No. 20-928

IN THE

Supreme Court of the United States

NATIONAL COALITION FOR MEN, ET AL.,
*Petitioner*s,

v.

SELECTIVE SERVICE SYSTEM, ET AL.,
*Respondent*s.

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

BRIEF OF *AMICI CURIAE* NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, ET AL., IN SUPPORT OF THE PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Amici are organizations that share a common commitment to civil rights, with a particular focus on eradicating discrimination on the basis of sex, gender, sexual orientation, and gender identity. Their collective missions focus on promoting equal rights for women under the law.

The National Organization for Women Foundation (NOW Foundation) is a 501(c)(3) organization devoted to achieving full equality for women through public policy education and litigation. The Foundation focuses on a broad range of women's rights issues, including economic justice, pay equity, racial discrimination, women's health and body image, women with disabilities, reproductive rights and justice, family law, marriage and family formation rights of same-sex couples, representation of women in the media, and global feminist issues. The NOW Foundation is affiliated with the National Organization for Women, the largest feminist grassroots organization in the U.S., with hundreds of chapters in all 50 states and the District of Columbia. Founded in 1966, NOW is the pioneering organization for the "Second Wave" feminist movement, laying the groundwork for a broad advocacy of women's equal rights. Since its inception, NOW's purpose has been to achieve equal rights for women—sharing equal

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

rights, responsibilities, and opportunities with men—while living free from discrimination. NOW has participated as amicus curiae in several cases before this Court involving challenges to laws and government policies that discriminate on the basis of sex, including *Rostker v. Goldberg*, 453 U.S. 57 (1981).

The Women's Law Project (WLP) is a nonprofit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education, and individual counseling. Throughout its history, WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil-rights laws. WLP has a strong interest in the proper application of the Constitution's guarantee of equal protection to ensure equal treatment under federal law.

Gender Justice is a nonprofit advocacy organization whose mission is to eliminate gender barriers, whether linked to sex, sexual orientation, gender identity, or gender expression. Gender Justice makes use of three integrated program areas—impact litigation, policy advocacy, and education—to target the root causes of gender discrimination and highlight the central role that cognitive bias and stereotypes play in producing and maintaining inequality. As part of its impact litigation program, Gender Justice acts as counsel in cases involving gender equality in the Midwest region, including providing direct representation of individuals facing discrimination.

Gender Justice also participates as amicus curiae in cases that have an impact on the region and nationally.

The Women's Law Center of Maryland, Inc. is a nonprofit, public interest, membership organization of attorneys and community members with a mission of improving and protecting the legal rights of women. Established in 1971, the Women's Law Center achieves its mission through direct legal representation, research, policy analysis, legislative initiatives, education, and implementation of innovative legal services programs to pave the way for systematic change. Through its various initiatives, the Women's Law Center pays particular attention to issues relating to gender discrimination, sexual harassment, employment law, and family law.

KWH Law Center for Social Justice and Change is a nonprofit law center focused on strengthening and supporting the well-being of women, families with children, and communities in the South and Southwest by promoting racial and gender equity and economic, educational, and healthcare equity. The KWH Law Center engages with, supports, and collaborates with like-minded organizations throughout the United States to support its mission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The nation's male-only draft registration cannot stand. The classification embodied in the Military Selective Service Act ("MSSA")—requiring men to register but not women—reflects a familiar stereotyping of sex roles: women are meant to be left at home to care for the family, while men are meant to go to war to fight for their country. This division of roles between women who need protection and the men who can provide it can no longer be maintained.

First, this Court's decision in *Rostker v. Goldberg*, 453 U.S. 57 (1981), is a misfit in this Court's equal protection jurisprudence. In *Rostker*, this Court misapplied its heightened scrutiny framework in upholding Congress's decision to exempt women from military registration requirements. By failing to properly consider whether excluding women was substantially related to furthering Congress's goal of ensuring military readiness—or, the converse, whether including women would frustrate that goal—this Court ignored evidence that undermined Congress's categorical exclusion and credited evidence that perpetuated harmful stereotypes.

Second, Congress's decision to exclude women from the male-only registration requirement denies women a key aspect of their citizenship. To reap equal rewards of citizenship, women must equally bear its burdens. This Court affirmed that principle when it held that women cannot be excluded from mandatory jury service. It held that anything less than equal

participation marks women as second-class citizens who are unable to fulfill their obligations as full members of society.

The same holds true here. Congress's failure to include women in the MSSA's registration scheme perpetuates invidious stereotypes and archaic generalizations about the limited role women can and should play in serving their country, and imposes real harm. This Court should grant the petition for certiorari, overturn *Rostker*, and hold that the MSSA's sex-based classification is unconstitutional.

ARGUMENT

I. *Rostker* Misapplied the Court's Equal Protection Framework.

A sex-based classification is constitutional only if it can withstand heightened scrutiny. Such a classification can survive only if the government shows that it "substantially relate[s]" to "important governmental objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). This is a "demanding" burden on the government; its justification must be "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

In *Rostker*, the Court held that the MSSA's sex-based registration scheme satisfied heightened scrutiny. The Court stressed the important interest in "raising and supporting armies." *Rostker*, 453 U.S. at 70. And it reasoned that the MSSA's male-only registration requirement was substantially related to

that government interest because "Congress determined that any future draft" would require "combat troops," and women, at the time, were "not eligible for combat." *Id.* at 76.

The Court departed from the established equal protection framework in three critical ways. First, *Rostker* failed to grapple with the key question posed under equal protection doctrine—whether excluding women from military registration would substantially further Congress's interests in military readiness. Second, because of that failure in its conceptual framing, *Rostker* ignored substantial evidence that Congress's interests would have been furthered by registering women rather than excluding them. Third, *Rostker* overlooked that outdated and harmful stereotypes about women's societal role shaped Congress's decision to exclude women from the MSSA.

A. *Rostker* did not properly apply well-established equal protection doctrine.

As an initial matter, *Rostker* misconstrued the requirement that the MSSA's sex-based classification be "substantially related" to the government's stated objective. That equal protection analysis, properly conducted, examines whether the "gender-based distinction"—the exclusion of one gender but not the other—"closely serves to achieve that objective." *Craig*, 429 U.S. at 200. Put another way, the question is whether a gender-neutral approach would frustrate the government's interests. *See Orr v. Orr*, 440 U.S. 268, 282 (1979) (explaining that the state law was unconstitutional because "[p]rogress toward fulfilling

[the state's] purpose *would not be hampered* … if it were to treat men and women equally") (emphasis added); *see also Rostker*, 453 U.S. at 94 (Marshall, J., dissenting).

In the years preceding *Rostker*, the Court consistently applied that framework. It asked, for instance, whether allowing both men and women aged 18-20 to buy alcohol (rather than just women) would frustrate the goal of "enhanc[ing] … traffic safety." *Craig*, 429 U.S. at 199. It asked whether providing social security benefits to both widows and widowers of wage earners (rather than just widows) unconditionally on a showing of actual dependency would frustrate the goal of "insur[ing] covered wage earners and their families against the economic and social impact on the family normally entailed by loss of the wage earner's income." *Califano v. Goldfarb*, 430 U.S. 199, 213 (1977). And it asked whether requiring both men and women to pay alimony (rather than just men) would frustrate the goals of providing help for needy spouses or compensating women for past discrimination during marriage. *Orr*, 440 U.S. at 282. That framework still applies today. *See* Pet. 24 (listing cases).

Rostker inverted this analysis. The Court did not ask whether a gender-neutral registration scheme would frustrate Congress's goal of maintaining "'adequate armed strength … to insure the security of [the] Nation.'" *Rostker*, 453 U.S. at 75 (quoting 50 U.S.C. § 451(b)). In other words, it did not look at whether registering women would make it substantially more difficult to protect the government's national security interests.

Instead, the Court asked whether registering women was necessary to achieve Congress's goal. *Id.* at 77, 81. It accepted Congress's "decision to exempt women from registration" because Congress had concluded that any military mobilization "would be characterized by a need for combat troops." *Id.* at 76, 77. Since women were statutorily barred at the time from serving in combat, Congress concluded that women "would not be needed" for that mobilization effort. *Id.* at 77; *see also id.* at 80 ("Congress was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than 'equity.'"); *id.* (quoting the observation from Senator Nunn of the Senate Armed Services Committee that "as far as military necessity, and that is what we are primarily, I hope, considering in the overall registration bill, there is no military necessity for [registering women]"). And this Court relied on Congress's determination that women conscripts were unnecessary because "whatever the need for women for noncombat roles during mobilization … it could be met by volunteers." *Id.* at 81.

Much of the testimony in the congressional record before the Court addressed this same misplaced question. In hearings before the House, Assistant Secretary of Defense for Manpower Pirie said: "It is doubtful that a female draft can be justified on the argument that wartime personnel requirements cannot be met without them," as the "pool of draft eligible men ... is sufficiently large to meet projected wartime requirements." Registration of Women: Hearing on H.R. 6569 Before the Subcommittee on Mil. Personnel of the H. Comm. on Armed Servs., 96th

Cong., 2d Sess., 6 (1980) (1980 House Hearings). In hearings before the Senate, Army Chief of Staff General Meyer likewise testified that women did not need to be drafted because, in wartime, "there are such large numbers of young men available." Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the S. Comm. on Armed Servs., 96th Cong., 2d Sess., 1657, 749 (1980) (1980 Senate Hearings).

Rather than looking at whether registering women in Selective Service registration was necessary to achieve the government's interest, *Rostker* should have looked at whether registering them would frustrate it. Under the correct framework, this Court would have seen that the record did not reflect a considered judgment by Congress that it was important to exclude women from registration to preserve the country's defense.

Had this Court's inverted approach in *Rostker* prevailed in other equal protection contexts, the results in later cases would have been significantly different. A case in point is *United States v. Virginia*, 518 U.S. at 519, where the Court held that the Virginia Military Institute's (VMI) male-only enrollment policy violated the Fourteenth Amendment's Equal Protection Clause. The Court analyzed several possible justifications for the Commonwealth's exclusion of women from VMI's training: to promote the benefits of single-sex education, to offer a "diversity" of educational approaches, and to offer a rigorous "method of character development and leadership training" that

would produce "citizen soldiers." *Id.* at 535, 541. Of those, the Court found that only the last was legitimate. *Id.* at 545.

Had this Court followed *Rostker*, it would have asked whether a gender-neutral admissions policy was necessary to produce the citizen soldiers VMI aimed to train. Clearly, it was not. VMI had "notably succeeded in its mission to produce leaders" since it was established in 1839. *Id.* at 520. But this Court recognized that this was not the relevant question. The Court instead asked whether VMI's goal would be "substantially advanced by women's categorical exclusion"—i.e., whether a gender-neutral admissions policy would frustrate VMI's interests. *Id.* at 546. The Court correctly found that it would not. *Id.* As *Virginia* and other cases show, *Rostker* thus came to the wrong answer by asking the wrong question.

B. *Rostker* overlooked substantial evidence that the MSSA's exclusion of women did not advance military readiness.

Had *Rostker* followed this Court's well-established equal protection framework and asked whether a gender-neutral classification would frustrate the government's interest in military preparedness, it would have encountered overwhelming evidence that it would not. As Justice Marshall observed in his *Rostker* dissent, "representatives of both the Department of Defense and the Armed Services testified that," far from impeding military readiness, "women in the All-Volunteer Armed Forces ha[ve] contributed

substantially to military effectiveness." 453 U.S. at 91 (Marshall, J., dissenting).

That is because women filled an important range of useful roles in the military even when they were categorically excluded from combat positions. True, Congress preferred reserving many non-combat positions for combat eligible servicemembers. *Id.* at 81-82. But it also recognized that combat restrictions did not prevent a smaller number of women from serving in the many non-combat positions that needed to be filled. *See* S. Rep. No. 96-826 at 158 (1980). According to the Assistant Secretary of Defense for Manpower's testimony before the House Subcommittee on Military Personnel, the Department of Defense advocated for registering women precisely because they were some of "the best qualified people" for support roles in critical fields of specialization that did not need to be filled by combat-eligible soldiers—fields such as "electronics, communications, navigation, radar repair, jet engine mechanics, drafting, surveying, ordnance, transportation and meteorology," in addition to "fields such as administrative/clerical and health care/medical," in which women were already the "vast majority" of the military workforce. 1980 House Hearings at 6, 7.

Had the Court in *Rostker* properly applied heightened scrutiny, the government's exclusion of women from the MSSA's registration requirement would have been revealed for what it was—discrimination. It was not based on whether women could have performed a useful role to meet military needs. Nor did it advance the government's interest in military flexibility—an argument disproved by the

simple fact that female volunteers already served important roles. *See Rostker*, 453 U.S. at 91 (Marshall, J., dissenting). Registering women for the Selective Service, even limited to the roles they could perform at the time, was fully compatible with Congress's preference for preserving a force of mainly combat-eligible soldiers.

C. *Rostker* overlooked evidence that the MSSA's exclusion of women was rooted in negative stereotypes about women's capabilities and roles.

Rostker also overlooked that Congress's decision to categorically exclude women from the registration requirement—as opposed to requiring women to register to serve the useful roles they were already serving—stemmed from long-held stereotypes about women's role in society. Those "'archaic and overbroad' generalizations" are precisely the sort of invidious sex-based classifications that this Court regularly invalidated under the Equal Protection Clause. *Goldfarb*, 430 U.S. at 207 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

The legislative record of the MSSA is replete with examples. As the district court in *Rostker* noted, the legislative history of the MSSA's 1948 enactment was permeated by "an aura of male chauvinism." *Goldberg v. Rostker*, 509 F. Supp. 586, 597 n.15 (E.D. Pa. 1980). During the House debate, for instance, one member stated that enlisted men "object[ed] to the idea of having to take orders from a [female] officer." *Id.* (quoting 94 Cong. Rec. 6970 (June 2, 1948) (statement of Rep. Van Zandt)). "Put yourself in the position of an

enlisted man," the member continued, "and I am sure you will agree with them." *Id*.

When Congress debated whether to amend the MSSA to include women in 1980, the Senate's Report, which represented "findings of the entire Congress," *Rostker*, 453 U.S. at 74, reflected the "romantic paternalism" that, only a few years before *Rostker*, this Court had criticized for "put[ting] women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). The Senate Report warned, for instance, that requiring women to register for the draft would have an undesirable "societal impact" on the nation. S. Rep. 826 at 157-58. It credited testimony from "a variety of groups" concerned "that drafting women would place unprecedented strains on family life." *Id.* at 159. And it expressed concern that the American public would react "unpredictabl[y]" if "a young father" had to "remain[] home with the family" while a "young mother" went off to war. *Id.*

These "old notions" of the societal impact of removing women from the home to serve their country in a time of need are "more consistent with the role-typing society has long imposed than with contemporary reality." *Goldfarb*, 430 U.S. at 199 (internal quotation marks omitted). While perhaps "more subtle" than the discrimination women faced earlier in the century, concerns of this sort were nonetheless "pervasive" at the time. *Frontiero*, 411 U.S. at 686. By excluding women from an essential obligation of citizenship—the duty to serve one's country in its time of need—Congress perpetuated the myth that women are unnecessary to the nation's

national security, reflecting stereotypical attitudes towards the roles of men and women that have no relation to the government's interest in military readiness and that "perpetuate the legal, social, and economic inferiority of women." *Virginia*, 518 U.S. at 534.

A century before its decision in *Rostker*, this Court explained that "the constitution of the family organization … indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood." *Bradwell v. State of Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring). By 1981, the Court had already recognized how damaging this type of sentiment was—and is—to women. *See, e.g.*, *Frontiero*, 411 U.S. at 684-88; *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). In *Rostker*, it had the opportunity to extend that reasoning to the military context. It should have taken it.

II. Excluding Women From Selective Service Undermines Their Value As Citizens And Reinforces Outdated And Harmful Stereotypes.

The MSSA's male-only registration requirement reflects the exclusion of women from a critical element of citizenship: the obligation of all citizens to serve the nation in a time of need. Just as this Court recognized that their exclusion from the burdens of jury service labelled women as unqualified for public service, so too the exclusion of women from registration stigmatizes them as incapable of contributing to the country's defense. The MSSA's exclusion labels women as second-class citizens who

have little to offer the nation and who must be protected by men. These invidious stereotypes undermine women's place as equals in society and inflict real harms, in violation of their right to equal protection guaranteed by the Fifth Amendment.

A. Registration for Selective Service is an essential feature of citizenship.

Citizenship has two central qualities: it bestows rights and it imposes obligations. Those rights and obligations are "interwoven." William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 Fordham L. Rev. 1721, 1724 (2000). Rights "can help create the conditions for obligations to be carried out," and public service "create[s] conditions for mutual respect among citizens that facilitate[s] the operation of rights." *Id.*

Mandatory military service has historically been a central component of citizenship. Since the nation's founding, any person deemed eligible for citizenship was "firmly bound by the social compact" to perform "his proportion of military duty for the defence of the state" when the country's security required it. Henry Knox, A Plan for the General Arrangement of the Militia of the United States 2 (1786). Those excluded from this country's early grants of citizenship often used military participation as a key to obtaining it. *See* Elizabeth L. Hillman, *Heller, Citizenship, and the Right to Serve in the Military*, 60 Hastings L.J. 1269, 1282 (2009) ("Military service has been a centerpiece of the citizenship aspirations of groups other than African Americans as well. Other racial minorities, undocumented immigrants, women, and lesbians and

gay men have pressed for access to the risks and sacrifices of military service as a means to gain the privileges and benefits of full citizenship.").

This Court has recognized "the reciprocal obligation of the citizen to render military service in case of need." *Arver v. U.S.*, 245 U.S. 366, 378 (1918). The Court has characterized that obligation to serve—and the government's right to compel service—as essential to "the very conception of a just government." *Id.* Even when that service is involuntary, this Court has called it a "supreme and noble duty" in which individuals can "contribut[e] to the defense of the rights and honor of the nation." *Id.* at 390.

In enacting the MSSA, Congress similarly recognized that "the obligations" of serving in the armed forces form a part of "free society" that "should be shared generally." 50 U.S.C. § 3801(c). The MSSA's proponents tied the statute's registration scheme to the bond between service and citizenship, explaining that citizens have a "*moral responsibility*, or duty, to serve," Richard V.L. Cooper, Military Manpower and the All-Volunteer Force 35 (1977), https://tinyurl.com/yb8pqbmu, and that "peacetime registration is an important element in terms of civic responsibility." Memorandum from Gen. David C. Jones, Chairman of the Joint Chiefs of Staff, to the Sec'y of Def. (Dec. 4, 1981).

Registration for mandatory military service is still closely tied to citizenship. As the National Commission on Military, National, and Public Service ("National Commission")—which was charged by

Congress in 2017 with reviewing the military Selective Service process—explained, "the Selective Service System was premised on the notion of citizenship obligation." Nat'l Comm'n on Mil., Nat'l, & Pub. Serv., *Inspired to Serve: The Final Report of the National Commission on Mil., National, and Public Service* 118 (Mar. 2020) [hereinafter *Inspired to Serve*] (quoting Charles C. Moskos, Jr., *The All-Volunteer Military: Calling, Profession, or Occupation?*, Parameters 7, no. 1 (1977)). When Congress requires individuals to register, it "reaffirms the Nation's fundamental belief in a common defense," and signals that those who register "are valued for their contributions in defending the Nation." *Id.* at 115. The MSSA, in its current form, improperly deprives women of this recognition and status.

B. The exclusion from a "burden" of citizenship is just as invidious as the denial of a benefit.

This Court has recognized the invidious effect of similar exclusions from the "burdens" of citizenship that were once thought to operate benignly in women's favor. Like registration for Selective Service, women were once excluded from the solemn obligation to serve on juries. That denial of a basic part of citizenship reinforced outdated stereotypes and deprived women of equal access to the justice system. These harms were only eliminated by this Court's recognition that the exclusion violated the constitutional right to equal protection. The Court should apply that same reasoning to invalidate the

MSSA's harmful exclusion of women from its registration requirement.

In *Hoyt v. Florida*, 368 U.S. 57 (1961), this Court upheld the constitutionality of a Florida statute limiting the service of women on juries to volunteers. *Hoyt* deemed the limitation reasonable because, at the time, "wom[e]n [were] still regarded as the center of home and family life," so the state was justified in concluding "that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." *Id.* at 62. Women were thus eligible for "favored" treatment—the ability to serve if they wished, and exemption from the responsibility to serve if they did not.

But that favor came at a high price. The exclusion of women from mandatory jury service sent the message that women, "for no reason other than gender," were "presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994). That message reinforced old stereotypes that women were not capable of undertaking the same civic sacrifices as men. *See, e.g.*, *De Kosenko v. Brandt*, 63 Misc. 2d 895, 897-98 (N.Y. Sup. Ct. 1970) (describing a woman's request for a "jury of her peers" as better "addressed to the 'Nineteenth Amendment State of Womanhood' which prefers cleaning and cooking … to becoming embroiled in [the] plaintiff's problems"). It also perpetuated "a history of exclusion from political participation," by preventing women from "sharing in the administration of justice," a "phase of civic

responsibility." *J.E.B.*, 511 U.S. at 135, 142 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975)).

Other harms and forms of discrimination flowed from this underlying sex classification. Because female defendants could not obtain sufficient numbers of women to serve on their juries, they were denied their constitutional right to trial by "an impartial jury drawn from a fair cross section of the community." *Taylor*, 419 U.S. at 536; *see Duren v. Missouri*, 439 U.S. 357, 367 (1979) ("The resulting disproportionate and consistent exclusion of women from the jury wheel and at the venire stage was quite obviously due to the *system* by which juries were selected."). Women jurors also faced pay discrimination based on their sex, which the state justified by drawing on their volunteer status. *See, e.g.*, *Goldblatt v. Bd. of Educ. of City of N.Y.*, 52 Misc. 2d 238, 239 (N.Y. Civ. Ct. 1966) (holding that a woman was not entitled to equal pay for jury service because, while "[a] man is 'required' to serve," a woman "is automatically entitled to exemption by reason of being '[a] woman.'").

This Court ultimately recognized those harms and held that excluding women from mandatory jury service violated the Equal Protection Clause of the Fourteenth Amendment. *J.E.B.*, 511 U.S. at 135 (explaining that the Court "repudiated" *Hoyt* in *Taylor* under the Sixth Amendment, but that its holding and reasoning were also "consistent with the heightened equal protection scrutiny afforded gender-based classifications"). The time has come, for similar reasons, to repudiate *Rostker*.

C. The MSSA's continued exclusion of women from the Selective Service perpetuates stereotypes and imposes real harm.

Like the exclusion of women from mandatory jury service, Congress's decision to exclude women from mandatory registration for Selective Service reflects stereotypical attitudes about the roles of women in society that have no relation to the government's stated interests. There is no justifiable basis in the interest of military readiness that supports the continued exclusion of women from this essential obligation of citizenship—the duty to serve one's country in its time of need. Significantly, the chief basis relied upon in *Rostker*, that women could not serve in combat roles, is no longer true. *See* Memorandum from Sec'y of Def. to Sec'ys of the Military Dep'ts Acting Under Sec'y of Def. for Pers. & Readiness, Chiefs of the Military Servs., and Commander, U.S. Special Operations Command 1 (Dec. 3, 2015). It is now even more clear than it was when *Rostker* was decided—the MSSA's gendered line-drawing serves no purpose but to perpetuate the fiction that women are unnecessary to the nation's national security because they are less capable and less suitable than men.

This Court has long recognized that special treatment of women perpetuates sex stereotypes and thereby hamstrings women's full and equal access to economic and civic life. *Frontiero*, 411 U.S. at 684; *see also Virginia*, 518 U.S. at 534. Male-only conscription is not a benign benefit offered to women; it is the categorical exclusion of women from a core feature of

citizenship. The MSSA grants women the "favor" of exempting them from the obligation to register for Selective Service and the ensuing obligation to serve in the military if drafted. But as *Frontiero* and *Virginia* explained, the decision to spare women from this obligation stems from historical "romantic paternalism" that merely "perpetuate[s] the legal, social, and economic inferiority of women." *Virginia*, 518 U.S. at 534.

The National Commission's March 2020 report reveals that the same invidious generalizations about women's capacities continue to influence Congress's refusal to extend the MSSA's registration requirement to women. The report highlighted that opposition to a gender-neutral registration for Selective Service often flowed as "a consequence of gender stereotypes about the proper role for women and their need for special protection." *Inspired to Serve* at 118. For some, "women's unique biological distinction—their ability to conceive and bear children—is an immutable difference that justifies differential treatment and raises concern that military service may adversely affect the fertility of female service members." *Id.* at 120. Draft registration, according to these opponents, "would interfere with or deny many women the ability to embrace the vocation of motherhood"—a "step" that "would be disruptive to American society because men and women have different social and familial roles." *Id.* By continuing to exclude women from the MSSA's mandatory registration scheme, Congress supports these underlying stereotypes—the "myth that all men are more competent than all women" and that women

are a "weaker sex" who "require[] the protection of men." *Id.* at 119.

Importantly, that stigma is perhaps most concretely felt by women who are currently serving in the military. For current service women, exclusion from the MSSA "stigmatiz[es] them as an inferior class of service member whose military service is not condoned by the military." *Doe 2 v. Mattis*, 344 F. Supp. 3d 16, 27 (D.D.C. 2018). This exclusion "singles out" women "from all other service members and marks them as categorically unfit for military service. … It sends the message to their fellow service members and superiors that they cannot function in their respective positions." *Id.* at 30 (citation and internal quotation marks omitted). When tied with Congress's justification that women should not be drafted because they will take the place of other, better suited men, the MSSA conveys that women do not belong in the military and that, in fact, their "very presence makes the military weaker and less combat-ready." *Id.* (citation and internal quotation marks omitted).

This is not an abstract matter. Not only does the MSSA perpetuate harmful stereotypes, but by validating those stereotypes and undermining women's role in the military, it increases the likelihood that women who do serve in the military will face a hostile reception. *See* Anthony King, *The Female Combat Soldier*, 22 European J. of Int'l Relations 122, 129 (2015). Currently, one in four active-duty women in the U.S. military are subjected to sexual harassment or some form of gender discrimination. Andrew R. Morral, et al., *Sexual*

Assault and Sexual Harassment in the U.S. Military, RAND Corp. 84 (2015) https://tinyurl.com/2obs2n3f. Women in our military community also face serious challenges in competing with men for equal promotion opportunities, regardless of merit, in part due to skewed visions of what a "military leader" looks like. *See* Elizabeth M. Trobaugh, *Women, Regardless: Understanding Gender Bias in U.S. Military Integration*, 88 Joint Force Quarterly 46, 53 (2018). The MSSA's exclusion of women reflects and reinforces the sexual stereotype that young mothers should stay at home while young fathers fight the nation's wars—a perpetuation of the idea that women are inherently inferior and not fit to serve. The MSSA's legislative history repeatedly reveals that Congress was animated by a concern about women's proper role.

The adverse consequences of this misguided and outdated view—undermining women's status as equal citizens, excluding women from a core feature of citizenship, and the concrete resistance and unfair treatment they often face when they do embrace service—are familiar. They are the same stigmatic harm and perpetuation of female inferiority that this Court has repeatedly held violates the Constitution. This Court should rectify that harm by granting the petition for certiorari, overruling *Rostker*, and holding that excluding women from a central duty of citizenship violates their right to equal protection guaranteed by the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date February 11, 2021