No. 19-20272

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL COALITION FOR MEN; JAMES LESMEISTER, Individually and on behalf of others similarly situated; ANTHONY DAVIS,

Plaintiffs - Appellees

v.

SELECTIVE SERVICE SYSTEM; DONALD BENSON, as Director of Selective Service System,

Defendants - Appellants

On Appeal from

United States District Court for the Southern District of Texas

4:16-CV-3362

RESPONSE BRIEF OF APPELLEES

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so the justices Court may evaluate possible disqualification or recusal.

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None	

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STATEMENT REGARDING ORAL ARGUMENT

Appellees defer to the Court's decision on whether oral argument is necessary.

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STATEMENT OF THE CASE

Because they are males, Appellees James Lesmeister ("Lesmeister") and Anthony Davis ("Davis") were required by law to register, and did register, for the draft under the Mandatory Selective Service Act ("MSSA"), which women are not required to do. (ROA 700-701.) Lesmeister and Davis are members of Appellee National Coalition For Men ("NCFM"). NCFM is a non-profit, 501(c)(3) educational and civil rights organization established under the laws of the State of California and of the United States with male members ages 18-25 years old who meet the MSSA qualifications. (ROA 699.)

NCFM was established in 1976 to examine how sex discrimination affects males in areas such as child custody, divorce, domestic violence services, military conscription, paternity laws, criminal sentencing, public benefits, false accusations, and education. (ROA 699-701.) For example: NCFM represented battered men in the landmark case of *Woods v. Horton*, 167 Cal.App.4th 658 (2007), which ruled that statutes excluding male victims from state-funded services are unconstitutional; NCFM help enact legislation to protect men from paternity fraud, and; NCFM members were the prevailing appellants and attorney in the landmark California Supreme Court case of *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, holding that men and others against whom businesses discriminate need not demand equal treatment to have standing to sue under the Unruh Act.

The MSSA requires all male United States citizens and all male immigrant non-citizens between the ages of 18 and 26-years-old to register with the MSSA within thirty days of their 18th birthday. 50 U.S.C. § 453(a). Once these young men are registered, up until January 1 of the year they turn 21 years of age, they must notify the Selective Service within ten days of any changes to any of the information provided on the registration card, including a change of address. Failure to comply with the MSSA can subject these young men to five years in prison, a $10,000 fine, denial of federal employment, and/or student aid. 50 U.S.C. § 462(a). Women are not subject to any of these requirements or penalties.

On January 12, 2013, United States Secretary of Defense Leon E. Panetta and Chairman of the Joint Chiefs of Staff Martin E. Dempsey issued a memorandum officially rescinding the ban on women in combat. (ROA 703.) The Memorandum directed that integration of women into combat positions be completed "as expeditiously as possible," no later than January 1, 2016, and gave the military departments until May 15, 2013 to submit a detailed plan for the implementation of this directive. This Memorandum further pronounced, *inter alia,* that in 2012 the military opened over 14,000 positions previously closed to women, that throughout 2012, combat roles continued opening for women, and that by January 2013, thousands of women had served alongside men in combat roles in Iraq and Afghanistan. (*Ibid*.)

On April 4, 2013, NCFM and Lesmeister filed the Complaint in this case against Appellants for violation of Appellees' and other men's rights to Equal Protection for forcing only men but not women to register for the MSSA. (ROA 12.) On June 17 and 19, 2013, Appellants filed a Motion to Dismiss. (ROA 48.) On July 29, 2013, the Central District Court of California, dismissed the case as not ripe. (ROA 308.) On September 26, 2013, NCFM and Davis appealed. (ROA 318.)

On December 4, 2015, while the appeal was pending, the United States Department of Defense ("DoD") sent a letter to Congress providing that the DoD "intends to assign women to previously closed positions and units across all Services and U.S. Special Operations Command." (ROA 705-819.)

On February 19, 2016, the Ninth Circuit Court of Appeal reversed the District Court's decision. (ROA 341.) On November 15, 2016, the Central District Court of California transferred the case to the Central District Court of Texas. (ROA 453.) While the case was pending in that court, Davis was added as a plaintiff.

On March 17, 2017, the DoD issued a detailed 37-page report titled "Report on the Purpose and Utility of a Registration System for Military Selective Service" ("Pentagon Report") that strongly supported requiring both men and women to register for the MSSA. (ROA 821.) The Pentagon Report found that on December 3, 2015, Secretary of Defense Ashton Carter opened "all military occupational specialties to women and removed all final restrictions on the service of women in

combat," and that "qualified women were eligible to participate in all career fields, in all duty positions, at all echelons of the Armed Forces." (ROA 838.) The Pentagon Report also found that in December 2015, the DoD advised Congress that the impending change "further alters the factual backdrop" underpinning *Rostker v. Goldberg,* 453 U.S. 57 (1981) ("*Rostker"*), but took no further stance on the legal issues raised by allowing women in combat. (ROA 838.)

The Pentagon Report described the injustice to male citizens of being required to register and face stiff penalties that women do not face, and recognized that requiring both men and women to register for the draft would help restore "perception and *reality* of fair and equal treatment for *all* in the administration of essential federal and state programs." (ROA 189, 842, emphasis in original.) The Pentagon Report concluded that continuing to require only men to register for the MSSA would constrain success by restricting the database of professions, skills, academic degrees, and licenses, useful even for a voluntary recruitment system, which would "prove an unfortunate omission." (ROA 860.)

The Pentagon Report also indicated that the draft does not necessarily have to be about combat. (ROA 839.) Appellants admit that their own website reads:

> The U.S. came close to drafting women during World War II, when there was a shortage of military nurses. However, there was a surge of volunteerism and a draft of women nurses was not needed.

(ROA 815-818, 863.)

On August 22, 2018, Appellees filed a Motion for Summary Judgment ("MSJ"). (ROA 671.) On February 22, 2019, the Central District Court of Texas granted the MSJ. (ROA 1227.) The District Court found Appellants "do not present any evidence to support their claim" that requiring women to register for the MSAA would decrease female enlistment, which the court found was based on an unfounded assumption that women are significantly more combat-averse than men, and that this argument "appears to have been created for litigation," as Appellants "have not produced any evidence that Congress actually looked to this concern in its male-only registration policy." (ROA 1240.) Ultimately, the court ruled:

> In short, while historical restrictions on women may have justified past discrimination, men and women are now 'similarly situated for purposes of a draft or registration for a draft. If there ever was a time to discuss 'the place of women in the Armed Services,' that time has passed. Defendants have not carried the burden of showing that the male-only registration requirement continues to be substantially related to Congress's objective of raising and supporting armies.

(ROA 1244, 1255.)

Accordingly, the District Court granted declaratory relief, holding that the male-only registration requirement violates men's Constitutional right to equal protection, but the court did not rule on injunctive relief. (ROA 1255.) Appellants appealed. (ROA 1472.) Appellees later filed a motion for injunctive relief, which was denied on the ground that the balance of hardships did not support injunctive relief. (ROA 1478.)

SUMMARY OF ARGUMENT

In *Rostker,* several men asserted that the male-only registration requirement under the MSSA violated men's rights to equal protection. The District Court and the Court of Appeal both ruled in favor of the men and found the male-only registration requirement violated equal protection. In a sharply divided decision, with a vigorous dissent from Justice Thurgood Marshall, the Supreme Court held that because women were not allowed in combat, men and women were not similarly situated, and thus an analysis of equal protection did not apply under the circumstances. *Rostker, supra,* 453 U.S. at 58.

Since then, however, the circumstances have completely changed. As early as 2012, the military began allowing women in thousands of previously closed combat roles. And now, the DoD has lifted all gender-based restrictions in combat, while the Pentagon has strongly recommended requiring both men *and* women to register for the MSSA. Accordingly, as the primary basis on which *Rostker* relied no longer exists, the District Court applied equal protection analysis and held that Appellees met their burden of showing the MSSA's male-only registration requirement violates the Constitutional right to equal protection as it discriminates against men and is not carefully tailored to an important government interest. The District Court's decision was correct and should be upheld, because times have indeed changed.

ARGUMENT

II. THE COURT CORRECTLY APPLIED HIGHTENED SCRUTINY.

Appellants argue that sex discrimination in the MSSA should be reviewed based on the lower, rational basis standard instead under heightened review. (AOB.) However, Appellants' cited cases emphasize that the lower standard of review – rational basis – only applies because those cases involve immigration policies for foreign nationals outside the United States, who are not protected by the Constitution. People in the United States are protected by the fundamental Constitutional right of equal protection, and that right should not be diminished by lowering the well-established standard of heightened scrutiny.

A. Equal protection is a fundamental Constitutional right.

The United States Constitution guarantees all people in the United States the equal protection of its laws. Equal protection "is essentially a direction that all persons similarly situated should be treated alike." *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000). The United States Supreme Court has held:

> Discrimination itself, by perpetuating 'archaic and stereotypic notions' . . . can cause serious noneconomic injuries to those persons who are personally denied equal treatment.

Heckler v. Mathews, 465 U.S. 728, 739-740 (1984). Our High Court has also held that legislative classifications that distribute benefits and burdens on the basis of sex carry "the baggage of sexual stereotypes." *Orr v. Orr,* 440 U.S. 268, 283

(1979). Therefore, classifications based upon sex, like classifications based upon race, alienage, or national origin, are "inherently suspect" and subject to heightened scrutiny review. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (statute allowing male but not female members of the military to receive certain benefits if they were married could not withstand strict scrutiny).[1]

"Parties who seek to defend sex-based government action must demonstrate an 'exceedingly persuasive justification" for that action.'" *United States v. Virginia,* 518 U.S. 515, 531 (1996). Sex discrimination must be examined under the "heightened" scrutiny mandated by *Craig v. Boren*, 429 U.S. 190 (1976). Under this test, a sex-based classification cannot withstand constitutional challenge unless it is substantially related to an important governmental objective. *Kirchberg v. Feenstra*, 450 U.S. 455, 459, 459-460 (1981). The party defending the classification carries the burden of demonstrating both the importance of the governmental objective it serves and the substantial relationship between the discriminatory means and the asserted end. *Wengler v. Druggist Mutual Ins. Co.*, 446 U.S. 142, 151 (1980). Thus, the Government must show the sex-based classification bears "a close and

[1] Notably *Frontiero, supra,* another military case, ruled that equal protection requires the U.S. military to provide its female members with the same housing and medical benefits as it provides its male members.

substantial relationship to [the achievement of] important governmental objectives." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979).

B. <u>The cases cited by Appellants are about foreign nationals.</u>

Appellants cite several cases to support their position that a lower level of scrutiny should apply in this case due to national security reasons. Thus, the cases they cite can be easily distinguished from this case, which affects male United States citizens and male United States immigrant non-citizens. The cases Appellants cite apply a lowered standard of scrutiny for sex discrimination in immigration policies for foreign nationals outside the U.S., who are of course not protected by the United States Constitution, in sharp contrast to the U.S. citizens and immigrant non-citizens in the current case, who of course do enjoy the protections of the Constitution.

For example, Appellants cite *Trump v. Hawaii ("Hawaii"),* 138 S. Ct. 2392, 2420, n.5 (2018). (AOB 19.) However, in *Hawaii*, the plaintiffs sought to "invalidate a national security directive regulating the entry of aliens abroad" (*id.* at 2418) by making an establishment clause challenge to an executive order relating to foreign nationals, not people in the U.S. (*id.,* at 2403, 2420). The Court used rational basis review instead of heightened scrutiny because "the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised . . . largely immune from judicial control." *Ibid.* This is clearly inapposite to the instant case, which involves an equal protection challenge by people in the United States.

Courts have distinguished *Hawaii* on grounds directly applicable to this case. For instance, *CASA de Md., Inc. v. Trump*, 355 F. Supp. 3d 307 (2018) held,

> *Hawaii* dealt with aliens seeking admission to the United States for the first time, while this case deals with residents who have lived in the United States for years and have established deep connections—some of them familial—to this country. Courts have long established that, "[s]ince an alien obviously brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit." "But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." Commensurate with this legal residence is a "generous and ascending scale of rights as [the alien] increases his identity with our society."

Supra, 355 F. Supp. 3d at 322-323. Obviously, this distinction would certainly apply here as well, where Appellees are U.S. residents.

Likewise, Appellants also cite *Fiallo v. Bell,* 430 U.S. 787 (1977) for the same position. However, *Fiallo* addressed a policy giving automatic United States citizenship to children born out of wedlock overseas to U.S. citizen mothers but not United States citizen fathers. The Court applied rational basis review because it involved foreign nationals, not people in the United States. While NCFM is disheartened by this sexist and anti-father policy, *Fiallo* is still completely inapposite because it was about foreign nationals. The Court in *Fiallo* specifically held:

> At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. Our cases "have long recognized the power to expel or exclude aliens as a

> fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Our recent decisions have not departed from this long-established rule. Just last Term, for example, the Court had occasion to note that "the power over aliens is of a political character and therefore subject only to narrow judicial review." And we observed recently that in the exercise of its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens."

Fiallo, supra, 430 U.S. at 792 (citations omitted).

Appellants further argue that "there is certainly nothing in *Rostker* that says that heightened scrutiny is appropriate." (AOB 20.) That is not true. The Court in *Rostker* specifically upheld the heightened scrutiny standard, stating:

> The Solicitor General argues, largely on the basis of the foregoing cases emphasizing the deference due Congress in the area of military affairs and national security, that this Court should scrutinize the MSSA only to determine if the distinction drawn between men and women bears a rational relation to some legitimate Government purpose, and should not examine the Act under the heightened scrutiny with which we have approached gender-based discrimination. We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further "refinement" in the applicable tests as suggested by the Government.

Roster, supra, 453 U.S. at 69-70 (citations omitted.)

Appellants' argument for abandoning the well-established heightened security standard for equal protection based on sex simply is not supported by any applicable authorities. Therefore, this District Court properly applied heightened scrutiny review to the male-only registration requirements of the MSSA, and that application should be upheld.

III. THE COURT CORRECTLY RULED THAT THE MALE-ONLY REGISTRATION REQUIRMENT IS UNCONSTITUTIONAL.

Under the MSSA, all male U.S. citizens and all male immigrant non-citizens between the ages of 18 and 26-years-old must register with the MSSA within thirty days of their 18th birthday. 50 U.S.C. § 453(a). After they register, men must notify the government within ten days of any changes to any information on the registration card until January 1 of the year they turn 21 years of age. Failure to comply can subject them to five years in prison, a $10,000 fine, and denial of federal employment or student aid. 50 U.S.C. § 462(a). None of this applies to women.

The District Court correctly granted Appellees' MSJ. First, the court correctly found no genuine dispute of any material fact. Second, the court correctly found that Appellees were entitled to summary judgment under their First Cause of Action for equal protection because: (1) women are now allowed in all combat roles, (2) the primary basis on which *Rostker* relied no longer exists, and (3) the male-only requirement is no longer carefully tailored to an important government interest.

In *Rostker, supra,* several men who had registered for the MSSA made an equal protection challenge to the MSSA's male-only registration requirement. The District Court found the requirement violated the men's rights to equal protection. The Court of Appeal affirmed. But in a sharply divided decision, with a vigorous dissent by Justice Thurgood Marshall and joined by Justices William Brennan and

Byron White, the majority of the Supreme Court held that equal protection does not apply because women are not allowed in combat. *Id.,* at 58. The Court held:

> Since women are excluded from combat service by statute or military policy, men and women are simply not similarly situated for purposes of a draft or registration for a draft.

Ibid.

Since *Rostker* – over 38 years ago - the world has significantly changed, with women and men, especially in the U.S., increasingly being viewed as equals. In February 2012, the military opened over 14,000 positions previously closed to women, and by January 2013, thousands of women had served alongside men in combat roles in Iraq and Afghanistan. (ROA 703.) Then on January 12, 2013, the DoD rescinded the ban on women in combat and directed that integration of women into combat positions be completed "as expeditiously as possible" and no later than January 1, 2016. (ROA 703.) On December 4, 2015, DoD wrote a letter to Congress announcing it "intends to assign women to previously closed positions and unit across all Services and U.S. Special Operations Command." (ROA 705-819.)

On March 17, 2017, the Pentagon Report explained how things have significantly changed since *Rostker*, and that on December 3, 2015 the DoD opened all military occupational specialties to women and removed all final restrictions on the service of women in combat, and that "qualified women were eligible to participate in all career fields, in all duty positions, at all echelons of the Armed

Forces." (ROA 1407-1408.) The report explained that in 2016, the military appointed the first female Combatant Commander, that women graduated from the Army's elite Ranger school, served on Navy submarines, and completed Marine Corps Artillery officer's training, as this gender shift enabled the DoD to expand its recruiting to the entirety of the population and enlist qualified personnel for service in combat occupations. (ROA 1408.)

The Pentagon Report provided a detailed analysis into the direct benefits of expending MSSA registration to women, expressing, "It 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," and "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." (ROA 1409.) Other direct benefits included doubling the contact data updated monthly and discontinuing the cost of paying commercial vendors for data to generate female leads. (ROA 1409.)

The Pentagon Report also cited the following indirect benefits of expanding the MSSA to women: (1) reminding youth of the importance of military, national and public service; (2) conjoining the interests of all Americans and the military; (3) signaling an enhanced resolve to defend our nation through the commitment and capability of all citizens; and (4) promoting fairness and equity. (ROA 1410-1411.)

The Pentagon Report also finds the current law is unjust to men, concluding:

> In a tactical manifestation of the inequity inherent in the current system, men are required to register for selective service as a condition of eligibility for myriad consequential benefits and services at both the federal and state levels. A man who forgets, delays, or fails to register is denied government employment, job training, student loans and grants, a driver's license, and a security clearance, to name but a few. Even if he has registered, government action on a man's application for benefits and services for which he is eligible often is held in abeyance while his selective service registration is verified with the SSS. Women suffer none of these denials or delays, solely because they are not required to register for the draft, solely because they are . . . women**.** That technical arguments can be applied to justify such differences in treatment is beside the point. Men are treated differently than their female counterparts, for reasons seemingly grounded in gender; this inequity creates the perception of discrimination and unfair dealing—a tarnish that attaches to the military selective service system writ large. A man who forgets or neglects to register until after he turns 26, past the age at which registration is required, must show, by a preponderance of the evidence, that his failure was not "knowing and willful". The process for adjudicating the matter can be lengthy—as long as 18 months in some cases. During this period, the man is not eligible for certain federal and state benefits and services. A requirement for universal registration would place women and men on equal footing.

(ROA 1412.)

The Pentagon Report described how expanding the MSSA to women would restore the perception and reality of equal treatment, stating:

> Each would be required to register; each would be required to verify registration as a prerequisite to receipt of government benefits and services; and each would be subject to the same penalties—the denial of benefits and services—for non-compliance. Restoring the perception and reality of fair and equal treatment for all in the administration of essential federal and state

> programs is an additional benefit to be derived from extending to women the requirement to register for the draft.

(ROA 1412.)

The Pentagon Report also examined the costs and logistical implications of expanding the MSSA to women, and found that, while requiring women to register is likely to require an increase in resources, the Selective Service has already developed a five-year, phased implementation plan that would absorb such the increase, and describes the plan in detail. (ROA 1412-1413.)

After further evaluating various issues, the Pentagon Report concluded:

> It appears that, for the most part, expanding registration for the draft to include women would enhance further the benefits presently associated with the selective service system. Opening registration to *all* members of the population aged 18-25 – regardless of gender – would convey the added benefit of promoting fairness and equity not previously possible in the process and would comport the military selective service system with our nation's touchstone values of fair and equitable treatment, and equality of opportunity.

(ROA 1428-1429.)

The Pentagon Report also decided that continuing to require only men to register would "constrain success" by restricting the database of professions, skills, academic degrees, and licenses, useful even for a voluntary recruitment system, which would "prove an unfortunate omission." Specifically, the Report determined:

> A targeted draft in a future war would presumptively focus on highly technical skills in short supply in the labor market as a whole. The percent of individuals qualified in such skills is

> unlikely to be as variable by gender as are the combat MOSs. Accordingly, targeting a draft to 50% of the available population—males only—would severely constrain success.

(ROA 1430.)

Accordingly, the conditions upon which *Rostker* found men and women "not similarly situated" no longer exist, 38 years after that decision was made. Back when *Rostker* was decided, women were not allowed in *any* military combat roles, and innumerable non-military roles also existed in society that women were not allowed to assume. Since then, American women have increasingly served in both military combat roles and also in most, if not all, non-military roles. In recent years, the DoD has rescinded all restrictions on women in combat and has strongly recommended that women be required, along with men, to register for the MSSA. Therefore, unlike back in 1981 when *Rostker* was decided, given the current status of women in American society, and especially given the status of women in America's military, equal protection analysis now applies to draft registration. And the MSSA's antiquated male-only registration requirement clearly violates equal protection.

By law, the government bears the burden of proving that requiring only men to register is closely and substantially related to an important governmental purpose. It is not the decision to register men that must be shown to be necessary to further the goal of raising an army, but the decision to register *only* men.

As is set forth above, under the MSSA, all male U.S. citizens and all male immigrant non-citizens between the ages of 18 and 26 are required by law to register with the MSSA within thirty days of their 18th birthday, and must continually notify the SSS of their whereabouts or other changes to the information on their registration card within ten days. Men who fail to comply can be imprisoned, fined, and denied federal employment and federal financial aid.

These penalties are not unrealistic. Over the years, a number of men have contacted NCFM concerning hurdles they faced in proving they registered. In *Elgin v. Bush,* 641 F.3d 6 (1st Cir. 2011), three men who were terminated from their federal employment for failing to register for the MSSA when they were young sued the MSSA. One was homeless most of his life including during his draft-age years. These are indisputable examples of the harms that only men face under the MSSA.[2]

[2] In addition to these penalties under federal law, many states have implemented their own penalties against men who have not registered. According to USA Today, forty states and the District of Columbia link MSSA registration to driver's licenses; thirty-one states have legislation mirroring federal law linking student aid and employment to the MSSA. Eight states ban men from registering in state colleges or universities without registering for the MSSA. In Alaska, men who don't register cannot receive an annual dividend from the Alaska Permanent fund. In Ohio, men who do not register for the MSSA must pay out-of-state tuition fees. "Since 1993, more than 1 million American men have requested a formal copy of their draft status from the Selective Service System, according to data obtained by USA TODAY under the Freedom of Information Act. Those status-information letters are the first step in trying to appeal the denial of benefits, and are the best indication of how many men have been impacted by legal consequences of failing to register." See, www.usatoday.com/story/news/nation/2019/04/02/failing-register-draft-women-court-consequences-men/3205425002/.

The Pentagon Report itself found that requiring both men and women to register for the MSSA would help restore "perception and *reality* of fair and equal treatment for *all* in the administration of essential federal and state programs." (ROA 1412, emphasis in original.) Specifically, the report explained:

> In a tactical manifestation of the inequity inherent in our current system, men are required to register for the selective service as a condition of eligibility for myriad consequential benefits and services at both the federal and state levels. A man who forgets, delays, or fails to register is denied government employment, job training, student loans and grants, a driver's license, and a security clearance, to name but a few. Even if he has registered, government action on a men's application for benefits and services for which he is eligible often is held in abeyance while his selective service registration is verified with the [Selective Service System]. Women suffer none of these denials or delays, solely because they are not required to register for the draft, solely because they are . . . women. That technical arguments can be applied to justify such differences in treatment is beside the point. Men are treated differently than their female counterparts, for reasons seemingly grounded in gender; this inequity creates the perception of discrimination and unfair dealing – a tarnish that attaches to the military selective service system writ large. A requirement for universal registration would place women and men on equal footing. Each would be required to register; each would be required to verify registration as a prerequisite to receipt of government benefits and services; and each would be subject to the same penalties – the denial of benefits and services – for non-compliance. Restoring the perception and *reality* of fair and equal treatment for *all* in the administration of essential federal and state programs is an additional benefit to be derived from extending to women the requirement to register for the draft.

(ROA 1412, emphasis in original.)

As Appellants offer no reason why the MSSA should only apply to men, the District Court correctly held Appellants do not meet their burden.

IV. APPELLANTS' STARE DECISIS ARGUMENT IS BASLEESS AND WAS REJECTED BY A RECENT FEDERAL DECISION.

Appellants argue that under the doctrine of *stare decisis,* the District Court in this case lacked authority to rule in any way other than how *Rostker* ruled. (AOB 11-13.) Appellants conspicuously omit that they recently made this very same argument and it was rejected in a case in which a woman made an equal protection challenge to the MSSA's male-only registration requirement. *Kyle-Labell v. Selective Serv. System*, 364 F. Supp. 3d 394, 415-416 (2019).

In *Kyle-Labell,* a woman sued the Selective Service System and argued that the MSSA's male-only registration requirement violates her equal protection rights. The Selective Service argued, just as they do here, that *stare decisis* precluded the District Court from finding in any way other than how *Rostker* ruled. The District Court flatly rejected this argument and held:

> Defendants ask that this Court apply *Rostker's* holding to the present alleged facts and summarily dismiss Plaintiff's current claim. But "[t]here is . . . a difference between following a precedent and extending a precedent." *Jefferson Cty. v. Acker*, 210 F.3d 1317, 1320 (11th Cir. 2000). When the facts of a Supreme Court decision "do not line up closely with the facts before [the Court]," it cannot be said that the decision "directly controls" the new case. *See id.* Here, Plaintiff alleges that as a result of Pentagon and Congressional actions women can serve in all combat roles, and therefore, men and women are now similarly situated for purposes of the MSSA. (SAC ¶¶ 43, 45 & 56; Pl.'s Opp. Br. at 9). Plaintiff, thus, asks this Court to answer the following question: whether the sex-based classification drawn by the MSSA is substantially related to achieving the purposes of the MSSA, when men and women *are* similarly situated. Consequently, Plaintiff poses a

> question never addressed by the *Rostker* Court, and as a result, *Rostker* cannot "compel the outcome" of this case. *See Lambrix*, 520 U.S. at 528 n.3. Accordingly, while persuasive and instructive, *Rostker* does not "directly control[ ]" this case. *See Acker*, 210 F.3d at 1320; *Bruno*, 487 F.3d at 306; *United States v. Acosta*, 502 F.3d 54, 60 (2d Cir. 2007) (stating that, where "neither [of two Supreme Court cases], stands as direct precedent requiring" an outcome, "*no* Supreme Court precedent stands in the way of [the lower court's] holding").

Kyle-Labell, supra, 364 F. Supp. 3d at 416.

Appellants cite several cases for their position, all of which address statutory interpretation, not a situation where the government has removed the primary basis on which a prior Supreme Court decision relied. Appellants take short quotes out of context to build a house of cards that collapses upon further examination. In fact, Appellants cited the same cases in *Kyle-Labell,* and the court rejected their interpretation of those cases. For example, Appellants cite *Rodriguez de Quijas v. Shearson / AM. Express, Inc.,* 490 U.S. 477, 484 (1989) and a concurring opinion in *Elgin, supra,* 641 F3d at 22-24 (1st Cir. 2011) to support their *stare decisis* argument (AOB 12-13.) But *Kyle-Labell* disagreed with this application of the cases, finding:

> First, the *Rodriguez* doctrine does not have an application in this case. *Rodriguez* instructs that lower courts should not assume that a newer Supreme Court decision implicitly overrules a prior precedent. . . . Here, however, Plaintiff has not asked this Court to consider whether a newer Supreme Court decision has implicitly overruled *Rostker*. Rather, Plaintiff asks the Court to consider the effect that intervening actions undertaken by the Pentagon and Congress has had on the current enforcement of the MSSA. Neither *Rodriguez* nor its progeny say anything about such a situation. Defendants point the Court to the concurrence in *Elgin* to support their argument that the *Rodriguez* doctrine applies to intervening factual changes. But *Elgin* is easily

> distinguishable for two reasons. First, unlike this case, the plaintiffs there argued that an intervening Supreme Court decision had implicitly overturned *Rostker*; i.e., precisely what *Rodriguez* says lower courts cannot do. And second, unlike the allegations in this case, at the time *Elgin* was decided "women [were] still precluded from ground combat positions." In short, because Plaintiff contends that intervening factual changes have altered the application of the MSSA, and not that an intervening Supreme Court decision has eroded *Rostker's* legal foundation, the rule outlined by *Rodriguez* and its progeny simply does not apply in this case. Second, even if this Court were to apply the *Rodriguez* doctrine, at this stage of the litigation it cannot be said that the holding in *Rostker* directly controls the question before this Court, and therefore, it cannot be said that *Rostker* bars Plaintiff's equal protection claim.

Kyle-Labell, supra, 364 F. Supp. 3d, at 414-416 (citations omitted).

Further, Appellants admit in a footnote that the majority in *Elgin* simply held that the prior precedent should be overruled, and Appellants do not maintain that the District Court was wrong in so holding. (AOB 13, fn2.)

Appellants also cite *Agostini v. Felton,* 521 U.S. 203, 237, 239 (1997) to support their *stare decisis* position. But that case also concerned statutory interpretation. In *Agostini,* the city of New York began sending public school teachers to teach in parochial schools during school hours. Taxpayers sought declaratory and injunctive relief in *Aguilar v Felton*, 473 US 402, 87 L Ed 2d 290 (1985) claiming the program violated the establishment clause. The District Court granted summary judgment for the board. The Court of Appeals reversed. The Supreme Court affirmed the reversal.

On remand, the District Court enjoined the board from sending teachers into parochial schools. The board then provided the same services inside public schools. Years later, the board sought relief from the injunction based on post-*Aguilar* factual changes and new appellate interpretations of the establishment clause. The District Court denied the motion. The Court of Appeals affirmed. The Supreme Court reversed, holding that while the post-*Aguilar* factual changes were insignificant for relief, the post-*Aguilar* legal changes were sufficient. *Id.,* at 215-216, 225-235. The Court did not rule that the lower courts lacked the authority to find otherwise, but instead recognized that under new circumstances, lower courts can reasonably rule differently from the Supreme Court.

Specifically, the Supreme Court in *Agostini* stated,

> In *Rufo* v. *Inmates of Suffolk County Jail*, we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show "a significant change either in factual conditions or in law." A court may recognize subsequent changes in either statutory or decisional law. . . . A court errs when it refuses to modify an injunction or consent decree in light of such changes.

Agostini, supra, 521 U.S. at 215 (citations omitted).

Appellants also cite *State Oil Co. v. Khan*, 522 U.S. 3, 20-21 (1997). (AOB 13.) But that case again involved new statutory interpretation, not a totally new federal policy.

In *State Oil Co.,* a corporation contracted with an oil company to lease and operate a gas station owned by the oil company. The contract stated that if the station charged a higher price than the oil company's suggested price, the excess would go to the oil company. The corporation sued the oil company, alleging the price fixing violated the Sherman Act. The District Court entered summary judgment for the oil company. The Court of Appeals reversed, holding that under *Albrecht v Herald Co.*, 390 US 145 (1968), the price-fixing violated the Sherman Act per se. The Supreme Court vacated and remanded, overruling *Albrecht* and finding the price-fixing is not a per se violation. The Court acknowledged that *stare decisis* is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles," and "[t]his Court has expressed its reluctance to overrule decisions involving statutory interpretation." *State Oil Co., supra,* 522 U.S. at 20. However, the Court also held:

> But *stare decisis* is not an inexorable command. In the area of antitrust law, there is a competing interest, well-represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."

Id., at 20-21 (citations omitted).

Thus, *State Oil Co.* does not support Appellants' position that the District Court lacked authority to rule as it did. Indeed, *State Oil Co.* tells us that even where

stare decisis is strongest - statutory interpretation - there is still room for reinterpretation based on changes in circumstances and even "common-law tradition." This is even more true where the government completely removes its policy that the Supreme Court relied on in its prior decision.

By comparison, *State Oil Co.* would be similar to this case if after the *Albrecht* decision, the parties removed the price-fixing in the contract, and then a new Sherman Act challenge arose. Certainly, in that scenario, the lower courts would have authority to rule differently from the Supreme Court under the new circumstances. The difference between these two scenarios is exactly what the court in *Kyle-Labell* meant when it distinguished "following a precedent" from "extending a precedent." (*Supra,* 364 F. Supp. 3d, at 414, citing *Jefferson Cty., supra,* 210 F.3d at 1320.

Appellants also cite a dissenting opinion in *Roper v. Simmons,* 543 U.S. 551, 590 (2005) for the language that:

> [I]t remains "*this* Court's prerogative *alone* to overrule one of its precedents." That is so even where subsequent decisions or factual developments may appear to have "significantly undermined" the rationale for our earlier holding.

Id., at 594[3] (citations omitted). (AOB 13.) But every case cited in this dissent involved statutory interpretation. And the majority in *Roper* upheld the Court of

[3] Appellants cite page 590 but the language they quote appears to be on page 594.

Appeal's interpretation of the Eighth Amendment based on new and evolving views on the death penalty for minors that differed from a prior Supreme Court ruling.

Fortunately, because facts, circumstances, and society are always changing, the U.S. Supreme Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) did not robotically follow the *stare decisis* doctrine in applying *Plessy v. Ferguson*, 163 U.S. 537 (1896). Instead, the *Brown* court overturned *Plessy's* equal protection precedent that racially segregated public facilities were legal, so long as the facilities for blacks and whites were equal. In much the same way, Appellants' *stare decisis* argument is without merit in this modern era in which the outmoded stereotypes underpinning *Rostker* are seen as outdated and inapplicable. The District Court had authority to rule based on the post-*Rostker*, modern-day facts, current circumstances, and present-day society.

V. APPELLANTS OFFER NOTHING TO "DEFER" TO.

Without providing any evidence or expert position that women should not be allowed in combat, or that women should not have to register for the draft even if men do, Appellants argue that the Court should "defer" to Congress on this issue. But as the District Court found, Appellants offer no evidence to support their position.

Deference requires something to which the court can defer. Here, Appellants present no evidence that women should not be in combat or that

they should not be required to register for the draft. Thus, there is nothing to defer to, as there arguably was back when *Rostker* was decided 38 years ago.

Notably, the Pentagon Report is the only expert analysis of the issue here. As the District Court noted, Appellants have submitted no evidence to the contrary. Thus, Appellants' arguments about "deference" fail, as they have not provided anything to defer to, let alone met their burden of proof.

The Pentagon Report strongly supports requiring both men and women to register under the MSSA, and offers no grounds for a contrary interpretation. The fact that the DoD, in a footnote, deferred to congressional deliberations does not change the well-documented DoD's position on the matter. And administrative deference to legislative deliberations is a far cry from judicial delay of a Constitutional question while legislative deliberation takes place, especially in today's extraordinarily partisan Congress.

As the District Court correctly found, "Congress has been debating the male-only registration requirement since at least 1980 . . ." and "Congress has been debating the MSSA's registration requirement for decades with no definite end in sight." Decision, pp. 5-6. And as the Court in *Rostker* recognized:

> But [n]one of this [judicial deference] is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause.

Rostker, supra, 453 U.S. at 67-68

Our Constitution is not just a guide, a roadmap, or a handbook of suggestions. It is the supreme law of the land. To defer to a legislative committee without anything from that committee or any expert statement to which to defer, while the only expert statement (Pentagon Report) strongly supports expanding MSSA registration to women, would be to undermine the sovereignty and force of the Constitution and to signal that it can be twisted at will. It would be the modern-day equivalent of deferring to a State of Kansas legislative committee to decide if racially segregated public facilities were legal.

Appellants' deference argument also relies on the false assumption that the draft has to be instituted in preparation for combat. But Appellants admit their own website notes that women were nearly drafted previously in our history:

> The U.S. came close to drafting women during World War II, when there was a shortage of military nurses. However, there was a surge of volunteerism and a draft of women nurses was not needed."

Even the Pentagon Report states:

> 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. A broader, deeper registrant pool would enhance the ability of the SSS to provide manpower to the DoD in accordance with its force needs. This is particularly important because 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.

(ROA 1410.)

Therefore, a primary assumption of Appellants' argument for deference – that the issue of women in combat is an expert-based issue that necessitates deference to Congress – is false. If people can be drafted for non-combat roles – and they have been and will continue to be drafted for non-combat roles – then the issue of whether women should be in combat is not even relevant to women and the draft.

In any event, the DoD now allows women in all combat roles. Therefore, the primary basis on which *Rostker* relied on back in 1981 no longer exists, and the District Court correctly ruled that the male-only registration requirement violates equal protection.

VI. CONCLUSION.

For all the foregoing reasons, the Districts Court' ruling should be affirmed.

Respectfully Submitted.

Law Office of Marc E. Angelucci

Date: _10/3/19

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CERTIFICATE OF SERVICE

I certify that on 10/3/19, the foregoing document was served, via the Court's CM/ECF Document Filing System, upon the following registered CM/ECF users:

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