No. 20-

IN THE
Supreme Court of the United States

NATIONAL COALITION FOR MEN, JAMES LESMEISTER, AND ANTHONY DAVIS,

Petitioners,

v.

SELECTIVE SERVICE SYSTEM AND DONALD BENTON, AS DIRECTOR OF SELECTIVE SERVICE SYSTEM,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), this Court held that the Military Selective Service Act, under which men—but not women—are required to register for the draft, withstood constitutional challenge because women at that time were categorically prohibited from serving in combat roles. Because the primary purpose of registration was to replace combat troops, the Court explained, "[t]he existence of the combat restrictions clearly indicates the basis for Congress' decision to exempt women from registration." *Id.* at 77.

In 2013, the Department of Defense lifted the ban on women in combat. But the obligation to register remains limited to men.

The question presented is whether, in light of the Department of Defense having lifted the ban on women in combat, this Court should overrule *Rostker* and hold that the federal requirement that men but not women register for the Selective Service, authorized under 50 U.S.C. § 3802(a), violates the right to equal protection guaranteed by the Fifth Amendment.

PARTIES TO THE PROCEEDING

The National Coalition For Men, James Lesmeister, and Anthony Davis, petitioners on review, were the plaintiffs-appellees below.

The Selective Service System and Donald Benton, as Director of Selective Service System, respondents on review, were the defendants-appellants below.

RULE 29.6 DISCLOSURE STATEMENT

The National Coalition For Men is a 501(c)(3) non-profit corporation. It has no parent entities and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit:

National Coalition for Men v. *Selective Service System*, No. 19-20272 (5th Cir. Aug. 13, 2020) (reported at 969 F.3d 546)

U.S. District Court for the Southern District of Texas:

National Coalition for Men v. *Selective Service System*, No. H-16-3362 (S.D. Tex. Feb. 22, 2019) (reported at 355 F. Supp. 3d 568)

U.S. Court of Appeals for the Ninth Circuit:

National Coalition for Men v. *Selective Service System*, No. 13-56690 (9th Cir. Feb. 19, 2016) (unreported, available at 640 F. App'x 664)

U.S. District Court for the Central District of California:

National Coalition for Men v. *Selective Service System*, No. CV 13-2391 DSF (MANx) (C.D. Cal. July 29, 2013) (unreported, available at 2013 WL 12096510) (order granting motion to dismiss)

National Coalition for Men v. *Selective Service System*, No. CV 13-2391 DSF (MANx) (C.D. Cal. Nov. 9, 2016) (unreported, available at 2016 WL 11605246) (on remand, order granting in part and denying in part motion to dismiss and transferring action to the Southern District of Texas)

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PETITION FOR A WRIT OF CERTIORARI

National Coalition For Men, James Lesmeister, and Anthony Davis respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 969 F.3d 546. Pet. App. 1a-7a. The Southern District of Texas's opinion and order are reported at 355 F. Supp. 3d 568. Pet. App. 12a-34a.

JURISDICTION

The Fifth Circuit entered judgment on August 13, 2020. Pet. App. 1a. On March 19, 2020, this Court

extended the deadline to petition for a writ of certiorari to 150 days from the date of the lower court judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment, U.S. Const. amend. V, provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

The Military Selective Service Act, 50 U.S.C. § 3802(a), provides:

> Except as otherwise provided in this chapter, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 1101(a)(15) of Title 8, for so long as he continues to maintain a lawful nonimmigrant status in the United States.

INTRODUCTION

Every man in the United States must celebrate his eighteenth birthday by registering for the Selective Service. *See* 50 U.S.C. § 3802(a); Proclamation No. 4771 of July 2, 1980, 45 Fed. Reg. 45,247 (July 3, 1980) (requiring registration within thirty days of a man's eighteenth birthday or entry into the country, with limited exceptions). The act of registration has long had symbolic significance, *see United States* v. *O'Brien*, 391 U.S. 367 (1968), as well as practical consequences. Men who fail to register may face criminal prosecution, denial of federal student loans, disqualification from citizenship, and a host of other penalties.

Over forty years ago, several young men subject to the registration requirement challenged it as unlawful sex discrimination. *See Rostker* v. *Goldberg*, 453 U.S. 57 (1981). At the time, this Court had begun to invalidate sex-based laws predicated on outmoded notions of men's and women's abilities and preferences. *See, e.g.*, *Reed* v. *Reed*, 404 U.S. 71 (1971). Nevertheless, the Court upheld the men-only registration requirement because women were categorically banned from serving in combat roles. *Rostker*, 453 U.S. at 76-79. The Court relied in part on a Senate Armed Services Committee Report, *e.g.*, *id.* at 75-81, which in addition to noting women's categorical exclusion from combat roles, concluded that "drafting women would place unprecedented strains on family life," S. Rep. No. 96-826, at 159 (1980).

Rostker's fundamental premise is no longer true. In 2013, the Department of Defense lifted the ban on women in combat "effective immediately." Memorandum from Chairman of the Joint Chiefs of Staff, and Sec'y of Def., to Sec'ys of the Military Dep'ts Acting

Under Sec'y of Def. for Personnel and Readiness, and Chiefs of the Military Services 1 (Jan. 24, 2013) ("2013 Memo").[1] And in 2015, the Department of Defense announced that all military roles, units, and schools would officially be open to women with "no exceptions." Memorandum from Sec'y of Def., to Sec'ys of the Military Departments Acting Under Sec'y of Def. for Personnel and Readiness, Chiefs of the Military Services, and Commander, U.S. Special Operations Command 1 (Dec. 3, 2015) ("2015 Memo").[2] Thousands of women have since served with distinction in combat positions across all branches of the military.

It is time to overrule *Rostker*. The registration requirement has no legitimate purpose and cannot withstand the exacting scrutiny sex-based laws require. The Department of Defense and the National Commission on Military, National, and Public Service ("Commission") unequivocally acknowledge that requiring women and men alike to register would "promote fairness and equity" and further the goal of military readiness. Office of Under Sec'y of Def. for Personnel & Readiness, Dep't of Def., *Report on the Purpose and Utility of a Registration System for Military Selective Service* 17-19 (Mar. 2017) ("2017 Defense Report").[3] As the Commission has explained, by burdening only men while excluding women, the Military Selective Service Act ("MSSA") "sends a message" that women "are not vital to the defense of the country."

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[1] *Available at* https://dod.defense.gov/Portals/1/Documents/WISRJointMemo.pdf.

[2] *Available at* https://dod.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf.

[3] *Available at* https://hasbrouck.org/draft/FOIA/DOD-report-17MAR2017.pdf.

Nat'l Comm'n on Mil., Nat'l, & Pub. Serv., *Inspired to Serve: Final Report of the National Commission on Military, National, and Public Service* 118 (Mar. 2020).

Rostker was wrong, moreover, when it was decided. The Court in *Rostker* should have examined whether *excluding* women from registration was substantially related to furthering the government's interest in raising and supporting armies. But instead, the Court asked whether *including* women was necessary to meet that interest in light of the ban on women in combat. The Court ultimately justified one sex-based discrimination by reference to another, rather than examining whether the combat ban was itself discriminatory. The Court also overlooked evidence that Congress's desire to exclude women from registration was rooted in archaic stereotypes about men's and women's roles within and outside of the home.

This petition presents an ideal vehicle to revisit *Rostker*. The registration requirement is one of the last sex-based classifications in federal law. It imposes selective burdens on men, reinforces the notion that women are not full and equal citizens, and perpetuates stereotypes about men's and women's capabilities. The district court below declared men-only registration unconstitutional, reasoning that *Rostker* no longer controls because the changed factual circumstances nullify the underlying justification for retaining the sex distinction in registration. Pet. App. 23a-34a. The Fifth Circuit reversed. It acknowledged that the fundamental predicate for *Rostker* no longer obtains, but held that *Rostker* remains "controlling" unless and until this Court revisits it. *Id.* at 6a-7a.

Should this Court repudiate men-only registration, Congress can choose the path forward from there.

President Carter called on Congress to address the discriminatory registration regime 40 years ago. The Defense Department itself and the Commission formed to study the issue have concluded that the men-only requirement undermines military interests. Yet it has stood for four decades as "one of the most potent remaining public expressions of ancient canards about the proper role of women." *Rostker*, 453 U.S. at 86 (Marshall, J., dissenting) (internal quotation marks omitted). This Court should overturn *Rostker* and declare the men-only registration requirement unconstitutional.

STATEMENT

A. The Military Selective Service Act.

Under the MSSA, "it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who * * * is between the ages of eighteen and twenty-six, to present himself for and submit to registration" for the Selective Service within thirty days of his eighteenth birthday or arrival in the United States. 50 U.S.C. § 3802(a); Proclamation No. 4771, 45 Fed. Reg. 45,247; *see Selective Service–Who Must Register*, Selective Serv. Sys., https://www.sss.gov/wp-content/uploads/2020/11/WhoMustRegisterChart.pdf (last visited Jan. 7, 2021) (identifying limited exceptions).

Upon registering, men must provide their full name, date of birth, address, and Social Security number. 50 U.S.C. § 3802(b); *see Register*, Selective Serv. Sys., https://www.sss.gov/register (last visited Jan. 7, 2021). Men subject to this requirement must update

the Selective Service System within ten days of any address change. And they must do so every time they move until age twenty-six. 32 C.F.R. § 1621.1(a). Men who knowingly fail to comply are subject to penalties, including up to five years' imprisonment, a fine of $250,000, or both. 50 U.S.C. § 3811(a); 18 U.S.C. § 3571(b); *see Benefits & Repercussions*, Selective Serv. Sys., https://www.sss.gov/register/benefits-and-repercussions (last visited Jan. 7, 2021). They may be denied federal civil service appointments, federal student loans, and job training assistance. 5 U.S.C. § 3328(a); 50 U.S.C. § 3811(f); *see* 29 U.S.C. § 3249(h). They may also be denied citizenship. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 201(a), § 245A(a)(4)(D), 100 Stat. 3359, 3395; 8 C.F.R. § 245a.11(d)(3). Women face none of these burdens or penalties.

The modern "selective service" approach was first adopted in World War I. Unlike earlier draft programs, which enrolled all eligible individuals, this method permitted the Government to "*select* individuals from a pool of registrants," lessening the risk that the Government would draft workers performing crucial roles in the domestic industrial base. Cong. Rsch. Serv., R44452, *The Selective Service System and Draft Registration: Issues for Congress* 3 (2020) ("CRS Selective Service Report"). The United States inducted nearly three million men during World War I, and over ten million men during World War II. *Id.* at 13, tbl. 1.[4]

[4] As used in this petition, "draft" refers to the process by which registered individuals are selected by lottery. "Inducted" and

The draft was next used during the wars in Korea and Vietnam, when the United States inducted approximately 1.5 million and 1.8 million men, respectively. *Id.* As those numbers grew, so too did public opposition to the draft, leading President Ford to suspend registration in 1975. *Id.* at 14. Many expressed concern, however, that absent a registration requirement, the military would not "have the resources or infrastructure" to respond rapidly in an emergency. *Id.* Those fears came to a head in 1979 when the Soviet Union invaded Afghanistan, leading President Carter to reinstate the registration requirement. It has remained in effect since. *Id.*

B. Integration Of Women Into Military Service.

Following World War II, in which hundreds of thousands of women served,[5] Congress formally recognized women as an enduring part of the military in the Women's Armed Services Integration Act of 1948. Pub. L. No. 80-625, 62 Stat. 356. The Act permitted women to enlist and serve in all branches of the

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"conscripted" are used interchangeably to refer to drafted individuals who have entered the military. *See Return to the Draft*, Selective Serv. Sys., https://www.sss.gov/about/return-to-draft/#s1 (last visited Jan. 7, 2021).

[5] *See Pers. Adm'r of Massachusetts* v. *Feeney*, 442 U.S. 256, 269 n.21 (1979) (350,000 women served during World War II). Congress considered drafting women nurses during World War II. Following the Allied invasion of Normandy, President Roosevelt called for a draft of nurses to care for the wounded, describing the need as "too pressing to await the outcome of further efforts at recruiting." CRS Selective Service Report, *supra*, at 6-7 (internal quotation marks omitted). The House of Representatives authorized the draft of nurses by a vote of 347 to 42, but the legislation stalled in the Senate as the war drew to a close. *See id.*

Armed Services. *Id.* But women were prohibited from serving in combat positions—by statute, with respect to the Air Force and Navy, and by "established policy," with respect to the Army and Marines. *Rostker*, 453 U.S. at 76. Women were also prohibited from holding a rank above lieutenant colonel or commander and barred from serving on most ships. *See* Women's Armed Services Integration Act of 1948 §§ 104(c), 104(d)(3), 203, 210, 212, 303(c).

Over time, the Armed Forces and Congress removed many of these restrictions. In the 1960s and 1970s, Congress eliminated prohibitions on women serving on ships and at the highest levels of the military. *See* Cong. Rsch. Serv., R44321, *Diversity, Inclusion, and Equal Opportunity in the Armed Services: Background and Issues for Congress* 25-26 (2019) ("CRS Diversity Report"). At Congress's request, President Carter convened a task force in 1980 to "examine[] initiatives to maintain and improve our active and reserve Armed Forces." Staff of H. Comm. on Armed Servs., 96th Cong., Presidential Recommendations for Selective Service Reform 1, 23 (Comm. Print 1980). The task force recommended extending the MSSA's registration requirement to women. *See id.* President Carter agreed, stating that women could "perform well in skills and jobs needed by the military" and that registering women would help the Armed Forces meet "wartime personnel requirements." *Id.* at 22-23.

But Congress rejected the task force's proposal. A Senate Armed Services Committee Report, later adopted by both Houses of Congress, explained that the ban on women in combat was both the "starting point" for Congress's analysis and "the most im-

portant reason for not including women in a registration system." S. Rep. No. 96-826, at 157; *see Rostker*, 453 U.S. at 76-77. The report also invoked "important societal reasons" for not extending registration to women, concluding "that drafting women would place unprecedented strains on family life" by requiring "a young mother" to serve in the Armed Forces while "a young father remain[ed] home with the family." S. Rep. No. 96-826, at 159. "[S]uch a result * * * is unwise and unacceptable to a large majority of our people," the report opined. *Id.*

C. *Rostker* v. *Goldberg*.

In 1980, a district court declared the MSSA's men-only registration requirement unconstitutional on equal-protection grounds, but this Court reversed. *Rostker*, 453 U.S. at 63, 83. Applying the standard of review articulated in *Craig* v. *Boren*, 429 U.S. 190 (1976), this Court held that "the Government's interest in raising and supporting armies is an important governmental interest." *Rostker*, 453 U.S. at 70 (internal quotation marks omitted). In light of congressional testimony regarding "the current thinking as to the place of women in the Armed Services," the Court deferred to Congress's "studied choice of one alternative in preference to another." *Id.* at 71-72.

"The existence of the combat restrictions clearly indicates the basis for Congress' decision to exempt women from registration," this Court explained, and thus the "exemption of women from registration is not only sufficiently but closely related to Congress' purpose in authorizing registration." *Id.* at 77, 79. "The purpose of registration * * * was to prepare for a draft *of combat troops*," and "[w]omen as a group, * * * unlike men as a group, are not eligible for combat." *Id.*

at 76. "Men and women," this Court held, "because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft." *Id.*

Three Justices dissented.

D. Women Begin To Serve In Combat Roles.

In the decades following *Rostker*, women's eligibility for military roles has continuously expanded, culminating in the military rescinding the categorical ban on women in combat roles.

In the 1960s and 1970s, Congress eliminated the restrictions on women serving at the highest levels of the military. *See* CRS Diversity Report, *supra*, at 25-26. In the 1990s, Congress removed the restrictions on assigning women to combat aircraft and ships. *See id.* at 27. And the Department of Defense rescinded the rule barring women from serving in positions at risk of direct combat (known as the "Risk Rule"), although it continued to prevent women from serving in units "whose primary mission is to engage in direct combat on the ground." Memorandum from the Sec'y of Def. to Sec'ys of the Army, Navy, Air Force; Chairman, Joint Chiefs of Staff; and Asst. Sec'ys of Defense 1 (Jan. 13, 1994) ("1994 Memo").[6]

In 2012, the Department of Defense rescinded the military's "co-location policy," which had excluded women from units serving alongside "direct ground combat units." Office of Under Sec'y of Def., Personnel & Readiness, Dep't of Def., *Report to Congress on the*

[6] *Available at* https://www.govexec.com/pdfs/031910d1.pdf.

Review of Laws, Policies and Regulations Restricting the Service of Female Members in the U.S. Armed Forces ii (Feb. 2012).[7] The Department of Defense, "in coordination with the Military Departments and the Joint Staff," found "no compelling reason for continuing" this policy because "the dynamics of the modern-day battlefield are non-linear, meaning there are no clearly defined front line and safer rear area." *Id.* at 3.

In 2013, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff rescinded the rule categorically barring women from serving in direct ground combat roles. 2013 Memo, *supra*.[8] This change was intended to "fully integrate women without compromising our readiness, morale, or war-fighting capacity." *Id.* at 1. Though the rescission was "effective immediately," the Defense Secretary allowed the military additional time to consider whether some roles should nonetheless remain closed to women. *Id.* at 1-2.

Following "three years of extensive studies," *Dep't of Def. Press Briefing by Sec'y Carter in the Pentagon Briefing Room*, Dep't of Def. (Dec. 3, 2015),[9] the Defense Secretary in 2015 determined no exceptions were warranted and women "should have the opportunity to serve in any position," 2015 Memo, *supra*, at

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[7] *Available at* https://apps.dtic.mil/dtic/tr/fulltext/u2/a556468.pdf.

[8] The terms "roles" and "positions" in this petition refer to Military Occupational Specialties, or MOS, as referenced in the 2013 Memo and the 1994 Memo.

[9] *Available at* https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/632578/department-of-defense-press-briefing-by-secretary-carter-in-the-pentagon-briefi.

1. This decision, the Secretary explained, followed a "rigorous analysis of factual data" demonstrating that the Department of Defense's previous standards were "either outdated or didn't reflect the tasks actually required in combat" given "real-world operational requirements." 2015 Press Briefing, *supra*. Women would now be permitted to "drive tanks, fire mortars, and lead infantry soldiers into combat. They'[d] be able to serve as Army rangers and green berets, Navy SEALS, Marine Corps infantry, Air Force parajumpers and everything else that was previously open only to men." *Id.*[10]

Since the ban on women in combat roles was lifted, over 2,900 women have served in Army combat positions alone. *See Inspired to Serve*, *supra*, at 114. Women have graduated from elite military training programs, including the Army's Ranger School,[11] the Navy Seal officer assessment and selection program,[12]

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[10] The Defense Secretary approved the Services' final implementation plans for the full integration of women in March 2016. Memorandum from Sec'y of Def. to Sec'ys of the Military Dept's; Under Sec'y of Def. for Pers. & Readiness; Chiefs of the Military Servs.; and Commander, U.S. Special Operations Command (Mar. 9, 2016), *available at* https://www.hsdl.org/?view&did=791183.

[11] Ellen Haring, *Meet the Quiet Trailblazers*, ArmyTimes (May 3, 2020), https://www.armytimes.com/opinion/commentary/2020/05/03/meet-the-quiet-trailblazers.

[12] Hope Hodge Seck, *The First Woman Has Made it Through SEAL Officer Screening*, Military.com (Dec. 11, 2019), https://www.military.com/daily-news/2019/12/11/first-woman-has-made-it-through-seal-officer-screening.html.

and the Green Berets.[13] And women have given their lives in combat in service to this country.[14]

E. Congress Maintains The Men-Only Registration Requirement Despite Commission Recommendation.

The Department of Defense notified Congress in late 2015 that it had rescinded the ban on women in combat roles without exception. *See* Pet. App. 48a-50a. The Department acknowledged that by lifting the combat ban, it had changed the "backdrop" against which this Court decided *Rostker*. *Id.* at 53a.

In a subsequent report to Congress, the Department of Defense explained that expanding the registration requirement to women would have numerous direct and indirect benefits. 2017 Defense Report, *supra*, at 17-19. For example, registering women would "enhance the ability of the [Selective Service System] to provide manpower" in "accordance with its force needs," "provide[ ] valuable military recruiting leads," and reinforce the importance of public service. *Id.* at 17-18. And it would "promote fairness and equity," signaling "to allies and potential enemies alike[ ] an enhanced resolve to defend our nation and its partners, through the commitment and capability of the entirety of our citizenry." *Id.* at 18-19.

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[13] Thomas Gibbons-Neff, *First Woman Joins Green Berets After Graduating From Special Forces Training*, N.Y. Times (July 16, 2020), https://www.nytimes.com/2020/07/09/us/politics/woman-green-berets-army.html.

[14] *See, e.g.*, Liz Sawyer, *Minnesota woman among six Americans killed in Afghan attack*, StarTribune (Dec. 23, 2015), https://www.startribune.com/minnesota-woman-among-six-americans-killed-in-afghan-attack/363317681.

Instead of extending registration to women, however, Congress established the Commission to further evaluate whether to expand the MSSA's registration requirement to women. *See* Nat'l Def. Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 555(c)(2)(A), 130 Stat. 2000, 2135 (2016).[15] In the Commission's final report, it unreservedly recommended taking that "necessary—and overdue—step." *Inspired to Serve*, *supra*, at 122. As the Commission explained, this measure would "promote[ ] the national security of the United States by allowing the President to leverage the full range of talent and skills available during a national mobilization," "reaffirm[ ] the Nation's fundamental belief in a common defense, and signal[ ] that both men and women are valued for their contributions in defending the Nation." *Id.* at 115.

Despite both the Commission's and the Department of Defense's views, Congress has not acted.

F. Procedural History.

Petitioner National Coalition For Men (NCFM)'s stated mission is to end harmful stereotypes against boys and men. Its members include men between the ages of eighteen and twenty-six subject to the MSSA's registration requirement. Petitioners James Lesmeister and Anthony Davis are two such young

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[15] The Senate version of the 2016 NDAA would have required women to register because, now that "the ban on females serving in ground combat units has been lifted * * *, there is no further justification to apply the [MSSA] to males only." S. Rep. No. 114-255, at 150-151 (2016). The legislative history contains little discussion about why Congress elected to establish the Commission rather than enact the Senate's amendment. *See* Pet. App. 28a n.5.

men. Since turning eighteen, Mr. Lesmeister and Mr. Davis have been required to continually maintain their registration in the face of severe penalties if they fail to do so. *See* Pet. App. 40a-41a.

After the Department of Defense announced that the ban on women in combat was rescinded—but before implementation plans had been fully developed—Mr. Lesmeister and NCFM challenged the men-only registration requirement in the U.S. District Court for the Central District of California. Petitioners argued that, in light of the rescission of the combat ban, *Rostker* was no longer good law and the gender-based registration requirement was unconstitutional.

The District Court for the Central District of California initially dismissed the suit on ripeness grounds, stating that it was unclear when the policy change would go into effect. *See id.* at 45a. The Ninth Circuit reversed, finding that any uncertainty had dissipated with the Defense Secretary's 2015 announcement, and concluding that Mr. Lesmeister and NCFM members were subject to continuing obligations under the MSSA. *See id.* at 45a-47a. On remand, the Central District of California transferred the case to the Southern District of Texas, where Mr. Lesmeister resided, and Mr. Davis joined the suit. *See id.* at 37a.

The District Court for the Southern District of Texas affirmed that Petitioners had standing and that the case was ripe. *Id.* at 15a-18a, 40a-42a. The court issued a declaratory judgment concluding that because women can now serve in combat positions, "*Rostker* is factually distinguishable." *Id.* at 21a. The court held that the men-only registration requirement could no longer survive heightened scrutiny because, given the

rescission of the combat ban, that requirement is not "substantially related to Congress's important objective of drafting and raising combat troops." *Id.* at 27a, 34a. Respondents' contrary arguments "smack[ed] of 'archaic and overbroad generalizations' about women's preferences," *id.* at 29a (quoting *Schlesinger* v. *Ballard*, 419 U.S. 498, 507-508 (1975)), and were the "'accidental by-product of a traditional way of thinking about females,' rather than a robust, studied position," *id.* at 34a (quoting *Rostker*, 453 U.S. at 74).

The district court denied Petitioners' request for an injunction requiring both men and women—or neither—to register, explaining that "[t]he legislative branch is best equipped—and constitutionally empowered—to reform the draft registration system." *Id.* at 11a. Petitioners did not appeal that ruling.

Respondents appealed, and the Fifth Circuit reversed. The court acknowledged that "the factual underpinning of the controlling Supreme Court decision has changed." *Id.* at 6a. It nevertheless concluded that "only the Supreme Court may overrule its precedents," even when they rest on "increasingly wobbly, moth-eaten foundations." *Id.* at 6a-7a (internal quotation marks omitted). The Fifth Circuit held that "*Rostker* forecloses" Petitioners' claims unless and until this Court holds otherwise. *Id.* at 7a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RECONSIDER *ROSTKER* AND HOLD THAT THE MEN-ONLY REGISTRATION REQUIREMENT VIOLATES THE FIFTH AMENDMENT.

The men-only registration requirement is one of the last remaining *de jure* sex distinctions in federal law. Under *Rostker*, it has remained undisturbed for 40 years. In light of the military's rescission of the combat ban—and the fact that *Rostker* was wrongly decided to begin with—this Court should reconsider *Rostker*.

Stare decisis generally counsels in favor of retaining precedent, but it "is not an inexorable command." *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009) (internal quotation marks omitted). It is appropriate for this Court to overrule a prior decision where later developments have "eroded" its "underpinnings," the original decision cannot be squared with related decisions, *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995), and reliance interests are limited, *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018). *See, e.g.*, *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2481, 2485-86, 2493 (2018).

Each criterion is met here. *Rostker*'s central premise—that it was appropriate not to register women because women were banned from combat—is no longer true. *Rostker* was wrong when it was decided and conflicts with later precedent, as the men-only registration requirement was predicated on outmoded notions of men's and women's abilities and preferences. And there are no significant reliance interests; indeed, the

military has advised Congress that extending registration to women would have many benefits. This Court should overrule *Rostker*.

A. *Rostker*'s Key Factual Underpinning Has Been Extinguished.

As both lower courts recognized, *Rostker*'s factual foundation crumbled when the military rescinded the categorical prohibition on women serving in combat roles.

In *Rostker*, the Court held that the men-only registration requirement was "not a case of Congress arbitrarily choosing to burden one of two similarly situated groups." 453 U.S. at 78. Rather, the Court explained, "because of the combat restriction on women," men and women "are simply not similarly situated for purposes of a draft or registration for the draft." *Id.* The "gender classification" in the MSSA thus "realistically reflects the fact that the sexes are not similarly situated in this case." *Id.* at 79 (internal quotation marks omitted).

That is no longer true. The combat ban was rescinded in 2013. *See* 2013 Memo, *supra*. In 2015, the Department of Defense determined that women should be permitted to serve in *all* military positions across all military branches—"including infantry, armor, reconnaissance, and *** special operations units," with "no exceptions." 2015 Press Briefing, *supra*. That decision represented a culmination of the steady erosion of restrictions on women's military service in the years since *Rostker*. As the military explained, these changes continued to "move forward" its plan "to eliminate all unnecessary gender-based barriers to service." Memorandum from Chairman of

the Joint Chiefs of Staff to Sec'y of Def. (Jan. 9, 2013) ("Chairman Memo").[16]

Because women and men now serve in combat positions, both are eligible to serve as combat replacements. Thus, in *Rostker*'s terms, women are now "similarly situated" to men for purposes of registration. 453 U.S. at 78. Consequently, any need to replace combat troops through the Selective Service can no longer justify the MSSA's limitation to men.

The related concerns *Rostker* cited regarding the logistical impacts of registering women on military flexibility—to the extent they were ever valid—have similarly evaporated. *Rostker* deferred to Congress's decision to credit testimony that "training would be needlessly burdened by women recruits who could not be used in combat"; that inducting women would raise "administrative problems"; and that "divid[ing] the military into two groups—one in permanent combat and one in permanent support"—would impede military flexibility. *Id.* at 81-82 (quoting S. Rep. No. 96-226, at 9 (1979); S. Rep. No. 96-826, at 158-159).

All of those concerns hinged on the ban on women in combat roles. None remains relevant today. The military has over a decade of experience with the efficient deployment of combat units including men and women, in times of both war and peace, in a manner that "ensures combat effectiveness and protects the welfare of the force." 2015 Memo, *supra*, at 1; *see also* 2013 Memo, *supra*; Chairman Memo, *supra*. And the military has developed training standards that apply to both men and women. *See* Chairman Memo, *supra*; Dep't of the Army, *Annual Report on Progress of the*

[16] *Available at* https://www.hsdl.org/?view&did=729422.

Army in Integrating Women into Military Occupational Specialties and Units Recently Opened to Women: Report to Congress 2 (July 2019).[17] Women have successfully graduated from military academies and training programs at all levels, from basic training to the elite forces.[18] *See supra* pp. 13-14. Indeed, the Selective Service System in this litigation admitted that it is "presently unaware of any specific logistical problems that would arise if women were required to register for the Selective Service." Pet. App. 55a. The administrative and logistical concerns discussed in *Rostker* thus no longer exist.

The argument in *Rostker* that registering women would somehow hinder military readiness, moreover, has been decidedly refuted. *See* 453 U.S. at 80-81. As military leadership recognized in lifting the combat ban, women serve in increasingly diverse military roles and provide invaluable contributions to the national defense. And this is particularly true given the changing realities of modern warfare—in which the line between combat and non-combat positions has become more indistinct. *See supra* pp. 12-13.

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[17] *Available at* https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/Sept2019/USA%20RFI%205.pdf.

[18] To be sure, as a result of women's historical exclusion from combat roles and other critical positions in the military, women have yet to achieve equal participation within the current all-volunteer force, and significant obstacles remain to women's advancement. *See* U.S. Gov't Accountability Off., GAO-20-61, Female Active-Duty Personnel: Guidance and Plans Needed for Recruitment and Retention Efforts (2020). That is a different battle on a different front. *See* Third Am. Compl., *Serv. Women's Active Network* v. *Esper*, No. 12-CV-06005-EMC (N.D. Cal. June 28, 2018), ECF No. 122.

Indeed, it was largely these changes that led both the Commission and the Department of Defense to inform Congress that the current men-only registration requirement *undermines* national security. *See Inspired to Serve*, *supra*, at 116; 2017 Defense Report, *supra*, at 17-19. As the Commission put it, "the potential for ground combat should not be a basis for excluding women from the registration requirement" because "the very notion of a front line is outdated." *Inspired to Serve*, *supra*, at 116. "[N]early 80 percent of today's military positions are classified as noncombat," and a "future draft in support of today's modern military is likely to require [support services as well as] intelligence and communication specialists, linguists, logisticians, medical personnel, and drone or cyber operators, among others." *Id.*; *see* 2017 Defense Report, *supra*, at 17 ("Future wars may have requirements for skills in non-combat fields in which the percentage of individuals qualified would not be as variable by gender."). Thus, in addition to serving in combat positions as traditionally understood, women are also equally qualified to serve in all other military capacities. Given these increasingly diverse military needs, the Department of Defense explained that "[i]t would appear imprudent to exclude approximately 50% of the population—the female half—from availability for the draft in the case of a national emergency." 2017 Defense Report, *supra*, at 17. Instead, a "broader, deeper registrant pool would enhance the ability of the SSS to provide manpower to the [Department of Defense] in accordance with its force needs." *Id.*

The predicate of *Rostker* thus no longer holds. It can no longer be said that limiting registration to men serves the nation's interest in military preparedness.

Both the Department of Defense and the Commission have unequivocally concluded that extending the registration requirement to women would *promote*, rather than impede, military readiness. Men and women are similarly situated for purposes of registration, and there is no justification for imposing a registration requirement on men only and treating women as not fit for this obligation of citizenship.

B. *Rostker* Was Wrongly Decided And Conflicts With Later Precedent.

Not only is *Rostker* unjustifiable today, it was wrong when it was decided, and it cannot be squared with this Court's subsequent equal protection decisions. The demanding heightened-scrutiny test has led the Court to invalidate almost all sex-based classifications it has considered. The MSSA should be no different.

Heightened scrutiny applies to all sex-based classifications. *See Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1689-90 (2017); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 723-724 (1982). The gender distinction must be substantially related to achieving an important government objective; and any justifications offered must be " 'exceedingly persuasive,' " and the "demanding" "burden of justification * * * rests entirely on the State." *United States* v. *Virginia*, 518 U.S. 515, 532-533 (1996) (quoting *Hogan*, 458 U.S. at 724).

Rostker failed to apply that standard. Instead of examining whether *excluding* women from registration was substantially related to furthering the government's interest in raising and supporting armies, the Court asked whether *including* women was *necessary* to meet that interest. *Compare Rostker*, 453 U.S. at

77 (explaining that because women were banned from combat, there was no need to register women), *and id.* at 81 ("Congress simply did not consider it worth the added burdens of including women in draft and registration plans."), *with id.* at 105 (Marshall, J., dissenting) ("[I]t is incumbent on the Government to show that excluding women from a draft to fill those positions substantially furthers an important governmental objective.").

Decades of equal protection jurisprudence demonstrate that this was error. Just one Term after *Rostker*, this Court rejected the notion that admitting only women to a state nursing school furthered the state's purported objective of providing opportunities for women to obtain training in that field. *See Hogan*, 458 U.S. at 729-730. *Hogan* did not ask whether the state could meet its goal by admitting only women; it asked whether *excluding men* was substantially related to achieving that goal, and found it was not. *Id.* at 731 ("[T]he record in this case is flatly inconsistent with the claim that excluding men * * * is necessary to reach any of [Mississippi University for Women's] educational goals."). Similarly, in *Virginia*, the Court did not inquire whether Virginia's goal of producing citizen soldiers could be achieved without admitting women—the state's history made that self-evident. *See* 518 U.S. at 520. Rather, the decision hinged on the finding that the state's goals were not "substantially advanced by women's categorical *exclusion*." *Id.* at 545-546 (emphasis added); *see also J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 137 (1994) (considering whether gender-based peremptory challenges "provide substantial aid to a litigant's effort to secure a fair and impartial jury").

Rostker is fundamentally at odds with those precedents because it improperly absolved the Government of its burden to demonstrate that *excluding* women from registration would advance military readiness. In fact, the legislative record showed that women at the time were qualified to serve in some 80,000 non-combat positions, freeing an equal number of men to serve in combat positions. 453 U.S. at 80-81; *id.* at 100 (Marshall, J., dissenting). And military officials had testified that they supported registering women to better understand "the available strength * * * within the military qualified pool in this country." S. Rep. No. 96-226, at 14.

Yet the Court accepted the Government's argument that there would be no need to draft women to satisfy the need for combat replacements because there were already enough men in the registrant pool, and because women could not serve in combat roles. This simply uses one sex-based distinction to justify another—and is precisely the sort of tautological reasoning this Court has repeatedly rejected. *See, e.g.*, *Virginia*, 518 U.S. at 545 (rejecting as "notably circular" the government's stated justification that preserving VMI's men-only admission policy was necessary to preserve the institution's single-sex character). Indeed, if preserving the discriminatory status quo were sufficient justification for continued exclusion of women, practically every equal protection challenge to a sex-based classification would have been decided differently.

Moreover, *Rostker* ignored evidence that Congress's refusal to extend registration to women in 1980 rested at least in part on archaic gender stereotypes, and

failed to reckon with how women's continued exclusion served to "perpetuate historical patterns of discrimination." *J.E.B.*, 511 U.S. at 139-140 n.11.

In upholding the men-only registration requirement, *Rostker* relied heavily on findings in the Senate Armed Services Committee Report, later adopted by both Houses of Congress, about military preparedness and needs. 453 U.S. at 65. That report emphasized the "sweeping implications for our society" and "unprecedented strains on family life" conscripting women would cause. S. Rep. No. 96-826, at 159. Imagine "a young mother being drafted and a young father remaining home with the family in a time of national emergency," the report warned. *Id.* Such a result, it concluded, would be "unwise and unacceptable to a large majority of our people." *Id.*; *see also id.* at 161 (including findings that the "administration has given insufficient attention to * * * the induction of young mothers, and to the strains on family life that would result from the registration and possible induction of women").[19]

This Court has long prohibited gender classifications based on such stereotypes, recognizing that "if a 'statutory objective is to exclude or "protect" members of one gender' in reliance on 'fixed notions concerning

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[19] The facts underlying these stereotyped justifications have changed as well. The military now has a host of policies to address the needs of families, including parental leave, breastfeeding support, and deployment exemptions for pregnancy and postpartum recovery and adoptive parents. *See Inspired to Serve*, *supra*, at 112-113 & nn. 290-291; *Breastfeeding Resources*, Army Pub. Health Ctr. (Jan. 15, 2020), https://phc.amedd.army.mil/topics/healthyliving/wh/Pages/BreastfeedingandBreast-Health.aspx; Dep't of Def. Instruction 1342.19 § 4(g) (issued May 7, 2010, rev. Nov. 30, 2017).

[that gender's] roles and abilities,' the 'objective itself is illegitimate.' " *Morales-Santana*, 137 S. Ct. at 1692 (quoting *Hogan*, 458 U.S. at 725) (alteration in original). The Senate Armed Services Committee's concern about the "unacceptable" result of fathers raising their children is precisely that sort of habitual stereotype. S. Rep. No. 96-826, at 159; *see Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 736 (2003) (rejecting the "self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver"). This Court's conclusion in *Rostker* that "the decision to exempt women from registration was not the 'accidental by-product of a traditional way of thinking about females' " ignored the record. 453 U.S. at 74 (quoting *Califano* v. *Webster*, 430 U.S. 313, 320 (1977)).[20]

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[20] The committee reports accompanying the 1948 Act, for their part, did not discuss the decision to exclude women from the draft at all. During the 1940s, however, several legislators discussed the possibility of registering women as an argument against requiring *anyone* to register. *See, e.g.*, 94 Cong. Rec. 8385 (1948) (statement of Rep. Douglas) (arguing against peacetime draft by observing that "[i]f men are to be drafted, why not women, too?"); 91 Cong. Rec. 3565 (1945) (statement of Sen. Wheeler) ("[W]e have been shocked to hear that women in Russia are going into the combat service," but "we are more civilized, more Christianlike, than some nations that have done such things."). Under similar circumstances, this Court has had no difficulty concluding that a lack of articulated justification for the exclusion of women reflected "once habitual, but now untenable, assumptions" regarding women's domestic roles. *Morales-Santana*, 137 S. Ct. at 1690-91; *see Virginia*, 518 U.S. at 533-534; *J.E.B.*, 511 U.S. at 132-134; *Stanton* v. *Stanton*, 421 U.S. 7, 14-15 (1975).

Finally, *Rostker* failed to consider the extent to which the exclusion of women from registration, and ultimately from the obligation to serve if called, "create[d] or perpetuate[d] the legal, social, and economic inferiority of women." *Virginia*, 518 U.S. at 534. The obligation to defend one's country is a central attribute of citizenship; denying that obligation to women treats them as less than full citizens simply by virtue of their sex. Yet *Rostker* did not even address that concern. Heightened scrutiny requires a more searching analysis. *See J.E.B.*, 511 U.S. at 140 n.11 (equal protection analysis "requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination"). A faithful application of that test would have required the Court to inquire whether the combat ban was itself premised on "overbroad generalizations about the * * * talents, capacities, or preferences" of women, *Virginia*, 518 U.S. at 533, or upon attitudes of "romantic paternalism," *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion).

In short, *Rostker* is an outlier in this Court's sex discrimination jurisprudence, wrong when it was decided, and even more evidently erroneous today.

C. No Significant Reliance Interests Counsel Against Revisiting *Rostker*.

There are no significant reliance interests at stake or other factors that would prevent the Court from overruling *Rostker*. The draft is not in effect; if this Court repudiates *Rostker*, Congress will have time to choose the appropriate course of action—including ex-

tending registration to women, eliminating the registration requirement, or adopting a new system for ensuring military readiness.

The Department of Defense has acknowledged that extending the registration requirement to women carries many benefits. *See* 2017 Defense Report, *supra*, at 17-19. The Commission has concluded there is no rationale for continuing to exclude women. *See Inspired to Serve*, *supra*, at 116. And addressing the issue now—when there is no threat of the draft being reinstated—leaves time for Congress and the military to remedy the issue. Any reliance interests that may exist, moreover, do not "outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Arizona* v. *Gant*, 556 U.S. 332, 349 (2009).

* * *

Under heightened scrutiny, the justification for a sex-based classification is not frozen in perpetuity. It must be reevaluated as circumstances change. *See Morales-Santana*, 137 S. Ct. at 1690; *Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663, 669-670 (1966). And those circumstances have changed dramatically. The factual and legal bases of the Court's ruling in *Rostker* have been upended; its central predicate has been eliminated with the combat ban's rescission. The decision was poorly reasoned then and is a stark outlier now. And the Government has never identified any discernible reliance interests. The Court should revisit *Rostker* and hold that the men-only registration requirement is unconstitutional.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

Whether "a fundamental civic obligation" and its concomitant burdens may be limited to men solely because of their sex is a question worthy of this Court's review. *Rostker*, 453 U.S. at 86 (Marshall, J., dissenting); *see Rostker* v. *Goldberg*, 448 U.S. 1306, 1309 (1980) (Brennan, J., in chambers) ("The importance of the question and the substantiality of the constitutional issues are beyond cavil."). Limiting registration for compulsory government service to men places a significant burden on men alone, simply because of their sex, with wide-ranging consequences for both individuals and society. It also perpetuates pernicious stereotypes about the "proper" roles of men and women. That is precisely what the Constitution's guarantee of equal protection guards against.

Since this Court first recognized that the right to equal protection protects against sex discrimination, *see Reed*, 404 U.S. 71, it has granted certiorari in dozens of cases involving sex-based classifications and has invalidated those classifications in nearly all, including those touching on the military. *See, e.g.*, *Virginia*, 518 U.S. at 539-540; *J.E.B.*, 511 U.S. at 130-131; *Hogan*, 458 U.S. at 729-730; *Craig*, 429 U.S. at 204; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero*, 411 U.S. at 686-688 (plurality opinion). At the heart of those decisions is the recognition that "[w]hen persons are excluded from participation in our democratic processes solely because of race or gender, th[e] promise of equality dims." *J.E.B.*, 511 U.S. at 146.

The MSSA is one of the few remaining federal laws codifying a statutory exclusion based on sex. As the

Department of Defense has put it, the MSSA does not "comport" with the "touchstone values of fair and equitable treatment." 2017 Defense Report, *supra*, at 19; *cf. Inspired to Serve*, *supra*, at 118 (recognizing that equality in registration has often been a "prerequisite for" "groups historically discriminated against" to "achiev[e] equality as citizens"). This Court should intervene, as it has many times before, to prevent the "ratif[ication] and reinforce[ment]" of "prejudicial views of the relative abilities of men and women." *J.E.B.*, 511 U.S. at 140.

The Court's review is warranted, moreover, given the significant ongoing burdens the MSSA imposes on young men throughout the country, and the serious penalties for those who fail to comply. The MSSA requires men who live in this country to register for the Selective Service once they turn eighteen and to keep that registration up to date until they turn twenty-six (with limited exceptions). *See* 50 U.S.C. § 3802(a); *supra* pp. 6-7. At any given time, approximately one out of every ten men in America is personally affected by those requirements.[21] Men must notify the government every time they move—a particularly burdensome requirement at a time when young people are highly mobile. 32 C.F.R. § 1621.1(a); *see* Zachary Scherer, *Young Adults Most Likely to Change Living Arrangements; Older Adults Who Are Foreign Born*

[21] The Census Bureau estimates that in 2021 over 16 million men—more than ten percent of all men in America—will be between the ages of eighteen and twenty-six. *See* U.S. Census Bureau, *Tbl. 1. Total U.S. Resident Population by Age, Sex, and Series: April 1, 2020 (In thousands)*, *available at* https://www.census.gov/data/tables/2020/demo/popest/2020-demographic-analysis-tables.html.

Less Likely to Live Alone Than Native Born, U.S. Census Bureau (Aug. 31, 2020), https://www.census.gov/library/stories/2020/08/young-adults-most-likely-to-change-living-arrangements.html.

Failure to comply carries serious penalties. Those who do not register face fines of as much as $250,000 and up to five years in prison. *Benefits & Repercussions*, *supra*; *see supra* p. 7. In the 1980s, following a decade in which political protest of the draft was common, the Department of Justice investigated those who failed to register—including prosecuting, convicting, and imprisoning men who did not comply. *See* Selective Serv. Sys., *Semiannual Report of the Director of Selective Service: October 1, 1982-March 31, 1983*, at 11 (1983) (explaining that from July 1981 to March 1983, the Selective Service System referred 5,624 persons to the Department of Justice for investigation). To this day, the Selective Service System annually forwards to the Department of Justice the names of hundreds of thousands of men "who have either evaded registration or refused to register," and who could be subject to prosecution as a result. 2017 Defense Report, *supra*, at 5 n.21.

Men who fail to register also face the loss of "eligibility for myriad consequential benefits and services at both the federal and state levels." *Id.* at 19. At the federal level, this includes eligibility for student loans, civil service jobs, and, for immigrants, citizenship. *Benefits & Repercussions*, *supra*. Many states have layered on additional penalties, including the inability to obtain or renew a driver's license.[22] More than

[22] *See e.g.*, Ark. Code Ann. § 27-16-507(a)(1)(A); Fla. Stat. § 322.0515(1)(a); Ga. Code Ann. § 40-5-8; 31 R.I. Gen. Laws § 31-

thirty states make registration a precondition for state financial aid, state employment, or both.[23] And eight states bar men from enrolling in public colleges and universities without first registering for the Selective Service.[24]

These consequences have real, enduring effects on the lives of men in this country. Those who "mistakenly fail[] to register" or to timely update their address after moving, perhaps by oversight or because they were homeless or in prison, may be "penalized with loss of Federal or State benefits"—"lifelong penalties" that the Commission has called "unduly harsh." *Inspired to Serve*, *supra*, at 101.

Men who register for the Selective Service also face

10-47(a); *see also State-Commonwealth Legislation*, Selective Serv. Sys., https://www.sss.gov/registration/state-commonwealth-legislation (last visited Jan. 7, 2021) (identifying additional penalties by state).

[23] *See* Gregory Korte, *For a million U.S. men, failing to register for the draft has serious, long-term consequences*, USA Today (Apr. 3, 2019), https://www.usatoday.com/story/news/nation/2019/04/02/failing-register-draft-women-court-consequences-men/3205425002; *see, e.g.*, Tenn. Code Ann. § 49-4-904(2) (ineligibility "for any scholarship or grant"); Ariz. Rev. Stat. Ann. § 15-1841(A) (same); N.D. Cent. Code § 15-10-36 (same); N.J. Stat. § 18A:71B-6(a) (same); Ala. Code § 36-26-15.1(a)(1) (ineligibility for state employment); Ark. Code Ann. § 6-80-104 (same); Miss. Code Ann. § 25-9-351(1) (same).

[24] *See, e.g.*, Ala. Code § 36-26-15.1(a)(2); Colo. Rev. Stat. § 23-5-118; N.H. Rev. Stat. Ann. § 187-A:39(I). Other states impose yet more penalties. For example, Alaskans who fail to register cannot receive dividends from the Alaska Permanent Fund. *See* Alaska Stat. § 43.23.005(a)(7). And North Carolina requires proof of registration to receive financial aid from programs for the dependents of veterans. *See* N.C. Gen. Stat. §§ 143B-1224(3), 143B-1226(b)(3), (4).

another profound consequence: the threat of being drafted. *See Return to the Draft*, *supra* (discussing obligations that would be imposed on registrants if a draft were instated). The potential to be involuntarily called to serve—to leave one's home and family and risk one's life, whether in combat or any other military role in a foreign theater—is a heavy obligation. And it is one that, under current law, only men must carry.

Like many laws that have purported to privilege women over men, the men-only registration requirement burdens women too by perpetuating the notion that women are unworthy of "full citizenship stature." *Virginia*, 518 U.S. at 532. Excluding women from a duty characterized as a "fundamental civic obligation" conveys "not only that they are not vital to the defense of the country but also that they are not expected to participate in defending it." *Inspired to Serve*, *supra*, at 118. As this Court recognized in *J.E.B.*, excluding women from civic duties—such as jury service—sends the message that women "are presumed unqualified by state actors" and "reinvokes a history of exclusion from political participation." 511 U.S. at 142. And by imposing the requirement only on men, the MSSA communicates that—notwithstanding the valor and sacrifice of military women—men are categorically better suited for the field of battle, stronger and more capable, and more indispensable to the nation's preparedness and national security, regardless of individual characteristics or aptitude. *See Inspired to Serve*, *supra*, at 118. "[T]his inequity creates the perception of discrimination and unfair dealing—a tarnish that attaches to the military selective service system writ large." 2017 Defense Report, *supra*, at 19.

Limiting the registration requirement to men also reinforces archaic stereotypes that women are "destined solely for the home and the rearing of the family" and men "for the marketplace and the world of ideas." *Stanton*, 421 U.S. at 14-15. Congress relied on those very stereotypes in 1980 when it declined to expand the registration requirement to women based on the belief that drafting women would cause "unacceptable" "strains on family life." S. Rep. No. 96-826, at 159; *see supra* pp. 10, 26. Although purportedly protective of women, such stereotypes betray "attitude[s] of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero*, 411 U.S. at 684 (plurality opinion). At the same time, they convey that men's bonds to their homes and families are secondary to their public duty as citizens—a "stunningly anachronistic" notion that harms men and women alike. *Morales-Santana*, 137 S. Ct. at 1693; *see Hibbs*, 538 U.S. at 736; *Weinberger*, 420 U.S. at 643.

III. THIS CASE IS AN IDEAL VEHICLE TO RECONSIDER *ROSTKER*.

This petition presents a clean vehicle to address the continuing validity of *Rostker*.

This case is on all fours with *Rostker*. Both cases were brought by men subject to the MSSA's registration requirements. *Compare* Pet. App. 2a, 13a-14a, *with Rostker*, 453 U.S. at 61-62. Plaintiffs here and in *Rostker* raise the same legal claim: that "the male-only military draft is unlawful sex discrimination." Pet. App. 2a; *see Rostker*, 453 U.S. at 59 ("The question presented is whether [the MSSA] violates the Fifth Amendment to the United States Constitution

in authorizing the President to require the registration of males and not females."). The question is also cleanly presented. The district court declared the registration requirement invalid precisely because the combat ban no longer exists. Pet. App. 28a-34a. The Fifth Circuit acknowledged that undisputed fact and its central role in *Rostker*. It reversed solely because it concluded *Rostker* is "controlling" and only this Court can revisit that decision. *Id.* at 5a.

Moreover, this case, like *Rostker*, is plainly justiciable. The district court held that "all three plaintiffs have standing." *Id.* at 14a. The Government did not contest that conclusion on appeal. *Cf. id.* at 1a-7a. There is no question that Petitioners' claims are ripe. *See id.* at 46a. The repeal of the ban on women in combat roles is a fait accompli. Nor is there any reason to wait to take up this question. Congress has had 40 years to act. It has not done so, even despite the Commission's recommendation that Congress extend the registration requirement to women, and the Department of Defense's acknowledgment that doing so would promote military readiness and national security. *See Inspired to Serve*, *supra*, at 8, 111; 2017 Defense Report, *supra*, at 17-19. There is no reason to think that waiting any longer will shed more light on these issues.

The lack of authorization for a draft at this time is another reason to consider this important constitutional question presented now—*before* a crisis arises. Should the Court declare the men-only registration requirement unconstitutional, Congress has considerable latitude to decide how to respond. It could require everyone between the ages of eighteen and

twenty-six, regardless of sex, to register; it could rescind the registration requirement entirely; or it could adopt a new approach altogether, such as replacing the MSSA's registration requirement with a more expansive national service requirement. *Cf. Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 194 (1978) ("While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' it is equally—and emphatically—the exclusive province of the Congress * * * to formulate legislative policies and mandate programs and projects * * * ." (internal citation omitted)).

As the Fifth Circuit opinion illustrates, there is nothing to be gained and much to be lost by failing to take up this petition. Should Congress choose to extend the registration requirement to women, the Selective Service System and the Department of Defense would need time to plan for and implement that change. As the Commission warned, "waiting until the moment when the Nation must [institute a draft] would undermine the preparations required to successfully insure against inadequate military strength." *Inspired to Serve*, *supra*, at 123; *see* 2017 Defense Report, *supra*, at 19-20. It is therefore prudent for this Court to address the constitutionality of the registration requirement at a time when no draft is authorized. Doing so will give Congress the opportunity to select the appropriate course, in the event the Court holds that limiting the registration requirement to men violates the guarantee of equal protection.

CONCLUSION

The petition for a writ of certiorari should be granted.

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