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

NATIONAL COALITION FOR MEN *et al.*,

Plaintiffs,

v.

SELECTIVE SERVICE SYSTEM *et al.*,

Defendants.

No. 4:16-cv-3362

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A STAY OF PROCEEDINGS AND SUMMARY JUDGMENT NUNC PRO TUNC, AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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NATURE AND STAGE OF THE PROCEEDINGS

Defendants Selective Service System and Donald M. Benton, in his official capacity as Director of the Selective Service System, move for a stay of proceedings, and summary judgment *nunc pro tunc*, and respectfully submit this memorandum of law in support of their motions and in opposition to Plaintiffs' motion for summary judgment.

ISSUES TO BE RULED UPON

1. Whether a stay of proceedings pending Congress's consideration of the final report of the National Commission on Military, National, and Public Service, is warranted. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936); *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003).

2. Whether Defendants are entitled to summary judgment on Count I of Plaintiffs' first amended complaint because the requirement of the Military Selective Service Act ("MSSA"), 50 U.S.C. § 451 et seq., that "every male citizen of the United States … submit to registration," is consistent with the equal protection component of the Fifth Amendment.

SUMMARY OF THE ARGUMENT

The Constitution vests Congress with broad discretion over military affairs, particularly with respect to regulation of the composition of the armed forces. Pursuant to that authority, Congress established a national commission to reexamine the nation's system of selective service. Formally known as the National Commission on Military, National, and Public Service, the "Commission" is tasked with considering questions foundational to the issue of selective service, among them whether a system of selective service is still necessary today, and, if one is necessary, whether it should be expanded to

all Americans regardless of sex. The Commission has already received guidance from the President, the Secretary of Defense, and other cabinet secretaries, and is currently holding events around the country to gather the views of the public. Once this process is complete, the Commission will issue a set of recommendations to Congress and the President regarding the future of the Selective Service System ("SSS").

Plaintiffs ask the Court to pretermit Congress's chosen process for study and potential reform by holding that the Military Selective Service Act ("MSSA"), 50 U.S.C. § 3802(a), which requires men between the ages of 18 and 26 to register with the SSS, is unconstitutional. The Court should not address that question now, but should instead use its inherent authority to stay this matter until the Commission completes its work and Congress has an opportunity to consider the Commission's findings. Allowing Plaintiffs' suit to progress would be inappropriate in light of the significant deference due to the legislative branch on issues of military policy, the significant prejudice to Defendants of a forced change in policy before the issue is fully examined by Congress, and the negligible prejudice to Plaintiffs of complying with the MSSA in its present form.

If the Court chooses to entertain this claim at this time, Congress's decision to leave the MSSA intact while it undertakes a comprehensive review of conscription policy does not run afoul of equal protection principles. In *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981), the Supreme Court addressed the constitutionality of the MSSA and squarely held that it passed muster under the equal protection component of the Fifth Amendment. Plaintiffs raise the same claim here, and on *stare decisis* principles, *Rostker* dictates judgment in Defendants' favor. Even if *Rostker* has been called into question by policy

changes, only the Supreme Court, not district or appellate courts, may reconsider *Rostker*'s central holding.

In all events, even if the Court concludes that *Rostker* is distinguishable, *Rostker*'s framework for analyzing equal protection issues related to the draft still binds this Court and counsels judgment in Defendants' favor. As the Supreme Court has emphasized, judicial deference "is at its apogee when legislative action under the congressional authority to raise and support armies . . . is challenged." *Rostker*, 453 U.S. at 70. Plaintiffs' arguments ignore this principle. Congress's affirmative choice to study the issue further in light of the recent policy decision to terminate all remaining prohibitions on voluntary service by women in combat positions easily passes muster under the Supreme Court's highly deferential standard for reviewing Congress's decisions in the realm of military policy. Plaintiffs' demand that the Court not only declare this system unconstitutional, but enjoin the SSS to carry out the policy Plaintiffs prefer, would go far beyond the Court's role in adjudicating such disputes.

For these reasons, the Court should grant Defendants' motion to stay this litigation or, in the alternative, deny Plaintiffs' motion for summary judgment and grant Defendants' cross-motion for summary judgment.

BACKGROUND

I. The Military Selective Service Act

In 1948, Congress enacted the MSSA, which provides, in relevant part, that

> it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who . . . is between the ages of eighteen and twenty-six, to present himself for and submit to registration at

> such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

Id. § 453(a) (1948), currently codified at 50 U.S.C. § 3802(a). The MSSA's registration requirement facilitates conscription into the armed forces if a draft is reinstated, with the primary goal of providing a pool of potential combat troops for induction. *Rostker*, 453 U.S. at 59-60. Today, the "current focus" of the draft remains "on mass mobilization of primarily combat troops." National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 552(b)(4), 130 Stat. 2000, 2131 (2016).

II. Despite Evolving Policy On Women In Combat, Congress Has Maintained The Male-Only Registration Requirement Of The MSSA.

President Carter recommended that Congress amend the MSSA to authorize the registration and conscription of women after reinstating the draft in 1980. *See Rostker*, 453 U.S. at 59. After extensively considering the question through multiple rounds of hearings, floor debate, and committee proceedings, Congress chose not to amend the MSSA. *Id.* at 72. As *Rostker* explains, Congress determined that "the primary manpower need[ed]" in the event of a draft "would be for combat replacements," *id.* at 76 (citation omitted), and because women were ineligible to serve in combat, they should be exempted from the registration requirement. *See id.* at 76-82. Thereafter, on July 2, 1980, President Carter reinstated the male-only registration requirement. Proclamation No. 4771, 45 Fed. Reg. 45,247 (July 2, 1980). The Supreme Court subsequently upheld this determination in *Rostker*.

Congress revisited the draft in 1991, after it repealed restrictions on women flying

combat aircraft. *See* Pub. L. No. 102-190, § 531, 105 Stat. 1290 (1991). Congress established the Presidential Commission on the Assignment of Women in the Armed Forces and directed it to report on the implications of assigning women to combat positions, and of requiring women to register for the draft. *Id.* §§ 541, 542(c)(3) & (4), 543(c). In its report, the commission issued a recommendation in favor of maintaining the draft in its current form. Presidential Commission on the Assignment of Women in the Armed Forces, *Report to the President* 40 (Nov. 15, 1992).

In 1993, Congress acted to repeal the statutory ban on women serving on combat ships. *See* Pub. L. No. 103-160, § 541, 107 Stat. 1659 (1993), *repealing* 10 U.S.C. § 6015 (1988). Rather than change the draft requirement, Congress chose to further monitor the integration of women into combat roles. It enacted legislation requiring DoD to notify Congress of further changes to military policy on assignment of women to combat units or to units whose mission requires routine engagement in direct combat on the ground, and explain its views on the constitutionality of the MSSA in conjunction with any changes. Pub. L. No. 103-160, §§ 542(a), (b)(1), (b)(3), (b)(4), 107 Stat. 1659-60 (1993). In 2006, Congress modified this reporting policy to take into account DoD's 1994 policy "by which female members of the armed forces are restricted from assignment to units and positions below brigade level whose primary mission is to engage in direct combat on the ground." 10 U.S.C. § 652(a)(4).

DoD revoked the 1994 policy in 2013, "effectively removing the remaining barrier to the integration of women into all military occupational specialties and career fields." Memo. From Secretary of Defense Ashton Carter Re. "Implementation Guidance for the

Full Integration of Women in the Armed Forces," Declaration of Michael Gerardi, Ex. 1 at 1 (Dec. 3, 2015). Today, "[a]nyone, who can meet operationally relevant and gender neutral standards, regardless of gender, should have the opportunity to serve in any position." *Id.* In recognizing that repeal of the 1994 rule was "the continuation of a deliberate, methodical, evidence-based, and iterative process" of integration, then-Secretary of Defense Carter explained that "[i]ntegration provides equal opportunity for men and women who can perform the tasks required; it does not guarantee women will fill these roles in any specific number or at any set rate." *Id.* at 1, 3.

In its final notice to Congress pursuant to 10 U.S.C. § 652(a)(3)(A)-(B), submitted on December 3, 2015, then-Secretary of Defense Carter observed that while "[t]he opening of all direct ground combat positions to women further alters the factual backdrop to the . . . decision in *Rostker*," the Supreme Court "did not explicitly consider whether other rationales underlying the statute would be sufficient to limit the application of the MSSA to men," and that DoD would consult with the Department of Justice as appropriate on these issues. *See* Detailed Legal Analysis, Gerardi Decl., Ex. 2. Then-Secretary Carter approved the implementation plans for this policy change proposed by the various branches of the military in a memorandum issued on March 9, 2016. Memo. From Secretary Ashton Carter Re. "Approval of Final Implementation Plans for the Full Integration of Women in the Armed Forces," Gerardi Decl., Ex. 3, at 1 (Mar. 9, 2016),

The Pentagon's actions led Congress to reconsider the male-only registration requirement of the MSSA during debate on the 2017 National Defense Authorization Act ("NDAA"). The version of this Act that initially passed the Senate would have required

women to register for selective service, and created a legislative commission to review the draft as a whole. S. 2943, 114th Cong. (2016). The version of the bill that passed the House of Representatives merely asked the Secretary of Defense to study the issue and report to Congress on the matter. H.R. 4909, 114th Cong. (2016). Some senators urged the conference "to refrain from this expansion and to instead, task an independent commission to study the purpose and utility of the Selective Service System, specifically determining whether the current system is unneeded, if it is sufficient, or if it needs an expanded pool of potential draftees." Letter to Armed Services Committee Chairs From 17 Senators, Sept. 7, 2016, Gerardi Decl., Ex. 4. The House and Senate eventually agreed to remove the provision requiring female registration, while adopting the House's proposal of a DoD review and the Senate's proposal of a legislative commission. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 551-57, 130 Stat. 2000 (2016).

III. The Commission Is Fulfilling Congress's Mandate To Study The Draft, Including The Male-Only Registration Requirement.

The centerpiece of Congress's plan to study the draft was the creation of the Commission. On April 3, 2017, the President established and transmitted to the Commission and Congress principles for the reform of the military selective service process. *See* Pub. L. No. 114-328, § 555(c)(1); Gerardi Decl., Ex. 5. On July 13, 2017, the Secretary of Defense submitted to the Committees on Armed Services of the Senate and the House of Representatives and to the Commission a report "on the current and future need for a centralized registration system under the Military Selective Service Act . . . [and

on] expanding registration to include women." Pub. L. No. 114-328 § 552(a)(1) & (b)(1)(C); *see* ECF No. 73-1, Ex. 4. And on December 5, 2017, the Secretary of Defense, Attorney General, the Secretary of Homeland Security, the Secretary of Labor, and other officials designated by the President jointly transmitted to the Commission and Congress recommendations for the reform of the military selective service process and military, national, and public service. Pub. L. No. 114-328 § 555(d)); Gerardi Decl., Ex. 6. The Commission is currently holding public meetings throughout the United States in order to "get a range of views" to inform its recommendations. *See* Press Release, "National Commission on Military, National, and Public Service Announces Locations of Public Meetings for 2018," April 13, 2018, Gerardi Decl., Ex. 7. Members of the public can also share their views with the Commission. *Id.* The commission must report to Congress and the President by March 19, 2020. Pub. L. No. 114-328 § 555(e)(1).

ARGUMENT

I. The Court Should Stay These Proceedings Pending Resolution Of The Policy Process Now Underway.

This Court possesses the inherent power to stay proceedings in cases before it. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). When deciding whether to grant a stay, it must weigh the parties' interests and balance hardships. *See Cajun Offshore Charters, LLC v. BP Prods. N. Am., Inc.*, 2010 WL 2160292, * 1 (E.D. La. May 25, 2010). Specifically, it should consider: (1) the potential prejudice to plaintiffs from a stay; (2) the hardship to defendants if the stay is denied; and (3) the judicial efficiency in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected

to result from a stay. *Trahan v. BP*, CIV.A. H–10–3198, 2010 WL 4065602, at *1 (S.D. Tex. Oct. 15, 2010). Where those factors counsel in favor of a stay of proceedings, this Court should issue such a stay. *See, e.g.*, *Coker v. Select Energy Servs., LLC*, 161 F. Supp. 3d 492, 495 (S.D. Tex. 2015).

Likewise, this Court should avoid ruling on constitutional claims where those claims are not ripe. The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park*, 538 U.S. at 808 (citation omitted). The doctrine serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements," and to protect other branches of government from judicial interference until their decisions are formalized and their "effects felt in a concrete way by the challenging parties." *Id.* at 807–08. Thus, the ripeness doctrine allows courts to "avoid [] constitutional question[s]" where ruling on them is not yet necessary. *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 91 (5th Cir. 2011). In assessing whether a claim is prudentially ripe, courts must evaluate both (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Here, the considerations relevant both to granting a discretionary stay and to the prudential ripeness doctrine counsel in favor of a stay of proceedings.

A. The Issues Before This Court Are Not Presently Fit For Judicial Resolution And Are Likely To Be Simplified Following A Stay.

After extensive debate over whether women should be required to register with the

SSS, *see* ECF No. 57 at 2, Congress passed legislation establishing a commission to conduct a bipartisan review of the future of military selective service. The scope of this review is addressed to foundational questions concerning selective service, including whether "a military selective service process" or some other "mechanism to draft large numbers of replacement combat troops" is any longer necessary to our national defense; whether the selective service process should be expanded beyond military purposes, to target "individuals with skills (such as medical, dental, and nursing skills, language skills, cyber skills, and science, technology, engineering, and mathematics (STEM) skills) for which the Nation has a critical need"; and whether the selective service should be expanded to require registration "*without regard to age or sex*." Pub. L. No. 114-328 § 551(b) (emphasis added). Thus, the precise issue Plaintiffs seek for this Court to adjudicate (among other issues foundational to selective service registration) is currently under consideration by a bipartisan body established by a coordinate branch of government.

The Court should not intrude on this process. The Commission, Congress, the Executive Branch, and the public are engaged in an ongoing policy process designed to evaluate the precise issues the Plaintiffs have raised. Judicial intervention would wrest the issue from the political branches, and violate precepts of constitutional avoidance by ruling on a federal constitutional question that may later become unnecessary. *Rosedale*, 641 F.3d at 91; *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (a court's power to declare a statute unconstitutional should be "a tool of last resort").

Moreover, the Commission is not only considering whether the SSS should continue

to register only men, but also whether the agency should continue to register any person whatsoever. *See* Pub. L. No. 114-328 § 551(b). Ruling on the more-narrow question of women's registration could disrupt or distract a process that may ultimately render that question moot by ending registration in its entirety. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998) ("[T]he disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of—even repetitive—post implementation litigation." (citation omitted)) And even if Plaintiffs' claims are not mooted, Congress's consideration of the Commission's findings will inform the Court's review of the constitutionality of the MSSA in light of changing circumstances, just as Congress's reconsideration of the draft in the early 1980s helped the Supreme Court adjudicate the constitutionality of the MSSA in *Rostker*. 453 U.S. at 74–75; *see also Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163 (1967) (challenge to regulation authorizing inspection was not ripe in part because the Court "ha[d] no idea . . . what reasons [the agency] will give to justify [its] order"); *Coker*, 161 F. Supp. 3d at 495 (staying case where ongoing appellate proceedings could "simplify" the issues before the district court). At a minimum, this Court's analysis of the constitutional questions presented in this litigation will "stand on a much surer footing" after the Commission and Congress have completed their review process. *Toilet Goods*, 387 U.S. at 164.

Judicial intervention would also be at odds with the tradition of deference to Congress's expertise in an area that is constitutionally committed to its discretion. "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391

U.S. 367, 377 (1968). Accordingly, deference to military-related judgments by Congress and, where appropriate, the Executive, is a recurrent theme in constitutional law. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953). Not only "is the scope of Congress'[s] constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Rostker*, 453 U.S. at 65 (citation omitted). Courts must be "particularly careful not to substitute [their] judgment of what is desirable for that of Congress, or [their] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Id.* at 68. And Congress has explicitly determined that further study is needed before requiring women to register with the SSS in its current configuration. *See id.* at 72–73; ECF No. 57 at 2.

The Ninth Circuit's previous ruling on ripeness in this case is not to the contrary. *Nat'l Coal. for Men v. Selective Serv. Sys.*, 640 F. App'x 664 (9th Cir. 2016). At the time of that decision, Congress had not yet established the Commission, and the Ninth Circuit had no opportunity to consider the implications of the Commission for the ripeness inquiry. *See id.* at 666. Nor did it address the propriety of a stay under the Court's inherent authority to manage its cases.

Accordingly, pursuant to long-established principles of military deference, the Court should defer to the policymaking process created by Congress in the form of the Commission. The Court should not short-circuit this process by acting before Congress has had an opportunity to consider the Commission's findings. *See Schlesinger v. Ballard*, 419 U.S. 498, 510 n.13 (1975) (explaining that deference to Congress is even more

appropriate when pending legislation may remedy a challenged classification). The issues raised in Plaintiffs' amended complaint are not fit for judicial resolution and are likely to be clarified, or resolved altogether, following a stay.

B. The Balance Of The Hardships Weighs In Favor Of Defendants.

In addition to the factors that counsel in favor of awaiting further action by the Commission and Congress, Plaintiffs face no looming hardship to justify immediate judicial intervention against a statute that has been in place for decades. The prospect of a future war that would lead to a reinstatement of the draft is entirely speculative, and there is no reason to believe that remaining on the SSS's registration rolls will in any way harm Plaintiffs. Moreover, given that Plaintiffs have already registered with the SSS, they cannot be subject to any penalty for failing to register. The only continuing obligation Plaintiffs conceivably bear is a minuscule one—to update the SSS with changes to their contact information. In short, granting a stay at this time would cause Plaintiffs no immediate or significant hardship. *Compare Texas v. United States*, 523 U.S. 296, 301 (1998) (no hardship where plaintiff was "not required to engage in, or to refrain from, any conduct"); *with Abbott Labs.*, 387 U.S. at 152 (sufficient hardship where challenged policy had a "direct effect on the day-to-day business" of the plaintiffs).

In contrast, proceeding with litigation would deprive the Commission and Congress of the opportunity to collect additional information and to apply their judgment and expertise to a matter that is committed to Congress's authority by the Constitution. An adverse ruling could also result in the discontinuance of further registration, which could undermine national security by jeopardizing the Government's ability to mobilize in a

national emergency. Alternatively, such a ruling could require the Government to spend millions of dollars and expend significant resources and effort changing the system of selective service—a considerable hardship—when Congress may wish to change the system in a completely different manner following the Commission's review. In light of the balance of hardships weighing decidedly in Defendants' favor and the other reasons discussed above, this Court should stay this case pending Congress's consideration of the Commission's recommendations.

II. Plaintiffs' Motion for Summary Judgment Should Be Denied, And Defendants' Cross-Motion Should Be Granted.

A. Standard Of Review.

The parties have filed cross-motions for summary judgment. Rule 56 of the Federal Rules of Civil Procedure mandates entry of summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Curtis v. Anthony*, 710 F.3d 587, 594 (5th Cir. 2013).

B. The Court Remains Bound By *Rostker* Despite Changes To The Military's Policy On Women In Combat.

Plaintiffs assert an equal protection claim virtually identical to the one the Supreme Court rejected in *Rostker*. That should be the end of this case. District and circuit courts must adhere to Supreme Court decisions, and the prerogative of overruling such decisions lies with the Supreme Court alone. *See Rodriguez de Quijas v. Shearson/Am. Exp. Inc.*, 490 U.S. 477, 484 (1989); *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997) (reaffirming *Rodriguez de Ouijas*); *United States v. Rodriguez-Montelongo*, 263 F.3d 429,

434 (5th Cir. 2001). The Court concluded in its ruling on the motion to dismiss that it was no longer bound by *Rostker* because of the recent changes to the women in combat policy. ECF No. 66, at 7. Defendants of course respectfully disagree that *Rostker* has been undermined by these developments, but in all events, it is well established that lower courts are bound to follow Supreme Court precedent, even when the underpinnings of a decision have been called into question. *Rodriguez de Quijas*, 490 U.S. at 484.

The district court's opinion in *Schwartz v. Brodsky*, 265 F. Supp. 2d 130 (D. Mass. 2003), and Judge Stahl's concurring opinion in *Elgin v. U.S. Dep't of Treasury*, 641 F.3d 6 (1st Cir. 2011), illustrate the correct approach. Plaintiffs in both cases challenged the male-only registration system. By the time *Schwartz* was decided, Congress had repealed the statutory Navy and Air Force restrictions on women serving on combat ships and aircraft, and thousands of women had already served in a theater of combat during Operations Desert Shield and Desert Storm. 265 F. Supp. 2d at 132 n.4. Moreover, when *Elgin* was decided eight years later, a recently concluded study by a congressional commission on military diversity had recommended integration of women into male-only ground combat units. 641 F.3d at 23. Nonetheless, both courts followed *Rostker*. As Judge Stahl noted, "determin[ing] what, if any, impact these developments had on the continued vitality of *Rostker*" was "left solely to the Supreme Court." *Id.* at 24. It is the role of the Supreme Court to evaluate how these changes might impact *Rostker*'s holding, to evaluate the viability of other alternative rationales advanced in *Rostker* (such as administrative convenience), and to overrule the case, if necessary. Accordingly, summary judgment is appropriate on the basis of *Rostker* alone.

C. Even If *Rostker* Does Not Control the Outcome Of This Case, The MSSA Is Constitutional.

1. A Highly Deferential Form Of Review Applies To The MSSA.

Plaintiffs assert that "intermediate" scrutiny, as described in cases like *Craig v. Boren*, 429 U.S. 190 (1976), is the proper legal standard to apply to their claims. Pls.' Br. 19–21. But in cases involving legislative judgment regarding the regulation of the military, including *Rostker* itself, the Supreme Court has applied a more deferential standard, even when considering classifications that would normally prompt intermediate scrutiny. This highly deferential standard more closely resembles "rational basis" review, and is the correct framework under which to analyze Plaintiffs' claims.

The Supreme Court in *Rostker* acknowledged that military deference means "the [constitutional] tests and limitations to be applied may differ because of the military context." 453 U.S. at 67. Although the Supreme Court expressly refused to attach a "label[]" to the type of review applicable to military policies alleged to trigger heightened scrutiny, *id.* at 70, the Court's departures—in *Rostker* and other military cases—from core aspects of strict or intermediate scrutiny demonstrates that its approach most closely resembles rational-basis review. The Court has deferred to the political branches on military matters even in the face of significant evidence to the contrary, including testimony from current and former military officials. *See Goldman*, 475 U.S. at 507–08; *Rostker*, 453 U.S. at 63. It has granted Congress significant latitude to choose "among alternatives" in furthering military interests. *Rostker*, 453 U.S. at 71–72. And it has

expressly held that in setting military policy Congress may "focus on the question of military need rather than 'equity.'" *Id.* at 80 (citation omitted).

The Supreme Court recently reaffirmed this highly deferential standard of review in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), when it rejected the invitation to import "the *de novo* 'reasonable observer' inquiry" into "the national security and foreign affairs context," including cases that involve review of "military actions." *Id.* at 2420 n.5. Instead, the Court applied "rational basis review" and stressed that judicial "inquiry into matters of . . . national security is highly constrained." *Id.* at 2420 (citing *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)). In conducting its review of a policy affecting national security, the Supreme Court stressed that a court "cannot substitute [its] own assessment" for the political branches "predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'" *Id.* at 2421 (quoting *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948)). The Supreme Court further explained that this deferential review may apply "across different contexts and constitutional claims," even when evaluating a "categorical" classification "on the basis of sex." *Id.* at 2419 (citing *Fiallo v. Bell*, 430 U.S. 787, 795, 799 (1977)).

Plaintiffs point to no comparable case in which the Supreme Court has applied intermediate scrutiny to second-guess military judgments made by the political branches. The closest any case comes is *Frontiero v. Richardson*, 411 U.S. 677 (1973), which overturned a military policy that made it more difficult for a female to declare her spouse a "dependent" for purposes of employment benefits. But although the military was the employer in *Frontiero*, the government never asserted that the military's employee benefits

policy was entitled to any deference based on military concerns. The distinction at issue in *Frontiero* therefore does not fall within the class of "complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force" that "are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Gilligan*, 413 U.S. at 10.

Under the highly deferential standard applicable to the MSSA, courts may conduct their review based on policy considerations that appear in the record, that are publicly available and subject to judicial notice, or that Congress may have rationally believed. *See Rostker*, 453 U.S. 74–75, 81 (relying on 1980 legislative record to sustain 1948 statute exempting women from requirement to register for the draft); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (upholding different mandatory-discharge requirements for male and female naval officers based on what "Congress may … quite rationally have believed"). Courts "hardly ever strike[] down a policy as illegitimate" under this standard. *Hawaii*, 138 S. Ct. at 2420.

2. The MSSA Is Consistent With Equal Protection Principles.

Should the Court conclude that *Rostker* is not dispositive, it must decide whether leaving the MSSA in place while Congress studies the registration system as a whole is consistent with equal protection. Whether the Court inquires if the all-male draft is "substantially related to [the] achievement of" an "important governmental objective[]" under an intermediate scrutiny analysis mindful of the traditional deference afforded to the political branches in military matters, *Craig*, 429 U.S. at 197, as Plaintiffs insist, or the "rational basis"-like test applied in the military context, as Supreme Court case law

demands, the MSSA passes muster.

To begin, Congress's decision to leave the MSSA in place while the Commission studies the matter is, in itself, a reasonable response to DoD's policy change. During the 2016 debates over the NDAA, Congress had a wide range of proposals to amend the draft before it, including proposals that would have eliminated the draft entirely and that required the SSS to register women. But after considering these proposals, Congress chose not to enact them. Instead, Congress established the Commission to receive input on these issues from all relevant stakeholders, study the matter, and make recommendations as to how to proceed. *See* Pub. L. No. 114-328 §§ 552(a)(1) & (b)(1)(C), 555(c)(1) & (d).

The same principles of military deference underlying the Supreme Court's decisions in *Rostker* and other cases counsel this Court to uphold the MSSA while Congress reconsiders the propriety of the structure and aims of the draft in light of the findings and recommendations of the Commission it established to study the matter. The Commission may recommend shifting the focus of the draft away from combat troops and toward other areas of need. ECF No. 73-1, Ex. 4, at 27–30 (discussing potential benefits and drawbacks of "drafting to need"). The Commission may even follow the course Plaintiffs prefer. *Id.* at 14–19 (summarizing the benefits and potential policy questions raised by universal conscription). Regardless of the outcome, the determination of the proper way to facilitate conscription into the armed forces in the event of a national emergency (if it is to be undertaken at all) is the constitutional responsibility of Congress and the Executive. *See Ballard*, 419 U.S. at 510 ("[I]t is the primary business of armies and navies to fight [wars] . . . . The responsibility for determining how best our Armed Forces shall attend to that

business rests with Congress and with the President" (citing U.S. Const., Art. II, § 2, cl. 1)). Granting Plaintiffs the relief they seek now would intrude on Congress's decision-making process and run contrary to the substantial deference that courts owe the legislative branch regarding military affairs.

Moreover, Congress could recognize that the new DoD policy, which creates opportunities for qualified women in the all-volunteer force, does not dictate what changes should be made to conscription policy. Then-Secretary of Defense Carter's memorandum on opening combat roles to women noted that the objective of the policy is to create "equal opportunity for men and women who can perform the tasks required; it does not guarantee that women will fill these roles in any specific number or at any set rate." Gerardi Decl., Ex. 1, at 3. By contrast, the current registration system is designed to conscript individuals in response to "military manpower induction requirements" submitted by DoD to the SSS, which are then "extrapolated to identify the number of men who must be called up to achieve the desired end state," with a primary focus on combat troops. ECF No. 73-1, Ex. 4, at 26; *see also* Pub. L. No. 114-328, § 552(b)(4), 130 Stat. 2000, 2131 (2016) ("current focus" of the draft is the "mass mobilization of primarily combat troops").

That purpose is in tension with DoD's new policy. Although the eligibility of women for combat may play a role in determining conscription policy, it does not answer the question of whether women should be conscripted into combat roles. Past studies commissioned by Congress recommending the full integration of women into the armed forces recognized potential tradeoffs for the military from even the perception that women could be forced into combat roles. Military Leadership Diversity Commission, *From*

Representation to Inclusion: Diversity Leadership for the 21st-Century Military (2011), Gerardi Decl., Ex. 8 at 73 ("If young women perceive the opening of combat career fields to mean that they will be *required* to enter these occupations rather than being *allowed* to volunteer for them … the Services may find it difficult to achieve their recruiting missions."). DoD has acknowledged this debate as well and noted the thorny practical and equitable questions raised by conscription. ECF No. 73-1, Ex. 4, at 16-17. Congress rationally chose to study such concerns before attempting to amend the MSSA.

Lastly, although all combat positions are now open to women, the Supreme Court's decision in *Rostker* rested not only on the exclusion of women from combat roles but also on the administrative burden of registering and drafting women. 453 U.S. at 81. The Court explained: "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans." *Rostker*, 453 U.S. at 81. The Court also cited the Senate Report to the MSSA, which mentioned that if women were registered and drafted, "[o]ther administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards would [] exist." *Id.* (citing S. Rep. No. 96-826, 159, U.S. Code Cong. & Admin. News 1980, 2649). DoD has acknowledged the concerns of some policymakers that "it would be inefficient to draft thousands of women when only a small percentage would be physically qualified to serve as part of a combat troop." ECF No. 73-1, Ex. 4, at 16-17.

Plaintiffs assert that "the MSSA does not have to be for purposes of combat, and that MSSA can register people for purposes other than combat," as demonstrated by the

fact that the United States "came close to drafting women during World War II." Pls.' Br. 20–21. But even if circumstances that arose during World War II provided some insight into statutory policy enacted after that war concluded, it would not diminish the policy judgments of Congress upheld in *Rostker*. By the time the Supreme Court decided *Rostker*, "Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops," and analyzed the MSSA with respect to that purpose. 453 U.S. at 76. The Commission is studying whether changes to warfare have altered this presumption. But even if "future wars may have greater requirements for more technical skills in non-combat fields, for which the percent of individuals qualified would not be as variable by gender" as combat positions, ECF No. 73-1, Ex. 4, at 16-17, Congress recognized that the "current focus" of the draft is still "on mass mobilization of primarily combat troops." Pub. L. No. 114-328, § 552(b)(4). It was reasonable for Congress to decide that if men will, for the foreseeable future, comprise the predominant percentage of persons serving in combat forces, then the basis for the MSSA has not materially changed. Courts have neither the institutional competence nor constitutional authority to second-guess such predictive judgments as to the evolving nature of warfare and the future personnel needs of the military. In short, the fact that a draft could serve other purposes in the future provides little insight into whether Congress could conclude that the MSSA serves the present purposes of the draft.

The existence of these concerns justifies Congress's present decision to maintain male-only registration while it undertakes a comprehensive review of selective service. Although DoD has made significant progress in integrating female volunteers into

previously closed combat billets, women still represent a small percentage of those billets compared to men. *See, e.g.* Joint Case Management Statement, *Service Women's Action Network v. Mattis*, No. 3:12-cv-06005-EMC, ECF No. 113, at 13 (N.D. Cal. April 12, 2018) (noting "238 female enlisted infantry Soldiers," "165 cavalry scouts and armor crewmembers," and "189 junior enlisted" Marines in previously closed combat units), Gerardi Decl., Ex. 9. The involuntary registration of millions of civilian females for potential mass conscription into combat units presents a very different question. Plaintiffs have not presented any evidence that would undermine Congress's conclusion that the administrative burden of registering civilian females at large outweighs the benefit of being able to draft women quickly in times of crisis. But even if Plaintiffs had presented such evidence, it would not be this Court's place to substitute its judgment for Congress's contrary conclusion.

3. Congress's Justifications, Not Those Of The Defense Department, Are Controlling In Assessing The Justifications For The MSSA.

Plaintiffs' discuss at length a DoD report to Congress which, among other things, outlines certain policy arguments in favor of requiring women to register with the SSS. ECF No. 73-1, Ex. 4; Pls.' Br. 15–20. This report does not resolve the constitutional question before the Court for at least two reasons. In the first place, the report ultimately concluded that "[i]n the absence of a comprehensive study and a broader national dialogue on the issues, DoD takes no position on whether the current national registration system and mobilization process could or should be modified." *Id.* at 36. The report also clarified that "[a]ny such review should be part of a much broader national discussion and should

not be solely determined by DoD." *Id.* at 37. The Commission is now engaged in precisely such a national discussion.

Second, even if DoD's report could be read to express a policy preference for requiring women to register with the SSS, the policy challenged in Plaintiffs' complaint is the MSSA—a law enacted and kept in place by Congress. Indeed, during the Congressional debates preceding *Rostker*, members of the Executive Branch and the military testified in support of requiring women to register for the draft. 453 U.S. at 79. But the Supreme Court rejected the lower court's attempt to rely on this testimony, concluding that it was up to Congress to evaluate whether such testimony was persuasive, and that the Court was obligated to defer to Congress's determination. *Id.* at 82–83. Thus, the potential policy benefits of female registration outlined by DoD are matters to be assessed by Congress through the very policy process now underway.

III. Plaintiffs Are Not Entitled To Injunctive Relief.

Under no circumstances should the Court issue an injunction to end the "sex-based . . . draft registration program." Am. Compl., ECF. 60 at 13, Prayer for Relief, ¶ 1. Such relief would be incompatible with the substantial deference that courts owe the political branches over military affairs. Again, *Rostker* points to the right result. Upon concluding that the MSSA was unconstitutional, the district court in *Rostker* issued an injunction similar to the one Plaintiffs request here. *See Goldberg v. Rostker*, 509 F. Supp. 586, 605 (E.D. Pa. 1980) (enjoining the SSS "from requiring the registration under the Military Selective Service Act of any member of the plaintiff class[,]" which the court defined as those males subject to registration under the Presidential Proclamation of July 2, 1980);

Pls.' First Am. Compl. 13, Prayer for Relief, ECF No. 60. The government applied for a stay pending appeal from the Supreme Court, and Justice Brennan, acting in his capacity as Circuit Justice for the Third Circuit, stayed the District Court's order enjoining commencement of registration. *Rostker v. Goldberg*, 448 U.S. 1306 (1980). He concluded, *inter alia*, that an immediate stay of the court's injunction was appropriate because the gravity of the harms to the United States—a clear and present threat to national security, significant expenditure of resources, and frustration of the shaping of foreign policy by the political branches—far outweighed any injury the plaintiffs would suffer from registration. *Id.* at 1309-10.

Those same considerations are in no way disrupted by the military's decision to open all combat positions to females. Even Justice Brennan, who voted to strike down the MSSA at the merits stage in *Rostker*, agreed that a district court injunction was a step too far. Indeed, the potential harms to the United States of such an injunction are heightened due to the possibility of disrupting the ongoing review of the MSSA. After complying with an injunction, the SSS might have to change its registration policy yet again once the Commission completes its study and Congress decides to act on its recommendations. Whatever the Court decides, no injunction should issue here.

CONCLUSION

For the foregoing reasons, the Court should either grant Defendants' motion to stay this litigation pending Congress's consideration of the Commission's recommendations or, in the alternative, deny Plaintiffs' motion for summary judgment and grant Defendants' cross-motion for summary judgment.

Date: September 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2018, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Michael J. Gerardi
MICHAEL J. GERARDI

CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with Plaintiffs' counsel regarding the motion to stay proceedings, and counsel for Plaintiffs indicated his opposition to the motion. Pursuant to LR 7.1(D), the parties did not confer on Defendants' motion for summary judgment.

/s/ Michael J. Gerardi
MICHAEL J. GERARDI