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 the United States District Court
for the Southern District of Texas

BRIEF FOR APPELLANTS

JOSEPH H. HUNT
Assistant Attorney General

RYAN K. PATRICK
United States Attorney

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

MARK B. STERN
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff
Civil Division, Room 7211
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-3518

CERTIFICATE OF INTERESTED PERSONS

National Coalition for Men, et al. v. Selective Service System, et al., No. 19-20272

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

Plaintiffs-appellees:

Anthony Davis
James Lesmeister
National Coalition for Men

Defendants-appellants:

Selective Service System
Lawrence G. Romo (former Director of the Selective Service System)
Donald Benton

Counsel:

For plaintiffs-appellees:

Marc Angelucci

For defendants-appellants:

Sonia M. Carson
Anthony J. Coppolino
Stuart F. Delery
Bryan R. Diederich
Michael J. Gerardi
Joseph H. Hunt
Lynn Yuhee Lee
Benjamin C. Mizer
Hashim M. Mooppan

Chad A. Readler
Benjamin M. Shultz
Mark B. Stern

s/ Benjamin M. Shultz
Benjamin M. Shultz
Attorney of Record for Appellants

STATEMENT REGARDING ORAL ARGUMENT

In this case of nationwide significance, the district court held unconstitutional the statute requiring men to register for the military draft. The government respectfully believes that oral argument would assist the Court in resolving the constitutional issue.

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STATEMENT OF JURISDICTION

Plaintiffs sued a federal government agency and its director, asserting that the federal statute requiring men to register for the draft is unconstitutional. ROA.530-31, 541. Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1343(3)-(4). ROA.535. On February 22, 2019, the district court entered a final judgment that denied plaintiffs' request for an injunction but granted them declaratory relief. ROA.1246. Defendants filed a notice of appeal on April 22, 2019, ROA.1472, within the time prescribed by Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

In preparation for a potential military draft, Congress has required nearly all males to register with the Selective Service System when they turn 18. The Supreme Court upheld this statute in *Rostker v. Goldberg*, 453 U.S. 57 (1981), rejecting a claim that Congress unconstitutionally excluded women from the registration requirement. The question presented is whether the district court erred in refusing to follow *Rostker*'s holding based on its assessment of changed circumstances.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Military Selective Service Act ("Act") has long required all male citizens between the ages of eighteen and twenty-six, with some exceptions, to register with a federal agency known as the Selective Service System ("Selective Service"). 50 U.S.C.

§§ 3802(a), 3809(a)(1). These registrations must be in accordance with the Act's implementing regulations, *see id.* § 3802(a), and their purpose "is to facilitate any eventual conscription" into the armed forces in the event of a military draft. *Rostker v. Goldberg*, 453 U.S. 57, 59-60 (1981); *see also* 50 U.S.C. § 3801. The Act does not require women to register. 50 U.S.C. § 3802(a).

In *Rostker v. Goldberg*, the Supreme Court considered whether the Act's male-only registration requirement amounts to unconstitutional sex discrimination under the Fifth Amendment. 453 U.S. at 59. As the Court's opinion recounted, President Carter and various military leaders had recommended in 1980 that the Act be amended to permit the registration of both sexes. *Id.* at 60-61, 79. In response, "Congress considered the question at great length" and heard "extensive testimony and evidence," including through multiple rounds of hearings, floor debate, and committee proceedings, before deciding to retain the male-only requirement. *Id.* at 61, 72. The Court found constitutional significance in the fact that Congress had not acted "unthinkingly" or "reflexively," *id.* at 72, as well as the fact that "the Constitution itself requires . . . deference to congressional choice" when military affairs are involved, *id.* at 67, and then ultimately concluded that "Congress acted well within its constitutional authority when it authorized the registration of men, and not women," under the Act. *Id.* at 83.

In reaching that conclusion in *Rostker*, the Court recognized that "the purpose of registration is to develop a pool of potential combat troops," and the Court

observed that statutory prohibitions and military policy restricted the ability of women to serve in combat. 453 U.S. at 77-78. The Court also explained that while some women might nonetheless suitably be inducted into the armed forces, "Congress simply did not consider it worth the added burdens of including women in draft and registration plans." *Id.* at 81. And the Court approvingly cited Congress's expressed concern that training might be "needlessly burdened" if it included a number of female recruits that would ultimately be found to not be combat ready. *Id.* The Court then held that because of differences in each sex's readiness for combat positions, men and women were not "similarly situated for purposes of a draft or registration for a draft." *Id.* at 78.

2. Since *Rostker,* there have been changes in the restrictions on women serving in combat positions. In 1991, Congress repealed restrictions on women flying combat aircraft. Pub. L. No. 102-190, § 531, 105 Stat. 1290, 1365 (1991). In 1993, Congress eliminated the ban on women serving on combat ships. Pub. L. No. 103-160, § 541, 107 Stat. 1547, 1659 (1993), *repealing* 10 U.S.C. § 6015 (1988). And in 2013, the Department of Defense ("DOD") decided that it would soon rescind an earlier policy excluding women from assignment to units and positions whose primary mission is to engage in direct ground combat. ROA.966.

In late 2015, DOD announced that this policy change would be implemented in early 2016. ROA.966. DOD recognized, however, that "full integration" would still remain a work in progress, ROA.973, and DOD noted its concern that (among

other things) there would be challenges in integrating "the military occupational specialties and positions that were previously closed to women." ROA.966. Those challenges included a potential need for a cultural shift in various career fields; complexities involved with using sex-integrated forces in coordination with allies and partners in areas of the world that subscribe to different norms on women's roles; and devising and implementing strategies to mitigate an observed difference in men's and women's injury rates that the Army and Marine Corps had documented in ground combat training. ROA.967-68.

Following DOD's 2016 policy change, Congress reexamined the Act's male-only registration requirement while debating the 2017 National Defense Authorization Act. The version of the bill that initially passed the Senate would have required women to register with the Selective Service, and would have created a legislative commission to review the draft as a whole. S. 2943, 114th Cong. § 591 (June 14, 2016). The version of the bill that initially passed the House of Representatives merely asked the Secretary of Defense to study requiring women to register, and would have required a report to Congress on the matter. H.R. 4909, 114th Cong. § 528 (May 18, 2016).

While the bill was in conference committee, a group of senators urged that Congress refrain from requiring women to register, and that it "instead, task an independent commission to study the purpose and utility of the Selective Service System, specifically determining whether the current system is unneeded, if it is

sufficient, or if it needs an expanded pool of potential draftees." ROA.975-76. Consistent with that suggestion, Congress in the final public law removed the provision requiring female registration, and it instead created a "National Commission on Military, National, and Public Service" ("the Commission") to study the issue further. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 551-557, 130 Stat. 2000, 2129-2137 (2016).

In doing so, Congress gave the Commission a broad mandate to "conduct a review of the military selective service process," and to "consider methods to increase participation in military, national, and public service opportunities to address national security and other public service needs." Pub. L. No. 114-328, § 555(a). This included, among a number of other specific tasks, the duty to evaluate whether a selective service process was even needed, and if it was needed, whether it should be conducted "without regard to . . . sex." *Id.* §§ 551, 555. The same legislation directed DOD to provide a report to the Commission and to Congress about (among other things) the benefits of mandatory registration, how those benefits would be affected if registration were expanded to women, and the "feasibility and utility" of modifying the registration system to focus on mass mobilization "of all military occupational specialties" rather than just on mobilizing combat troops. *Id.* § 552.

DOD's report was completed in March 2017. ROA.821. The Commission commenced its work soon after. Pursuant to a statutory mandate, *see* Pub. L. No. 114-328, § 554(a)-(b), the Commission held public meetings throughout the United

States in order to "get a range of views" to inform its recommendations. *See* ROA.1115-16 (2018 hearings); 84 Fed. Reg. 801 (Jan. 31, 2019) (2019 hearings). The Commission also gave members of the public an opportunity to submit written comments, *see* Pub. L. No. 114-328, § 554(d); 83 Fed. Reg. 17,573 (Apr. 20, 2018), which the Commission is statutorily required to "consider . . . when developing its recommendations." Pub. L. No. 114-328, § 554(d)(3).

The Commission released an interim report in January 2019, which set out a summary of the information received by that point and the further tasks ahead. ROA.1195-1226. That interim report specifically noted that the Commission was still "carefully considering and actively seeking input" on whether the registration requirement should be extended to women. ROA.1211. The Commission's final report is due to the President and Congress by March 2020, and it will be publicly available. *See* Pub. L. No. 114-328, § 555(e); *see also* 83 Fed. Reg. 7080, 7081 (Feb. 16, 2018 (recognizing that the Commission's "establishment date" was in September 2017).

B. Factual Background and Prior Proceedings

1. This case commenced in April 2013 in the Central District of California. Plaintiffs were originally James Lesmeister, a male who alleged he had recently registered with Selective Service upon turning 18, and an organization called the National Coalition for Men ("the Coalition"). ROA.12-14. Plaintiffs alleged that in light of changes in women's eligibility to serve in combat roles, the male-only

registration requirement constituted unlawful sex discrimination in violation of the Fifth Amendment. ROA.16-18. Plaintiffs sought declaratory and injunctive relief. ROA.18.

The district court dismissed the complaint on ripeness grounds, noting that, at the time, the status of women's ability to join combat troops was uncertain. ROA.312-14. The Ninth Circuit reversed in February 2016, explaining that, in its view, much of the previous uncertainty no longer existed and that any remaining uncertainty did not render the claims unripe. ROA.341-43. The court also rejected one of the government's standing arguments, explaining that the government was "wrong to argue that [plaintiffs] lack standing because their alleged equality injuries would not be redressed if the burdens they challenge were extended to women." ROA.343-44. The court otherwise declined to address the government's standing arguments, leaving them to the district court on remand. ROA.344.

2. On remand, the district court ruled that Lesmeister had alleged sufficient facts to support standing because he both had to register with Selective Service and had a continuing obligation to update his registration if he moved. ROA.448-49. But the court also found that the Coalition lacked standing, as it had not identified Lesmeister or any other individual with standing as a member. ROA.449-50. The court then concluded that there was no basis for venue in the Central District of California, and it transferred the case to the Southern District of Texas (where Lesmeister resided). ROA.450-51.

3. Following transfer, plaintiffs amended their complaint to add a new plaintiff, Anthony Davis, who alleged he was a male between 18 and 25, had recently registered for the draft as required, and was a member of the Coalition. ROA.530, 533. The government moved to dismiss, but the district court denied the motion, concluding that all three plaintiffs had standing. The court further opined that plaintiffs' claim was not barred by *Rostker*. ROA.644-51.

Both sides cross-moved for summary judgment, and the district court granted plaintiffs' motion and denied the government's. ROA.1227. The court adhered to its view that *Rostker* was not controlling because women were now eligible for combat roles, as they had not been when *Rostker* was decided. For this reason, the court concluded it had to evaluate the Act's constitutionality "anew." ROA.1235-36. The court also believed that *Rostker* mandated heightened scrutiny for sex-based discrimination claims in the military context, ROA.1236-38, and the court concluded that the government's justifications for male-only registration were insufficient to withstand that heightened scrutiny. ROA.1238-45.

The court issued a final judgment declaring the male-only registration requirement unconstitutional. *See* ROA.1245-46. The court refused to issue an

injunction, however, explaining that plaintiffs had not briefed their entitlement to injunctive relief in their summary judgment papers. ROA.1245.[1]

SUMMARY OF ARGUMENT

In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Supreme Court upheld the male-only registration requirement against claims that the requirement violated the Fifth Amendment. That is the same claim asserted here. The proper resolution of that claim is plain: *Rostker* forecloses the claim in this Court. This Court and the Supreme Court have made clear that only the Supreme Court may overrule its own precedents, even if it is urged that subsequent developments have cast doubt on a precedent's reasoning. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Ballew v. Continental Airlines, Inc.*, 668 F.3d 777 (5th Cir. 2012). If *Rostker* is to be overruled, that decision must be rendered by the Supreme Court. Any other path would be an end run around the Supreme Court's role within the federal judiciary. And that concern is especially compelling here, as this case involves the judiciary evaluating a requirement imposed by a coequal branch of government, the matter concerns military affairs, the political branches are actively engaged in a comprehensive reevaluation of the registration requirement that may soon result in

[1] Thirty days after the district court ruled, plaintiffs filed a Rule 60(b) motion requesting that the court amend its decision to grant injunctive relief. *See* ROA.1249. The district court denied that motion, ROA.1478-80, and plaintiffs have declined to appeal from either the district court's judgment or its Rule 60(b) decision.

further changes to the legal landscape, and *Rostker*'s central holding has in any event not been undermined by recent changes.

Because *Rostker* controls, this Court need go no farther. But even if the Court believes *Rostker* is no longer binding, it should conclude that the Act is constitutional. As *Rostker* itself recognized, and as the Supreme Court has reaffirmed in numerous other cases, Congress is entitled to extremely wide deference when it legislates with regard to military affairs, even when Congress draws distinctions that would otherwise trigger heightened scrutiny in the civilian context.

Applying that deference here yields the conclusion that the male-only registration requirement remains constitutional. Congress acted rationally when it elected to maintain the status quo while simultaneously creating a comprehensive process, and a national Commission, to reevaluate the existing registration requirement (including whether registration is even still needed at all). Additionally, based on a variety of concerns—including some expressed by the Secretary of Defense upon implementing the new combat policy—Congress rationally could have concluded that women's eligibility for combat positions would not make them just as likely as men to *serve* in combat positions in the event of a draft. Thus, based on the same practical and administrative concerns that *Rostker* itself blessed, Congress reasonably could have understood that the two sexes were not similarly situated for registration purposes.

Finally, although heightened scrutiny is inappropriate here, the district court also erred in its application of that test. The district court failed to evaluate the validity of Congress's decision to keep the status quo while engaged in comprehensive study, a particularly significant error because Congress had evidence before it showing that even after DOD's policy change, questions existed regarding the impact of sex differences in the context of a draft.

STANDARD OF REVIEW

The district court's ruling on summary judgment is reviewed de novo. *Century Surety Co. v. Seidel*, 893 F.3d 328, 332 (5th Cir. 2018). "Summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quotation marks omitted).

ARGUMENT

THE ACT'S MALE-ONLY REGISTRATION REQUIREMENT IS CONSTITUTIONAL

A. The Supreme Court's Decision In *Rostker* Is Controlling.

The Supreme Court in *Rostker v. Goldberg* was clear: "Congress acted well within its constitutional authority when it authorized the registration of men, and not women, under the Military Selective Service Act." 453 U.S. 57, 83 (1981).

Rostker's holding should be the beginning and end of this Court's analysis. The Supreme Court reserves for itself "the prerogative of overruling its own decisions," and until that occurs a subordinate court like this one must "follow the case which

directly controls." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see also Agostini v. Felton*, 521 U.S. 203, 237, 239 (1997) (reaffirming that the lower courts were bound by the Supreme Court decision on point, even though there was "a bona fide, significant change in subsequent law"). Thus, even if this Court were convinced that the Supreme Court would overrule *Rostker* if given the chance—though as we explain below *Rostker*'s holding remains correct—this Court must still follow *Rostker* until the Supreme Court actually overrules it.

As this Court has recognized, the Fifth Circuit is "a strict *stare decisis* court" when it comes to Supreme Court precedent. *Ballew v. Continental Airlines, Inc.*, 668 F.3d 777, 782 (5th Cir. 2012) (quotation marks omitted); *see also Hernandez v. United States*, 757 F.3d 249, 265 (5th Cir. 2014) ("we cannot ignore a decision from the Supreme Court unless directed to do so by the Court itself"). By doing so, this Court "respect[s] the Supreme Court's singular role in deciding the continuing viability of its own precedents." *Perez v. Stephens*, 745 F.3d 174, 180 (5th Cir. 2014).

Moreover, this is not a case in which this Court is being asked to apply precedent to a different statute than one previously addressed by the Supreme Court. It is instead being asked to overturn the same statute upheld against the same challenge presented here. The district court cited no instance in which this Court has accepted such an invitation.

The changes in women's legal status with respect to combat roles has no bearing on this Court's inquiry. On the contrary, this Court's obligation to follow

Supreme Court precedent applies even if there has been "a bona fide, significant change in subsequent law." *Agostini*, 521 U.S. at 239. Moreover, this Court has recognized that it remains bound by a Supreme Court decision even if that decision's reasoning was later rejected by the Supreme Court itself. *Ballew*, 668 F.3d at 782.

Nor does it matter that the district court characterized women's new combat eligibility as a change in "factual circumstances." ROA.1236 n.4. The Supreme Court itself has recognized that its precedents are binding on lower courts even in the face of arguments that those precedents have been overtaken by factual changes. *See State Oil Co. v. Khan*, 522 U.S. 3, 20-21 (1997) (explaining that lower courts were bound by a prior Supreme Court case, even though changes in economic realities had undermined that prior decision); *Roper v. Simmons*, 543 U.S. 551, 590 (2005) (O'Connor, J., dissenting) (explaining that lower courts are bound by on-point Supreme Court cases "even where subsequent decisions *or factual developments*" have significantly undermined a prior holding (emphasis added) (citations omitted)).[2] *Accord Elgin v. U.S. Dep't of Treasury*, 641 F.3d 6, 22-24 (1st Cir. 2011) (Stahl, J., concurring) (recognizing that *Rostker* was controlling precedent, even in the face of a Fifth Amendment challenge to the registration requirement that had invoked "dramatic changes in the roles of

[2] The majority opinion in *Roper* simply held that the prior precedent should be overruled, and did not discuss whether the lower court had acted improperly by doing the same. *Roper*, 543 U.S. at 555-79.

women in the military" since *Rostker* was decided), *aff'd on other grounds*, 567 U.S. 1 (2012).

Indeed, changes in factual circumstances are precisely the kind of thing the Supreme Court considers when deciding whether to overrule one of its earlier precedents. *See, e.g.*, *State Oil*, 522 U.S. at 20-21. The principle that the Supreme Court reserves for itself "the prerogative of overruling its own decisions," *Rodriguez de Quijas*, 490 U.S. at 484, would be nullified if a lower court could invoke changed factual circumstances as a reason to disregard Supreme Court precedent. And that is all the more true when it is quite debatable whether the changes at issue are even material; as we explain in the next section, *see infra*, pp.15-29, *Rostker*'s central holding remains correct.

The need to await Supreme Court direction is also especially compelling in cases, like this one, where the judiciary is being asked to invalidate an act of Congress. *Rostker* itself recognized that "Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States," and the Court further explained that the judiciary must have "due regard" when it is "sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." *Rostker*, 453 U.S. at 64. That "due regard" thus counsels that lower courts act particularly cautiously in this area. Plus, that is particularly true when one considers that plaintiffs are seeking to take Congress to task for not *amending* an earlier statute in light of

factual changes—yet Congress may well have been acting against the backdrop of the Supreme Court's earlier decision when it pursued precisely that course. And the need to act cautiously with regard to a coequal branch takes on even more importance when one considers that military affairs are at issue, and thus the case implicates an area where judicial deference to Congress is at its maximum. *Id.* at 70.

Finally, the need to await Supreme Court direction is supported still further in this case by the fact that the political branches are already engaged in an ongoing review process to determine whether to amend the registration requirement to include women (as well as whether to even maintain a system of registration in the first place). With that process well underway—the Commission's report is due to Congress in March 2020—a lower court should be especially wary of getting ahead of the Supreme Court and disrupting how that Court elects to manage the judiciary's role in the ongoing dialogue. And that is especially true when one considers that the Commission's report to Congress, and Congress's response, will almost certainly provide additional factual context for the judiciary to evaluate any registration requirement that Congress elects to maintain.

B. Even If *Rostker* Does Not Control The Outcome Of This Case, The Male-Only Registration Requirement Is Constitutional.

Because *Rostker* controls, this Court need go no farther. But even if this Court were to accept the district court's view that *Rostker*'s ultimate holding is no longer binding precedent, it does not follow that *Rostker* is irrelevant, let alone that the

registration requirement must fall. Rather, as we explain below, *Rostker* remains instructive on both the standard of review and the proper analysis of the statute accounting for women's eligibility for combat positions in the volunteer forces. And under that analysis, the statute remains constitutional.

1. A Highly Deferential Standard Of Review Applies To The Male-Only Registration Requirement.

The male-only registration requirement is embodied in an act of Congress, and this Court thus begins with "the presumption of constitutionality," *Flemming v. Nestor*, 363 U.S. 603, 617 (1960), that attaches to all acts of Congress. And that is especially true here. *Rostker* specifically recognized that any analysis of the Military Selective Service Act had to begin with the recognition that Congress was a "coequal branch of government," whose members have sworn to uphold the Constitution, and who as part of their debate over the Act "specifically considered the question of the Act's constitutionality." *Rostker*, 453 U.S. at 64.

That customary deference, moreover, is only the beginning of the deference that is owed Congress in this case. As the Supreme Court explained in *Rostker* itself, registration is "the first step in the induction process" into the military, and congressional judgments about registration are thus "based on judgments concerning military operations and needs." *Rostker*, 453 U.S. at 68. Constitutional questions about the registration requirement therefore implicate an area where "the lack of competence on the part of the courts is marked," *id.* at 65, and "judicial deference" to

congressional judgment is "at its apogee," *id.* at 70. *See also Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986) (recognizing the high level of deference that is appropriate when military affairs are at issue, and stressing that the Executive and Legislative branches are the entities in our system of government that are charged with formulating military policies).

Crucially, this extremely high level of deference applies even when Congress makes classifications that, in civilian contexts, might otherwise trigger heightened scrutiny. *Rostker* explained that the "tests and limitations to be applied" under the Fifth Amendment can "differ because of the military context" since "the Constitution itself" requires judicial deference in this area. 453 U.S. at 67; *see also Weiss v. United States*, 510 U.S. 163, 177 (1994) (refusing to apply traditional Due Process analysis to the military context); *Solorio v. United States*, 483 U.S. 435, 447-48 (1987) (listing a "variety of contexts" where significant deference applied when considering the constitutional rights of military members). And in practice, Supreme Court decisions involving constitutional challenges in the military context have applied something akin to rational basis review, even when the challenges were of a type that would otherwise trigger more searching levels of scrutiny.

For instance, in *Rostker* the Court was dealing with a claim of sex discrimination. When dealing with such claims in civilian contexts, courts will "carefully inspect[]" the challenged action, *United States v. Virginia*, 518 U.S. 515, 532 (1996), and will normally reject "administrative ease and convenience," *Craig v. Boren*,

429 U.S. 190, 198 (1976), as a basis to sustain the statute. Yet in *Rostker*, the Court accepted concerns about "administrative problems" as sufficient to uphold the registration requirement. 453 U.S. at 81.

Similarly, when assessing defenses against civilian sex-discrimination claims, courts will refuse to accept "post hoc" justifications and will inquire whether "the proffered justification is 'exceedingly persuasive'"—a standard that the Supreme Court has described as "demanding." *Virginia*, 518 U.S. at 533. Yet in *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975), the Court upheld different mandatory-discharge requirements for male and female naval officers based on what "Congress may … quite rationally have believed." And in *Rostker*, the Court deferred to Congress even in the face of significant contrary evidence, including testimony from military officials, 453 U.S. at 63; the Court uncritically accepted the constitutional validity of the underlying restrictions on women serving in combat, *id.* at 77; and the Court reaffirmed that the political branches had significant latitude to choose "among alternatives" in furthering military interests, *id.* at 71-72. Indeed, two different dissenting opinions in *Rostker* emphasized how the majority had departed from typical equal protection analysis in a case involving sex discrimination. *See id.* at 85 (White, J., dissenting); *id.* at 94-95 (Marshall, J., dissenting).

The Court's decision in *Goldman v. Weinberger* drives home the point that the military context can change the applicable level of scrutiny. At the time *Goldman* was decided, heightened scrutiny applied to facially neutral laws that substantially

burdened religious exercise. *See* 475 U.S. at 506. Yet the Court in *Goldman* upheld a military policy preventing Jews from wearing yarmulkes in uniform, even in the face of strong evidence against that policy and contentions that the military had acted "ipse dixit," based on principles of deference to military judgment about where to "draw[] the line." *Id.* at 509-10. *Goldman* was even explicit in stating that judicial "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Id.* at 507.

That point is reinforced by the Supreme Court's recent decision in *Trump v. Hawaii*, which declined to import "the de novo 'reasonable observer' inquiry" under the Establishment Clause into "the national security … context," which includes "military actions." 138 S. Ct. 2392, 2420 n.5 (2018). The Court instead applied "rational basis review" and stressed that judicial "inquiry into matters of … national security is highly constrained," *id.* at 2420, even when evaluating a "'categorical' … classification that discriminate[s] on the basis of sex," *id.* at 2419. And previously, in *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court had applied a standard akin to rational basis review in the closely related immigration context, even though the Court was considering a claim of sex discrimination. *Id.* at 798.

Contrary to the district court's suggestion, *see* ROA.1236-38, it does not matter that in *Rostker* the Court refused to attach a "label[]" to the type of review it was applying. *Rostker*, 453 U.S. at 70. As explained above, in substance, the Court's

approach most closely resembled rational basis review. Thus, whatever "label" is assigned this lenient form of review, it is not heightened scrutiny. And there is certainly nothing in *Rostker* that says that heightened scrutiny is appropriate.

2. The Male-Only Registration Requirement Is Constitutional.

A. Under an appropriately deferential standard of review that accounts for the military context, this Court's inquiry is akin to rational basis review. *See also Schlessinger*, 419 U.S. at 508 (upholding a military policy that facially discriminated between the sexes based on what "Congress may . . . quite rationally have believed"). Thus, the governmental classification at issue must have a "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Duarte v. City of Lewisville*, 858 F.3d 348, 354 (5th Cir. 2017) (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Here, the relevant purpose is the government's interest in raising and supporting armies—an interest that *Rostker* already recognized as not just "legitimate," but as "important" (as would be required if heightened scrutiny were applicable). 453 U.S. at 70. And for multiple reasons, Congress could "quite rationally have believed" that purpose would be served by the Act's male-only registration requirement, notwithstanding recent changes to women's eligibility for combat positions.

First, for at least some period of time, Congress could have quite reasonably decided to continue with the decision made by the 1980 Congress while the

government was engaged in active efforts to examine the issue afresh. Central to the Court's holding in *Rostker* was the notion that Congress was particularly entitled to deference because it "did not act 'unthinkingly' or 'reflexively'" when it maintained existing law in 1980, and instead had chosen this course only after "extensively" considering the issue in "hearings, floor debate, and in committee," over the course of multiple years. *Rostker*, 453 U.S. at 72. The 1980 Congress also did *not* call for automatically changing draft registration requirements in the event of changes in women's eligibility for combat positions. *Cf.* 10 U.S.C. § 652(a) (requiring that if DOD made changes to women's eligibility to serve in combat positions, DOD had to submit a report to Congress on the constitutional implications of that change for the male-only registration requirement). Implicit in *Rostker*, therefore, is the principle that Congress is entitled, at a minimum, to a period of time in which it can extensively reconsider the issue in light of changes in women's combat eligibility. And here, Congress understandably concluded that the best way for it to gather the relevant information was in a comprehensive, multi-step process, designed to maximize opportunities for expert and public input on this issue of national impact and importance.

That comprehensive process began with Congress tasking DOD to write a report about (among other things) the benefits of mandatory registration, how those benefits would be affected if registration were expanded to women, and the "feasibility and utility" of modifying the registration system to focus on mass

mobilization "of all military occupational specialties" rather than just on mobilizing combat troops. Pub. L. No. 114-328, § 552. Congress also created an independent National Commission on Military, National, and Public Service to "conduct a review of the military selective service process," and to "consider methods to increase participation in military, national, and public service opportunities to address national security and other public service needs." *Id.* §§ 553(a), 555(a). Congress determined that the Commission would then get the DOD report, *see id.* § 552(a); would receive recommendations from other agencies, *see id.* § 555(d); would hold public hearings and meetings, *see id.* § 554(a)-(b); and would solicit and receive public comments, *see id.* § 554(d). Congress ultimately tasked the Commission with writing a final report on a number of related issues, including whether a system of selective service even continues to be needed, and if so "whether such a system should include mandatory registration by all citizens and residents, regardless of sex." *Id.* § 555(b), (c)(2). That report must include "legislative language and recommendations for administrative action to implement the recommendations of the Commission." *Id.* § 555(e)(1).

The Commission's public report is due to Congress and the President within 30 months after the Commission's establishment (*i.e.*, in March 2020). *See* Pub. L. No. 114-328, § 555(e); 83 Fed. Reg. 7080 (Commission's "establishment date" was in September 2017). Congress has understandably elected to maintain the status quo while the Commission conducts its work. There is nothing irrational or unreasonable about such a careful and considered approach. *Cf. Wenner v. Texas Lottery Comm'n*, 123

F.3d 321, 326 (5th Cir. 1997) (recognizing that preliminary injunctions "commonly favor the status quo and seek to maintain things in their initial condition so far as possible until after a full hearing permits final relief to be fashioned"). Indeed, for plaintiffs to take the contrary position, they have to make the extraordinary argument that Congress erred not by passing an unconstitutional statute but instead by refusing to immediately *amend* a longstanding statute that had already been upheld by the Supreme Court as constitutional.

Second, Congress's decision to study the issue further makes particular sense when one considers that there are still rational reasons that justify male-only registration—rational reasons that are sufficient in their own right to sustain the statute. Even though women are now eligible for volunteer combat positions, Congress could rationally have believed that men and women are still not similarly-situated for purposes of registering for the draft because there are still relevant differences between the sexes that could affect each sex's relative likelihood of effectively serving in the broad range of available combat roles.

That point is important because *Rostker* itself recognized that if men and women as a group were not similarly situated in their ability to serve as combat troops in a conscription context, Congress quite understandably could have distinguished between the two sexes for purposes of draft registration. *Rostker*, 453 U.S. at 81. *Rostker* deferred in particular to Congress's determination that "the important goal of military flexibility" would be harmed if women were drafted who could only be

utilized in "noncombat positions . . . during a mobilization." *Id.* at 81-82; *see also id.* at 81 (citing Congress's rejection of a system where "all women [would] be registered, but only a handful [would] actually be inducted in an emergency," which Congress found to be "a confused and ultimately unsatisfactory solution"). *Rostker* also was quite sensitive to Congress's unwillingness to incur the administrative burdens, including added costs, that would result from registering all women if a relatively lower proportion of women than men were ultimately able to serve in emergency combat. *Id.*; *see also* ROA.842-43 (discussing the additional resources required to register women). And *Rostker* recognized—citing concerns expressed in a Senate report—that if a greater percentage of women than men would ultimately be ineligible to fill combat billets, sex-based registration restrictions could serve to allocate training resources efficiently. 453 U.S. at 81-82. Indeed, that point could have particular resonance if military training resources were stretched thin in the event of a sudden and unexpected urgent need to train newly-drafted troops.

In light of the above, Congress could rationally have understood that making women eligible to volunteer for combat positions would not automatically render them just as likely as men to serve in all combat positions. That was certainly true in 1980 (as well as today), when Congress could have expected that physical differences between men and women might mean that women were less likely to serve effectively in at least certain kinds of combat roles (such as those requiring certain levels of physical strength), even if their sex did not render them categorically ineligible for

those roles. Indeed, those differences likely informed Congress's decision to "recognize[] and endorse[]" the then-current exclusion of women from combat positions, which the President concurred in, *see Rostker*, 453 U.S. at 77. It also likely informed Congress's decision in 1980 not to require that any changes in women's registration status occur in lockstep with changes in women's eligibility for combat positions.

While that point would itself be sufficient to sustain the statute, more recent evidence reinforces the point that opening all combat roles to female volunteers does not necessarily mean that men and women will be equally likely to serve in all combat roles in a conscription context. When DOD began implementing its new combat policy in late 2015, then-Secretary of Defense Ashton Carter explained how the new policy would not result in immediate "full integration," and the military would instead need to remain cognizant of various observed sex differences. ROA.966-67. For instance, "Army and Marine Corps studies found that women participating in ground combat training sustained injuries at higher rates than men, particularly in occupational fields requiring load-bearing." ROA.967. Then-Secretary Carter also noted that there may be parts of the world—which include some important military allies—where key people "are culturally opposed to working with women" and using integrated combat units could "complicate cooperation with allies and partners." ROA.968. Even assuming those identified concerns could eventually be mitigated (a premise Congress understandably could have been uncertain of), Congress could

rationally have understood that the issues either had not yet been successfully mitigated, or would require the expenditure of significant resources to mitigate. Indeed, that understanding accords with DOD's subsequent report to the Commission (also provided to Congress, *see* ROA.821, 824), which noted that some people believe physical differences between men and women cause women to have lower survival rates if used as ground combat troops, and that some individuals had expressed concerns that drafting men and women in equal numbers could be inefficient. ROA.839-40.

B. Even if heightened scrutiny applied, under which the male-only registration requirement has to be "substantially [related] to an important governmental interest," *Dallas Fire Fighters Ass'n v. City of Dallas*, 150 F.3d 438, 442 (5th Cir. 1998), the current statute would still pass constitutional muster.

As noted, *see supra*, p.20, *Rostker* already found that the government's interest in raising and supporting armies qualifies as an "important" interest. The district court acknowledged as much. *See* ROA.1238-39. Thus, the only question under this standard is whether Congress's current registration system is "substantially" related to that interest.

The previous discussion explains that this substantial relationship exists, particularly because Congress decided to engage in extensive study before deciding whether to alter the registration scheme. *Rostker* itself commended Congress for not acting "unthinkingly" or "reflexively" when it maintained the male-only draft in 1980.

Rostker, 453 U.S. at 72. And that decision was one in which Congress declined to automatically tether the male-only registration requirement to women's eligibility for combat positions. Similarly, the fact that there are physical differences between men and women, which could affect the relative proportion in which each sex is able to serve in the full panoply of combat positions, shows that Congress had legitimate bases on which to provide only for registration of males.

The district court's contrary conclusion failed to come to grips with the government's arguments. The court thought that the government had offered only "two potential justifications" for Congress's decision to maintain male-only registration, neither of which was the need for further study. *See* ROA.1240-45. In fact, however, the government's motion briefing had clearly articulated the need for further study as a basis on which the court should have upheld the statute. *See* ROA.944-45. The court's decision thus provides no basis at all to reject the government's argument on this point.

The court also failed to adequately address the government's arguments for why women were not currently similarly situated to men for purposes of registration. The district court dismissed these arguments because it essentially confined itself to the legislative history of Congress's *1980* decision, and then found that Congress's analysis was either inadequate or largely premised on women's exclusion from combat roles. ROA.1241-45; *see also* ROA.1240 n.5 (contending that the 2016 "Congress generated very little documentation on why it ultimately declined to amend the" Act,

and so the court "must primarily rely on congressional records from" the 1980 debate). But in doing so, the district court ignored that the 2016 Congress was plainly aware of DOD's policy change and had even cited then-Secretary Carter's December 3, 2015 decision to change DOD policy. *See* H.R. Rep. No. 114-840, at 1039 (2016) (Conf. Rep.) (specifically citing "the December 3, 2015, decision by the Secretary" of Defense "to open all previously closed military occupations to women"); *see also* S. Rep. No. 114-255, at 150-151 (2016) (discussing the DOD policy change). Congress could fairly be tasked with knowledge of DOD's assessment of its policy change as expressed in the Secretary's December 3, 2015 letter, and that letter provided bases on which Congress could have maintained the existing registration system—including differential injury rates, and concerns about integrating with allies in various parts of the world who hold different cultural views about women. *See* ROA.966-68.

Nor was the district court correct in brushing off the 1980 legislative history. As recounted in *Rostker*, that legislative history included a number of expressed concerns about military flexibility, training efficiency, and administrative burdens associated with registering individuals less likely to serve in combat roles. *See Rostker*, 453 U.S. at 76. While offered in the context of a regime where women were ineligible to serve in combat, much of that reasoning is still applicable to a regime where women are eligible to serve yet less likely to do so. And the 1980 Congress clearly believed there were sex-based differences in terms of likely suitability for combat positions. *See id.* at 76-77.

In any event, the district court's concern about the relative lack of legislative history only underscores why Congress acted constitutionally when it decided to await the Commission's report before acting. It is presumably *because* Congress had not yet thoroughly considered the issue in light of the policy change that Congress decided to create the Commission to engage in a comprehensive review. Thus, if the current legislative record is inadequate, that only reinforces the propriety of Congress's decision to keep the status quo in place while the Commission performs its work.

CONCLUSION

For the foregoing reasons, the district court's declaratory judgment should be reversed and the case remanded with instructions to enter judgment for the defendants.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

RYAN K. PATRICK
United States Attorney

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

MARK B. STERN
s/ Benjamin M. Shultz
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff
Civil Division, Room 7211
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-3518
Benjamin.Shultz@usdoj.gov

August 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2019, I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Benjamin M. Shultz
Benjamin M. Shultz

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7052 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Benjamin M. Shultz
Benjamin M. Shultz

ADDENDUM

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50 U.S.C. § 3802

§ 3802. Registration

(a) 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.

(b) Regulations prescribed pursuant to subsection (a) may require that persons presenting themselves for and submitting to registration under this section provide, as part of such registration, such identifying information (including date of birth, address, and social security account number) as such regulations may prescribe.

National Defense Authorization Act For Fiscal Year 2017, Pub. L. No. 114-328, §§ 551-557

§ 551. Purpose, Scope, And Definitions.

(a) PURPOSE.—The purpose of this subtitle is to establish the National Commission on Military, National, and Public Service to—

(1) conduct a review of the military selective service process (commonly referred to as "the draft"); and

(2) consider methods to increase participation in military, national, and public service in order to address national security and other public service needs of the Nation.

(b) SCOPE OF REVIEW.—In order to provide the fullest understanding of the matters required under the review under subsection (a), the Commission shall consider—

(1) the need for a military selective service process, including the continuing need for a mechanism to draft large numbers of replacement combat troops;

(2) means by which to foster a greater attitude and ethos of service among United States youth, including an increased propensity for military service;

(3) the feasibility and advisability of modifying the military selective service process in order to obtain for military, national, and public service individuals with skills (such as medical, dental, and nursing skills, language skills, cyber skills, and science, technology, engineering, and mathematics (STEM) skills) for which the Nation has a critical need, without regard to age or sex; and

(4) the feasibility and advisability of including in the military selective service process, as so modified, an eligibility or entitlement for the receipt of one or more Federal benefits (such as educational benefits, subsidized or secured student loans, grants or hiring preferences) specified by the Commission for purposes of the review.

(c) DEFINITIONS.—In this subtitle:

(1) The term "military service" means active service (as that term is defined in subsection (d)(3) of section 101 of title 10, United States Code) in one of the uniformed services (as that term is defined in subsection (a)(5) of such section).

(2) The term "national service" means civilian employment in Federal or State Government in a field in which the Nation and the public have critical needs.

(3) The term "public service" means civilian employment in any non-governmental capacity, including with private for-profit organizations and non-

profit organizations (including with appropriate faith-based organizations), that pursues and enhances the common good and meets the needs of communities, the States, or the Nation in sectors related to security, health, care for the elderly, and other areas considered appropriate by the Commission for purposes of this subtitle.

§ 552. Preliminary Report On Purport And Utility Of Registration System Under Military Selective Service Act.

(a) REPORT REQUIRED.—To assist the Commission in carrying out its duties under this subtitle, the Secretary of Defense shall—

(1) submit, not later than July 1, 2017, to the Committees on Armed Services of the Senate and the House of Representatives and to the Commission a report on the current and future need for a centralized registration system under the Military Selective Service Act (50 U.S.C. 3801 et seq.); and

(2) provide a briefing on the results of the report.

(b) ELEMENTS OF REPORT.—The report required by subsection (a) shall include the following:

(1) A detailed analysis of the current benefits derived, both directly and indirectly, from the Military Selective Service System, including—

(A) the extent to which mandatory registration benefits military recruiting;

(B) the extent to which a national registration capability serves as a deterrent to potential enemies of the United States; and

(C) the extent to which expanding registration to include women would impact these benefits.

(2) An analysis of the functions currently performed by the Selective Service System that would be assumed by the Department of Defense in the absence of a national registration capability.

(3) An analysis of the systems, manpower, and facilities that would be needed by the Department to physically mobilize inductees in the absence of the Selective Service System.

(4) An analysis of the feasibility and utility of eliminating the current focus on mass mobilization of primarily combat troops in favor of a system that focuses on mobilization of all military occupational specialties, and the extent to which such a change would impact the need for both male and female inductees.

(5) A detailed analysis of the Department's personnel needs in the event of an emergency requiring mass mobilization, including—

(A) a detailed timeline, along with the factors considered in arriving at this timeline, of when the Department would require—

(i) the first inductees to report for service;

(ii) the first 100,000 inductees to report for service; and

(iii) the first medical personnel to report for service; and

(B) an analysis of any additional critical skills that would be needed in the event of a national emergency, and a timeline for when the Department would require the first inductees to report for service.

(6) A list of the assumptions used by the Department when conducting its analysis in preparing the report.

(c) COMPTROLLER GENERAL REVIEW.—Not later than December 1, 2017, the Comptroller General of the United States shall submit to the Committees on Armed Services of the Senate and the House of Representatives and to the Commission a review of the procedures used by the Department of Defense in evaluating selective service requirements.

§ 553. National Commission On Military, National, And Public Service.

(a) ESTABLISHMENT.—There is established in the executive branch an independent commission to be known as the National Commission on Military, National, and Public Service (in this subtitle referred to as the "Commission"). The Commission shall be considered an independent establishment of the Federal Government as defined by section 104 of title 5, United States Code, and a temporary organization under section 3161 of such title.

(b) MEMBERSHIP.—

(1) NUMBER AND APPOINTMENT.—The Commission shall be composed of 11 members appointed as follows:

(A) The President shall appoint three members.

(B) The Majority Leader of the Senate shall appoint one member.

(C) The Minority Leader of the Senate shall appoint one member.

(D) The Speaker of the House of Representatives shall appoint one member.

(E) The Minority Leader of the House of Representatives shall appoint one member.

(F) The Chairman of the Committee on Armed Services of the Senate shall appoint one member.

(G) The ranking minority member of the Committee on Armed Services of the Senate shall appoint one member.

(H) The Chairman of the Committee on Armed Services of the House of Representatives shall appoint one member.

(I) The ranking minority member of the Committee on Armed Services of the House of Representatives shall appoint one member.

(2) DEADLINE FOR APPOINTMENT.—Members shall be appointed to the Commission under paragraph (1) not later than 90 days after the Commission establishment date.

(3) EFFECT OF LACK OF APPOINTMENT BY APPOINTMENT DATE.—If one or more appointments under subparagraph (A) of paragraph (1) is not made by the appointment date specified in paragraph (2), the authority to make such appointment or appointments shall expire, and the number of members of the Commission shall be reduced by the number equal to the number of appointments so not made. If an appointment under subparagraph (B), (C), (D), (E), (F), (G), (H), or (I) of paragraph (1) is not made by the appointment date specified in paragraph (2), the authority to make an appointment under such subparagraph shall expire, and the number of members of the Commission shall be reduced by the number equal to the number otherwise appointable under such subparagraph.

(c) CHAIR AND VICE CHAIR.—The Commission shall elect a Chair and Vice Chair from among its members.

(d) TERMS.—Members shall be appointed for the life of the Commission. A vacancy in the Commission shall not affect its powers, and shall be filled in the same manner as the original appointment was made.

(e) STATUS AS FEDERAL EMPLOYEES.—Notwithstanding the requirements of section 2105 of title 5, United States Code, including the required supervision under subsection (a)(3) of such section, the members of the Commission shall be deemed to be Federal employees.

(f) PAY FOR MEMBERS OF THE COMMISSION.—

(1) IN GENERAL.—Each member, other than the Chair, of the Commission shall be paid at a rate equal to the daily equivalent of the annual rate of basic pay

payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the actual performance of duties vested in the Commission.

(2) CHAIR.—The Chair of the Commission shall be paid at a rate equal to the daily equivalent of the annual rate of basic pay payable for level III of the Executive Schedule under section 5314, of title 5, United States Code, for each day (including travel time) during which the member is engaged in the actual performance of duties vested in the Commission.

(g) USE OF GOVERNMENT INFORMATION.—The Commission may secure directly from any department or agency of the Federal Government such information as the Commission considers necessary to carry out its duties. Upon such request of the chair of the Commission, the head of such department or agency shall furnish such information to the Commission.

(h) POSTAL SERVICES.—The Commission may use the United States mails in the same manner and under the same conditions as departments and agencies of the United States.

(i) AUTHORITY TO ACCEPT GIFTS.—The Commission may accept, use, and dispose of gifts or donations of services, goods, and property from non-Federal entities for the purposes of aiding and facilitating the work of the Commission. The authority in this subsection does not extend to gifts of money.

(j) PERSONAL SERVICES.—

(1) AUTHORITY TO PROCURE.—The Commission may—

(A) procure the services of experts or consultants (or of organizations of experts or consultants) in accordance with the provisions of section 3109 of title 5, United States Code; and

(B) pay in connection with such services travel expenses of individuals, including transportation and per diem in lieu of subsistence, while such individuals are traveling from their homes or places of business to duty stations.

(2) LIMITATION.—The total number of experts or consultants procured pursuant to paragraph (1) may not exceed five experts or consultants.

(3) MAXIMUM DAILY PAY RATES.—The daily rate paid an expert or consultant procured pursuant to paragraph (1) may not exceed the daily rate paid a person occupying a position at level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(k) FUNDING.—Of the amounts authorized to be appropriated by this Act for fiscal year 2017 for the Department of Defense, up to $15,000,000 shall be made available to the Commission to carry out its duties under this subtitle. Funds made available to the Commission under the preceding sentence shall remain available until expended.

§ 554. Commission Hearings And Meetings.

(a) IN GENERAL.—The Commission shall conduct hearings on the recommendations it is taking under consideration. Any such hearing, except a hearing in which classified information is to be considered, shall be open to the public. Any hearing open to the public shall be announced on a Federal website at least 14 days in advance. For all hearings open to the public, the Commission shall release an agenda and a listing of materials relevant to the topics to be discussed. The Commission is authorized and encouraged to hold hearings and meetings in various locations throughout the country to provide maximum opportunity for public comment and participation in the Commission's execution of its duties.

(b) MEETINGS.—

(1) INITIAL MEETING.—The Commission shall hold its initial meeting not later than 30 days after the date as of which all members have been appointed.

(2) SUBSEQUENT MEETINGS.—After its initial meeting, the Commission shall meet upon the call of the chair or a majority of its members.

(3) PUBLIC MEETINGS.—Each meeting of the Commission shall be held in public unless any member objects or classified information is to be considered.

(c) QUORUM.—Six members of the Commission shall constitute a quorum, but a lesser number may hold hearings or meetings.

(d) PUBLIC COMMENTS.—

(1) SOLICITATION.—The Commission shall seek written comments from the general public and interested parties on matters of the Commission's review under this subtitle. Comments shall be requested through a solicitation in the Federal Register and announcement on the Internet website of the Commission.

(2) PERIOD FOR SUBMITTAL.—The period for the submittal of comments pursuant to the solicitation under paragraph (1) shall end not earlier than 30 days after the date of the solicitation and shall end on or before the date on which recommendations are transmitted to the Commission under section 555(d).

(3) USE BY COMMISSION.—The Commission shall consider the comments submitted under this subsection when developing its recommendations.

(e) SPACE FOR USE OF COMMISSION.—Not later than 90 days after the date of the enactment of this Act, the Administrator of General Services, in consultation with the Secretary, shall identify and make available suitable excess space within the Federal space inventory to house the operations of the Commission. If the Administrator is not able to make such suitable excess space available within such 90-day period, the Commission may lease space to the extent the funds are available.

(f) CONTRACTING AUTHORITY.—The Commission may acquire administrative supplies and equipment for Commission use to the extent funds are available.

§ 555. Principles And Procedure For Commission Recommendations.

(a) CONTEXT OF COMMISSION REVIEW.—The Commission shall—

(1) conduct a review of the military selective service process; and

(2) consider methods to increase participation in military, national, and public service opportunities to address national security and other public service needs of the Nation.

(b) DEVELOPMENT OF COMMISSION RECOMMENDATIONS.—The Commission shall develop recommendations on the matters subject to its review under subsection (a) that are consistent with the principles established by the President under subsection (c).

(c) PRESIDENTIAL PRINCIPLES.—

(1) IN GENERAL.—Not later than three months after the Commission establishment date, the President shall establish and transmit to the Commission and Congress principles for reform of the military selective service process, including means by which to best acquire for the Nation skills necessary to meet the military, national, and public service requirements of the Nation in connection with that process.

(2) ELEMENTS.—The principles required under this subsection shall address the following:

(A) Whether, in light of the current and predicted global security environment and the changing nature of warfare, there continues to be a continuous or potential need for a military selective service process designed to produce large numbers of combat members of the Armed Forces, and if so, whether such a system should include mandatory registration by all citizens and residents, regardless of sex.

(B) The need, and how best to meet the need, of the Nation, the military, the Federal civilian sector, and the private sector (including the non-profit sector) for individuals possessing critical skills and abilities, and how best to employ individuals possessing those skills and abilities for military, national, or public service.

(C) How to foster within the Nation, particularly among United States youth, an increased sense of service and civic responsibility in order to enhance the acquisition by the Nation of critically needed skills through education and training, and how best to acquire those skills for military, national, or public service.

(D) How to increase a propensity among United States youth for service in the military, or alternatively in national or public service, including how to increase the pool of qualified applicants for military service.

(E) The need in Government, including the military, and in the civilian sector to increase interest, education, and employment in certain critical fields, including science, technology, engineering, and mathematics (STEM), national security, cyber, linguistics and foreign language, education, health care, and the medical professions.

(F) How military, national, and public service may be incentivized, including through educational benefits, grants, federally-insured loans, Federal or State hiring preferences, or other mechanisms that the President considers appropriate.

(G) Any other matters the President considers appropriate for purposes of this subtitle.

(d) CABINET RECOMMENDATIONS.—Not later than seven months after the Commission establishment date, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Secretary of Labor, and such other Government officials, and such experts, as the President shall designate for purposes of this subsection shall jointly transmit to the Commission and Congress recommendations for the reform of the military selective service process and military, national, and public service in connection with that process.

(e) COMMISSION REPORT AND RECOMMENDATIONS.—

(1) REPORT.—Not later than 30 months after the Commission establishment date, the Commission shall transmit to the President and Congress a report containing the findings and conclusions of the Commission, together with the recommendations of the Commission regarding the matters reviewed by the Commission pursuant to this subtitle. The Commission shall include in the report

legislative language and recommendations for administrative action to implement the recommendations of the Commission. The findings and conclusions in the report shall be based on the review and analysis by the Commission of the recommendations made under subsection (d).

(2) REQUIREMENT FOR APPROVAL.—The recommendations of the Commission must be approved by at least five members of the Commission before the recommendations may be transmitted to the President and Congress under paragraph (1).

(3) PUBLIC AVAILABILITY.—The Commission shall publish a copy of the report required by paragraph (1) on an Internet website available to the public on the same date on which it transmits that report to the President and Congress under that paragraph.

(f) JUDICIAL REVIEW PRECLUDED.—Actions under this section of the President, the officials specified or designated under subsection (d), and the Commission shall not be subject to judicial review.

§ 556. Executive Director And Staff.

(a) EXECUTIVE DIRECTOR.—The Commission shall appoint and fix the rate of basic pay for an Executive Director in accordance with section 3161 of title 5, United States Code.

(b) STAFF.—Subject to subsections (c) and (d), the Executive Director, with the approval of the Commission, may appoint and fix the rate of basic pay for additional personnel as staff of the Commission in accordance with section 3161 of title 5, United States Code.

(c) LIMITATIONS ON STAFF.—

(1) NUMBER OF DETAILEES FROM EXECUTIVE DEPARTMENTS.—Not more than one-third of the personnel employed by or detailed to the Commission may be on detail from the Department of Defense and other executive branch departments.

(2) PRIOR DUTIES WITHIN EXECUTIVE BRANCH.—A person may not be detailed from the Department of Defense or other executive branch department to the Commission if, in the year before the detail is to begin, that person participated personally and substantially in any matter concerning the preparation of recommendations for the military selective service process and military and public service in connection with that process.

(d) LIMITATIONS ON PERFORMANCE REVIEWS.—No member of the uniformed services, and no officer or employee of the Department of Defense or other executive branch department (other than a member of the uniformed services or officer or employee who is detailed to the Commission), may—

(1) prepare any report concerning the effectiveness, fitness, or efficiency of the performance of the staff of the Commission or any person detailed to that staff;

(2) review the preparation of such a report (other than for administrative accuracy); or

(3) approve or disapprove such a report.

§ 556. Termination Of Commission.

Except as otherwise provided in this subtitle, the Commission shall terminate not later than 36 months after the Commission establishment date.