No. 20-928

In The
Supreme Court of the United States

NATIONAL COALITION FOR MEN,
JAMES LESMEISTER, AND ANTHONY DAVIS,

Petitioners,

v.

SELECTIVE SERVICE SYSTEM AND
DONALD BENTON, AS DIRECTOR OF
SELECTIVE SERVICE SYSTEM,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE CENTER FOR MILITARY READINESS, EAGLE FORUM, CONCERNED WOMEN FOR AMERICA, ADM JEROME JOHNSON, LTG BENJAMIN R. MIXON, LTG WILLIAM G. BOYKIN, MG WILLIAM K. SUTER, RADM HUGH P. SCOTT, MD, AND PAUL O. DAVIS, PHD, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amicus Center for Military Readiness (CMR) is an independent, non-partisan 501(c)(3) public policy organization, which reports on and analyzes military social issues that affect unit cohesion and combat effectiveness in the U.S. Armed Forces. CMR promotes high standards and sound priorities that strengthen morale and readiness of the All-Volunteer Force.

Amicus Eagle Forum, founded by the late Phyllis Schlafly, is a pro-family citizen lobbyist organization. Eagle Forum equips women and men to participate in the process of self-government and public policymaking so that America will continue to be a land of individual liberty, public and private virtue, and private enterprise.

Amicus Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare.

Amicus ADM (Ret.) Jerome Johnson was the Vice Chief of Naval Operations and Commander of the U.S.

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[1] No counsel for a party authored any part of this brief, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. *Amici curiae* timely provided notice of intent to file this brief to all parties, and all parties have consented to the filing of this brief.

Second Fleet, Joint Task Force 120, and NATO's Striking Fleet Atlantic. Commissioned as a Naval Aviator, he commanded Attack Squadron VF 27, the aircraft carrier *Coral Sea*, and Carrier Group Four. He has led units in combat operations and is personally familiar with the realities of combat and the attributes required for both individuals and units to achieve victory on the battlefield. He offers the Court his perspective based on his 38 years of military experience.

Amicus LTG (Ret.) Benjamin R. Mixon served as Commander of the U.S. Army Command in the Pacific and the 25th Infantry Division. He offers the Court his perspective based on 35 years of military experience, including combat command responsibilities in Iraq and Afghanistan. Gen. Mixon is personally familiar with the realities of combat and the attributes required for both individuals and units to achieve victory on the battlefield.

Amicus LTG (Ret.) William G. Boykin was an original member of the Army's elite Delta Force and subsequently led the unit in combat operations as its commander. During his 36-year Army career, LTG Boykin commanded the U.S. Army Special Forces Command, the John F. Kennedy Special Warfare Center, and served as the Deputy Under Secretary of Defense for Intelligence. He offers the Court his perspective based on his decades of experience leading soldiers in combat.

Amicus MG (Ret.) William K. Suter was a career Army Judge Advocate. He is a Vietnam veteran, served as the Staff Judge Advocate, 101st Airborne Division, Commandant of The Judge Advocate General's School, and Assistant Judge Advocate General of the Army. After his Army service, he served for 22 years as the 19th Clerk of the Supreme Court of the United States. He offers the Court his perspective based on his distinguished legal career and his knowledge of the unique role and purpose of the military in American society.

Amicus RADM (Ret.) Hugh P. Scott is a physician. He is an expert in medical physical standards and has extensive experience with medical boards determining fitness for duty cases, particularly those involving combat related assignments including special operations. Admiral Scott served in senior healthcare executive positions including Fleet Surgeon U.S. Pacific Fleet during the Persian Gulf War, Assistant Chief Operational Medicine and Fleet Support, Bureau of Medicine and Surgery, and as Director Medical Plans and Policy, Office of the Chief of Naval Operations.

Amicus Dr. Paul O. Davis received his Ph.D. from the University of Maryland, College of Human Performance. He is an expert in physical fitness and employment standards in the public safety sector. Dr. Davis encourages both men and women to reach their full potential in training for physically demanding occupations in which lives often are at risk.

SUMMARY OF THE ARGUMENT

This Court's decision in *Rostker v. Goldberg*, 453 U.S. 57 (1981), is still sound and should not be disturbed. No change in the law or the facts warrant reconsideration of *Rostker*'s constitutional rationale, much less reversing its holding, as Petitioners demand.

Petitioners claim the "fundamental premise" underlying *Rostker*, i.e., the categorical exclusion of women from combat roles in the Armed Forces, is "no longer true" and it is time to overrule *Rostker*. *NCFM v. Selective Service System*, No. 20-928, *Pet. for Cert.* at 3-4 (filed Jan. 8, 2021).

Petitioners misperceive *Rostker*'s fundamental premise, ignore the role, authority, and responsibility of Congress in raising and supporting armies, fail to acknowledge the physiological differences between males and females that bear upon the question of whether men and women are similarly situated with regard to filling the combat casualty replacement stream during a national mobilization, and seek to short-circuit the on-going legislative process that is considering whether to maintain the current selective service system, abandon it altogether, or create a different paradigm.

Rostker applied well-settled principles of judicial deference to Congress' exercise of its Article I powers in passing the Military Selective Service Act (MSSA) and its reauthorization of the registration requirement in 1980. 453 U.S. at 72-79. Petitioners have not carried

the high burden of justifying abandonment of such deference and substitution of the Court's judgment for that of Congress on this crucial question of national defense.

Furthermore, Petitioners' efforts to change current law are premature. Congress currently has the question of conscription and national service under consideration. Respect for congressional authority in this important area of military readiness under U.S. CONST. art. I, § 8, requires the Court to allow the legislative process to proceed without untimely interruption.

The Petitioners' case is neither a proper nor timely vehicle for re-examination of *Rostker*.

ARGUMENT

I. The Fundamental Premise of *Rostker* Has Not Changed.

A. Judicial Deference to Congressional Decision-making Under U.S. CONST. art. I, § 8, is the Fundamental Premise of *Rostker*.

In *Rostker* several young men challenged the male-only registration requirements of the Military Selective Service Act (MSSA), 50 U.S.C. App. § 451, *et seq*. They claimed the requirement for men but not women to register for the draft violated the equal protection

component of the Fifth Amendment's Due Process Clause.

The case, originally filed in 1971 during the Vietnam War, languished in the lower courts with little or no action because the draft was suspended in 1973 and the registration requirement was halted in 1975. 453 U.S. at 61. When the Soviets invaded Afghanistan in 1979, President Jimmy Carter decided that registration for the draft was needed to prepare the United States to meet the emerging threats in Southwest Asia. *Id.* Because the registration requirement, as well as the induction process, had been suspended, it was necessary for Congress to reallocate funds to spin the system back up. Accordingly, President Carter requested Congress to transfer funds from the Department of Defense (DoD) to the Selective Service System (SSS) to fund the reinstated registration process. *Id.* In addition to requesting Congress to fund the registration process, President Carter asked Congress to amend the MSSA to register and conscript women. 453 U.S. at 60-61.

Congress agreed that the events in Afghanistan warranted the activation of the registration system but after lengthy consideration balked at requiring women to register and become subject to conscription. 453 U.S. at 61.

The congressional debate on the issue focused renewed attention on the *Rostker* case that had been lying dormant in a federal court in Pennsylvania for almost 10 years. *Id.* The District Court ultimately

denied the government's motion to dismiss, certified the case as a class action, and included in the plaintiff class "all male persons who are registered or subject to registration" under the MSSA. 453 U.S. at 62. Just three days before the start date of the revival of the registration process, the District Court, applying the "important government interest" scrutiny test, held that the male-only registration requirement violated the equal protection component of the Due Process Clause of the Fifth Amendment, and permanently enjoined the government from registering anyone under the MSSA. *Goldberg v. Rostker*, 509 F. Supp. 586, 593 (E.D. Pa. 1980). The government sought immediate review by this Court and the District Court's injunction was stayed pending review. 453 U.S. at 64.

The Court began its analysis with the fundamental premise that "Congress is given the power under the Constitution 'To raise and support Armies,' 'To provide and maintain a Navy,' and 'To make Rules for the Government and Regulation of the land and naval forces,' " and noted that in excluding women from the draft pool "Congress explicitly relied upon its constitutional powers under art. I, §8, cls. 12-14." 453 U.S. at 59, 64-65. The Court recognized that *Rostker* 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." 453 U.S. at 64-65. Furthermore, the Court specifically noted, "[n]ot 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." 453 U.S. at 64.

To underscore this fundamental premise, Justice Rehnquist, writing for a 6-3 Court, reviewed the long line of cases where the Court appropriately deferred to the judgment of Congress when Congress was exercising its authority under U.S. CONST. art. I, § 8, cls. 12-14. *Rostker*, 453 U.S. at 65-67. *See Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) ("[J]udges are not given the task of running the Army."); *United States v. O'Brien*, 391 U.S. 367,377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end are broad and sweeping."); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (noting the judiciary's lack of expertise and competence regarding decisions as to composition, training, equipping and control of military forces); *Parker v. Levy*, 417 U.S. 733, 756 (1974) (upholding constitutionality of art. 134, UCMJ, against vagueness and overbreadth challenges because, "Congress is permitted to legislate both with greater breadth and with greater flexibility" in governing the military); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (recognizing the "broad constitutional power" of Congress to raise and regulate the armed forces in upholding Navy policy giving female officers more time than male officers to meet promotion milestones); *Middendorf v. Henry*, 425 U.S. 25 (1976) (noting that courts must give particular deference to Congress' exercise of its art. I, § 8, power); *Greer v. Spock*, 424 U.S. 828, 837-38 (1976) (upholding ban on political speeches by civilians on military

installations); *Brown v. Glines*, 444 U.S. 348 (1980) (upholding regulations imposing prior restraint on military personnel's right to petition).

Cases decided post-*Rostker* reinforce the importance of judicial deference in matters involving the military. *See*, *e.g.*, *Chappell v. Wallace*, 462 U.S. 296 (1983) (denying *Bivens* claim brought against ship commander by sailors alleging racial discrimination); *United States v. Albertini*, 472 U.S. 675 (1985) (upholding conviction for unlawful entry onto a military base during an "open house" after being barred from entry by commander); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding military regulations restricting wearing of religious apparel while in uniform against First Amendment challenge); *Solorio v. United States*, 483 U.S. 435 (1987) (affirming art. I, § 8, power of Congress to extend court-martial jurisdiction over offenses without a "service connection").

The glaring absence of any reference to U.S. CONST. art. I, § 8, in either the petition itself or the briefs of Petitioners' *amici* is powerful evidence that Petitioners and their *amici* seek to separate draft registration from Congress' power to raise and support armies. That is the same mistake the district court in *Rostker* made:

> Although the three-judge District Court often tried to sever its consideration of registration from the particulars of induction, see, *e. g.*, 509 F. Supp., at 604-05, Congress rather clearly linked the need for renewed registration with its views on the character of a subsequent

> draft. The Senate Report specifically found that "[a]n ability to mobilize rapidly is essential to the preservation of our national security. . . . A functioning registration system is a vital part of any mobilization plan." S. Rep. No. 96-826, *supra*, at 160. As Senator Warner put it, "I equate registration with the draft." Hearings on S. 2294, at 1197. See also *id.*, at 1195 (Sen. Jepsen), 1671 (Sen. Exon). Such an approach is certainly logical, since under the MSSA induction is interlocked with registration: only those registered may be drafted, and registration serves no purpose beyond providing a pool for the draft. Any assessment of the congressional purpose and its chosen means must therefore consider the registration scheme as a prelude to a draft in a time of national emergency. Any other approach would not be testing the Act in light of the purposes Congress sought to achieve.

453 U.S. at 75.

By obscuring the connection between draft registration, induction, and the combat needs Congress was seeking to fill, Petitioners, like the District Court in *Rostker*, ignore the fundamental principle that Congress, not the courts, has the primary constitutional responsibility for raising and supporting armies.

The District Court's fundamental error in striking down the MSSA was that it "relied heavily on the President's decision to seek authority to register women and the testimony of members of the Executive Branch and the military in support of that decision." 453 U.S.

at 79. It substituted its judgment for that of Congress. This Court was clear that was improper: "The District Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of Congress' evaluation of that evidence." 453 U.S. at 82-83. Nothing has changed to warrant departure from that fundamental premise.

B. Post-*Rostker* Refinements in the Level of Scrutiny for Sex-Based Classifications Do Not Warrant Revisiting *Rostker*.

Petitioners do not address the power of Congress to raise and support armies and what level of deference the Constitution demands that courts give to the exercise of such power. Instead, they rely on cases arising in civilian contexts which do not remotely implicate Congress' military powers. They argue that the Court's more recent equal protection decisions apply a more rigorous level of scrutiny than applied in *Rostker*, and that the sex-based classification in *Rostker* cannot survive this more exacting standard. *Pet. for Cert.* at 23-28.

But *Rostker* did not turn on the level of scrutiny required when reviewing sex-based categories. 453 U.S. 69-70. The *Rostker* plaintiffs' equal protection claim was rejected because, "the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated." 453 U.S. at 79, *quoting Michael M. v. Superior Ct.*, 450 U.S. 464, 469 (1981). As set forth in Part I.C., *infra*, draft age

males and females are still not similarly situated with regard to filling the combat casualty replacement stream during mobilization. Thus, any post-*Rostker* refinements in scrutiny levels of sex-based categories do not warrant revisiting *Rostker*.

Even if levels of scrutiny are somehow applicable here, none of the cases cited by Petitioners to justify overruling *Rostker* implicate Congress' Article I power to raise and support armies. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689-90 (2017) (invalidating length of residency differences for unwed mothers and fathers for citizenship purposes of their offspring); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (striking down state-imposed single-sex admission requirement for nursing school); *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (holding state single-sex military college violated equal protection); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137 (1994) (holding that sex-based preemptory challenges to jurors violates equal protection).

Refinement of scrutiny standards in sex-based equal protection claims arising in the civilian context does not alter the long-established principle that,

> [t]his Court has recognized that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' [*U. S. ex rel.*] *Toth v. Quarles*, 350 U. S. 11, 17. *See also Orloff v. Willoughby*, 345 U. S. 83, 94. The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, see U. S. Const.,

> art. I, § 8, cls. 12-14, and with the President. See U. S. Const., art. II, § 2, cl. 1.

Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).

The fundamental premise of *Rostker* has not changed. The authority of Congress to raise armies has not changed. The level of deference courts owe Congress in the exercise of its military powers has not changed. The standard of review in cases challenging Congress' exercise of its power to raise and support armies has not changed. The importance of the government interest in being able to respond with overwhelming military force to repel an existential threat to the nation has not changed. In short, there is no reason, compelling or otherwise, to revisit *Rostker*.

C. Expanding Roles for Women in the Military Do Not Warrant Revisiting *Rostker*.

Petitioners correctly note that women are no longer barred by either statute or military policy from serving in combat billets. From that, they argue that women and men are now "similarly situated" insofar as eligibility for combat goes, and, as a result, the equal protection component of the Fifth Amendment requires that they share equally in draft pool obligations.

This simplistic argument emphasizes the accomplishments of some remarkable women who have been able to meet the high standards required to qualify for combat arms assignments but ignores the draft's fundamental purpose in providing large numbers of

combat replacements during a national emergency, and avoids addressing the unassailable biological fact that men, as a group, are bigger, stronger, faster, and have greater endurance than women as a group.

To justify their push for equality over Congress' judgment concerning military necessity, Petitioners imagine a battlefield where size, strength, speed, and endurance simply do not matter, and they ask this Court to send men *and* women alike into it. They fail to recognize that the harsh realities of combat are not constrained by the imagination of lawyers, advocates for equality, or judges, no matter how sincere and committed they are to the principles of equality.

To be sure, the existence of the statutory and regulatory restrictions on assigning women to combat billets when *Rostker* was decided was an important factor in the Court's determination that women were not "similarly situated" for equal protection purposes. But it was not the only factor. The combat assignment policies at the time made for an easy case with no need for an exhaustive analysis of other factors to determine whether men and women are "similarly situated" to fill the casualty-replacement stream when the very survival of the nation is at stake. But there were then and still are other factors that support Congress' findings and *Rostker*'s holding.

A brief review of the arguments the District Court in *Rostker* inappropriately considered reveals a stark parallel with what Petitioners ask this Court to do in this case. First, the arguments for registration of

women in *Rostker* were grounded in notions of "equity," not military necessity. 453 U.S. at 80. This Court recognized, however, that in requiring only men to register for the draft, Congress grounded its policy decision on the need for a rapid stream of qualified combat replacements. By prioritizing military necessity, not notions of "equity," Congress appropriately exercised its armies clause powers. *Id.*

Second, the District Court found that women drafted who could not serve in combat positions could be used elsewhere in the military. 453 U.S. at 81. But this Court properly recognized that Congress considered and specifically rejected that alternative. *Id.* The purpose of the draft was not to fill various non-combat billets; rather, the purpose of the draft was to quickly provide qualified replacements for combat casualties.

Third, the District Court was not concerned with the administrative and logistical burden of drafting large number of registrants who are not qualified for combat billets. 453 U.S. at 81. This Court noted, on the other hand, that Congress was concerned that spending time, effort, and resources on culling non-combat qualified persons from those more likely to be combat qualified would hinder the goal of quickly filling the combat casualty replacement stream. *Id.*

In addition to ignoring the considered policy judgments of Congress, Petitioners also fail to address the elephant in the room: men, as a group, are stronger, bigger, faster, and have greater endurance than women as a group. Those attributes are critical not only to

individual survival on the battlefield, but overall victory in combat.

Petitioners correctly note that some women have proved themselves capable of meeting the high standards that combat demands, and the policy that prohibited them from serving in combat billets has been repealed. They fail to acknowledge, however, that the physiological differences between men and women have *not* been repealed. As a practical matter, the majority of women still are not assigned to units designed to engage in deliberate offensive action against the enemy because the size, speed, strength, and endurance characteristics necessary to survive and prevail in combat are not found to the degree necessary in the majority of women. Those who can meet those standards and who possess those characteristics are free to volunteer and serve in those roles. But merely because some women have demonstrated they can meet the demanding standards of combat roles does not mean that most women can.

The full integration of women into previously all-male combat billets was ordered by then Secretary of Defense Ashton Carter on December 3, 2015. Cheryl Pellerin, *Carter Opens All Military Occupations, Positions to Women*, DoD News, Dec. 3, 2015, https://www.defense.gov/Explore/News/Article/Article/632536/carter-opens-all-military-occupations-positions-to-women/ (*last visited* Feb. 25, 2021). Prior to that policy announcement, the Marine Corps conducted a three-year study that included testing male-only and mixed-gender

units in simulated combat environments and measuring their respective abilities to perform tasks essential to survival and victory on the battlefield. *Marine Corps Gender Integration Research Executive Summary*, Sept. 10, 2015, https://www.scribd.com/doc/280017557/Marine-Corps-gender-integration-research-executive-summary (*last visited* Feb. 25, 2021) (Copy attached as Appendix A).[2]

The Marine Corps' study revealed that women and men are *not* similarly situated when it comes to success on the battlefield. The summary (Appendix A) disclosed the following findings related to combat effectiveness:

> **Overall:** All-male squads, teams and crews demonstrated higher performance levels on 69% of tasks evaluated (93 of 134) as compared to gender-integrated squads, teams and crews. Gender-integrated teams performed

[2] The 978-page report of the Marine Corps Ground Combat Element Integrated Task Force study is available at https://dod.defense.gov/Portals/1/Documents/wisr-studies/USMC%20-%20Line%20Of%20Effort%203%20GCEITF%20Experimental%20Assessment%20Report2.pdf (*last visited* Mar. 6, 2021).

Results of the study prompted then Marine Corps Commandant Gen. Joseph Dunford to seek an exception to policy from the Secretary of the Navy to keep certain combat assignments, such as the infantry, all-male. That request was denied. The Department of Defense has refused to fully release Gen. Dunford's request and supporting rationale. *See Judicial Watch v. DoD*, No. 19-cv-01384 (D. D.C. Jan. 27, 2021) (denying release under FOIA).

> better than their all-male counterparts on (2) events.[3]
>
> **Speed:** All-male squads, regardless of infantry MOS, were faster than the gender-integrated squads in each tactical movement. The differences were more pronounced in infantry crew-served weapons specialties that carried the assault load plus the additional weight of crew-served weapon ammunition.
>
> **Lethality:** All-male 0311 (rifleman) infantry squads had better accuracy compared to gender-integrated squads. . . .
>
> Male provisional infantry (those with no formal 03xx school training) had higher hit percentages than the 0311 (school trained) females. . . .
>
> All-male infantry crew-served weapons teams engaged targets quicker and registered more hits on target as compared to gender-

[3] A 115-page Marine Corps Combat Development Command report noted, "We have seen numerous cases of compensation during physically demanding tasks, in which males have shifted positions to take over certain aspects of the tasks from females, such as loading ammo into trucks or heaving loaded packs on top of a wall." *Analysis of the Integration of Female Marines Into Ground Combat Arms and Units* at v., https://cmrlink.org/data/sites/85/CMRDocuments/285174854-Marine-Corps-analysis-of-female-integration.pdf (*last visited* Feb. 28, 2021). The results of the Marine Corps combat simulation exercises were consistent with earlier studies that found men routinely out-performed women on tasks requiring strength, size, speed, and endurance. Paul O. Davis, *Looking for a Few Good Women*, MARINE CORPS GAZETTE 77-84 (July 2014), https://cmrlink.org/data/sites/85/CMRDocuments/PaulODavis_MCGazette-July-2014.pdf (*last visited* Mar. 3, 2021).

> integrated infantry crew-served weapons teams, with the exception of M2 accuracy.
>
> All-male squads, teams and crews and gender-integrated squads, teams and crews had a noticeable difference in their performance on the basic combat tasks of negotiating obstacles and evacuating casualties. For example, when negotiating the wall obstacle male Marines threw their packs to the top of the wall, whereas female Marines required regular assistance in getting their packs to the top. During casualty evacuation assessments, there were notable differences in execution times between all-male and gender-integrated groups, except in the case where teams conducted a casualty evacuation as a one-Marine fireman's carry of another (in which case it was most often a male Marine who evacuated the casualty).

App. A at 7-8.

The summary also noted that testing revealed that "[f]emales possessed 15% less [anaerobic] power than males; the female top 25th percentile overlaps with the bottom 25th percentile for males." *Id.* at 9. Regarding anaerobic capacity, females possessed 15% less than males and the top 10th percentile of females in this category overlap with the bottom 50% of males. *Id.* Similar differences existed with aerobic capacity (VO2Max). *Id.*

The study also showed females were injured at more than six times the rate of the male participants.

Most of the injuries were associated with load carrying tasks. Overall, females' musculoskeletal injury rates (40.5%) were more than double those for males. (18.8%). *Id.*

The study also found that males graduated from various Marine training programs at significantly higher rates than females. *Id.* at 10.

Some proponents of fully integrating women into combat roles criticized the study's methodology because the women in the mixed-gender units were "*average* female Marines-rather than *high performers*" and that the study focused on the effectiveness of units instead of individuals. Daniel Lamothe, *Marine experience finds women get injured more frequently, shoot less accurately than men.* THE WASH. POST, Sept. 10, 2015 (*italics supplied*), https://www.washingtonpost.com/news/checkpoint/wp/2015/09/10/marine-experiment-finds-women-get-injured-more-frequently-shoot-less-accurately-than-men/ (*last visited* Feb. 25, 2021). That criticism ignores the obvious: Marines engage in combat as units and success depends upon the performance of the unit. *Marine Corps Gender Integration Research Summary*, Sept. 10, 2015, App. A at 6, *supra.* It also unfairly disparages the committed female Marines who participated in this important study. *See* Brig. Gen. George W. Smith, Jr., Dir., Marine Corps Force Innovation Office, *Memorandum for Commandant of the Marine Corps, Subj: United States Marine Corps Assessment of Women in Service Assignments* at 4 (Aug. 18, 2015) (describing female participants as "above average to well above average"),

https://web.archive.org/web/20170714084334/http://cdn.sandiegouniontrib.com:80/news/documents/2015/09/24/USMC_WISR_Documents_Not_releasable.pdf (*last visited* Feb. 28, 2021). But even the proponents of fully integrating women into combat roles acknowledged that, "[t]he average woman can't do what the average man does. I don't think that's a surprise to any of us." Lamothe, WASH. POST (Sept. 10, 2015) (*quoting* Ellen Haring, an Army reserve colonel and advocate for women in combat).

Despite Petitioners' recounting the successes of individual women who have passed the military's demanding standards for certain combat billets, the Marine Corps study revealed that mixed-gender units, which included "above average to well above average" women, were significantly outperformed by all-male units. Smith, *Memorandum for the Commandant of the Marine Corps* at 4, *supra.* Some female high performers have demonstrated their ability to handle the physical demands required in combat assignments, but there has been no suggestion than only high performers register for the draft.

While even proponents of women in combat acknowledge that, "[t]he average woman can't do what the average man does," Lamothe, WASH. POST (Sept. 10, 2015), it is the *average* woman who would be subject to a draft.

Demonstrated disparities between the success of male-only units and mixed-gender units in the Marine Corps study raise serious questions for policy makers:

What if the women in these units were average 18- to 26-year-olds who did not volunteer for the rigors of combat but were conscripted? Would those units perform better or worse? What if equal numbers of men and women were drafted and assigned to combat units in equal proportions? Would those mixed-gender units perform better or worse than the average all-male units in the study? The male-only registration requirement avoids having to answer those questions in the crucible of actual combat by counting the dead, dying, and wounded when the smoke clears from the battlefield. The Fifth Amendment prohibits "unjustifiable" discrimination. *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975) *quoting Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Surely it does not demand that young men and women risk their lives and the survival of the nation by engaging in such a deadly experiment.

The Marine Corps study revealed quite clearly that men and women are not similarly situated in the crucible of combat. Not only would the lives of individuals be at risk, the survival of the nation also would be at risk should we face a conflict that demands rapid mobilization through involuntary conscription. Those women who volunteer and can meet the demanding physical standards to succeed in combat roles are an inspiration to us all. But simply because some strong, brave, committed, and motivated women can perform admirably under combat conditions does not mean *Rostker*'s holding that men and women are not similarly situated in the context of registration for the draft is no longer accurate.

Nothing in the law, human physiology, or the nature of war has changed to warrant revisiting *Rostker* and embarking on a judicially compelled grand experiment to conscript young women and measure their worth by requiring them to endure the rigors and risks of actual combat.

II. Granting the Petition Will Usurp Congress' Responsibility to First Address the Issue.

During the mark-up of the National Defense Authorization Act for 2017, the Senate version of the bill included a provision to require women to register for the draft, because removing the limitations on combat assignments for women meant "there is no further justification" to limit registration to males, the same claim Petitioners urge as justification for this Court to overrule *Rostker*. S. Rep. No. 114-255, at 150-51 (2016). That provision failed. Instead, Congress created the National Commission on Military, National and Public Service. *Nat'l. Def. Authorization Act for Fiscal Year 2017*, Pub. L. No. 114-328, § 555(c)(2)(A), 130 Stat. 2000, 2135 (2016). Congress tasked the Commission with studying, *inter alia*, whether the draft was still necessary, whether women should be subject to the draft, as well as whether other forms of national service should be required of young Americans. The Commission's report was submitted to Congress last year. Nat'l. Comm'n. on Mil., Nat'l., & Pub. Serv., *Inspired to Serve: Final Report of the National Commission on Military, National, and Public Service* (Mar. 2020), https://www.inspire2serve.gov/reports (*last visited*

Mar. 1, 2021). The 117th Congress has the matter under active consideration. [4]

The Marine Corps study detailed in Part I.C., *supra*, presents Congress, the branch of government with constitutional authority and responsibility for raising and supporting armies, with stark, unresolved policy choices. Questions of when, if, who, why, and how to turn conscripted civilians into combat soldiers in the midst of a national emergency are a matter for congressional consideration, not judicial resolution. *Orloff v. Willoughby*, 345 U.S. 83 (1953); *United States v. O'Brien*, 391 U.S. 367 (1968); *Gilligan v. Morgan*, 413 U.S. 1 (1973). The Court is not equipped, nor does it have the expertise, to decide whether only the "high performers" whose successes the petitioners emphasize should be subject to registration and conscription or whether the risk of drafting "average" women to fill the combat replacement stream will be sufficient to defend the nation. Congress is charged with assembling the evidence, debating the merits of various proposals, and deciding these complex questions as the elected representatives of the people. That was true when *Rostker* was decided, and it is true today.

Congress may decide that the success of the All-Volunteer Force and the response by women to the opening of all combat assignments to women means

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[4] The Senate Armed Services Committee scheduled a hearing on the National Commission's report for March 11, 2021. https://www.armed-services.senate.gov/hearings (*last visited* Mar. 9, 2021).

there is no longer a need for anyone to register for the draft. It may decide that alternative avenues are available to ensure sufficient combat replacements are available should the need arise. It may decide that even though restrictions on women serving in combat billets have been eliminated, fundamental physiological differences between men and women are such that even if some female volunteers can successfully meet the demanding physical standards of combat assignments, drafting large numbers of women who cannot meet those standards will hinder the process of providing timely combat replacements.

The point is that the Constitution places this matter squarely within the purview of Congress. Congress has the report from the Commission and can receive input from the military, the administration, other knowledgeable sources, and the American public. Committees in both Houses have jurisdiction over the armed forces and have the responsibility, the authority, and the staff to consider all of the options and select the one that in their judgment is appropriate under the circumstances. With delivery of their report to Congress, the Commission discharged its charter, and the matter is where it belongs, before Congress.

If Congress decides to eliminate the registration requirement altogether, there is no need for the Court to revisit *Rostker*. Should Congress elect to include women in the draft pool and require they register the same as men, there is no need to revisit *Rostker*. Should Congress create some alternative requirement for national service in lieu of a draft, there is no need

to revisit *Rostker*. Should Congress conduct hearings, debate the issues, consider evidence not available nor necessary to the decision in *Rostker* – such as the results of the Marine Corps study – and decide to retain the current conscription paradigm, there is no need to revisit *Rostker*. There will be a new and detailed record to review in an appropriate case. The gravamen of Petitioners' claim is that Congress has not acted swiftly enough to respond to the National Commission's report. *Pet. for Cert.* at 15. But that is a matter for Congress, not this Court.

Granting the petition in this case will interrupt the legislative process and needlessly put the Court in control of a policy decision over which it admittedly lacks expertise. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (noting the judiciary's lack of expertise and competence regarding decisions as to composition, training, equipping and control of military forces). This Court should not prematurely interfere with Congress' constitutional role in determining how best to raise and support armies in a time of national emergency.

CONCLUSION

For the foregoing reasons, the Center for Military Readiness, Eagle Forum, Concerned Women for America, ADM Johnson, LTG Mixon, LTG Boykin, MG Suter, RADM Scott, and Dr. Davis, as *amici curiae*, respectfully request the Court deny the Petition for *Certiorari* in the instant case.

Dated March 12, 2021

Respectfully submitted,

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