available at http://www.defense.gov/Portals/1/Documents/ pubs/SIGNED_SD_WISR_Implementation_Memo.pdf
[5] The Services' implementation plans are available at http://www.defense.gov/News/Publications
[6] The Chairman's Memorandum of January 9, 2013 is available at http://www.defense.gov/news/WISRImplementationPlanMemo.pdf

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On December 18, 2017, Plaintiff filed its Second Amended Complaint ("SAC") alleging that the Army and Marine Corps' method of integrating females into previously closed combat billets, and the Marines Corps' method of training female recruits, violates the Equal Protection Clause of the Fifth Amendment. SAC, Dkt. 107. On February 16, 2018, Defendant filed a Motion to Dismiss the SAC arguing that Plaintiff lacked standing, its claims were non-justiciable, and that venue was improper. Dkt. 110. On May 1, 2018, the Court granted Defendant's motion on the issue of standing only and allowed Plaintiff to amend. Dkt. 118. Plaintiff filed its current Third Amended Complaint making the same claims for relief as the SAC on June 28, 2018. Dkt. 122.

ARGUMENT

I. SWAN Lacks Standing to Challenge DoD Policies.

The Secretary previously moved to dismiss SWAN's Second Amended Complaint, Dkt. 110, because SWAN's claims failed to allege a cognizable injury-in-fact that was causally related to the challenged Department of Defense ("DoD") policies. In response, SWAN argued that it had made sufficient allegations to support standing based on the organizational standing doctrine set forth in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and its progeny.

This Court dismissed Plaintiff's Second Amended Complaint finding that SWAN had not pled facts sufficient to establish standing under this theory of organizational standing. *See* Court's Opinion of May 1, 2018 ("Op."), Dkt. 118 at 18-22. The Court noted that SWAN had not provided "any specificity in describing (1) from what and (2) to what its resources have been reallocated." *Id.* at 22. On point (1) the Court found that "SWAN refers to 'advocacy initiatives and community programs,' SAC ¶ 13, but gives no information about what those initiatives and programs are." *Id.* And on point (2) the Court noted that "SWAN alleges that it 'fields complaints' and has responded to reports of disadvantages faced by service women as a result of the policies, but it does not allege, *e.g.*, that it has had to devote more resources to providing, *e.g.*, counseling and assistance in a manner similar to that provided by NCLR in *La Raza*." *Id.* The Court further noted that "the complaint does not

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clearly allege whether SWAN typically takes any action or provides services beyond fielding complaints." *Id.*

SWAN's present complaint seeks to address points (1) and (2), only as to the Army's Leaders First policy, but its articulation of those points confirms that its alleged injury is "nothing more than a setback [to its] abstract social interests[.]" *Project Sentinel*, 40 F. Supp. 2d at 1139. And as to the two Marine Corps policies it seeks to challenge, SWAN does not even address the Court's point (2) outside of repeating the same vague and conclusory allegations the Court has already rejected. As such, this Court should find that the allegations in the Third Amended Complaint are insufficient to establish standing.

As the party invoking federal jurisdiction, SWAN bears the burden of alleging facts that establish the three elements that constitute the "irreducible constitutional minimum of standing," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)—namely, that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Because "the standing inquiry requires careful judicial examination of . . . whether the particular plaintiff is entitled to an adjudication of the particular claims asserted," *Allen v. Wright*, 468 U.S. 737, 752 (1984), a "plaintiff must demonstrate standing separately for each form of relief sought," *Friends of the Earth*, 528 U.S. at 185. "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, (2013). Thus, the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of Government was unconstitutional." *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). As set forth below, where, as here, a case lacks an actual, identified individual plaintiff who alleges they are subject to and presently being injured by the policies at issue, an organization cannot invoke a court's jurisdiction

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merely because they choose to divert resources to oppose a governmental policy with which they disagree.

A. SWAN Lacks Organizational Standing.

In its Third Amended Complaint, SWAN claims that it has standing because its mission has been frustrated by DoD's actions and it has diverted resources in response. TAC ¶ 14. Thus, SWAN again attempts to rely on the organizational standing doctrine set forth in *Havens Realty*, 455 U.S. 363, and the cases following it. But once again *Havens Realty* does not advance SWAN's claim to standing. As a threshold matter, that case arose under a statutory private right of action to enforce a federal statute, the Fair Housing Act. *See Spokeo*, 136 S. Ct. at 1549 ("Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'") (quoting *Lujan*, 504 U.S. at 578). Congress's intention to allow private enforcement of statutory prohibitions against discriminatory housing practices thus drove the Court's standing analysis. *See Havens Realty*, 455 U.S. at 373–74; *see also Smith v. Pacific Properties & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (interpreting *Havens* to support standing where an organization has diverted resources "to combat the particular housing discrimination in question"). Here, by contrast, SWAN presses its claims directly under the Constitution and not on the basis of the Fair Housing Act or any other statutory right.

When applying *Havens* outside of the fair housing context, the Ninth Circuit has made clear that it is limited to situations where an organization is forced to divert resources to avoid some other cognizable injury to itself. Thus, in *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, the court held that an organization seeking to allege standing under *Havens* must establish, at a minimum, "that it would have suffered *some other injury* if it had not diverted resources to counteracting the problem." 624 F.3d 1083, 1088 (9th Cir. 2010) (emphasis added); *see also id.* at 1088 n.4 ("organization may sue only if it was forced to choose between suffering an injury and diverting resources to counteract the injury.").

In *Nat'l Council of La Raza v. Cegavske*, plaintiffs alleged that officials in the State of Nevada were not complying with Section 7 of the Nevada Voting Rights Act, which requires

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1 the state "to designate public assistance officers as voter registration agencies." 800 F. 3d
2 1032, 1035 (9th Cir. 2015). The voter registration agencies were then "required to distribute
3 voter registration application forms with each application for assistance[]" and "make
4 available assistance in filling out voter registration application forms to any person who
5 applies for public assistance or seeks recertification, renewal, or change of address, unless
6 that person declines in writing to register to vote." *Id.* (internal quotations and citations
7 omitted). The plaintiffs then alleged that the state's failure to preform theses duties,
8 mandated by statute, forced it to "expended additional resources . . . on efforts to assist
9 individuals with voter registration . . . who should have been offered voter registration
10 through Nevada's public assistance offices." *Id.* at 1036-37. Plaintiffs further alleged that if
11 the state properly followed the law they would spend "fewer resources on voter registration
12 drives in communities where DHHS [Nevada Department of Health and Human Services]
13 clients should be offered voter registration opportunities at DHHS offices." *Id.* And that
14 "[b]ut for defendants' violations of Section 7, Plaintiffs would be able to allocate substantial
15 resources to other activities central to [their] mission[s]." *Id.* In short, the plaintiffs alleged
16 that because the State of Nevada failed to perform its statutory duties they were forced to
17 perform those duties for them.

18 Thus, *La Raza* is consistent with the Supreme Court's holding in *Havens* that
19 organizational standing cannot rest on a mere choice to divert resources in response to a
20 governmental policy, but can only exist where the challenged action caused the organization
21 to divert funds. *See Havens Realty*, 455 U.S. at 379 (fair housing organization had standing
22 because the defendants' racial steering practices "perceptibly impaired" the organization's
23 ability to assist its clients in obtaining equal access to housing and required additional
24 resources to counteract the injury caused to the organization by those discriminatory
25 practices). Otherwise, Article III standing would exist whenever a public interest
26 organization decided to spend money opposing a governmental policy of concern or the
27 organization suffered a "setback to [it's] abstract social interests," *id.* (citing *Sierra Club v.*
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Morton, 405 U.S. 727, 739 (1972), the "very type of activity distinguished by *Havens*," *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 (D.C. Cir. 2005).

SWAN's present complaint fails to establish that it has organizational standing to challenge any of the DoD polices at issue. As to the Court's point (1) SWAN provides more information in the Third Amended Complaint on its "advocacy initiatives and community programs," *see* TAC ¶ 16, 22, and thus seeks to address the Court's prior opinion as to that point, but SWAN's allegations as to point (2) largely repeat the same vague allegations about "answering questions" of service members who have "voiced concerns" about the policies at issue, *see id.* ¶ 19, 21, which the Court previously rejected. Op. at 22.

Only once does SWAN go into any sort of detail on point (2) when it alleges:

> "In early 2018, in direct response to concerns raised through SWAN's Facebook page, SWAN staff held (and sponsored) a one-day "Trailblazers Workshop" in Fort Hood, Texas in order to support the first class of recruits trained for Army infantry roles at Fort Hood. One of the primary purposes of this workshop was to support and connect these infantry women in their day-to-day struggles, and to brainstorm how to deal with the ramifications of the "Leaders First" policy and the continuing barriers and stigmatization it creates. SWAN is scheduled to hold a second, similar workshop at Fort Bragg, North Carolina on July 14, 2019. Were it not for "Leaders First," SWAN would have spent those resources on one or more of the objectives set forth in its strategic plan." TAC ¶ 20.

But not only does this allegation solely address the Army's Leaders First policy, this alleged injury stands in stark contrast to the one the plaintiffs in *La Raza* alleged. In *La Raza* the plaintiffs alleged that because the State of Nevada failed to perform its statutory duties to register voters, they had to conduct voter registration drives, in new communities, to register the very same voters. 800 F.3d at 1037. Here, by contrast, SWAN is not being forced to perform any sort of function due to the Army's Leaders First policy – it simply chose to spend money on two "brainstorm[ing]" sessions on how to challenge it. Thus, this allegation only confirms that it has suffered "nothing more than a setback [to its] abstract social interests[.]" *Project Sentinel*, 40 F. Supp. 2d at 1139.

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SWAN's allegations as to the Court's point (2) pertaining to the Marine Corps' policies fall even farther from the mark. First, they make no allegations comparable to the "brainstorm[ing]" sessions allegedly held at Army bases Fort Hood and Fort Bragg. Rather, they rely entirely on allegations that they have had to "answer[] questions from women who seek to enter combat roles, who are entering these roles under the 'Leaders First' policy, or who are experiencing or who have experienced the segregated Marine Corps training[,]" TAC ¶ 19, and have "expended approximately 15% of their total working hours addressing concerns about the policies and practices that are the subject of this suit[,]" *id.* ¶ 21, "[i]nclud[ing] time spent responding to direct communications from its members, reaching out to Congress and other policymakers to advocate against these policies and practices, or connecting servicewomen to resources or networks that they need as they attempt to navigate military careers under these policies and practices." *Id.*

But these allegations amount to nothing more than a public interest organization choosing to expend resources to communicate on policy issues of concern to it. Moreover, the allegations are so vague it is impossible to even compare them to the types of allegations the Ninth Circuit has found sufficient to establish standing under the organizational standing doctrine. For example, these allegations repeatedly combine all three polices together—the Army's Leaders First policy, the Marine Corps' Leaders First policy, and the policies governing Marine Corps Recruit Training—making it impossible to discern whether or not SWAN has devoted resources as a result of each individual policy. *See Friends of the Earth*, 528 U.S. at 185 (A "plaintiff must demonstrate standing separately for each form of relief sought[.]"). Further, SWAN's selective use of the word "or" pertaining to Marine Corps Recruit Training, TAC ¶ 19, makes it impossible to determine whether they have ever fielded a complaint regarding the Marine Corps' policies as they exist today. Finally, SWAN's final caveat—"as they attempt to navigate military careers *under* these policies and practices[]," *see id.* (emphasis added)—calls into question whether or not they are responding to members with questions about these actual policies or to questions that are entirely unrelated to these polices from service members who happen to be in the service "navigating" their careers

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while these policies are also in place. Such allegations fair no better now than when the Court rejected them as insufficient to establish standing in the Second Amended Complaint.

Finally, because this case involves an action taken by the Executive branch and an action by the military, the Court's standing inquiry must be significantly more "rigorous" than in *La Raza*. *See Clapper*, 568 U.S. at 408*; Ree v. Zappos.com, Inc. (In re Zappos.com, Inc.)*, 888 F.3d 1020, 1026 (9th Cir. 2018) (recognizing that an "especially rigorous" standing inquiry is applied in cases involving national security, foreign affairs, and when a plaintiff asks the court to declare actions of a coordinate branch unconstitutional); *In re Adobe Sys. Privacy Litig.*, 66 F. Supp. 3d 1197, 1214 (N.D. Cal. 2014) (same); *see also California v. HHS*, 281 F. Supp. 3d 806, 821 (N.D. Cal. 2017) (applying the "especially rigorous" standing inquiry); *Camacho v. United States*, No. 12-cv-956-CAB, 2014 U.S. Dist. LEXIS 199054, at *8 (S.D. Cal. Oct. 28, 2014) (same); *Patterson v. United States Senate*, No. C 13-2311 SBA, 2014 U.S. Dist. LEXIS 47175, at *9 (N.D. Cal. Mar. 31, 2014) (same). SWAN, in its response to the Secretary's Motion to Dismiss the Second Amended Complaint, Dkt. 111, was unable to identify a single case where another Court has found that an organization, absent the participation of a service member allegedly suffering a present injury, has established standing under this "especially rigorous" standard to challenge a military policy. The allegations in their Third Amended Complaint do not entitle it to be the first.[7]

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[7] The Ninth Circuit's decision in *Fair Hous. Council v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012) relied on by Plaintiff differs significantly from this one. First, it arose under the expansive statutory rights of the Fair Housing Act. Second, the Fair Housing Council of San Diego pled a significantly greater diversion of resources, alleging that it "conducted approximately 49 outreach presentations," *id.* at 1226, as opposed to the two "workshops" that SWAN alleges it conducted in response to the Army Leaders First policy, *see* TAC ¶ 20. Third, *Roommate.com* did not involve a military action or a constitutional claim against a coordinate branch and thus the "especially rigorous" standing inquiry did not apply. And finally, the dissent in *Roommate.com*, specifically noted that the majority's holding was contrary to the Supreme Court's decision in *Lujan*, 504 U.S. at 560, because the Fair Housing Council did not adequately alleged that Roommate.com's activities caused it to divert its resources. *Roommate.com, LLC*, 666 F.3d at 1226-27 (Ikuta, J., concurring and dissenting). Further, the dissent noted that the allegations of the Fair Housing Council looked "suspiciously like a harm that is simply 'a setback to the organization's abstract social interests,' the very thing *Havens* indicated was not a 'concrete and demonstrable injury to the organization's activities,'" *id.* (quoting *Havens*, 455 U.S. at 379), further stating that "[w]here Supreme Court precedent is contrary to our precedent, we are the ones that have to change." *Id.*

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B. SWAN Lacks Associational Standing.

In its Third Amended Complaint SWAN also appears to be asserting associational standing to challenge DoD's policies through its "members," but this attempt to establish standing fairs no better. Associational standing allows an association to bring suit "solely as the representative of its members" "[e]ven in the absence of injury to itself." *Warth*, 422 U.S. at 511. To assert associational standing, an association must, *inter alia*, "show that a member suffers an injury-in-fact that is traceable to the defendant and likely to be redressed by a favorable decision," by asserting "'specific allegations establishing that at least one *identified member* had suffered or would suffer harm.'" *See Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194–95 (9th Cir. 2013) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)) (emphasis in *Associated Gen. Contractors of Am.*). Absent a member with standing, SWAN itself cannot establish standing under this theory.

SWAN attempts to establish standing under this theory to challenge the Army Leaders First policy by claiming that one of its members serving in the Army National Guard (presumably in Colorado as her civilian employment is alleged to be with the Denver Police Department) "[be]cause of the [Army] 'Leaders First' policy" "*was* treated differently from her male counterparts by being denied the ability to take inactive guard status for six months at the beginning of her service[.]" TAC ¶ 23 (emphasis added). As an initial matter SWAN makes no attempt to identify this "member" or explain how this individual qualifies as a traditional member or has the "indicia of membership" within SWAN to qualify as a member. SWAN claims that it has members with "whom it connects and communicates via Facebook activity, phone calls, email, or through its month e-newsletter[,]" *id.* ¶ 22, and that it holds annual membership summits that host between 50 and 60 individuals, *id.*, but does not identify this individual or how she participates in the organization. In these circumstances, the Court cannot exercise Article III jurisdiction based on associational standing. *See Advocates for Individuals with Disabilities Found. Inc. v. Golden Rule Props. LLC*, No. CV-16-02413-PHX, 2016 U.S. Dist. LEXIS 141935, at *5-7 (D. Ariz. Oct. 13, 2016)

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1 (dismissing associations' complaint because it "failed to assert a basis of membership for" any of its members named in the complaint); *Meister v. City of Hawthorne*, No. CV-14-1096-MWF, 2014 U.S. Dist. LEXIS 96206, at *20-22 (C.D. Cal. May 13, 2014) ("Without sufficient allegations that a [member] with individual standing to pursue the claims at issue here has sufficient indicia of membership [the association's] claims must be dismissed.").

But even assuming, *arguendo,* that SWAN had included sufficient allegations in its complaint to show that this service member was a member of its organization, it is clear that the service member would not have standing to sue in her own right because she only alleges a past injury attributable to the Army Leaders First policy. To establish standing for prospective injunctive relief, which is the only form of relief requested in this action, a plaintiff must demonstrate that she has "suffered or [is] threatened with a 'concrete and particularized" legal harm ... coupled with 'a sufficient likelihood that [she] will again be wronged in a similar way.'" *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir.2007) (quoting *Lyons*, 461 U.S. at 111). "As to the second inquiry, [a plaintiff] must establish a 'real and immediate threat of repeated injury.'" *Id.* (quoting *O'Shea*, 414 U.S. at 496); *see also Clapper*, 568 U.S. at 409 ("[W]e have repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient.") (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Further, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Lyons*, 461 U.S. at 102 (quoting *O'Shea*, 414 U.S. at 495-96).

Here, SWAN alleges that the training of one of its members was delayed by the Army Leaders First policy. But the allegations clearly show that this alleged injury occurred in the past, and otherwise fails to allege any present, ongoing injury. Further, SWAN has not alleged that another injury attributable to the Army Leaders First policy is forthcoming to this service member. Nor could SWAN plausibly make such an allegation, because by its very terms the Army Leaders First policy only applies to initial combat assignments. *See, e.g.,*

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Army Implementation Plan, Phase III, Assignment to Operational Units at 5-7.[8] From the allegations in the complaint, this service member has already had her initial combat assignment, *see* TAC ¶ 23 ("SWAN has a member who *is* an Infantry Platoon Leader in the Army National Guard") (emphasis added), and thus the Leader First policy will no longer apply to her on future assignments. Thus, this unidentified plaintiff would not have standing to challenge Leaders First, and therefore her circumstances cannot support SWAN's alleged associational standing.

The allegations SWAN makes in regards to the Marine Corps' policies are even sparser. To begin, SWAN makes no allegations supporting its associational standing to challenge the Marine Corps' Leaders First policy. SWAN only alleges that it "has servicewomen members in the Marine Corps who continue to suffer harassment and stigmatization from their male counterparts based on the segregated training, which perpetuates a culture that differentiates and excludes women." TAC ¶ 24. SWAN then offers a "member's" opinion regarding the Marine Corps Recruit Training policy, but does not identify whether that person is even serving in the Marine Corps. *Id.* Thus, SWAN has not identified a member who is currently subject to the policies of Marine Corps Recruit Training. And as far as SWAN attempts to claim that it has members, also unnamed and with no allegations specifically pertaining to any individual member, who are facing harassment or stigmatization as a result of that policy being applied to others, this cannot serve as a basis for standing of those members in their own right. *See Allen*, 468 U.S. at 757 n.22 (1984) ("[S]tigmatic injury…requires identification of some concrete interest with respect to which respondents are personally subject to discriminatory treatment. That interest must independently satisfy the causation requirement of standing doctrine."); *see also Count Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 154-55 (1979) ("A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his

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[8] The Army's Implementation Plan is available at https://www.defense.gov/Portals/1/Documents/pubs/WISR_Implementation_Plan_Army.pdf

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own rights."); *see also In re Navy Chaplaincy,* 534 F.3d 756, 760-61 (D.C. Cir. 2008) (Kavanaugh, J.) (rejecting a similar theory of stigmatic injury brought by Navy Chaplains). For these reasons, SWAN's theory of associational standing must also fail.

II. SWAN Fails to State A Claim Upon Which Relief May Be Granted.

Even if the Court determines that it can properly entertain Plaintiff's claims at this time, it nonetheless should dismiss the complaint because SWAN has not plausibly stated a claim for relief as to any of the DoD policies it challenges. First, SWAN bases its claims on allegations of animus that are clearly implausible on their face because the alleged statements occurred well after the policies they challenge were created. The statements allegedly made by President Trump, Secretary Mattis and Gen. (ret.) Kelly have no bearing on the policies at issue in this case, which SWAN itself acknowledges were all established by the prior administration. Second, the policies themselves easily survive the required rational basis review based solely on the proffered military justifications, including as reflected in documents referenced in the complaint, within the existing record, and publicly available and subject to judicial notice.

A. FRCP 12(b)(6) Standard

A motion to dismiss pursuant to Federal Rule 12(b)(6) tests the sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The well-pleaded facts must do more than permit the Court to infer "the mere possibility of conduct"; they must show that the pleader is entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). When determining whether a complaint states a claim, the Court accepts all allegations of material fact in the complaint as true and construes them in the light most favorable to the non-moving party. *Cedars—Sinai Medical Center v. National League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007). But the Court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint," and does "not . . . necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). At the pleading stage, the Court may consider not only the complaint itself, but also

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documents it refers to, whose authenticity is not questioned, and matters judicially noticed. *Zucco Partners LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009). The Court also need not accept as true allegations that are contradicted by documents properly subject to judicial notice, or incorporated into the complaint. *Gonzalez v. Planned Parenthood of Los Angeles*, 759 F.3d 1112, 1115 (9th Cir. 2014).

B. SWAN's Claims that the DoD Policies Were Motivated By Animus Are Implausible.

SWAN claims that the DoD policies they challenge were "at least in part the result of animus towards servicewomen on the part of the DoD and the Administration." TAC ¶ 47. To support this claim they point to certain statements alleged to have been made by then-candidate Trump in October 2016, President Trump in July 2017, Secretary Mattis in his civilian capacity in 2015, and President Trump's Chief of Staff, Gen. (ret.) Kelly in has last week as Commander of United States Southern Command in January 2016. *See* TAC ¶¶ 47-52. These allegations are clearly implausible on their face as the development of the challenged policies pre-dated this Administration and the federal civilian service by these individuals, making it impossible for any of their alleged animus to have prompted these policies, and the policies previously implemented remain in place.

The Leaders First policy for both the Army and Marine Corps was derived from 2013 guidance from Chairman of the Joint Chiefs Martin Dempsey, unanimously proposed by the Joint Chiefs of Staff,[9] that integration plans should ensure "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." Mem. from Chairman, Joint Chiefs of Staff of Jan. 9, 2013 to Secretary. Subsequently, Defense Secretary Leon Panetta affirmatively endorsed these guiding principles. *See* Mem. of Jan. 24, 2013 from the Secretary and Chairman to the Military Services.

[9] The Court may take judicial notice of the fact that President Trump, Secretary Mattis and Gen. (ret.) Kelly were not members of the Joint Chiefs of Staff on January 9, 2013.

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On December 3, 2015, Secretary Carter announced his "determin[ation] that no exceptions are warranted to the full implementation of the rescission of the '1994 Direct Combat Definition and Assignment Rule'" and that "[a]nyone, who can meet operationally relevant and gender neutral standards, regardless of gender, should have the opportunity to serve in any position." Mem. of Dec. 3, 2015 from Secretary to Military Services. Secretary Carter directed the Secretaries of the Military Departments and Chiefs of the Military Services to provide the full implementation plans created in accordance with the prior January 2013 directive to him no later than January 1, 2016. *Id.* The Army and Marine Corps complied with that directive and provided their implementation plans, which enacted the Leaders First policy, to Secretary Carter. On March 9, 2016, Secretary Carter approved each of the Services' final implementation plans. *See* Mem. of Mar. 9, 2016 from Secretary to Military Services. Each of these events occurred well before President Trump, Secretary Mattis, and Gen. (ret.) Kelly assumed their current offices, thus Plaintiff's claims as to the Leaders First policies cannot plausibly be based on such statements and alleged animus, particularly where the pre-existing policies remain in place.

Likewise, the Marine Corps' current recruit training methodology was also established well before the present Administration. A review of this entry level training program occurred as a result of the direction in the Marine Corps' 2015 Implementation Plan to assess "possible options to increase gender-combined training…." *See* Marine Corps Implementation Plan at 8.[10] Following that review, the Marine Corps increased gender-combined training and today the majority of recruit training occurs in a "gender combined/integrated environment." Declaration of Colonel Frank McKenzie, Dkt. 112-1 ¶ 7. Further, Plaintiff's inference of animus by now former Parris Island commanding officer Brigadier General Renforth is unfounded. As noted in the article cited by Plaintiff, *see* TAC ¶ 45, and consistent with the review directed by the Marine Corps' Implementation Plan, Brig. General Renforth expanded the integration of male and female recruits during his

[10] The Marine Corps' Implementation Plan is available at https://www.defense.gov/Portals/1/Documents/pubs/WISR_Implementation_Plan_USMC.pdf

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tenure, to include integration of battalion leadership structures to expose female and male recruits to leaders of both genders. *See* https://www.military.com/daily-news/2017/06/06/marine-boot-camp-now-integrated-should-get-commander-says.html ("All requirements for graduation are completed in co-ed settings, and Renforth has overseen the integration of hikes, the final physical fitness test and combat fitness test requirements, and the famous Crucible during his tenure."). As such, Plaintiff's allegations of animus pertaining to Marine Corps Recruit Training are also implausible.

Moreover, even if SWAN's allegations of animus were plausible their utility is limited here. As the Supreme Court recently emphasized in *Trump v. Hawaii,* when conducting a review of a national security policy the courts must focus on the policy itself and the stated justifications rather than statements of alleged animus. 138 S. Ct. at 2420 ("[W]e may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.")

C. The DoD Policies at Issue Pass the Required Rational Basis Review.

Finally, if the question is reached, SWAN fails to state a claim that the challenged policies violate the requirements of the Equal Protection Clause. When reviewing a decision involving the "composition, training, equipping, and control of the military force," the Court applies a highly deferential form of review. *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). Military deference stems from the Supreme Court's recognition that control of the armed forces is vested in the Executive and Legislative branches by the text of the Constitution itself. *See Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) ("[T]he Constitution itself requires such deference."). Thus, when reviewing a military decision "courts must give deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Winter*, 555 U.S. at 9 (citing *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

As the Supreme Court has repeatedly stressed, application of military deference means that "the tests and limitations to be applied may differ because of the military context." *Rostker*, 453 U.S. at 67. As such, the type of review applicable to military policies alleged to

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trigger heightened scrutiny, including sex-based classifications, *id.* at 70, substantially departs from that conducted in the civilian context. *See id.* at 80 ("Congress was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than 'equity.'"); *see also Goldman*, 475 U.S. at 507 (noting that "review of military regulations challenged on First Amendment grounds," for instance, are "far more deferential than constitutional review of similar laws or regulations designed for civilian society").

The Supreme Court recently confirmed this point in *Hawaii*, when it rejected the invitation to import "the *de novo* 'reasonable observer' inquiry" into "the national security and foreign affairs context," including cases that involve review of "military actions." 138 S. Ct. at 2420 n.5. Instead, based on deference principles, the Court applied "rational basis review" and stressed that judicial "inquiry into matters of . . . national security is highly constrained." *Id.* at 2420 (citing *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)). In conducting its review of a policy affecting national security, the Supreme Court stressed that a court "cannot substitute [its] own assessment for the Executive's predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'" *Id.* at 2421 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948)). The Supreme Court further explained that this deferential review may apply "across different contexts and constitutional claims," even when evaluating a "'categorical'" classification "on the basis of sex." *Id.* at 2419 (citing *Fiallo v. Bell*, 430 U.S. 787, 795, 799 (1977)).

This deferential standard of review requires the Court to "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds," *Hawaii,* 138 S. Ct. at 2420. The Court can readily conduct this review at the pleading stage based on the policy rationale advanced by the military, including as reflected in documents cited in the complaint or contained in the record or publicly available and subject to judicial notice. *See Rostker*, 453 U.S. 74-75, 81 (relying on 1980 legislative record to sustain 1948 statute exempting women from requirement to register for the draft); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (upholding different mandatory-

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discharge requirements for male and female naval officers based on what "Congress may … quite rationally have believed"). Upon doing so, it is clear that the challenged DoD policies rely on important military interests, and not on animus as SWAN claims, and thus SWAN's Third Amended Complaint does not plausibly state an Equal Protection Claim.

i.) The Army and Marine Corps' Leaders First Policies Pass the Required Rational Basis Review.

As an initial matter, SWAN's claim that the military is assigning females based "purely on their gender," TAC ¶ 63, is belied by the description of the Leaders First policy in their own complaint and the integration plans themselves. A plain reading of the Service Implementation Plans shows that the Leaders First policy considers rank of the service member, the specific type of combat assignment the service member is seeking, as well as the number of females already in the unit, and that the policy applies only to initial combat assignments. *See, e.g.,* Army Implementation Plan, Phase III, Assignment to Operational Units at 5-7.[11]

Second, the plans themselves, as well as the history behind them, show that they were developed not for discriminatory purposes, as SWAN alleges, but as a way of ensuring the successful integration of females into newly opened combat units. *See, e.g.,* Mem. from Chairman, Joint Chiefs of Staff of Jan. 9, 2013 to Secretary. The Leaders First policies for both the Army and Marine Corps were derived from the 2013 unanimous proposal by the Joint Chiefs of Staff to rescind the military's 1994 direct ground combat definition and assignment rule ("DGCDAR"). *Id.* That proposal also stated that Service integration plans should ensure "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." *Id.*

Moreover, both the Army and Marine Corps have articulated further military justifications for the Leaders First policy. In June 2013, the Army tasked its Training and Doctrine Command (TRADOC) to conduct a multi-year Gender Integration Study (GIS) to

[11] The Army's Implementation Plan is available at https://www.defense.gov/Portals/1/Documents/pubs/WISR_Implementation_Plan_Army.pdf

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identify factors expected to affect integration and recommend implementation strategies to mitigate identified risks. *See* Gender Integration Study (GIS), Executive Summary.[12] A key recommendation of the study was to integrate female leaders first. *See* GIS, Recommendations in the Near-Term at 50. The study found that assigning more senior females to combat units prior to the assignment of female junior enlisted soldiers could minimize certain identified risk factors, such as sexual harassment, gender stereotypes, and combat unit culture. *See* GIS, Barrier 2 at 45-46.

Based on these recommendations, the Army developed its Leaders First strategy which was incorporated into the Army's implementation plan submitted to Secretary Carter for approval in January 2016. Upon approval, on 9 March 2016, Headquarters Army published its implementation plan directing the Army to begin a phased integration, noting in the narrative "[a] key element of this Integration Plan is the concept of 'leaders first,' which prescribes the placement of a female Armor or Infantry leader in a unit prior to the assignment of female junior enlisted Soldiers of the same branch to that unit." Army Implementation Plan at 1.

The Marine Corps also conducted studies which supported its own Leaders First strategy. *See* Fact Sheet: Women in Service Review (WISR) Implementation at 2, 5-6.[13] One study, conducted by the RAND Corporation, found that assignment of women in groups, rather than as solo individuals, was important to the satisfaction and success of the female military members. *See* The Implications of Integrating Women into the Marine Corps Infantry, RAND Corporation, 2015[14] at 33 ("However, the Marine Corps can learn from the experience of foreign militaries in using critical mass to guide the assignment of women. The experiences from foreign militaries suggest that attention to critical mass and to the numbers of women assigned to integrated combat units is likely to be important. Assigning women

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[12] The Army's Gender Integration Study (April 21, 2015) is available at https://www.defense.gov/Portals/1/Documents/wisr-studies/Army%20-%20Gender%20Integration%20Study3.pdf

[13] Available at https://www.defense.gov/Portals/1/Documents/pubs/Fact_Sheet_WISR_FINAL.pdf

[14] Available at https://www.rand.org/pubs/research_reports/RR1103.html

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in groups of a sufficient size does seem to increase their satisfaction and success, particularly in occupations in which there are a small number of women."). Another study from the University of Michigan suggested that assigning at least two female members could create more positive results in a predominately male group, than a single member. *See* Michigan State University Gender Diversity in Male-Dominated Teams – The Impact of Compositional Configurations Over Time.[15]

These justifications from the Joint Chiefs of Staff, along with the independent justifications of both the Army and Marine Corps, clearly articulate "legitimate" military interests that are advanced through the Leaders First policy and this Court may not substitute SWAN's judgment or its own for the military's when reviewing those claims. *Hawaii*, 138 S. Ct. at 2402 ("the Court cannot substitute its own assessment for the Executive's predictive judgments on such matters"). Based on such military judgments, both Leaders First policies already meet the highly deferential standard of review the Court must apply and therefore, SWAN has not plausibly stated an Equal Protection Claim as to either of these policies. *See also id.* at 2420-21; *Rostker* at 72-74; *Goldman*, 475 U.S. at 509-10.

ii.) The Marine Corps' Recruit Training Methodology Passes the Required Rational Basis Review.

SWAN's claim as to the unconstitutionality of Marine Corps Recruit Training ("MCRT") is similarly implausible. *See* TAC ¶ 24. MCRT is the introductory phase of transforming men and women into uniformed members of the Marine Corps; it provides the first building block in a process which builds physical strength and discipline for successful transitioning into advanced training. Marine Corps Order 1510.32F (2012)[16] at 1 ("Marine Corps Recruit Depot[] (MCRDs) Parris Island…[conducts] recruit training in order to transform recruits into basic Marines through a thorough indoctrination in our history, customs, and traditions and by imbuing them with the mental, moral, and physical foundation necessary for successful service to Corps and Country.").

[15] Available at https://www.defense.gov/News/Publications/WISR-Studies/
[16] Available at https://www.marines.mil/Portals/59/MCO%201510.32F.pdf

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As with the Leaders First policies, the policies governing military recruit training are reviewed under a highly deferential form of review. *See Winter*, 555 U.S. at 7. Therefore, the Department must show that the decision to keep some aspects of MCRT segregated along gender lines is supported by legitimate military justifications. *Hawaii,* 138 S. Ct. at 2419; *see also Rostker*, 453 U.S. at 80 ("Congress was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than 'equity.'"). The policies governing MCRT clearly meet this deferential standard because the training program is based upon the government's interest in maintaining the military readiness of the Marine Corps and not that of gender discrimination.

A recent report by the RAND Corporation explained that by separating male and female recruits at the initial stages of MCRT, the Marine Corps "[s]eeks to raise expectations for individual performance, instill high levels of confidence, and maximize physical fitness while minimizing injuries" without distraction. *See* An Assessment of Options for Increasing Gender Integration in Air Force Basic Military Training, Rand Corporation[17] at 26 (2018) (Although primarily a study regarding the Air Force, the Marine Corps was also the subject of this study). The report further noted that "[a]ll training that follows boot camp is gender-integrated." *Id.* The Commandant of the Marine Corps further explained these justifications before the Senate Armed Services Committee. In answer to the question from Senator Tillis "[w]hat in your professional military opinion are the benefits of that approach[]" the Commandant responded:

> "Because of the data we have on the physical differential and because of the opportunity for these female recruits to be led by female drill instructors and female officers, they see females as role models. There is no distraction and they are allowed to compete. They see other women that can lead and compete. They get an opportunity to improve their physical fitness, and then that gives them an opportunity to gain some confidence before …they graduate as [M]arines, [after which] every part of our training from [M]arine [C]ombat [T]raining to our MOS training of the operational force is fully integrated, men and women serving side by side." Remarks

[17] Available at https://www.rand.org/pubs/research_reports/RR1795.html

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 305-8902

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by Commandant of the Marine Corps, General Robert B. Neller before the Senate Armed Services Committee on February 2, 2016 at 91.[18]

The Commandant then stated that in his view this training method "is critical and sets [Marines] up for success." *Id.*

As a prior Congressional Commission study notes "[the Marine Corps'] [g]ender segregated recruit training has a significant effect on operational unit combat readiness/ effectiveness, not because of the military skills it teaches but because of the way it teaches them. It is the cornerstone of the Marine Corps' rheostat approach to gender integration. By separating the genders at recruit training, partially integrating them at [Marine Combat Training], and then fully integrating them at the various MOS schools, the Marine Corps has created a progressive training program that senior leaders believe develops mutual respect and appreciation among Marines." Congressional Commission on Military Training and Gender-Related Issues ("Blair Report"), Final Report, Vol. 1, (July 1999), at 181.[19] This process allows the Marine Corps to progressively intensify training in a phased manner with an end goal of creating a tactically proficient Marine for the operational environment. *Id.* at 99 ("The rheostat approach to training is designed to make the individual first into a Marine, no matter the gender, and then to produce effective operational units through unit and sustainment training. This works well for the Marine Corps because of their mission, composition, and culture.").

Indeed, the success of this process was shown at the time of the Blair Report by its measurement of Recruit graduate attitudes regarding commitment, respect for authority, and service branch identity—all of which are essential to training a Marine. *Id.* at 253. In these measurements, Marines scored the highest as a group, with female Marines who finished boot camp scoring the highest levels of all graduating Recruits measured. *Id.* at 253. The success of this model continues today as demonstrated by recent DoD data showing that female enlisted Marines are promoting at faster rates than men — on average picking up

[18] Available at https://www.armed-services.senate.gov/imo/media/doc/16-08_2-02-161.pdf
[19] Available at www.dtic.mil/dtfs/doc_research/p18_16v1.pdf

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20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 305-8902

E-6 almost a half year more quickly than male Marines. *See* https://www.marinecorpstimes.com/news/your-marine-corps/2018/06/27/why-are-they-moving-up-faster-women-in-the-corps-are-doing-better-than-you-think/.

Although SWAN disagrees with the Marine Corps' method of recruit training and apparently prefers the Army's method, TAC ¶ 46, the law is clear that courts should not second guess such military judgments. *See Goldman*, 475 U.S. at 507. Moreover, these reports show that the purpose of the Marine Corps' recruit training methodology is to ensure that civilians are transformed into Marines in a responsible and progressive manner. These are clearly legitimate military interests, and as with the Leaders First policies, the Court cannot substitute its own judgment for the Marine Corps' as to the best method of achieving those interests as Plaintiff has invited it to do. *See Hawaii,* 138 S. Ct. at 2419-2420; *see also Rostker*, 453 U.S. at 72-74. And as with the Leaders First policies, the policy rationale underlying Marine Corps Recruit Training is sufficient to satisfy the required rational basis review, and for that reason Plaintiff SWAN has not plausibly stated an equal protection claim as to any of the DoD policies it challenges.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's Third Amended Complaint in its entirety.

DATED: August 6, 2018

CHAD A. READLER
Acting Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Branch Director

ANDREW E. CARMICHAEL
Trial Attorney

By: */s/ Andrew E. Carmichael*
ANDREW E. CARMICHAEL

U.S. Department of Justice
Counsel for Defendant JAMES N. MATTIS

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 305-8902

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2018, I electronically filed the foregoing using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: August 6, 2018

/s/ Andrew E. Carmichael

ANDREW E. CARMICHAEL
Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-3346
Email: Andrew.e.carmichael@usdoj.gov

Counsel for Defendant