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

REPLY BRIEF FOR APPELLANTS

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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.

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James Lesmeister
National Coalition for Men

Defendants-appellants:

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

Amicus Curiae/Proposed Amicus Curiae

Eagle Forum Education & Legal Defense Fund
ACLU Foundation of Texas
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National Organization For Women Foundation
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

INTRODUCTION AND SUMMARY

In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Supreme Court upheld the statute at issue here, against the same constitutional challenge made here, emphasizing the significant deference that the Constitution accords the political branches in matters fundamental to the operation of the armed forces. Plaintiffs' brief disregards the Supreme Court's repeated admonition that only the Court itself can determine whether to set aside its precedent. That is particularly clear here, where the precedent concerns the precise statute and constitutional claim at issue in this Court.

Plaintiffs are equally wide of the mark in urging that this Court should not only depart from *Rostker* but should also apply heightened scrutiny to the statute and to Congress's ongoing consideration of the parameters of the registration requirement. Plaintiffs' assertion that the Supreme Court has applied special deference in the military context only in cases involving aliens is plainly incorrect. And plaintiffs make no response at all to the need for deference while the process for considering the registration established by Congress is underway. Indeed, plaintiffs' brief does not even acknowledge the existence of the Commission tasked with gathering information to assist Congress's evaluation of the costs and benefits of changes in registration policy. In sum, plaintiffs improperly disregard the current reevaluation of the registration requirement and erroneously ask this Court to set aside Supreme Court precedent and declare an act of Congress unconstitutional.

ARGUMENT

THE ACT'S MALE-ONLY REGISTRATION REQUIREMENT IS CONSTITUTIONAL

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

As our opening brief explained, *Rostker* should be the beginning and the end of this Court's analysis. *Rostker* upheld the same statute at issue here, against the same constitutional challenge. The Supreme Court has made clear that it has the exclusive prerogative to determine whether its precedent should be revisited in light of new factual developments or changes in the law. *See* Opening Br. 13-15 (citing, *inter alia*, *State Oil v. Khan*, 522 U.S. 3, 20-21 (1997), and *Agostini v. Felton*, 521 U.S. 203, 237, 239 (1997)).

Plaintiffs fail to come to grips with the Supreme Court's instruction. Instead, they rely heavily (Response Br. 26-28) on the district court opinion in *Kyle-Labell v. Selective Service System*, 364 F. Supp. 3d 394 (D.N.J. 2019), which the United States has not yet had the opportunity to appeal.[1] The district court in *Kyle-Labell*, like the district court here, believed that it had the authority to set aside Supreme Court precedent in light of changes in women's combat eligibility. *Kyle-Labell*, 364 F. Supp. 3d at 415-18. But that court, like the district court in this case, offered no meaningful response to *Agostini* and *State Oil* beyond observing that this case involves changes in

[1] The *Kyle-Labell* opinion partially denied the government's motion to dismiss. 364 F. Supp. 3d at 418. As of the filing of this brief, the case is still pending, and no party has yet moved for summary judgment.

statutes and military regulations rather than the changes in Supreme Court jurisprudence at issue in those two opinions. *See id.* at 415; *see also* Response Br. 27-28. *State Oil*, however, involved more than just changes to Supreme Court jurisprudence. *See* 522 U.S. at 15-19 (discussing, among other things, changes in market structures since the earlier Supreme Court case and changes in underlying economic knowledge). Moreover, as *Agostini* and *State Oil* make clear, and as this Court has stressed, the lower courts are obliged to respect "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). If that obligation applies even when the Supreme Court itself has cast doubt on one of its own precedents, *see, e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-84 (1989), it surely applies with full force when something external to the Supreme Court is cited as a basis for disregarding precedent.

Plaintiffs also suggest that *Agostini* and *State Oil* are inapposite on the ground that they involved "statutory interpretation." Response Br. 28-29. That is not an accurate description of *Agostini*, which involved a change in the Supreme Court's Establishment Clause jurisprudence. 521 U.S. at 237.[2] But more fundamentally, a

[2] Plaintiffs are also wrong to claim *Agostini* "recognized that under new circumstances, lower courts can reasonably rule differently from the Supreme Court." Response Br. 29. Even as *Agostini* overruled a prior Supreme Court case, the opinion "reaffirm[ed]" that, until that occurred, the lower courts had been required to follow the earlier Supreme Court case that directly controlled. *See* 521 U.S. at 235-36, 237-38.

lower court's obligation to follow controlling precedent is not diminished when it considers a constitutional question squarely addressed by the Supreme Court. *See, e.g.*, *Hernandez v. United States*, 757 F.3d 249, 265 (5th Cir. 2014) (noting the lower court's obligation to follow the Supreme Court's holding in a constitutional case). Indeed, as discussed in our opening brief, the imperative to adhere to Supreme Court precedent may well be *greater* in constitutional cases. Opening Br. 14-15. Plaintiffs offer no response to that discussion. Nor do they address the particular need to be faithful to precedent here, where the political branches are actively engaged in a reassessment of the challenged policy, for the reasons set out in our opening brief. Opening Br. 15.

Plaintiffs' observation that the Supreme Court sometimes overrules its own precedents only underscores the errors in their argument. Response Br. 30-32. The Supreme Court is free to reexamine its holding in *Rostker*. Lower courts are not.

B. Even Assuming That The Lower Courts Can Properly Reconsider *Rostker's* Vitality, The Male-Only Registration Requirement Is Constitutional.

If this Court were to revisit *Rostker*'s continuing vitality, it should reject plaintiffs' challenge to the Military Selective Service Act. Plaintiffs' brief misreads applicable Supreme Court case law, and responds only in cursory fashion to the discussion in our opening brief.

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

As discussed in our opening brief, the Supreme Court has established that when core military affairs are at issue, the judiciary must apply a high level of deference to the political branches, even when considering classifications that would trigger heightened scrutiny in the civilian context. Opening Br. 16-20. In response, plaintiffs continue to urge that sex classifications always trigger heightened scrutiny, and they dismiss the decisions cited in our brief as simply concerning "foreign nationals outside the U.S." Response Br. 15.

That characterization is manifestly false. For instance, in *Goldman v. Weinberger*, 475 U.S. 503 (1986), the plaintiff was a commissioned officer in the Air Force, stationed at a base in California, who challenged the military's refusal to allow him to wear a yarmulke while in uniform. *Id.* at 504-05. At the time, heightened scrutiny applied to facially neutral laws that substantially burdened religious exercise. *See id.* at 506. But instead of applying that searching First Amendment inquiry, the Supreme Court explained that its customary standards were inapplicable in that military context, and it quoted *Rostker* to stress that "'[j]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.'" *Id.* at 508 (quoting *Rostker,* 453 U.S. at 70). It thus sustained the challenged military policy on yarmulkes, even in the face of strong evidence against that policy and contentions that

the military had acted "*ipse dixit*." *Id.* at 509-10. Similarly, in *Schlesinger v. Ballard*, 419 U.S. 498 (1975), a discharged male U.S. naval officer challenged a statutory scheme under which a woman in the same circumstances would have been allowed to remain in the armed forces. The Court rejected the naval officer's claim of gender discrimination, and it did so on the highly deferential ground that Congress could "quite rationally have believed" that the different treatment was appropriate. *Id.* at 508; *see also id.* at 511 (Brennan, J., dissenting) (discussing how the majority opinion in *Schlesinger* did not subject the challenged policy to "close judicial scrutiny," and had instead sustained the statute based on a hypothesized congressional purpose that was not substantiated by the underlying legislative history).[3]

Plaintiffs are of course correct that *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), related in part to foreign nationals (although the plaintiffs who had Article III standing to raise the relevant constitutional claim—an alleged Establishment Clause

[3] Proposed Amici ACLU et al seem to think it significant that *Schlesinger* cited—and distinguished—*Frontiero v. Richardson*, 411 U.S. 677 (1973), and *Reed v. Reed*, 404 U.S. 71 (1971). *See* ACLU Br. 6 n.6 (citing *Schlesinger*, 419 U.S. at 508). But that was in no way an endorsement of heightened scrutiny. Meanwhile, *Rostker*'s statement that *Schlesinger* "did not purport to apply a different equal protection test because of the military context," 453 U.S. at 71, is immediately followed by a statement that *Schlesinger* "did stress the deference due congressional choices among alternatives in exercising the congressional authority to raise and support armies and make rules for their governance." *Id.* Taken as a whole, and read in context, *Rostker* was thus saying that while *Schlesinger* did not *expressly* apply a different standard of review, the review it actually conducted was far more deferential to Congress than ordinary, as demonstrated above and in our opening brief.

violation—were U.S. citizens or permanent residents). *See id.* at 2406, 2416-20. But that undisputed point in no way supports their position here, because the Court in *Trump* equated the deference due in immigration matters with the appropriate level of deference regarding "military actions," *id.* at 2420 n.5, and plaintiffs concede that the Supreme Court in *Fiallo v. Bell*, 430 U.S. 787 (1977), applied (at most) rational basis review to an immigration statute that made distinctions based on sex, *see* Response Br. 16-17.[4]

Although plaintiffs urge that their claim of gender discrimination requires heightened scrutiny in the military context, they fail to explain why the Supreme Court in *Rostker* applied much greater deference in sustaining the statute challenged here against an attack brought by plaintiffs similarly situated to themselves. *See Rostker*, 453 U.S. at 62 (plaintiff class included all males who had to register with the Selective Service System); Opening Br. 16-20 (explaining why the standard of review actually employed in *Rostker* was a highly deferential one). Plaintiffs' assertion that *Rostker* applied heightened scrutiny is patently incorrect. Response Br. 17. Plaintiffs cite the passage in *Rostker* in which the Court explained that it was unwilling to give a *label* to the level of deference it accorded to the statute. *See Rostker*, 453 U.S. at 69-70; *see also id.* (explaining why the Court was unwilling to label the action here as simply

[4] Nor is *Fiallo*'s holding undermined by *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017). That case left *Fiallo* intact, and merely held that deferential review did not apply when the sex-based classification was about determining citizenship, as distinguished from aliens' entry into the country. *Id.* at 168-69.

"'military' on the one hand or 'gender-based' on the other," and declining to provide an "[a]nnounced degree[] of 'deference'"). Nevertheless, as discussed in our opening brief, the *substance* of the Supreme Court's review plainly was not the heightened standard usually applied in cases of asserted discrimination on the basis of sex or other protected traits, and, as noted above, the same was true in *Schlesinger v. Ballard* and *Goldman v. Weinberger*.

Nor are plaintiffs aided by their citation to *Frontiero v. Richardson*, 411 U.S. 677 (1973), which invalidated a statute that treated female service members differently from their male counterparts with regard to spousal benefits. Although the plurality opinion thought strict scrutiny was appropriate, *see id.* at 686 (plurality opinion), the remaining five justices did not endorse that view, and no specific level of scrutiny commanded a majority, *see id.* at 691 (Stewart, J., concurring in the judgment); *id.* at 691 (Rehnquist, J., dissenting); *id.* at 691-93 (Powell, J., concurring in the judgment). The Court in *Schlesinger v. Ballard* then later explained that *Frontiero* merely invalidated an "archaic and overbroad generalization[]," which the statute had relied on solely for an "administrative convenience" unrelated to military readiness. 419 U.S. at 507-10. Here, by contrast, the current registration scheme was a product of careful Congressional consideration, *see Rostker*, 453 U.S. at 70, and as *Rostker* explained, the draft and the justifications for the statute are linked to considerations of military readiness, including "administrative" concerns. *See also id.* at 81 (deferring to a congressionally-expressed concern that allowing women to register could create

"administrative problems" in such areas as training and housing, which might complicate a future mobilization and affect military preparedness (internal quotations marks omitted)).

Contrary to the suggestion of Proposed Amici ACLU et al, *United States v. Virginia*, 518 U.S. 515 (1996), does not hold that sex-based classifications are subjected to heightened scrutiny even in the military context. *Virginia* involved a state educational institution, whose single-sex status was solely a matter of state law. *See id.* at 520-21. Indeed, the *federal* government—which is the government actually entitled to deference when it comes to military matters, *see Rostker*, 453 U.S. at 64-68—was *suing* the state university for engaging in sex discrimination, thus fatally undermining any suggestion that military deference was warranted.

Finally, Proposed Amici are incorrect in contending that this Court's precedent requires heightened scrutiny even in the military context. Proposed Amici rely on a single sentence in *Prudential Insurance Co. of America v. Moorhead*, 916 F.2d 261 (5th Cir. 1990), where the Court cited *Rostker* without comment after describing its task "in an intermediate scrutiny case" as evaluating the challenged action "without a view as to any alternative we might have chosen had we been the primary decision-maker." *Id.* at 266. That was in no way a holding that *Rostker* requires intermediate scrutiny. Indeed, this Court stated explicitly in *Prudential* that it was "not reach[ing]" the question whether *Rostker* requires "greater deference" than intermediate scrutiny because the challenged statute was constitutional either way. *Id.* at 264 n.3.

2. The Male-Only Registration Requirement Is Constitutional.

Our opening brief offered several reasons why, under the appropriately deferential standard of review, this Court should sustain the registration statute. Our brief also identified reasons why the statute is constitutional even if heightened scrutiny applies. Plaintiffs fail to dispute some of these reasons entirely; as to others, they offer only cursory responses that misapprehend the governing standards.

First, our opening brief explained why Congress could have reasonably elected to maintain the status quo while the government reexamined draft-related issues in light of DOD's policy change. We noted that *Rostker* itself implicitly recognized that the government would, at minimum, be entitled to a period of time to extensively reconsider its registration policies if women's combat status changed. And we discussed how Congress had elected to create a comprehensive process, involving an independent national commission, to consider (among other things) whether a system of mandatory registration was still necessary, and if so, whether it should be conducted without regard to sex. Opening Br. 20-22. Indeed, we explained that Congress's decision to proceed cautiously in this manner was not only rational, but sufficiently compelling to survive even heightened scrutiny. Opening Br. 26-27.

Plaintiffs offer no response at all to the clearly rational manner in which Congress has addressed some of the very assertions advanced by plaintiffs here. Indeed, their brief does not even acknowledge the Commission's existence. Plaintiffs

cannot properly ask this Court to invalidate a statute upheld by the Supreme Court without regard to the current legislative process.

Second, our opening brief identified a number of rational reasons why Congress could think male-only registration was appropriate even though women are now eligible for volunteer combat positions. We noted that Congress might rationally have thought—both in 1980 and after the 2015 DOD policy change—that differences between the sexes could affect each sex's relative likelihood of effectively serving in the broad range of available combat roles if conscripted. And we explained how *Rostker* itself deferred to Congress's expressed concern that military flexibility might be harmed if registration did not make sex-based distinctions in these circumstances. Opening Br. 23-26.

Plaintiffs make no attempt to engage with the details of this argument. Nor do they dispute that at the time DOD communicated its 2015 policy change to Congress, it also identified some reasons (such as observed differences in injury rates, and complications coordinating with allies in certain parts of the world) why men and women might not be equally likely to serve in all combat roles if drafted. Instead, plaintiffs offer an extended discussion of a March 2017 DOD report, which they characterize as strongly endorsing registration by both men and women. Response Br. 9-10, 19-25.

Plaintiffs miss the mark. The cited DOD report was written because a federal statute had required a report to Congress and the Commission on (among several

other topics) the "extent to which expanding registration to include women would impact" the benefits derived from the Military Selective Service System. ROA.1394. The DOD report listed some benefits that might be realized if women were registered, *see* ROA.1410-12, but it also acknowledged some concerns associated with such a change, *see* ROA.1409-10, and the report ultimately took "no position on whether the current national registration system and mobilization process could or should be modified." ROA.1429. Nothing about the DOD report thus undermines the point that rational reasons could support male-only registration. Indeed, because the DOD report acknowledged that it would be valuable to conduct "a thorough assessment" of numerous issues surrounding registration, including sex-related issues, ROA.1430, the DOD report actually underscores Congress's wisdom in electing to maintain the status quo while the Commission conducts its work.

Furthermore, even if the DOD report had unequivocally supported registering women immediately (which it did not), that would not control the question whether Congress had acted rationally by continuing the existing registration system. In *Rostker*, the President himself had advocated for registration of both men and women, *see* 453 U.S. at 60, and members of the military had also endorsed that view before Congress, *see id.* at 79-80, yet the Supreme Court deferred to Congress's different conclusion. If the views of the Commander-in-Chief and other military leaders were insufficient to overcome Congress's contrary view, it follows that an agency report cannot displace such deference either. That is all the more true here, because DOD

itself had previously acknowledged to Congress that there may be various sex-based differences that could affect the relative likelihoods of men and women to effectively serve in the full range of combat roles. *See* Opening Br. 25-26.

Plaintiffs assert that this Court has "nothing to defer to," urging that our brief did not cite an evidentiary basis for its arguments in support of the registration statute. Response Br. 33. As a legal matter, this contention disregards the governing standard, under which the Court can uphold a statute based solely on what "Congress may . . . quite rationally have believed." *Schlesinger*, 419 U.S. at 508. As a factual matter, it disregards both the extensive factfinding underlying Congress's 1980 decision, *see* Opening Br. 20-21, 23-25, as well as DOD's 2015 letter to Congress, *see* Opening Br. 25-26. What plaintiffs' argument illustrates most clearly is that Congress acted reasonably in deciding to task an expert Commission with studying the issue extensively and reporting back to aid the legislative process.

CONCLUSION

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

Respectfully submitted,

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October 2019

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 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.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3265 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
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