APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
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 BENTON, AS DIRECTOR OF SELECTIVE SERVICE SYSTEM,

Defendants-Appellants.

No. 19-20272

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-3362

Filed August 13, 2020

Before WIENER, STEWART, and WILLETT, *Circuit Judges*.

PER CURIAM:

Plaintiffs-Appellees James Lesmeister, Anthony Davis, and the National Coalition for Men sued Defendant-Appellants the Selective Service System and its director (collectively, "the Government") alleging that the male-only military draft is unlawful sex discrimination. The district court granted Plaintiffs-Appellees declaratory judgment, holding that requiring only men to register for the draft violated their Fifth Amendment rights. Because that judgment directly contradicts the Supreme Court's holding in *Rostker v. Goldberg*, 453 U.S. 57, 78–79 (1981), and only the Supreme Court may revise its precedent, we REVERSE.

I. Background

The Military Selective Service Act (the "Act") requires essentially all male citizens and immigrants between the ages of eighteen and twenty-six to register with the Selective Service System, a federal agency, to facilitate their conscription in the event of a military draft. 50 U.S.C. §§ 3802(a), 3809. Men who fail to register or otherwise comply with the Act and its implementing regulations may be fined, imprisoned, and/or denied federal benefits. *Id.* §§ 3328, 3811(a), 3811(f). The Act does not require women to register. *See id.* § 3802(a).

In 1980, President Carter recommended to Congress that the Act be extended to cover women. *See Rostker*, 453 U.S. at 60 (citing House Committee on Armed Services, Presidential Recommendations for Selective Service Reform—A Report to Congress Prepared Pursuant to Pub. L. 96–107, 96th Cong., 2d Sess., 20–23 (Comm. Print No. 19, 1980), App. 57–61). Congress declined after "consider[ing] the question at great

length" with "extensive testimony and evidence." *Id.* at 61, 72. In 1981, the Supreme Court held in *Rostker v. Goldberg* that male-only registration did not violate the Due Process Clause of the Fifth Amendment. *Id.* at 78–79. The court based its reasoning on the fact that women were then barred from serving in combat and deferred to Congress's considered judgment about how to run the military. *See id.* at 76–77.

Since then, the military has gradually integrated women into combat roles. In the early 1990s, Congress repealed the statutory bans on women serving on combat aircraft and ships. Pub. L. No. 103-160, § 541, 107 Stat. 1547, 1659 (1993), *repealing* 10 U.S.C. § 6015 (1988) (ships), Pub. L. No. 102-190, § 531, 105 Stat. 1290, 1365 (1991) (aircraft). In 2013, the Department of Defense ("DoD") announced its intention to open all remaining combat positions to women, the last of which it opened in 2016.

Congress again considered male-only registration in the context of the 2017 National Defense Authorization Act. The Senate version of the bill would have required women to register, S. 2943, 114th Cong. § 591 (as passed by Senate, June 21, 2016), but the final law instead created a commission to study the military Selective Service process to determine, among other questions, whether the process was needed at all and, if so, whether to conduct it "regardless of sex," National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 551, 555, 130 Stat. 2000, 2130, 2135 (2016). The commission completed its report in March 2020. NATIONAL COMMISSION ON MILITARY, NATIONAL, AND PUBLIC SERVICE, INSPIRED TO SERVE (2020), https://inspire2serve.gov/sites/default/files/final-

report/Final%20Report.pdf. The 2017 National Defense Authorization Act also directed the Secretary of Defense to issue a report addressing, *inter alia*, the benefits of the Selective Service System and the impact on those benefits of requiring women to register, which the DoD completed in 2017. *Id.* § 552, 130 Stat. at 2123.

Plaintiffs-Appellees sued the Government under 42 U.S.C. § 1983 for violations of their Fifth Amendment rights to be free from sex discrimination. On cross-motions, the district court granted summary judgment for Plaintiffs-Appellees declaring that male-only registration was unlawful, but it declined to issue an injunction. The court reasoned that *Rostker* no longer controlled because women may now serve in combat. The Government appeals, asserting that *Rostker* does control and that, regardless of *Rostker*, male-only registration is still constitutional.

II. STANDARD OF REVIEW

The facts are not in dispute, so we review de novo the district court's grant of summary judgment "to determine whether it was rendered according to law." *United States v. Jesco Const. Corp.*, 528 F.3d 372, 374 (5th Cir. 2008).

III. ANALYSIS

In *Rostker*, the Supreme Court held that the male-only Selective Service registration requirement did not offend due process. 453 U.S. at 78–79. The Court relied heavily on legislative history showing that Congress thoroughly considered whether to require women to register. *See id.* at 71–72, 74, 76, 81–82. Congress, and thus the Court, believed the sole purpose of registration to be the draft of combat troops

in a national emergency. *Id.* at 75–76 ("Congress' determination that the need would be for combat troops if a draft took place was sufficiently supported by testimony adduced at the hearings so that the courts are not free to make their own judgment on the question."). Women were then barred from combat, so the Court examined the constitutional claim with those "combat restrictions firmly in mind." *Id.* at 77. The Court concluded, "This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups. . . . Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft." *Id.* at 78–79. Further, the Court rejected the district court's conclusion that women could be drafted in some number into noncombat positions without degrading the military's effectiveness, instead deferring to Congress's determination that the administrative and operational burdens of such an arrangement exceeded the utility. *Id.* at 81–82.

That holding is controlling on this court. The Fifth Circuit is a "strict stare decisis" court and "cannot ignore a decision from the Supreme Court unless directed to do so by the Court itself." *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 782 (5th Cir. 2012); *Hernandez v. United States*, 757 F.3d 249, 265 (5th Cir. 2014), *adhered to in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015), *vacated and remanded sub nom. Hernandez v. Mesa*, 137 S. Ct. 2003 (2017). "[F]ollow[ing] the law as it is . . . 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).

The Supreme Court is clear on this point as well. In *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997), the Court held that vertical maximum price fixing was not *per se* unlawful, overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). The Court disagreed with some of the reasoning in *Albrecht* but, relevant to this case, also found that the facts on which *Albrecht* rested had changed. *State Oil Co.*, 522 U.S. at 14–19. For example, the procompetitive potential of vertical maximum price fixing had become more evident since *Albrecht* because other business arrangements that combined with vertical maximum price fixing to help consumers were *per se* illegal at *Albrecht's* time but had since become more common. *Id.* at 14–15. Also, "the ban on maximum resale price limitations declared in *Albrecht* in the name of 'dealer freedom' ha[d] actually prompted many suppliers to integrate forward into distribution, thus eliminating the very independent trader for whom *Albrecht* professed solicitude." *Id.* at 16–17 (quoting 8 P. AREEDA, ANTITRUST LAW, ¶ 1635, p. 395 (1989)). The Court nevertheless noted that, "[d]espite . . . *Albrecht's* 'infirmities, [and] its increasingly wobbly, moth-eaten foundations,' . . . [t]he Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents." *Id.* at 20 (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996)).

Here, as in *State Oil Co.*, the factual underpinning of the controlling Supreme Court decision has changed, but that does not grant a court of appeals license to disregard or overrule that precedent. *See also Roper v. Simmons*, 543 U.S. 551, 594 (2005)

(O'Connor, J., dissenting) (pointing out that only the Supreme Court may overrule its precedents "even where subsequent decisions or factual developments may appear to have 'significantly undermined' the rationale for [the] earlier holding" and therefore the majority should have admonished the circuit court despite affirming its judgment); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Agostini v. Felton*, 521 U.S. 203, 237, 239 (1997) (confirming rule from *Rodriguez de Quijas* that lower courts may not "conclude [that] recent cases have, by implication, overruled an earlier precedent").

Plaintiffs-Appellees point to no case in which a court of appeals has done what they ask of us, that is, to disregard a Supreme Court decision as to the constitutionality of the exact statute at issue here because some key facts implicated in the Supreme Court's decision have changed. That we will not do.

Rostker forecloses Plaintiffs-Appellees' claims, so the judgment of the district court is REVERSED and the case DISMISSED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NATIONAL COALITION FOR MEN, *et al.*,

Plaintiffs,

v.

SELECTIVE SERVICE SYSTEM, *et al.*,

Defendants.

CIVIL ACTION H-16-3362

Entered April 29, 2019

MEMORANDUM OPINION AND ORDER

Pending before the court is a motion for relief from judgment filed by plaintiffs National Coalition for Men, Anthony Davis, and James Lesmeister (collectively, "Plaintiffs"). Dkt. 90. Plaintiffs also filed a "supplemental motion for summary judgment" containing additional briefing. Dkt. 91. Defendants Lawrence Romo and the Selective Service System (collectively, "Defendants") responded. Dkt. 92. Having considered the motions, response, and

applicable law, the court is of the opinion that Plaintiffs' motions (Dkts. 90, 91) should be DENIED.

This court previously granted summary judgment in Plaintiffs' favor. Dkt. 87. However, the court denied Plaintiffs' request for injunctive relief because Plaintiffs failed to request an injunction in their motion and did not brief the issue. *Id.* at 19. Plaintiffs now ask the court to reconsider its denial of the injunction request. Dkts. 90, 91. Defendants oppose injunctive relief and have appealed the court's original summary judgment ruling. Dkts. 92, 93.

As a threshold matter, Federal Rule of Civil Procedure 60(b) governs motions for relief from judgment. Typically, "[g]ross carelessness, ignorance of the rules, or ignorance of the law are insufficient bases" for relief under Rule 60. *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 357 (5th Cir. 1993). However, even if the court could consider Plaintiffs' request for an injunction strictly on the merits, Plaintiffs' arguments still fail.

First, Plaintiffs fail to demonstrate that they are entitled to relief under a typical injunction analysis. Injunctive relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365 (2008). A plaintiff seeking a permanent injunction must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent

injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57, 130 S. Ct. 2743 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837 (2006)).

Here, the third and fourth factors of this test weigh heavily against granting injunctive relief. Plaintiffs request that the court "either require both men and women to register, or require neither men nor women to register, for the [Military Selective Service Act]." Dkt. 90 at 7. Both of these proposed actions would place inequitable hardship on Defendants as well as disserve the public interest. At best, both of these changes would "lead to serious logistical problems, as well as millions of dollars in potentially wasted resources." Dkt. 92 at 10–11. At worst, upheaval of the draft registration system could "compromis[e] the country's readiness to respond to a military crisis." *Id.* at 9. "[A]lthough registration imposes material interim obligations . . . [the court] cannot say that the inconvenience of those impositions outweighs the gravity of the harm to the United States" should registration be enjoined. *Rostker v. Goldberg* (*Rostker I*), 448 U.S. 1306, 1310, 101 S. Ct. 1 (Brennan, Circuit Justice 1980). The balance of equities requires—and the public interest is best served by—preserving the current registration system pending appellate review.

Second, *Rostker v. Goldberg* (*Rostker II*), 453 U.S. 57, 101 S. Ct. 2646 (1981), counsels deference. "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *Rostker II*, 453 U.S. at 65 (quoting *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673 (1968)). While Congress is not "free to disregard the Constitution" in exercising its

military powers, "the Constitution itself" requires judicial deference to congressional judgment in this area. *Id.* at 67.

In this case, judicial deference requires the court to deny injunctive relief despite the ongoing constitutional violations. The draft has significant foreign policy, as well as national security, implications. *See Rostker I*, 448 U.S. at 1310 ("[T]he inauguration of registration by the President and Congress was . . . an act of independent foreign policy significance—a deliberate response to developments overseas."). The legislative branch is best equipped—and constitutionally empowered—to reform the draft registration system in light of these important policy considerations. *See Rostker II*, 453 U.S. at 65 ("Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked."). Moreover, Congress has created a commission that is currently studying draft reform and will make recommendations in the coming years. Dkt. 92 at 9. While these factors do not preclude judicial review entirely, they do strongly suggest that the court should defer to Congress by denying injunctive relief at this time.

Accordingly, Plaintiffs' motions for relief from judgment (Dkt. 90) and summary judgment (Dkt. 91) are DENIED.

Signed at Houston, Texas on April 29, 2019.

Gray H. Miller
Senior United States
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NATIONAL COALITION FOR MEN, *et al.*,

Plaintiffs,

v.

SELECTIVE SERVICE SYSTEM, *et al.*,

Defendants.

CIVIL ACTION H-16-3362

February 22, 2019

MEMORANDUM OPINION AND ORDER

Pending before the court is: (1) a motion for summary judgment filed by plaintiffs National Coalition for Men ("NCFM"), Anthony Davis, and James Lesmeister ("Plaintiffs") (Dkt. 73); and (2) a cross-motion for summary judgment and motion to stay filed by defendants Selective Service System ("SSS") and Lawrence Romo (collectively, "Defendants") (Dkt. 80). Plaintiffs responded to Defendants' cross-motion. Dkt. 81. Having considered the motions, response, evidence in the record, and

applicable law, the court is of the opinion that Plaintiffs' motion for summary judgment (Dkt. 73) should be GRANTED and Defendants' motion for stay and summary judgment (Dkt. 80) should be DENIED.

I. Background

This case balances on the tension between the constitutionally enshrined power of Congress to raise armies and the constitutional mandate that no person be denied the equal protection of the laws. U.S. Const. art. I, § 8; U.S. Const. amend. V; *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693 (1954).

The Military Selective Service Act ("MSSA") requires males—but not females—to register for the draft. The MSSA provides that "every male citizen of the United States, and every other male person residing in the United States . . . between the ages of eighteen and twenty-six," must register with SSS. 50 U.S.C. § 3802(a). After registering, men have a continuing obligation to update SSS with any changes in their address or status. § 3813. Failure to comply with the MSSA can result in up to $10,000 in fines and five years of imprisonment. § 3811(a). Males are also subject to other penalties for failing to register, including denial of federal student loans. § 3811(f).

Plaintiffs challenge the MSSA on equal protection grounds, arguing that the MSSA's male-only registration requirement violates the Fifth Amendment Due Process Clause. Dkt. 60 at 12. Plaintiffs Lesmeister and Davis are males subject to the draft requirements.[1] Dkt. 73-2 at 1–2. Both have

[1] Plaintiffs request judicial notice of certain facts in this case. Dkt. 73-2. To the extent Plaintiffs request judicial notice of facts that are not in dispute, the court grants this request.

registered with the SSS, in compliance with the MSSA. *Id.* NCFM is a non-profit, 501(c)(3) educational and civil rights corporation. *Id.* at 3. Some of NCFM's members, including Davis, are males subject to the draft requirements who have already registered or will have to register under the MSSA. *Id.* at 3–4.

In 2013, NCFM and Lesmeister filed suit against Defendants in the Central District of California. Dkt. 1. Initially, Judge Dale S. Fischer, the Central District of California judge, dismissed the case as not ripe for review. Dkt. 20. The Ninth Circuit reversed and remanded, holding that the plaintiffs' claims were "definite and concrete, not hypothetical or abstract, and so ripe for adjudication." *Nat'l Coal. for Men v. Selective Serv. Sys.*, 640 F. App'x 664, 665 (9th Cir. 2016) (citations and quotations omitted). On remand, Judge Fischer granted Defendants' motion to dismiss NCFM without prejudice because the organization lacked associational standing. Dkt. 44 at 4. Further, the court determined that venue was not proper in the Central District of California and transferred the case to the Southern District of Texas, where Lesmeister resides. *Id.* at 5.

Upon transfer, Lesmeister amended his complaint to name NCFM and Davis as plaintiffs. Dkt. 60. This court subsequently determined that all three plaintiffs have standing. Dkt. 59. Both Plaintiffs and Defendants now move for summary judgment, arguing that current equal protection jurisprudence entitles them to judgment as a matter of law.[2]

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[2] A court shall grant summary judgment when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Here, both sides have moved for summary judgment, so

II. Analysis

A. Motion to Stay

"The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708, 117 S. Ct. 1636 (1997). In their pending motion, Defendants first contend that the court should stay the current proceedings. Dkt. 80 at 15–21. Defendants argue that the case is not ripe for review because Congress is currently considering whether to add women to the draft. *Id.* Defendants also argue that, under separation-of-power principles, the court should postpone resolution of the case during congressional debate on the issue. *Id.* Finally, Defendants urge the court to stay the case using its inherent case-management power because the balance of hardships weighs in Defendants' favor. *Id.*

1. Ripeness

The justiciability doctrine of ripeness prevents courts, "through avoidance of premature adjudication, from entangling themselves in abstract agreements." *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977)). A court must dismiss for lack of ripeness when the case is "abstract or hypothetical." *Id.* (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987)). "Ripeness 'requir[es] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Texas v. United*

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the parties agree that there are no material fact issues to resolve. Dkt. 73; Dkt. 80.

States, 523 U.S. 296, 300–01, 118 S. Ct. 1257 (1998) (quoting *Abbott Labs.*, 387 U.S. at 149). "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required." *Choice Inc. of Tex.*, 691 F.3d at 715 (quoting *New Orleans Pub. Serv., Inc.*, 833 F.2d at 586).

Defendants argue that the case is not currently fit for judicial decision because Congress recently established the National Commission on Military, National, and Public Service ("the Commission") to consider whether Congress should modify or abolish the current draft registration requirements. Dkt. 80 at 17; National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 551, 130 Stat. 2000, 2130 (2016). Although the Ninth Circuit previously held that the case was ripe despite ongoing congressional debate, Defendants contend that the recently created Commission now renders Plaintiffs' claims unripe. *Id.* at 19. Defendants request that the court stay proceedings until the Commission has issued its report and Congress has had the opportunity to act on the Commission's recommendations. *Id.* at 21.

However, the existence of the Commission does not affect the ripeness of Plaintiffs' claims. The question of whether the MSSA violates the Constitution is purely legal; no further factual development is necessary for the court to decide the issue. Plaintiffs' claims are not "abstract or hypothetical." *Choice Inc. of Tex.*, 691 F.3d at 715 (quoting *New Orleans Pub. Serv., Inc.*, 833 F.2d at 586)). While the Commission's recommendations could affect the current proceedings, the Commission is not set to release its

final report until 2020. Dkt. 86-1 at 4 (Commission interim report). There is no guarantee that the Commission will recommend amending or abolishing the MSSA—and, even if it does, Congress is not required to act on those recommendations. Congress has been debating the male-only registration requirement since at least 1980 and has recently considered and rejected a proposal to include women in the draft. *Rostker*, 453 U.S. at 60; Dkt. 80-3 at 11 (Letter to Armed Services Committee Chairs, Sept. 2016). It is Defendants' arguments—not Plaintiffs' claims—that are too hypothetical for the court's consideration.[3]

"However, even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness." *Choice Inc. of Tex.*, 691 F.3d at 715 (citing *Cent. & S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 690 (5th Cir. 2000)) (quotations omitted). Here, Plaintiffs have demonstrated that they are subject to the MSSA. Dkt. 73-2. NCFM's members include individuals who will have to register under the MSSA in the future and will be subject to ongoing requirements to update their personal information. *Id.* Moreover, "discrimination itself, by perpetuating 'archaic and stereotypic notions' . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group."

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[3] Defendants also argue that deference to Congress is appropriate when pending legislation may render a legal challenge moot, and that such deference applies here. Dkt. 80 at 19–20 (citing *Schlesinger v. Ballard*, 419 U.S. 498, 510 n.13, 95 S. Ct. 572 (1975)). However, Defendants do not cite any pending legislation that would add women to the draft.

Heckler v. Mathews, 465 U.S. 728, 739–40, 104 S. Ct. 1387 (1984) (citations omitted). Thus, Plaintiffs have shown "some hardship" and the case is ripe.

2. Separation of Powers

Second, Defendants effectively argue that the court *must* grant a stay to give Congress proper deference in the realm of military affairs and avoid violating the separation of powers. Dkt. 80 at 11–13. Defendants cite Congress's broad constitutional power to conduct military affairs and the Supreme Court's decision in *Rostker v. Goldberg*, 453 U.S. 57, 101 S. Ct. 2646 (1981). Dkt. 80 at 17–19. However, "separation of powers does not mean that the branches 'ought to have no *partial agency* in, or no *controul* over the acts of each other.'" *Clinton*, 520 U.S. at 703 (quoting The Federalist No. 47, at 325–326 (James Madison) (J. Cooke ed., 1961) (emphasis in original)). Even judicial review that "significantly burden[s] the time and attention" of another branch "is not sufficient to establish a violation of the Constitution." *Id.* The Supreme Court has repeatedly affirmed that "concerns of national security . . . do not warrant abdication of the judicial role." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010).

Rostker itself expressly acknowledged that Congress does not receive "blind deference in the area of military affairs." 453 U.S. at 67. Even though congressional power in this area is "broad and sweeping," Congress may not "exceed[] constitutional limitations on its power in enacting such legislation." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 58, 126 S. Ct. 1297 (2006) (citations and quotations omitted). As this court previously reasoned:

> The court agrees with Defendants that Congress has broad power to raise and regulate armies and navies. *Rostker*, 453 U.S. at 65. Thus, "a healthy deference to legislative and executive judgments in the area of military affairs" should be given by the court. *Id.* at 66. *Rostker* thoroughly explained the reason to provide deference to Congress when dealing with military affairs. *See id.* at 64–67. But "[n]one of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause." *Id.* at 67.

Dkt. 66 at 6–7 (denying Defendants' motion to dismiss for failure to state a claim). *Rostker* explicitly requires Congress to comply with the Constitution in the area of military affairs, and Plaintiffs allege that the MSSA violates the Constitution. *Rostker*, 453 U.S. at 67; Dkt. 60 at 12. Additionally, as noted above, Congress has been debating the MSSA's registration requirement for decades with no definite end in sight. Even constitutionally mandated deference does not justify a complete and indefinite stay when parties allege that the federal government is presently violating their constitutional rights.

3. Inherent Power

Finally, Defendants request that the court exercise its discretion to stay the case. This court "has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton*, 520 U.S. at 706. Even if the burdens on the government do not violate separation-of-powers principles, "those

burdens are appropriate matters for the District Court to evaluate in its management of the case." *Id.* at 707. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Qualls v. EOG Res., Inc.*, No. H-18-666, 2018 WL 2317718, at *2 (S.D. Tex. May 22, 2018) (Miller, J.) (alteration in original) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163 (1936)). The movant must "make out a clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 254.

Defendants contend that a court ruling at this time "could disrupt or distract a process that may ultimately render [the issue] moot" if the Commission recommends "ending registration in its entirety." Dkt. 80 at 18; *see also* Dkt. 80 at 21 ("Alternatively, such a ruling could require the Government to spend millions of dollars and expend significant resources and effort changing the system of selective service—a considerable hardship—when Congress may wish to change the system in a completely different manner following the Commission's review."). However, if the court stayed the case until Congress acted on the Commission's recommendations, the case could be stayed indefinitely. The Commission is under no obligation to recommend certain outcomes to Congress, and Congress is under no obligation to follow or act on those recommendations. The fact and nature of future congressional action is highly speculative. Thus, the court's time and effort is likely best spent on the case at this stage, rather than at some indefinite time in the future.

Moreover, present resolution of the case will not create such a hardship for Defendants that the hardship justifies a continuous and indefinite violation of Plaintiffs' constitutional rights. Congressional resolution of this issue, if it occurs, will not necessarily be less burdensome for Defendants than judicial resolution. Defendants have not made out a "clear case of hardship or inequity." *Landis*, 299 U.S. at 254. Therefore, the court declines to use its inherent authority to stay the case.

B. *Rostker v. Goldberg* and Changing Opportunities for Women in the Military

On substance, Defendants first argue that the Supreme Court's holding in *Rostker v. Goldberg*, 453 U.S. 57, 101 S. Ct. 57 (1981), forecloses any challenge to gender discrimination in the MSSA. Dkt. 80 at 21–22. However, as this court previously held in denying Defendants' motion to dismiss, *Rostker* is factually distinguishable from the current case. Dkt. 66 (order denying Defendants' motion to dismiss for failure to state a claim). The court again declines to resolve the case on *Rostker* alone.

1. The *Rostker* Opinion

In *Rostker*, the Supreme Court squarely addressed the question of whether the male-only registration requirement in the MSSA violated equal protection principles. 453 U.S. at 83. The Court first noted that judging the constitutionality of a statute passed by Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Id.* at 64 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148, 48 S. Ct. 105 (1927)). Further, the case arose "in the context of Congress' authority over national defense and

military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Id.* at 64–65. Thus, the *Rostker* Court emphasized that it owed great deference to Congress's judgment in passing the MSSA because "the Constitution itself requires such deference to congressional choice." *Id.* at 67.

The Court held that the MSSA was constitutional. *Id.* at 83. After considering the extensive legislative history of the MSSA, the Court concluded that "the decision to exempt women from registration was not the accidental by-product of a traditional way of thinking about females." *Id.* at 74 (quotations omitted). Instead, the Court acknowledged that women were not eligible for combat, but that the purpose of registration was to prepare for a draft of combat troops. *Id.* at 76–77. The Court reasoned:

> This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft. Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause.

Id. at 78–79. Thus, the Court concluded that women's ineligibility for combat "fully justifie[d]" the MSSA's male-only registration requirement. *Id.* at 79. "The Constitution requires that Congress treat similarly situated persons similarly, not that it

engage in gestures of superficial equality." *Id.* Because men and women were not similarly situated with respect to combat eligibility, and therefore not similarly situated with respect to the draft, the Court held that the MSSA did not violate equal protection principles. *Id.*

2. Factual Developments Since *Rostker*

In the nearly four decades since *Rostker*, however, women's opportunities in the military have expanded dramatically. In 2013, the Department of Defense officially lifted the ban on women in combat. Dkt. 73-1 at 9. In 2015, the Department of Defense lifted all gender-based restrictions on military service. Dkt. 73-1 at 12. Thus, women are now eligible for all military service roles, including combat positions.

Therefore, although "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies," *Rumsfeld*, 547 U.S. at 58 (quoting *Rostker*, 453 U.S. at 70), the *Rostker* holding does not directly control here. The dispositive fact in *Rostker*—that women were ineligible for combat—can no longer justify the MSSA's gender-based discrimination.[4] "[A] legislative act contrary to the

[4] Defendants argue that under *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917 (1989), this court is bound by Supreme Court precedent regardless of a change in factual circumstances. Dkt. 80 at 21–22. However, *Rodriguez de Quijas* merely notes that, in the face of two legally conflicting decisions, lower courts should follow the decision most directly on point instead of attempting to overrule one of the conflicting decisions. 490 U.S. at 484. Despite *Rostker*'s undeniable relevance to this case, the *Rostker* holding is not directly on point and therefore does not mandate judgment in Defendants' favor.

constitution is not law," and it is the "province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 5 U.S. 137 (1803). The court will consider the constitutionality of the MSSA anew.

C. The MSSA and Equal Protection

1. Standard of Review

Laws differentiating on the basis of gender "attract heightened review under the Constitution's equal protection guarantee." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (citing *Califano v. Westcott*, 443 U.S. 76, 84, 99 S. Ct. 2655 (1979)). Typically, "[t]he defender of legislation that differentiates on the basis of gender must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Id.* at 1690 (quoting *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264 (1996)). Further, "the classification must substantially serve an important governmental interest *today*"—it is insufficient that the law served an important interest in the past. *Id.* (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)) (emphasis in original).

Although the MSSA discriminates on the basis of gender, Defendants argue that a lower, rational-basis-like standard of review applies. Defendants contend that "the Court's departures—in *Rostker* and other military cases—from core aspects of strict or intermediate scrutiny demonstrates that its approach most closely resembles rational-basis review." Dkt. 80 at 23. Defendants emphasize the *Rostker* Court's

highly deferential approach to reviewing the MSSA and argue that recent precedent, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), affirms this lower standard of review in the military context. *Id.* at 24.

However, Defendants' reliance on *Trump* is misplaced. The *Trump* decision concerned judicial review of the President's power over immigration. 138 S. Ct. at 2420. While the *Trump* Court acknowledged that a deferential standard of review applied "across different contexts and constitutional claims," the Court's entire discussion centered on different claims within the realm of immigration law. *Id.* at 2419. Certainly, there are significant similarities between the Court's deference to Congress in military affairs and its deference to the President in immigration affairs. However, the *Trump* decision is tangential, at best, to the issue currently before the court.

Instead, *Rostker* itself provides the applicable standard of review when Congress exercises its constitutional power to raise and support armed forces. In *Rostker*, as here, the government expressly argued that the Court should "only [] determine if the distinction drawn between men and women bears a rational relation to some legitimate Government purpose." 453 U.S. at 69. However, the Court expressly declined to adopt this position. *Id.* at 69–70. Rather, the Court relied on *Schlesinger v. Ballard*, 419 U.S. 498, 95 S. Ct. 572 (1975), in which the Court upheld naval regulations creating different promotion requirements for female officers. *Rostker*, 453 U.S. at 71. As the Court explained, "[*Schlesinger*] did not purport to apply a different equal protection test because of the military context, but 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.* at 71.

The Court emphasized that the judiciary "cannot ignore Congress' broad authority conferred by the Constitution to raise and support armies when we are urged to declare unconstitutional its studied choice of one alternative in preference to another for furthering that goal." *Id*. at 71–72. However, the Court went on to reason that "the Government's interest in raising and supporting armies is an 'important governmental interest,'" and that "[t]he exemption of women from registration is . . . closely related to Congress' purpose in authorizing registration." *Id.* at 70, 79 (quoting *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451 (1976)). The *Rostker* Court therefore subjected the MSSA to a heightened level of scrutiny, even in light of the Court's marked deference to Congress's "studied choice" between alternatives. *Id.* at 72.

2. Analysis

Thus, the dispositive question here is whether the MSSA both serves important governmental objectives and is substantially related to the achievement of those objectives. *Morales-Santana*, 137 S. Ct. at 1689. First, "[n]o one could deny" that the governmental objective of raising and supporting armies is an "important governmental interest." *Rostker*, 453 U.S. at 70. However, Plaintiffs initially counter that registration, and the draft itself, will not necessarily be used to draft combat troops in future wars. Dkt. 73 at 20–21. Plaintiffs contend that the court should analyze the MSSA with the understanding that registrants may be drafted into both combat and non-

combat roles, and that Congress's important objective should be understood in that light. *Id.*

However, while future wars may require a draft of non-combat troops, Congress still understands the draft, as it currently exists, to be for the "mass mobilization of primarily combat troops." National Defense Authorization Act, Pub. L. No. 114-328, § 552(b)(4), 130 Stat. at 2131. This determination is well within Congress's constitutional role of governing and maintaining effective armed forces. *See Rostker*, 453 U.S. at 68. The court's inquiry is thus restricted to whether the MSSA's male-only registration requirement is substantially related to Congress's important objective of drafting and raising combat troops.

Next, Defendants must show that the MSSA's male-only registration requirement is "substantially related" to Congress's objective. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331 (1982). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533; *see also Rostker*, 453 U.S. at 67 (noting that the Court previously struck down gender-based classifications that were based on "overbroad generalizations"). "[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Mississippi Univ. for Women*, 458 U.S. at 724 (citing *Frontiero v. Richardson*, 411 U.S. 677, 691, 93 S. Ct. 1764 (1973) (plurality opinion)).

Defendants offer two potential justifications for male-only registration.[5] First, Defendants argue that female eligibility to serve in combat roles "does not answer the question of whether women should be *conscripted* into combat roles" because conscription could lead to "potential tradeoffs" for the military. Dkt. 80 at 27 (emphasis added). Construed liberally, Defendants appear to be arguing that requiring women to register for the draft would affect female enlistment by increasing the perception that women

[5] In 2016, a Senate-passed version of the National Defense Authorization Act ("NDAA") would have required women to register for the draft. Dkt. 80-3 at 11 (Letter to Armed Services Committee Chairs, Sept. 2016). The Senate Armed Services Committee acknowledged that "the ban of females serving in ground combat units has been lifted by the Department of Defense, and as such, there is no further justification to apply the selective service act to males only." S. Rep. No. 114-255, at 150–51 (2016). However, opposition to this change remained, and the final version of the NDAA instead created the Commission to explore a number of draft-related topics. National Defense Authorization Act, Pub. L. No. 114-328, § 552, 130 Stat. at 2131; *see* Dkt. 80-3 at 11 (Letter to Armed Services Committee Chairs). However, based on record before the court, Congress generated very little documentation on why it ultimately declined to amend the MSSA. Defendants only offer a 2016 letter from a group of senators formally requesting that the House remove the provision adding women to the draft. Dkt. 80-3 at 11 (Letter to Armed Services Committee Chairs) ("We should not hinder the brave men and women of our armed forces by entrapping them in unnecessary cultural issues . . . The provision of the FY17 NDAA requiring women to register for the Selective Service should be removed."). Defendants do not offer concerns about "unnecessary cultural issues" as a justification for the MSSA's continued discrimination. Thus, the court must primarily rely on congressional records from previous debates on the MSSA.

will be forced to serve in combat roles. *Id.* at 28; Dkt. 80-3 at 173.

However, this argument smacks of "archaic and overbroad generalizations" about women's preferences. *Schlesinger*, 419 U.S. at 507–08; *see also Virginia*, 518 U.S. at 533; *Rostker*, 453 U.S. at 67. At its core, Defendants' argument rests on the assumption that women are significantly more combat-averse than men. Defendants do not present any evidence to support their claim or otherwise demonstrate that this assumption is anything other than an "ancient canard[] about the proper role of women." *Rostker*, 453 U.S. at 86 (Marshall, J., dissenting) (quotations and citations omitted). As the Court reasoned in *Schlesinger*:

> In both *Reed* and *Frontiero*[,] the challenged classifications based on sex were premised on overbroad generalizations . . . that men would generally be better estate administrators than women . . . [and] that female spouses of servicemen would normally be dependent on their husbands, while male spouses of servicewomen would not. In contrast, the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service.

419 U.S. at 507–08. It is not a "demonstrable fact" that fewer women will enlist for fear of being conscripted into combat. This justification fails.

Moreover, this justification appears to have been created for litigation. *See Virginia*, 518 U.S. at 533.

Defendants have not produced any evidence that Congress actually looked to this concern in declining to add women to the draft. Defendants' evidence establishes only that Congress may have considered a similar issue in evaluating the Department of Defense's decision to open combat positions to women. *See* Dkt. 80-3 at 171–74. Thus, although the court must give significant deference to Congress's judgment in military affairs, such deference is not implicated here.

Second, Defendants argue that Congress preserved the male-only registration requirement out of concern for the administrative burden of registering and drafting women for combat. Dkt. 80 at 28. Unlike Defendants' first offered justification, Congress considered this issue extensively in debates over the MSSA. *See* S. Rep. No. 96-826, at 156–61 (1980); *Rostker*, 453 U.S. at 81. Thus, the court's deference to Congress's "studied choice" is potentially at its height. *Rostker*, 453 U.S. at 72.

Typically, "any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution].'" *Frontiero*, 411 U.S. at 691 (quoting *Reed v. Reed*, 404 U.S. 71, 77, 92 S. Ct. 251 (1971)). However, even in light of this general rule, the *Rostker* Court considered and deferred to Congress's administrative concerns. *See Rostker*, 453 U.S. at 81–82; *accord Schlesinger*, 419 U.S. at 507–08. The Court distinguished past precedent by noting that the previous classifications "were based on overbroad

generalizations" but that, in contrast, Congress's choice to retain the MSSA was based on "judgments concerning military operations and needs." *Id.* at 67–68 (quotations omitted). Thus, *Rostker* affirms that administrative concerns may justify statutory gender classifications in service of Congress's broad power over military affairs.

Congress cited several administrative concerns in its 1980 rejection of adding women to the draft. The primary concern, again, centered around administrative difficulties caused by the ban on women in combat. S. Rep. No. 96-826, at 156–61; *see also id.* at 157 ("The policy precluding the use of women in combat is, in the Committee's view, the most important reason for not including women in a registration system."). The Committee had also expressed concern that "training would be needlessly burdened by women recruits who could not be used in combat." *Rostker*, 453 U.S. at 81 (quoting S. Rep. No. 96-226, at 9 (1979)). However, as previously discussed, women are now eligible for and have been integrated into combat units. Thus, although Congress was previously concerned about drafting large numbers of people who were categorically ineligible for combat, this concern factually no longer justifies the MSSA.

However, according to Defendants, Congress also worried about administrative problems caused by "women's different treatment with regard to dependency, hardship[,] and physical standards." *Id.* at 28; S. Rep. No. 96-826, at 159. Defendants emphasize that Congress's concern about the physical readiness of women for combat has not changed. Dkt. 80 at 28–29. Defendants point to an acknowledgment

by the Department of Defense that "[t]hose who are opposed" to female mandatory registration believe "it would be inefficient to draft thousands of women when only a small percentage would be physically qualified to serve as part of a combat troop." Dkt. 80 at 28; Dkt. 73-1 at 145–46 (Department of Defense, Report on the Purpose and Utility of a Registration System for Military Selective Service, 2017). Therefore, "if men will, for the foreseeable future, comprise the predominant percentage of persons serving in combat forces, then the basis for the MSSA has not materially changed." Dkt. 80 at 29; *see Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73, 121 S. Ct. 2053 (2001) (noting that equal protection principles do not prohibit acknowledgment of biological differences between genders).

Again, however, this argument falls short. At the outset, concerns about female physical ability do not appear to have been a significant factor in Congress's decision-making process regarding the MSSA. Instead, Congress mentioned concerns about female physical ability in passing, within a list, in one sentence of Defendants' cited report. S. Rep. No. 96-826, at 159. In contrast, Congress extensively discussed the ban on women in combat. *Id.* at 156–61. Congress also focused on the societal consequences of drafting women, such as the perceived impropriety of young mothers going off to war and leaving young fathers to care for children. *Id.* at 159. Defendants' evidence simply does not support the argument that Congress preserved a male-only draft because of concerns about female physical ability. Again, while the court must defer to Congress, the court does not have to defer to proffered justifications that have

little, if anything, to do with Congress's actual judgment on the matter. *See Morales-Santana*, 137 S. Ct. at 1696–97 (quoting *Virginia*, 518 U.S. at 533, 535–36) ("It will not do to 'hypothesiz[e] or inven[t]' governmental purposes for gender classifications '*post hoc* in response to litigation.'").

Further, under *Rostker*, the dispositive issue is whether men and women are *similarly situated* in regard to the draft. *Rostker*, 453 U.S. at 79. Thus, the relevant question is not what proportion of women are physically eligible for combat—it may well be that only a small percentage of women meets the physical standards for combat positions. However, if a similarly small percentage of men is combat-eligible, then men and women are similarly situated for the purposes of the draft and the MSSA's discrimination is unjustified. Defendants provide no evidence that Congress ever looked at arguments on this topic and then made a "studied choice" between alternatives based on that information. *Cf. id.* at 71–72.

Had Congress compared male and female rates of physical eligibility, for example, and concluded that it was not administratively wise to draft women, the court may have been bound to defer to Congress's judgment. Instead, at most, it appears that Congress obliquely relied on assumptions and overly broad stereotypes about women and their ability to fulfill combat roles.[6] Thus, Defendants' second proffered

[6] The average woman could conceivably be *better* suited physically for some of today's combat positions than the average man, depending on which skills the position required. Combat roles no longer uniformly require sheer size or muscle. Again, Defendants provide no evidence that Congress considered evidence of alleged female physical inferiority in combat—either

justification appears to be an "'accidental by-product of a traditional way of thinking about females,'" rather than a robust, studied position. *Rostker*, 453 U.S. at 74 (quoting *Califano v. Webster*, 430 U.S. 313, 320, 97 S. Ct. 1192 (1977)).

In short, while historical restrictions on women in the military may have justified past discrimination, men and women are now "similarly situated for purposes of a draft or registration for a draft." *Rostker*, 453 U.S. at 78. If there ever was a time to discuss "the place of women in the Armed Services," that time has passed. *Id.* at 72. Defendants have not carried the burden of showing that the male-only registration requirement continues to be substantially related to Congress's objective of raising and supporting armies.

IV. Conclusion

Defendants' motion to stay and motion for summary judgment (Dkt. 80) is DENIED. Although Plaintiffs' complaint requests injunctive relief, Plaintiffs have not briefed the issue and their summary judgment motion only requests declaratory relief. Dkt. 60 at 13; Dkt. 73 at 24. Therefore, Plaintiffs' request for an injunction (Dkt. 60) is DENIED. Plaintiffs' motion for summary judgment (Dkt. 73) is GRANTED.

Signed at Houston, Texas on February 22, 2019.

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Gray H. Miller
Senior United States District Judge

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in 1980 or 2016—and concluded that drafting women was unwise based on that evidence.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NATIONAL COALITION FOR MEN, *et al.*,

Plaintiffs,

v.

SELECTIVE SERVICE SYSTEM, *et al.*,

Defendants.

CIVIL ACTION H-16-3362

April 6, 2018

MEMORANDUM OPINION AND ORDER

Pending before the court is a motion to dismiss filed by defendants Selective Service System ("SSS") and Lawrence Romo (collectively, "Defendants"). Dkt. 63. Plaintiffs National Coalition for Men ("NCFM"), James Lesmeister, and Anthony Davis (collectively, "Plaintiffs") responded. Dkt. 64. Defendants replied. Dkt. 65. Having considered the complaint, motion, response, reply, and applicable law, the court is of the opinion that the motion to dismiss should be DENIED.

I. Background

This is a case about the constitutionality of the Military Selective Service Act's ("MSSA") requirement for males—but not females—to register for the draft.[1] Dkt. 60. Unless otherwise provided by the MSSA, "every male citizen of the United States[] and every other male person residing in the United States . . . between the ages of eighteen and twenty-six" must register with SSS. 50 U.S.C. § 3802(a); Dkt. 60 at 10. After registering, men have a continuing obligation to update SSS with any changes in their address or status. 50 U.S.C. § 3813; Dkt. 60 at 10–11. Failure to comply with the MSSA can result in fines or imprisonment. 50 U.S.C. § 3811; Dkt. 60 at 11.

Lesmeister and Davis are males subject to the draft requirements, and both recently registered accordingly. Dkt. 60 at 4–5. NCFM is a non-profit, 501(c)(3) educational and civil rights corporation. *Id.* at 2. Davis is a NCFM member. *Id.* at 3. Like Davis, some of its members are males subject to the draft requirements and have already registered or will have to register. *Id.*

On April 4, 2013, NCFM and Lesmeister filed a complaint in the Central District of California against Defendants alleging violations of the Fifth and Fourteenth Amendments of the Constitution and violation of 42 U.S.C. § 1983 for sex-based discrimination in the draft system. Dkt. 1. Plaintiffs argue that because women can participate in combat,

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[1] For the purposes of a motion to dismiss, the court accepts all well-pled facts contained in Plaintiffs' complaint as true. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

the Supreme Court decision upholding the constitutionality of sex-based discrimination in the draft is no longer applicable. Dkt. 1 (citing *Rostker v. Goldberg*, 453 U.S. 57, 101 S. Ct. 57 (1981)).

Initially, Judge Dale S. Fischer, the Central District of California judge, dismissed the case as not ripe for review. Dkt. 20. The Ninth Circuit reversed and remanded. *Nat'l Coalition for Men v. Selective Serv. Sys*., 640 F. App'x 664, 665 (9th Cir. 2016). Then, Lesmeister and NCFM voluntarily dismissed their Fourteenth Amendment and § 1983 claims. Dkt. 43. On November 9, 2016, Judge Fischer granted Defendants' motion to dismiss NCFM without prejudice because the organization lacked associational standing. Dkt. 44 at 4. Further, the court determined that venue was not proper in the Central District of California and transferred the case to the Southern District of Texas, where Lesmeister resides. *Id.* at 5. On August 16, 2017, this court granted Lesmeister leave to file an amended complaint. Dkt. 59. Lesmeister's amended complaint named NCFM as a plaintiff and added Davis as a plaintiff. Dkt. 60.

In the instant motion, Defendants move to dismiss Plaintiffs' remaining Fifth Amendment claim under: (1) Rule 12(b)(1) because Plaintiffs do not have standing to sue; and (2) Rule 12(b)(6) because Plaintiffs do not state a claim upon which relief can be granted. Dkt. 63 at 2.

II. Legal Standard

A. Rule 12(b)(1) Standard

A motion to dismiss under Rule 12(b)(1) challenges a federal court's subject matter jurisdiction. Fed. R.

Civ. P. 12(b)(1). Under Rule 12(b)(1), a claim is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the claim. *Home Builders Ass'n v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). Where, as here, a motion to dismiss for lack of jurisdiction is limited to a facial attack on the pleadings, it is subject to the same standard as a motion brought under Rule 12(b)(6). *See Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992).

B. Rule 12(b)(6) Standard

Rule 8(a)(2) requires that the pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A party against whom claims are asserted may move to dismiss those claims when the nonmovant has failed "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007)). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (citations omitted). While the allegations need not be overly detailed, a plaintiff's pleading must still provide the grounds of his entitlement to relief, which "requires more than labels and conclusions," and "a formulaic recitation of the elements of a cause of action will not do." *Id.*; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct.

1937 (2009). "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). Instead, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Evaluating a motion to dismiss is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. "Ultimately, the question for a court to decide is whether the complaint states a valid claim when viewed in the light most favorable to the plaintiff." *NuVasive, Inc. v. Renaissance Surgical Ctr.*, 853 F. Supp. 2d 654, 658 (S.D. Tex. 2012).

III. Analysis

A. Plaintiffs' Standing

Defendants move to dismiss Plaintiffs' claim because Plaintiffs do not have standing to sue. Dkt. 63 at 19. Defendants argue that Lesmeister and Davis lack standing because they have not suffered an injury from the MSSA's male-only registration requirement. *Id.* at 20. They also argue that because the individual plaintiffs lack standing, NCFM lacks associational standing. *Id.* at 23.

1. Lesmeister/Davis Standing

Under Article III of the Constitution, a plaintiff must have standing to sue in order for a court to have jurisdiction. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 120 S. Ct. 693 (2000). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered

an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 180–81.

Defendants argue that Lesmeister and Davis lack standing because: (1) neither can demonstrate an injurious harm; and (2) they cannot assert a *de facto* injury simply due to the alleged constitutional violation. Dkt. 63 at 20. Plaintiffs respond that they "are harmed because they are required to register for military conscription, continually report their whereabouts to the federal government under penalty of fines, jail, and will be denied federal benefits if they do not." Dkt. 64 at 2. Further, they allege they are harmed due to the sex-based discrimination, which sufficiently constitutes an injury. *Id.* Because the court agrees that Lesmeister and Davis have alleged an injury, the court need not consider whether the sex-based discrimination alone constitutes an injury.

As Judge Fischer previously found in this case, Plaintiffs allege that: (1) the MSSA requires males between the ages of 18 and 26 to register with SSS; (2) a registrant has a continuing obligation to update SSS with any changes in his address or status; (3) failure to comply with the MSSA can result in fines or imprisonment; and (4) Lesmeister and Davis have registered and are subject to the continuing obligation. Dkt. 44 at 3; *see also* Dkt. 60 at 10–11. Although Defendants argue that the prospect of being drafted fails to constitute a concrete harm, the court need not decide that issue because that is not the

harm Plaintiffs allege. Defendants also argue that because Lesmeister and Davis have complied with the MSSA, neither is subject to any action to enforce its requirements. *Id.* Regardless, both have a continuing obligation to update SSS with changes to their information. Dkt. 60 at 10–11. That obligation, paired with the requirement to register with SSS, constitutes an injury sufficient for Article III standing. *See E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743, 758 (S.D. Tex. 2013) (Rosenthal, J.) ("HBU's injury arises from the fact that the accommodation requires it to comply with the self-certification steps or face severe penalties. . . . HBU is harmed when it has to fill out the form authorizing its TPA to provide coverage and payments for emergency contraceptives, designating its TPA as the administrator for no-cost-sharing contraceptive benefits, and informing the TPA of its statutory and regulatory obligations."), *rev'd on other grounds sub nom. E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015), *vacated on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *see also Goldberg v. Rostker*, 509 F. Supp. 586, 590–91 (E.D. Pa. 1980), *rev'd on other grounds*, 453 U.S. 57 (1981). Because Lesmeister and Davis have Article III standing, Defendants' motion is DENIED.

2. Associational Standing

"It is well-established that an association has Article III standing to bring a suit on behalf of its members when '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Funeral Consumers All.,*

Inc. v. Serv. Corp. Int'l, 695 F.3d 330, 343 (5th Cir. 2012) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434 (1977)). Defendants argue that because NCFM cannot allege that any members have standing, NCFM also lacks standing. Dkt. 63 at 24. Because Davis is a member of NCFM and has standing to sue in his own right, NCFM does, too. *See Funeral Consumers*, 695 F.3d at 343; *see also supra* Section III.A.1. Thus, Defendants' argument fails, and the motion is DENIED.

B. Failure to State a Claim

Defendants argue that Plaintiffs fail to state a claim because: (1) entry of the relief sought would impermissibly intrude on Congress's authority over military affairs; and (2) *Rostker* binds the court and requires dismissal. Dkt. 63 at 25, 28. The court disagrees with both arguments. The court agrees with Defendants that Congress has broad power to raise and regulate armies and navies. *Rostker*, 453 U.S. at 65. Thus, "a healthy deference to legislative and executive judgments in the area of military affairs" should be given by the court. *Id.* at 66. *Rostker* thoroughly explained the reason to provide deference to Congress when dealing with military affairs. *See id.* at 64–67. But "[n]one of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause." *Id.* at 67. Plaintiffs allege that the MSSA violates the Constitution. Dkt. 60 at 12. Because *Rostker* explicitly requires Congress to comply with the Constitution in the area of military affairs, and because Plaintiffs allege Defendants did not, Plaintiffs state a claim upon which relief can be

granted. *See Rostker*, 453 U.S. at 67; *see also* Dkt. 60 at 12.

Regarding *Rostker*'s applicability, as the court explained, *Rostker* did not hold that Congress receives blind deference in the area of military affairs. 453 U.S. at 67. And regarding *Rostker*'s holding that the male-only draft did not violate the Constitution, the factual circumstances of this case are different. *See id.* at 76, 77 ("Women as a group, however, unlike men as a group, are not eligible for combat. . . . The existence of the combat restrictions clearly indicates the basis for Congress'[s] decision to exempt women from registration."). Now, women can serve in combat roles. Dkt. 60 at 7. Because the alleged factual circumstances of this case differ from the dispositive facts in *Rostker*, the court cannot conclude, at this stage, that *Rostker* controls the outcome.

IV. CONCLUSION

Because Plaintiffs have standing and assert a claim upon which relief can be granted, Defendants' motion to dismiss (Dkt. 63) is DENIED.

Signed at Houston, Texas on April 6, 2018.

Gray H. Miller
United States District Judge

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

SELECTIVE SERVICE SYSTEM and LAWRENCE G. ROMO, as Director of Selective Service System,

Defendants-Appellees.

No. 13-56690

D.C. No. 2:13-cv-02391-DSF-MAN

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted December 8, 2015
Pasadena, California

Filed February 19, 2016

MEMORANDUM[*]

Before: GOULD and BERZON, Circuit Judges, and STEEH,[**] Senior District Judge.

The National Coalition for Men ("Coalition") and James Lesmeister appeal the district court's dismissal of their suit against the Selective Service as unripe. We reverse and remand for further proceedings.

1. "[S]ince ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the District Court's decision that must govern." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 140 (1974). The district court's decision was largely premised on the fact that the Department of Defense has been engaged in a multi-year process of integrating women into formerly closed positions, and it was unclear the extent to which these positions would be opened. Much of that uncertainty has passed: as the government has noted, the Secretary of Defense recently announced that the military "intends to open all formerly closed positions" to women.

[*] This Disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The Honorable George Caram Steeh III, Senior District Judge for the U.S. District Court for the Eastern District of Michigan, sitting by designation.

Even if some uncertainty remains as to the full extent to which women will end up serving in combat roles, that does not render the Coalition and Lesmeister's claims unripe. The ripeness inquiry asks whether there is a legitimate controversy that is "fit for adjudication." *Assoc. of Am. Med. Colls. v. United States*, 217 F.3d 770, 782 (9th Cir. 2000) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). Lesmeister and the Coalition point to numerous specific changes in statutes, policies, and practices that have happened since the Supreme Court's decision in *Rostker v. Goldberg*, 453 U.S. 57 (1981). The Selective Service argues that women's roles in combat have not changed sufficiently to revisit *Rostker*. But whether there has been sufficient change to revisit *Rostker* is a question about the merits of the Coalition and Lesmeister's claims, not about ripeness. We make no comment on the merits of these claims, other than noting that they are "definite and concrete, not hypothetical or abstract," and so ripe for adjudication. *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000)).

2. For purposes of standing's redressability inquiry, the injuries the Coalition and Lesmeister allege could be addressed either by extending the burden of registration to women or by striking down the requirement for men. When a court sustains an equal protection challenge to a statute, "it may either declare the statute a nullity . . . or it may extend the coverage of the statute." *Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the

result)); *see also Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426-27 (2010) ("How equality is accomplished—by extension or invalidation of the unequally distributed benefit or burden, or some other measure—is a matter on which the Constitution is silent."). We express no view as to which remedy might ultimately be appropriate. But we note the Selective Service is wrong to argue that the Coalition and Lesmeister lack standing because their alleged equality injuries would not be redressed if the burdens they challenge were extended to women.

3. We decline otherwise to address the Selective Service's standing argument. The remaining challenges to standing are premised on alleged deficiencies in the complaint. The district court did not address these alleged deficiencies. A full consideration of the case-specific standing issues may benefit from amendment of the complaint and factual development. *See, e.g.*, *Hayes v. County of San Diego*, 736 F.3d 1223, 1229 (9th Cir. 2013); *Friery v. L.A. Unified Sch. Dist.*, 448 F.3d 1146, 1150 (9th Cir. 2006).

We remand for the district court to consider the questions of standing other than the one we have addressed, and, if it has jurisdiction, the merits of the case.

REVERSED and REMANDED.

APPENDIX F

LETTER FROM SECRETARY OF DEFENSE
TO PRESIDENT OF THE SENATE

FROM: SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

TO: THE HONORABLE JOSEPH R. BIDEN, JR.
PRESIDENT OF THE SENATE
UNITED STATES SENATE
WASHINGTON, DC 20510

December 3, 2015

Dear Mr. President:

This letter provides notification as required by section 652 and section 6035 of title 10, U.S.C., that the Department of Defense (DoD) intends to assign women to previously closed positions and units across all Services and U.S. Special Operations Command. The enclosure provides a detailed description of the intended changes and the required analysis of their impact on the constitutionality of the application of the Military Selective Service Act to males only. Additionally, the position descriptions for the affected occupational specialties, Additional Skill Identifiers, Skill Qualification Identifiers, and Navy Enlisted Classification Codes are enclosed. DoD will not implement changes to direct ground combat units and

occupations listed in the enclosure until 30 calendar days after notification is received by Congress.

Consistent with 10 U.S.C. 6035, no change in Department of the Navy policy limiting service on submarines to males shall take place until a period of 30 days of continuous session of Congress (excluding any day on which either House of Congress is not in session) expires following the date on which the notice is received by Congress. Additionally, DoD will not expend funds to configure any existing submarines or to design any new submarine to accommodate female crew members until the Department submits written notice of the proposed reconfiguration or design and a period of 30 days of continuous session of Congress (excluding any day on which either House of Congress is not in session) expires following the date on which the notice is received by Congress.

The DoD intends to open all formerly closed positions, occupations, Additional Skill Identifiers, Skill Qualification Identifiers, and Navy Enlisted Classification Codes to women in the Active and Reserve Components across all Services. The DoD reviewed the occupational standards associated with these positions and determined they are gender-neutral.

I appreciate your continued support of the extraordinary men and women serving our Nation. I am sending identical letters to the Speaker of the

House and the Chairmen of the congressional defense committees.

Sincerely,

/s/ Ash Carter

Enclosures:
As stated

* * *

Detailed Legal Analysis

The Department's notification under Section 652, title 10, United States Code, notifies Congress that, based on a comprehensive review of military assignment policies, the Department will open all positions to the assignment of women, thereby providing men and women the same opportunities to serve in all positions based on their abilities and qualifications. Section 652 requires that such notifications include a detailed analysis of the legal implications of the proposed change with respect to the constitutionality of the application of the Military Selective Service Act (50 App. U.S.C. 451 et seq.) (MSAA or Act) to males only. *See* 10 U.S.C. § 652(a)(3)(B).

The MSSA requires that every male citizen of the United States, and every other male person residing in the United States, between the ages of eighteen and twenty-six, register at such time or place, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed. 50 U.S.C. App. § 453(a).

In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the United States Supreme Court considered the constitutionality of male-only draft registration under the Act and upheld the Act. The Court held that the Act's male-only registration provisions did not violate the Fifth Amendment to the United States Constitution because men and women were not similarly situated for purposes of a draft or registration, in that women were excluded from combat by statute and military policy. The Court found that Congress acted within its constitutional authority to raise and regulate armies and navies

when it authorized the registration of men and not women. The Court made clear that its "precedents requiring deference to Congress in military affairs" were implicated in the case. *Id*. at 69.

In *Rostker*, the Court recognized that the decision by Congress to exclude women from the registration requirement was not the "accidental by-product of a traditional way of thinking about females" but rather was the subject of considerable national attention and public debate, and was extensively considered by Congress in hearings, floor debates, and in committee. *Id*. at 74 (internal quotation marks omitted). The Court deferred to Congress' explanation that "[i]f mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements." *Id.* at 76 (internal quotation marks omitted). Additionally, the Court noted that women were not similarly situated to men for purposes of the Act because of their exclusion from assignments to certain units whose primary mission is to engage in direct combat on the ground. *See id*. at 76-78.

The landscape on the assignment of women has changed since *Rostker* was decided. Since the *Rostker* decision, sections 8549 and 6015 of title 10, U.S.C. (prohibiting the assignment of women to aircraft engaged in combat and vessels engaged in combat, respectively) have been repealed. On February 8, 2012, the Department rescinded its co-location restriction on the assignment of women, and approved an exception to the 1994 Direct Ground Combat Definition and Assignment Rule that allowed the assignment of women to select direct ground combat units in specific occupations at the battalion level and above. On January 24, 2013, the Department

rescinded its 1994 Direct Ground Combat Definition and Assignment Rule, which prohibited the assignment of women to certain units and positions. In rescinding the 1994 policy, the Department established a way forward, using the guiding principles and milestones developed by the Joint Chiefs of Staff, to integrate women into all then-closed positions as expeditiously as possible, considering good order and judicious use of fiscal resources, no later than January 1, 2016. Throughout this process, the Department has kept Congress abreast of its changes through briefings and required notifications.

The opening of all direct ground combat positions to women further alters the factual backdrop to the Court's decision in *Rostker*. The Court in *Rostker* did not explicitly consider whether other rationales underlying the statute would be sufficient to limit the application of the MSSA to men. The Department will consult with the Department of Justice as appropriate regarding these issues.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NATIONAL COALITION FOR MEN et al.,

Plaintiffs,

v.

SELECTIVE SERVICE SYSTEM et al.,

Defendants.

No. 4:16-cv-3362

Dated: June 14, 2018

DEFENDANT SELECTIVE SERVICE SYSTEM'S OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

* * *

Interrogatory No. 11: Explain, in detail, any logistical problems you are aware of with requiring women to register for the Selective Service?

Objection: SSS objects to this interrogatory on the ground that it calls for speculation. Given that women do not currently register for the Selective Service, SSS cannot identify with any certainty what logistical

problems might arise if they were legally required to do so.

Response: SSS is presently unaware of any specific logistical problems that would arise if women were required to register for the Selective Service.

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