

Statement of SOTOMAYOR, J.

SUPREME COURT OF THE UNITED STATES

NATIONAL COALITION FOR MEN, ET AL. *v.*
SELECTIVE SERVICE SYSTEM, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20–928. Decided June 7, 2021

The petition for a writ of certiorari is denied.

Statement of JUSTICE SOTOMAYOR, with whom JUSTICE BREYER and JUSTICE KAVANAUGH join, respecting the denial of certiorari.

The Fifth Amendment to the United States Constitution prohibits the Federal Government from discriminating on the basis of sex absent an “‘exceedingly persuasive justification.’” *Sessions v. Morales-Santana*, 582 U. S. ____, ____ (2017) (slip op., at 9) (quoting *United States v. Virginia*, 518 U. S. 515, 531 (1996)); see *Califano v. Westcott*, 443 U. S. 76 (1979); *Califano v. Goldfarb*, 430 U. S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U. S. 636 (1975); *Frontiero v. Richardson*, 411 U. S. 677 (1973). Cf. *Bolling v. Sharpe*, 347 U. S. 497 (1954). The Military Selective Service Act requires men, and only men, however, to register for the draft upon turning 18. See 85 Stat. 353, 50 U. S. C. §3802(a). In *Rostker v. Goldberg*, 453 U. S. 57 (1981), this Court upheld the Act’s gender-based registration requirement against an equal protection challenge, citing the fact that women were “excluded from combat” roles and hence “would not be needed in the event of a draft.” *Id.*, at 77.

The role of women in the military has changed dramatically since then. Beginning in 1991, thousands of women have served with distinction in a wide range of combat roles, from operating military aircraft and naval vessels to participating in boots-on-the-ground infantry missions. See Brief for Modern Military Association of America et al. as

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Amici Curiae 11–18. Women have passed the military’s demanding tests to become U. S. Army Rangers, Navy SEALs, and Green Berets. See Brief for General Michael Hayden et al. as *Amici Curiae* 11–13. As of 2015, there are no longer any positions in the United States Armed Forces closed to women. See Memorandum from Secretary of Defense to Secretaries of the Military Departments et al. Re: Implementation Guidance for the Full Integration of Women in the Armed Forces 1 (Dec. 3, 2015). Petitioners ask the Court to overrule *Rostker* in light of these developments.

Petitioners, however, are not the only ones asking whether a male-only registration requirement can be reconciled with the role women can, and already do, play in the modern military. In 2016, Congress created the National Commission on Military, National, and Public Service (NCMNPS) and tasked it with studying whether Selective Service registration should be conducted “regardless of sex.” National Defense Authorization Act for Fiscal Year 2017, §§551(a), 555(c)(2)(A), 130 Stat. 2130, 2135.

On March 25, 2020, the Commission released its final report, in which it recommended “eliminat[ing] male-only registration.” *Inspired to Serve: The Final Report of the [NCMNPS]* 111. Among other things, the Commission found that “[m]ale-only registration sends a message to women 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.” *Id.*, at 118. Just a few months ago, the Senate Armed Services Committee held a hearing on the report, where Chairman Jack Reed expressed his “hope” that a gender-neutral registration requirement will be “incorporated into the next national defense bill.” *Tr. of Hearing on Final Recommendations and Report of the [NCMNPS] before the Senate Committee on Armed Services, 117th Cong., 1st Sess.*, 21 (Mar. 11, 2021).

It remains to be seen, of course, whether Congress will end gender-based registration under the Military Selective

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Service Act. But at least for now, the Court's longstanding deference to Congress on matters of national defense and military affairs cautions against granting review while Congress actively weighs the issue. I agree with the Court's decision to deny the petition for a writ of certiorari.