No. 19-20272

In the United States Court of Appeals for the Fifth Circuit

NATIONAL COALITION FOR MEN; JAMES LESMEISTER, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED; ANTHONY DAVIS,
Plaintiffs-Appellees,

v.

SELECTIVE SERVICE SYSTEM; DONALD BENSON, AS DIRECTOR OF SELECTIVE SERVICE SYSTEM,
Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, NO. 4:16-CV-3362-GHM, HON. GRAY H. MILLER

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS IN SUPPORT OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The case number is No. 19-20272. The case is styled as *National Coalition of Men v. Selective Service System*. Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the appellants' list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge. The undersigned counsel also certifies that *amicus curiae* Eagle Forum Education & Legal Defense Fund is a nonprofit corporation with no parent corporation, and that no publicly held corporation owns ten percent or more of its stock. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated: August 21, 2019

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF"), a nonprofit Illinois corporation, files this brief with the written consent of all parties.[1] Founded in 1981, EFELDF has consistently advocated for a strong military and for confining the Constitution to its original intent, as modified only by duly enacted amendments. In addition, EFELDF's founder, Phyllis Schlafly, was a leader in the movement against the Equal Rights Amendment, H.J.Res. 208, 86 Stat. 1523 (1972) ("ERA"), in the 1970s and 1980s; *amicus* EFELDF respectfully submits that the history of that effort has a direct bearing on the issues that the plaintiffs here attempt to import into the Fifth Amendment. For these reasons, EFELDF has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

The National Coalition for Men and two registration-aged males (collectively, "Plaintiffs") have sued the Selective Service System and its Director (collectively, "SSS") to challenge male-only registration for the draft under the Military Selective Service Act, 50 U.S.C. §§3801-3820 ("MSSA"). In addition to requiring only males to register, the MSSA provides penalties for failing to register, including criminal

[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

penalties prosecuted by the Department of Justice and restrictions on student aid under programs administered by the Department of Education. *See id.* §3811(c), (f).

Constitutional Background

The Constitution vests Congress with the powers to raise, support, and regulate the armed forces, U.S. CONST. art. I, §8, cl. 12-16, and makes the President Commander in Chief of those forces, with the duty to see that the laws are faithfully executed. *Id.* art. II, §§2-3. The Fifth Amendment's Due Process Clause provides that "[n]o person … shall … be deprived of life, liberty, or property, without due process of law," *id.* amend. V, cl. 4, into which the Supreme Court has read an equal-protection component equivalent to the Fourteenth Amendment's Equal Protection Clause. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Any decision under the Fifth Amendment applies equally to the states under the Fourteenth Amendment, and vice versa.

Evaluating these constitutional provisions together, the Supreme Court has held that male-only registration for the armed forces does not violate equal-protection principles: "Congress acted well within its constitutional authority when it authorized the registration of men, and not women, under the Military Selective Service Act." *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981). Plaintiffs challenge that.

Statutory Background

The MSSA requires males, but not females, to register for the draft. 50 U.S.C.

§3802(a). As indicated, the MSSA provides penalties for failing to register, primarily in the form of criminal penalties prosecuted by the Department of Justice, *id.* §3811(c), but also in the form of restrictions on student aid under programs administered by the Department of Education. *Id.* §3811(f). Although enacted in 1948, the MSSA has remained a work in progress as Congress has revised and reconsidered it. *See Rostker*, 453 U.S. at 74-75 (deeming all the post-enactment history as relevant to the MSSA decisions that Congress has made and maintained).

Factual Background

EFELDF adopts SSS's statement of the facts. SSS Br. at 1-9.

ARGUMENT

I. THE DISTRICT COURT'S JUDGMENT DOES NOT SATISFY ARTICLE III.

As a threshold matter, federal courts are courts of limited jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The parties cannot confer jurisdiction by consent or waiver, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982), and federal courts instead have the obligation to assure themselves of jurisdiction before reaching the merits. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). As such, although SSS does not raise these

issues, *amicus* EFELDF questions Article III and prudential jurisdiction.

A. The lack of injunctive relief prevents the judgment from redressing Plaintiffs' injuries.

EFELDF has no doubt that Plaintiffs *could have* established standing – and specifically redressability – for an equal-protection injury if they had sought injunctive relief. Courts can redress equal-protection injuries by leveling the disparate treatment up or down:

> [W]hen the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Heckler v. Mathews, 465 U.S. 728, 740 (1984) (emphasis in original, interior quotations omitted). For example, the lower court in *Rostker* "permanently enjoined the Government from requiring registration under the [MSSA]." *Rostker*, 453 U.S. at 63. Without an injunction or a "*mandate* of equal treatment," however, the District Court's declaratory judgment might be a simple advisory opinion, which Article III prohibits. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911).

In some cases, relief against a defendant governmental office or official may bind that office or official in its future dealings with the plaintiff. For example, the Internal Revenue Service ("IRS") would not attempt to collect a tax from a taxpayer when that taxpayer had obtained a declaratory judgment against the IRS that the tax was unconstitutional. Here, however, non-party governmental offices or officers –

such as the Department of Justice or the Department of Education – remain free to take Plaintiffs to task, notwithstanding a declaratory judgment against SSS and an SSS official, if Plaintiffs now choose not to register, based on the District Court's declaratory judgment. Even in the Southern District of Texas, the Southern District's decision is not binding: "federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011). Ending their dispute with SSS via a mere declaratory judgment might not redress Plaintiffs' injuries. That said, the lack of injunctive relief below likely would not stand in the way of an appellate court wanting to affirm the District Court. The All Writs Act, 28 U.S.C. §1651(a), "empowers the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions," *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966), and this Court presumably could thus attach injunctive relief on appeal if the Court believed that the MSSA violates Equal Protection.

B. The declaratory judgment here amounts to an advisory opinion.

The Declaratory Judgment Act provides *discretionary* relief: "any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party." 28 U.S.C. §2201(a) (emphasis added). Under that discretion, the Supreme Court has held it inappropriate to exercise that discretion piecemeal when the "proposed decree cannot end the controversy." *Pub.*

Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 246 (1952); *Calderon v. Ashmus*, 523 U.S. 740, 749 (1998) (declaratory relief improper where it "would not completely resolve those challenges, but would simply carve out one issue in the dispute for separate adjudication"). Because the District Court's declaratory judgment against SSS and an SSS official does not cure Plaintiffs' exposure to the repercussions of failing to register, the judgment does not appear to resolve Plaintiffs' dispute. Indeed, if forced to render an injunction against registration under the MSSA – instead of a mere declaratory judgment or advisory opinion – the reviewing court might realize that it was treading in territory reserved for the military and Congress under *Rostker*.

II. THE MSSA IS CONSTITUTIONAL UNDER *ROSTKER*.

If this Court finds Article III met and a declaratory judgment justified here, male-only registration nonetheless remains constitutional, either because *Rostker* directly controls the result or because *Rostker* nonetheless defines the analysis that this Court must use and leads to the same result.

A. The Supreme Court's result in *Rostker* binds this Court.

The Supreme Court has neither reversed nor even undermined the holding in *Rostker*, so that Supreme Court decision on the identical question presented should control here, notwithstanding that women now can serve in some combat roles:

> "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other

> line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. Felton, 521 U.S. 203, 237 (1997) (*quoting Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989)). Indeed, even before *Rostker*, this Court considered it "obvious" and "need[ing] no further discussion" to note that federal courts are "not competent or empowered to sit as a super-executive authority to review the decisions of the Executive and Legislative branches of government in regard to the necessity, method of selection, and composition of our defense forces is obvious and needs no further discussion." *Simmons v. U.S.*, 406 F.2d 456, 459 (5th Cir. 1969). *Amicus* EFELDF respectfully submits that this Court should end its merits analysis with *Rostker*. If judges of this Court believe that the *Rostker* holding no longer *should* control, they should say so in a decision reversing the District Court but encouraging the Supreme Court to revisit the issue.

As SSS explains, the mode for analyzing Equal Protection cases and military cases has not changed since 1981. *See* SSS Br. at 12-15; *compare Rostker*, 453 U.S. at 69-70 *with U.S. v. Virginia,* 518 U.S. 515, 533 (1996). Instead, the only changed circumstance cited is the removal of some policy and statutory barriers to women serving in combat, but those administrative and legislative changes did not change the underlying facts. *See* Section II.B.2, *infra* (discussing differences between men and women).

At bottom, Plaintiffs confuse *Rostker* with *Schlesinger v. Ballard*, 419 U.S. 498 (1975), which upheld sex-based differences in the time that a commissioned officer could serve before mandatory discharge for want of promotion. In *Ballard*, the sex-based distinction was justified directly because female officers lacked many of the opportunities for combat and other service that male officers had:

> In contrast, the different treatment of men and women naval officers under §§ 6382 and 6401 reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service. Appellee has not challenged the current restrictions on women officers' participation in combat and in most sea duty. Specifically, "women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital ships and transports." 10 U. S. C. § 6015. Thus, in competing for promotion, female lieutenants will not generally have compiled records of seagoing service comparable to those of male lieutenants. In enacting and retaining § 6401, Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with fair and equitable career advancement programs.

Ballard, 419 U.S. at 508 (interior quotations omitted). A future *Ballard*-style male officer might argue that the removal of combat restrictions could re-open the same differential treatment to renewed attack, but that is not true here. What distinguished Lt. Ballard from his female colleagues was the barrier – justified or not – against his

colleagues' getting oceangoing and combat experience. What distinguishes men and women for purposes of a draft is their suitability for combat, based on undisputed differences by sex, *see* Section II.B.2, *infra*, not the presence or absence of a policy or statutory barrier to women serving in combat.

The prior barriers to women in combat *reflected* those underlying biological differences, but the barriers did not *create* those differences. By contrast, in *Ballard*, the barriers themselves caused the differential levels of experience that male and female officers could accrue. But the innate differences between men and women remain, even after repeal of the legal barriers to women in combat. *See* Section II.B.2, *infra*.

B. Even if the *Rostker* result did not bind this Court, the *Rostker* mode of analysis would bind this Court.

Assuming *arguendo* that the result in *Rostker* were undermined by the changed circumstances regarding women's combat roles, *Rostker* would not become irrelevant here. Instead, *Rostker* would continue to control on the *mode of analysis* that this Court uses to analyze the changed circumstances. Using that analysis reaches the same result because the continued deference to congressional and Executive choices and the continued differences between men and women compel the same result today that they did in 1981.

Many facets of *Rostker* remain true today and thus bind this Court's analysis, even if *Rostker* itself does not control this Court's conclusions:

- Registration concerns the draft: "Registration is not an end in itself in the civilian world but rather the first step in the induction process into the military one, and Congress specifically linked its consideration of registration to induction." *Rostker*, 453 U.S. at 68.
- The draft concerns combat: "Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops." *Id.* at 76.
- The military exists to fight wars: "[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Id.* at 70-71 (interior quotations omitted).

As the Supreme Court summarized, "[t]he purpose of registration, therefore, was to prepare for a draft of *combat* troops." *Id.* at 76 (emphasis in original). That part of the analysis remains unchanged, as does the deference accorded to Congress and the military (Section II.B.1, *infra*) and the latitude to treat different things differently, notwithstanding Equal Protection principles (Section II.B.2, *infra*).

1. Courts review military matters more deferentially than the analogous civilian matters.

In *Rostker*, the Government argued for rational-basis review, 453 U.S. at 69-70, as SSS does here. *See* SSS Br. at 18-19, but the Court appears to have applied intermediate scrutiny with military-related deference: "Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied

may differ because of the military context." *Rostker*, 453 U.S. at 67. In doing so, the Court explained that both "[a]nnounced degrees of 'deference' to legislative judgments" and "levels of 'scrutiny' which this Court announces that it applies to particular classifications made by a legislative body" can "too readily become facile abstractions used to justify a result." *Rostker*, 453 U.S. at 69-70. With respect to deference, however, the Court acknowledged that "judicial deference … is at its apogee" for "legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance." *Id.* at 70. Deference – not the standard of review – is the controlling factor.

Although passing on the constitutionality of a congressional enactment has been called the "'the gravest and most delicate duty that this Court is called upon to perform,'" *Rostker*, 453 U.S. at 64 (*quoting Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)), that is not entirely complete. Within the realm of congressional enactments, there is a gravest of the grave:

> This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference. … Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked.

Id. at 64-65. Indeed, *Rostker* when even further:

> It is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Id. at 65-66 (interior quotations and alterations omitted).

Moreover, Congress and the President determine how to raise and direct the military: "Judges are not given the task of running the Army. … The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Id.* at 71 (interior quotations omitted).

As SSS explains, the Supreme Court's differential treatment of administrative burden in the civilian versus military contexts demonstrates that federal courts do not treat civilian and military issues the same. *See* SSS Br. at 16-20. Equal Protection principles may authorize courts – on behalf of private citizens – to tell the legislative and executive branches how to conduct civilian affairs, but they are – appropriately – much more deferential with military affairs. As the Senate Committee on Armed Services explained, "[r]egistering women for assignment to combat or assigning women to combat positions in peacetime then would leave the actual performance of sexually mixed units in an experiment to be conducted in war with unknown risk –

a risk that the committee finds militarily unwarranted and dangerous." S. REP. NO. 96-226, at 9 (1979). In another case involving a plaintiff trying to evade repercussions for evading military service, the Supreme Court noted that the Constitution "is not a suicide pact," and the first responsibility of the United States government is national defense and security. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). The same is true here.

2. Equal Protection does not require treating different things similarly just for the "equity" of it.

Equal Protection principles "essentially… direct that all persons similarly situated… be treated alike," *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985), and "protect *persons,* not *groups*." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995) (emphasis in original). "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940); *accord Cunningham v. Beavers*, 858 F.2d 269, 272 (5th Cir. 1988) ("Equal Protection … directs that all persons similarly circumstanced shall be treated alike; it does not require classes of people different in fact or opinion to be treated in law as though they were the same"). Equal treatment under the Constitution does not mean or require "engag[ing] in gestures of superficial equality." *Rostker*, 453 U.S. at 79. Although men and women are factually different, as explained below, it is enough here that Congress and the Executive are of the *opinion* that men and women are

different.

Congressional and military opinion – as expressed in the MSSA – is controlling here because that "opinion" controls, given the deference that courts give in the military context:

> He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it.

Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31-32 (1827); *see also* Section II.B.1, *supra*. Once again, this Court could stop its equal-protection analysis here, but EFELDF will go on to explain that men and women are different *in fact*, not just in opinion.

The congressional and military review of drafting women was extensively considered in 1980, *Rostker*, 453 U.S. at 74, and it is being extensively reconsidered now. SSS Br. at 3-6 (discussing, *inter alia*, the greater rate of injuries for women soldiers). But neither reconsideration nor policy changes can change the biological fact that men are stronger and more resistant to injury in combat conditions. These

issues are not unthinking or reflexive stereotypes; they are the result of rigorous analysis and review by the branches that the Constitution entrusts with making these decisions. *Rostker*, 453 U.S. at 72-75. The same is true in sports, which has been litigated to a greater extent in federal court:

> "Sport is basically a strength, speed and reaction time activity involving propelling a mass through space or overcoming the resistance of a mass. Physiologically and anatomically you cannot compare highly skilled male and female athletes on these parameters because of the inherent biological differences between the sexes. Men are stronger, faster, have better reaction time and more muscle tissue per unit of body mass. That is why athletic teams and competition are sex separate."

Ass'n for Intercollegiate Athletics for Women v. Nat'l Coll. Athletic Ass'n, 558 F.Supp. 487, 496 (D.D.C. 1983) (quoting Dr. Donna Lopiano, an expert for women's sports groups), *aff'd* 735 F.2d 577 (D.C. Cir. 1984); *accord Cape v. Tennessee Secondary Sch. Athletic Ass'n,* 563 F.2d 793, 795 (6th Cir.1977) ("[i]t takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation"). In other words, "the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in this case." *Rostker*, 453 U.S. at 79 (internal quotations and citations omitted). The relative strengths and fitness for combat service of men and women is not in serious dispute, and the decision is not up to this – or any other – federal court.

Although EFELDF opposes women in combat on policy grounds, EFELDF's argument does not denigrate female soldiers in our volunteer military: "Nothing in the MSSA restricts in any way the opportunities for women to volunteer for military service." *Rostker*, 453 U.S. at 74 n.11. Instead, the policy question here is whether the military should draft non-volunteer women for combat. And the legal question is whether Congress may permissibly answer that policy question in the negative. Whatever the answer to the policy question, the answer to the legal question is yes.

C. This Court should consider the Nation's rejection of the ERA in rejecting Plaintiffs' ERA-like claims.

A year after the Supreme Court decided *Rostker*, this Nation finally rejected the ERA. *See Nat'l Org. for Women, Inc. v. Idaho,* 459 U.S. 809 (1982) (ERA's extended ratification period expired in 1982). The ERA proposed to add language to the Constitution that would have provided a basis for the claims here:

> Under the Equal Rights Amendment the draft law will not be invalidated. Recognizing the concern of Congress with maintaining the Armed Forces, courts would construe the Amendment to excise the word "male" from the two main sections of the Act, dealing with registration and induction, thereby subjecting all citizens to these duties. A woman will register for the draft at the age of eighteen, as a man now does.

Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L.J. 871, 970-71 (1971). Moreover, the American people rejected the ERA in large part *because of* a well-founded fear that

ERA would lead to the very result demanded by Plaintiffs here. *Amicus* EFELDF respectfully submits that "[f]ew principles of statutory construction are more compelling than the proposition that [a legislative body] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442-43 (1987) (citation omitted). This Court should find that the fate of the ERA – the only constitutional text that would have supported Plaintiffs' claims – compels this Court to reject their claims.

D. The District Court abused its discretion by avoiding SSS's arguments about ongoing congressional review of this issue.

Because *amicus* EFELDF believes that *Rostker* and its mode of analysis compel this Court to rule for SSS, *amicus* EFELDF does not support SSS's argument that the ongoing review of this issue in Congress affects the decision here. *See* SSS Br. at 27. Nonetheless, EFELDF notes that SSS is correct that the District Court should not have ignored that SSS argument. *See*, *e.g.*, *U.S. v. Lynn*, 592 F.3d 572, 585 (4th Cir. 2010) ("court erred and so abused its discretion by ignoring [a party's] non-frivolous arguments"); *accord Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 612 (3d Cir. 1991); *Vitug v. Holder*, 723 F.3d 1056, 1064 (9th Cir. 2013). Insofar as review here is *de novo*, this Court need not remand for the District Court's views on the issue. Indeed, as indicated, this Court could rule for SSS *even without* the renewed congressional inquiry. Only a court otherwise planning to rule *against* SSS would need to address the renewed-inquiry argument.

E. Male-only registration satisfies intermediate scrutiny.

Even if this Court deems *Rostker* not controlling in its ultimate holding, the *Rostker* analysis compels the same conclusion here, even with the advent of women in combat. *Rostker* held – indisputably – that "the Government's interest in raising and supporting armies is an 'important governmental interest,'" 453 U.S. at 70, and that "[t]he exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration." *Id.* at 79. That meets intermediate scrutiny, provided that there is a difference between men and women *vis-à-vis* registration for a draft for combat purposes. *See* Section II.B, *supra*. (cataloging unchanged aspects of the *Rostker* analysis of this issue).

As explained in Section II.B.2, *supra*, there clearly is a difference between men and women for the purposes at issue here. While *amicus* EFELDF respectfully submits that no one could credibly think otherwise – *i.e.*, that anyone arguing otherwise is "talking about equity" when they should be "talking about military," *Rostker*, 453 U.S. at 80 (internal quotations omitted) – it does not matter what anyone but the military and Congress think: "Judges are not given the task of running the Army." *Id.* at 71. In other words, deference is controlling here. *See* Section II.B.1, *supra*. Consequently, even if this Court were not bound by the ultimate *Rostker* holding, the *Rostker* analysis would lead this Court to the same conclusion.

CONCLUSION

The decision of the District Court should be reversed.

Dated: August 21, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

No. 19-20272, *National Coalition of Men v. Selective Service System*.

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rule 29-2(c)(2), I certify that the foregoing *amicus curiae* brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 4,499 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 365, and I have relied on that software's word-count feature to calculate the word count.

Dated: August 21, 2019

Respectfully submitted,

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CERTIFICATE REGARDING ELECTRONIC SUBMISSION

No. 19-20272, *National Coalition of Men v. Selective Service System*.

I hereby certify that: (1) required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of the corresponding paper documents, except for this Certificate Regarding Electronic Submission; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: August 21, 2019

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CERTIFICATE OF SERVICE

No. 19-20272, *National Coalition of Men v. Selective Service System*.

I hereby certify that, on August 21, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that all participants in the case were registered for CM/ECF use.

/s/ Lawrence J. Joseph

Lawrence J. Joseph