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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Selective Service System does not defend men-only registration as constitutional, because it cannot. The law facially discriminates on the basis of sex. Each year, over a million young men in this country are required to register for the Selective Service. Young women are not.

Rather than attempt to justify its ongoing discrimination, the Selective Service System asks the Court to wait for Congress to fix the problem. But Congress

has had multiple opportunities over the last four decades to act. It has done nothing. Its 2016 decision to appoint a commission to spend years studying the issue—and then farm out the latest bill addressing it to thirteen different committees—says it all. *See* Opp. 13-14. Indeed, the Selective Service System's opposition to this petition, despite the president's public support for registering women,[1] shows that the political branches remain unwilling to remedy the Equal Protection injury.

This Court should not wait any longer for Congress to fix a blatant constitutional violation. A decision in Petitioners' favor would not usurp Congress's role with respect to military readiness. The declaratory judgment Petitioners seek would simply take an unconstitutional option—men-only registration—off the table, reserving for Congress the decision whether to require everyone to register or adopt an alternate system for preparedness.

And there is good reason for this Court to act now: Men-only registration enforces gender stereotypes at a time when America's servicewomen are still struggling for equality in the armed forces. *See* Br. Amicus Curiae of Modern Military Association of America et al. ("MMAA Br.") at 22. As those servicewomen put it, "their disparate treatment with respect to registration was yet another way in which the Government signaled that their contributions and sacrifices were

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[1] *See* Kathleen Curthoys, *Election 2020: Presidential Candidates Answer MOAA's Questions*, Military Officers Ass'n of Am. (Sept. 16, 2020), https://bit.ly/2Q25cro ("I would * * * ensure that women are also eligible to register for the Selective Service System so that men and women are treated equally in the event of future conflicts.").

not as valued as those of their male colleagues." *Id.* (internal quotation marks omitted). The Selective Service System's latest marketing push—which exhorts a young man to "be the man" and register, while his mother washes the dishes[2]—revives the discarded notion that women are "regarded as the center of home and family life," *Hoyt* v. *Florida*, 368 U.S. 57, 62 (1961), *overruled by Taylor* v. *Louisiana*, 419 U.S. 522 (1975), while men fight for our country, and aptly underscores the ongoing stigmatic harm to both men and women from men-only registration.

This petition is an ideal vehicle to address the question presented. Mr. Davis, like the plaintiffs in *Rostker*, is registered with the Selective Service and must continue to comply with an unconstitutional law or face fines and imprisonment. That is sufficient to confer standing. A similarly suitable vehicle may not reach this Court for years, if ever.

The Court should grant certiorari and end the continuing constitutional violation.

ARGUMENT

I. THE SELECTIVE SERVICE SYSTEM DOES NOT DEFEND THE LAW.

The Selective Service System declines to defend men-only registration. Indeed, it acknowledges that "relevant military conditions have changed markedly since *Rostker*" and "[s]ome of *Rostker*'s reasoning—in particular, the premise that men and women 'are simply not similarly situated' because of categorical

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[2] Selective Serv. Sys., *Stronger America – Public Service Announcement*, YouTube, at 00:24-00:25 (Oct. 21, 2020), https://www.youtube.com/watch?v=jV5PAuWvdw8&t=2s.

'combat restrictions on women'—rests on factual circumstances that have changed." Opp. 11-12 (citations omitted). Given those changed circumstances, the Selective Service System concedes that "this Court might someday wish to reconsider the constitutionality of the * * * registration requirement" and "might at some point be inclined to revisit its decision in *Rostker*." *Id.*

The Selective Service System offers no rationale for upholding *Rostker* because there is none. *Rostker* was wrong when it was decided, and it is certainly wrong now that women serve in combat roles. *See* Pet. 19-23. As the amicus brief submitted by General Michael Hayden, General Stanley McChrystal, Lieutenant General Claudia Kennedy, and other retired military leaders explains, our nation's "armed forces draw from the strength of the *entire* Nation, not only its men." Br. Amicus Curiae of Gen. Michael Hayden et al. at 2. "Women graduate from the Nation's top service academies, complete the most challenging combat training programs, deploy overseas, serve alongside men, and integrate into basic combat teams, including in the infantry." *Id.* Whatever merit *Rostker* had in 1981, today "[t]here remains no military justification for maintaining the male-only selective service registration requirement." *Id.* at 2-3.

Men-only registration is indefensible as a matter of law because it is rooted in impermissible assumptions about men's and women's roles and abilities. Restricting the registration requirement to men promotes "invidious stereotypes" that "undermine women's place as equals in society and inflict real harms." Br. Amicus Curiae of National Organization for Women Foundation et al. at 15. Those harms are acutely felt by

America's servicewomen, to whom men-only registration sends the message "not only that they are not vital to the defense of the country but also that they are not expected to participate in defending it." MMAA Br. 22 (internal quotation marks omitted). Those harms are also felt by men, including Petitioners, who are forced to comply with a discriminatory law or face fines or imprisonment. *See* Pet. 32-33.

The Court should grant certiorari to overturn a decision that the Selective Service System does not, and cannot, defend.

II. THE COURT SHOULD INTERVENE NOW.

Congress has had *forty years* to act since President Carter first called on Congress to end men-only registration, and it has failed at every turn. There is no reason for this Court to give Congress more time.

Congress did not act on President Carter's recommendation in 1980. It did not act in 1991 when it lifted restrictions on women flying combat aircraft. It did not act in 1993 when it eliminated the ban on women serving on combat ships. It did not act in 1994 when the military opened all positions to women except those with a primary mission of direct ground combat. It did not act in 2013 when the military announced that it would rescind the policy categorically excluding women from direct ground combat positions. It did not act in 2015 when the military announced that all combat roles would officially be open to women with "no exceptions" or in 2016 when the military implemented that policy. And it did not act in 2020 when the National Commission recommended extending registration to women. *See* Pet. 11-15; *see also* MMAA Br. 7-19.

Despite Congress's history of inaction, the Selective Service System has repeatedly assured the federal courts that Congress would soon act. It has been wrong every time. In 2013, the Selective Service System argued in this case that the federal courts should "not interfere before Congress has had an adequate chance to consider the matter just months after the military instituted new policies." Def's Mem. in Supp. of Mot. to Dismiss at 22, *Nat'l Coal. for Men* v. *Selective Serv. Sys.*, No. 2:13-cv-02391-DSF-MAN (C.D. Cal. June 19, 2013), ECF No. 11-1. In 2015, the Selective Service System asked the Ninth Circuit to "defer[] adjudication of this case" because Congress is "on the precipice" of addressing the issue, agreeing that it would be better "to tell everybody to cool it for six months or * * * a year while * * * Congress considers this because it's right on [Congress's] docket right now."[3] And in 2018, the Selective Service System asked the district court to stay this case because "Congress, the Executive Branch, and the public are engaged in an ongoing policy process." Defs.' Mem. in Supp. of Mot. for Stay of Proceedings at 10, *Nat'l Coal. for Men* v. *Selective Serv. Sys.*, No. 4:16-cv-03362 (S.D. Tex. Sept. 20, 2018), ECF No. 80.

The Selective Service System claims this time is different because the matter is "under active consideration." Opp. 15. But Congress has "active[ly]" considered extending registration to women or ending registration of men in *every Congress since 2000* (with one exception) and has not done so. *See, e.g.*, S. 1139, 117th Cong. (2021); H.R. 5492, 116th Cong. (2019);

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[3] Oral Argument at 8:06-8:42, 9:35-10:54, 17:56-18:17, *Nat'l Coal. for Men* v. *Selective Serv. Sys.*, No. 13-56690 (9th Cir. Dec. 8, 2015), *available at* https://bit.ly/32mDQyI.

S. 3041, 114th Cong. (2016); H.R. 4478, 114th Cong. (2016); H.R. 1509, 114th Cong. (2015); H.R. 748, 113th Cong. (2013); H.R. 747, 113th Cong. (2013); H.R. 1152, 112th Cong. (2011); H.R. 5741, 111th Cong. (2010); H.R. 393, 110th Cong. (2007); H.R. 4752, 109th Cong. (2006); H.R. 2723, 109th Cong. (2005); H.R. 163, 108th Cong. (2003); S. 89, 108th Cong. (2003); H.R. 3598, 107th Cong. (2001).[4] Congress's track record does not inspire confidence.

As the government has advised this Court on other occasions, the "speculative possibility that Congress might ultimately enact" a bill that is "still pending in committee * * * should not deter the Court from considering the important questions presented by this case." U.S. Pet. Reply at 8, *United States* v. *Eurodif S.A.*, 555 U.S. 305 (2009) (No. 07-1059), 2008 WL 905193. This Court has repeatedly granted certiorari despite pending legislation. *See, e.g.*, *United States* v. *Windsor*, 570 U.S. 744 (2013) (granting certiorari despite pending bills, including S. 598, 112th Cong. (2011)); *TC Heartland LLC* v. *Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) (granting certiorari despite pending legislation in both the House and Senate, *see* Brief in Opposition at 29, No. 16-341, 2016 WL 6873253); *Henderson ex rel. Henderson* v.

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[4] The Selective Service System touts the latest bill as if it were a done deal, but significant opposition remains: The ranking Republican member of the Senate Armed Services Committee called extending registration to women "controversial" and warned that there "would be" opposition. *To Receive Testimony on the Final Recommendations and Report of the National Commission on Military, National, and Public Service: Hearing Before the S. Comm. on Armed Servs.*, 117th Cong. 26-27 (2021), *available at* https://bit.ly/3v9IAE5.

Shinseki, 562 U.S. 428 (2011) (granting certiorari despite government's argument that "two legislative proposals" would "greatly limit the prospective significance of the decision below," Brief in Opposition at 6, No. 09-1036, 2010 WL 2173778); *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913 (2005) (granting certiorari despite eight pending bills, *see* Brief in Opposition at 13 & n.9, No. 04-480, 2004 WL 2569692). It should do the same here.

The Selective Service System also maintains that this Court should "defer to Congress" in "this sensitive military context." Opp. 10; *see id.* at 12. But this case does not involve a sensitive military context or usurp military judgment. It involves a database of names from which the military may someday select whom to call up. The military is free to select only those people who possess skills needed in a future conflict. And the military has already made the judgment that women can serve in combat roles and that "registering women would enhance the ability of the [Selective Service System] to provide manpower." Pet. 14 (internal quotation marks omitted).

The Selective Service System's emphasis on deference to Congress, *see* Opp. 13, is misplaced for another reason: Because Petitioners seek only declaratory relief, a decision in their favor would not interfere with Congress's legitimate choices with respect to registration. It would simply take one option off the table—the option that the Selective Service System declines to defend. Congress would retain wide latitude to decide who should register, or if registration is still necessary, so long as it does so in a non-discriminatory manner.

Finally, the Selective Service System suggests that this Court defer addressing the question presented because it involves the Constitution. *See* Opp. 12. The fact that this case involves an ongoing constitutional violation weighs in favor of review, not against it. Deferring consideration would mean that the "alleged harm and injuries likely would continue for * * * years." *Windsor*, 570 U.S. at 761. Courts cannot avoid their duty "to say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), "merely 'because the issues have political implications.'" *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 196 (2012).

III. PETITIONERS HAVE STANDING.

The Selective Service System professes "[s]ignificant doubt" concerning Petitioners' standing. Opp. 16. But the Court reached the merits in *Rostker*, and it should do the same here. The three-judge district court in *Rostker* held that "the continuing obligations placed on registrants" constituted "a sufficient intrusion on an individual's rights" to confer standing. *Goldberg* v. *Rostker*, 509 F. Supp. 586, 591 (E.D. Pa. 1980). This Court accepted that conclusion and ruled on plaintiffs' Equal Protection claim. *See Rostker* v. *Goldberg*, 453 U.S. 57, 61-63 & n.2 (1981) (noting standing dispute below); *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (court has independent obligation to assess standing).

Petitioners allege the same injury here, and all four courts that have ruled in this case agree that Petitioners have standing. The Central District of California held that because "the government required [Petitioner] Lesmeister to register and requires him to update the [Selective Service System] with any changes

to his address," but "does not impose such obligations on women," he has suffered a redressable injury. Mem. at 3, *Nat'l Coal. for Men*, No. 2:13-cv-02391-DSF-MAN, ECF No. 44 (internal quotation marks omitted). The Southern District of Texas concurred. *See* Pet. App. 41a. The Ninth Circuit confirmed that "the Selective Service is wrong to argue that [Petitioners] lack standing," concluding that they alleged "equality injuries" that could be "redressed." *Id.* at 46a-47a. The Selective Service System did not even challenge Petitioners' standing in the Fifth Circuit, *see* Opp. 17 n.2, and the Fifth Circuit reached the merits.

Petitioners are not required "to expose [themselves] to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 128-129 (2007) (emphasis omitted). "The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction." *Id.* The Selective Service System's position that Petitioners lack standing because they have already registered ignores this Court's precedent, as well as the significant intrusion of permanently including Petitioners' names and addresses in a government database used to select registrants for military service.[5]

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[5] The Selective Service System retains men's registration information until their 85th birthday, and throughout adulthood men must prove they are registered to obtain "certain government employment or benefits." Cong. Rsch. Serv., R44452, *The Selective Service System and Draft Registration: Issues for Congress* 27 (2020).

Mr. Davis also has standing because he is subject to "a continuing obligation to update [the Selective Service System] with changes to" his information. Pet. App. 41a.[6] The Selective Service System's theory that Mr. Davis has standing only if he has concrete plans to move, Opp. 18-19, ignores his continuing legal duty to keep his information up-to-date *regardless* of whether he ultimately changes residences. *See id.* at 18 (describing this requirement as an "ongoing legal obligation").

Petitioners have also suffered a "stigmatizing injury"—"one of the most serious consequences of discriminatory government action"—as a result of the challenged sex classification. *Allen* v. *Wright*, 468 U.S. 737, 755 (1984); *see Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 625 (1984). This Court has long recognized the grave harms resulting from the imposition of "impermissible stereotypes," including those at the heart of this case—that women are not fit for combat and men are not suited to raise families. *See J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994). Because Petitioners are personally subject to the registration requirement, *Allen*, 468 U.S. at 755—which continues to apply to men but not women—that "denial of equal treatment" confers standing. *Ne. Florida Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993); *see Trafficante* v. *Metro. Life Ins. Co.*, 409 U.S. 205, 208-210 (1972).

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[6] *See* 50 U.S.C. § 3811(a) (penalty for failure to register or comply with regulations); 32 C.F.R. § 1621.1(a) (imposing "duty" on registrants "[u]ntil otherwise notified by the Director of Selective Service" to provide notice of name and address changes).

This case does not involve a "largely unexplored extension of existing standing doctrine," Opp. 20, but a basic application of that doctrine to a clear Equal Protection violation. Petitioners' standing does not pose an obstacle to certiorari.

IV. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE QUESTION PRESENTED.

There are no obstacles to certiorari: Petitioners are subject to an unconstitutional law the Selective Service System declines to defend, and they have standing to challenge it. Further delay is unwarranted.

The Selective Service System suggests this Court wait for two district-court cases challenging men-only registration, but it does not suggest that either case is a better vehicle—and they are not. *See* Opp. 16 n.1. In *Kyle-Labell* v. *Selective Service System*, the plaintiff is a now-23-year-old woman who seeks to register. *See* 364 F. Supp. 3d 394, 399 (D.N.J. 2019). The Selective Service System has argued that she lacks standing because she "faces no imminent hardship" and is "free to enlist." *Id.* at 406 (internal quotation marks omitted). There has been no activity in that case for almost a year, and the plaintiff is likely to turn 26 before this Court would have any opportunity to take up her case. *Murphy* v. *United States*, No. 1:09-cv-11496-MLW (D. Mass. filed Sept. 11, 2009), is an even less likely candidate. There have been no docket entries in that case since 2012.

This petition is before the Court now. It raises a clear Equal Protection violation, and it asks this Court to overturn a decision whose time has come. The Court should grant certiorari.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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