

No. 20-928

IN THE
Supreme Court of the United States

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

v.

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

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

**BRIEF OF THE MODERN MILITARY
ASSOCIATION OF AMERICA, SERVICE WOMEN'S
ACTION NETWORK, PROTECT OUR DEFENDERS,
RESERVE ORGANIZATION OF AMERICA, AND
ENLISTED ASSOCIATION OF THE NATIONAL
GUARD OF THE UNITED STATES AS
AMICI CURIAE SUPPORTING PETITIONERS**

PETER E. PERKOWSKI
Modern Military Association
of America
1725 I Street, NW Suite 300
Washington, DC 20006
peter@modernmilitary.org

*Counsel for Modern Military
Association of America*

February 11, 2021

JAIME A. SANTOS
Counsel of Record
JENNY ZHANG
JACQUELINE ODUM
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4000
jsantos@goodwinlaw.com

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. Congress Enacted and Preserved Men-Only Registration Based on Assumptions About Women’s Proper Role in the Military and in Society.....	4
A. Congress Enacted the MSAA Against a Backdrop of Significant Restrictions on Women’s Military Service.	4
B. Congress Preserved Men-Only Registration Based on the Assumption that Women Are Unsuitable for Combat....	7
II. Recent Experience Shows that Women Are Not Only Suitable for Combat but Also Critical to All Aspects of the Military’s Mission.....	11
A. Women’s Participation in the Military Expanded after <i>Rostker</i>	11
B. Post-9/11 Conflicts in Iraq and Afghanistan Highlighted the Need for Women in Ground Combat Operations. ...	13
C. Since 2016, Women Have Officially Served in Ground Combat Positions.....	16
D. Other Changes in the Military Have Further Undermined the Basis for Sex-Based Registration.	19

III. Men-Only Registration Perpetuates Assumptions that Denigrate Women and Other Marginalized Americans in the Military and in Society.....	21
IV. Now is the Time for the Court to Hold Sex-Based Registration Unconstitutional.....	27
CONCLUSION	28

TABLE OF AUTHORITIES

	Page(s)
 CASES	
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973).....	6
<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981).....	3
 STATUTES	
Army Reorganization Act of 1901, 31 Stat. 753.....	4
Military Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604	2
National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160 107 Stat. 1547 (1993).....	24
Women’s Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356.....	5, 6
 LEGISLATIVE HISTORY	
94 Cong. Rec. (1948).....	4, 5, 6
S. Rep. No. 96-226 (1979).....	9, 10, 22
S. Rep. No. 96-826 (1980).....	7, 10

<i>The Implementation of the Decision to Open All Ground Combat Units to Women: Hearing Before the S. Comm. on Armed Serv., 114th Cong. (2016)</i>	14, 15
--	--------

OTHER AUTHORITIES

Advisory Comm. on Women in the Servs., <i>Commander, Submarine Force Atlantic Director, Manpower and Personnel</i> (Dec. 4, 2019), https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/Dec2019/USN%20RFI%207%20SUBFOR.pdf?ver=2019-11-25-135917-070	18
Marc Ambinder, <i>Sam Nunn Urges Rethink Of Don't Ask, Don't Tell</i> , Atlantic (June 3, 2008), https://www.theatlantic.com/politics/archive/2008/06/sam-nunn-urges-rethink-of-dont-ask-dont-tell/53393/	24
Douglas W. Bristol & Heather M. Stur, <i>Integrating the US Military: Race, Gender, and Sexual Orientation Since World War II</i> (John Hopkin Univ. Press 2017)	22
Cong. Res. Serv., RL32492, <i>American War and Military Operations Casualties: Lists and Statistics</i> (2020), https://fas.org/sgp/crs/natsec/RL32492.pdf	14
Terri Moon Cronk, <i>Cultural Support Team Women Serve with Distinction</i> , U.S. Army (Apr. 30, 2015), https://www.army.mil/article/147493/cultural_support_team_women_serve_with_distinction	15

- Nathaniel Frank, *“Unit Cohesion” Isn’t a Real Reason to Ban Trans People from the Military*, Slate (Aug. 1, 2017; 8:35 AM), <https://slate.com/human-interest/2017/08/unit-cohesion-is-a-fake-rationale-for-the-transgender-military-ban.html>. 25
- Frequently Asked Questions*, Selective Service System, <https://www.sss.gov/faq/#who-needs-to-register> 25
- Jessica Glenza & Alana Casanova-Burgess, *The US Air Force Gave Her a Choice: Your Baby or Your Job*, The Guardian (Dec. 13, 2019, 5:30 AM), <https://www.theguardian.com/world/2019/dec/13/us-air-force-pregnancy-susan-struck-abortion-motherhood-america>..... 6
- U.S. Gov’t Accountability Off., GAO/NSIAD-99-7, *Gender Issues: Information on DOD’s Assignment Policy and Direct Ground Combat Definition 2* (1998), <https://www.gao.gov/archive/1999/ns99007.pdf>..... 7
- Ellen Harin, *Meet the Quiet Trailblazers*, Army Times (May 3, 2020), <https://www.armytimes.com/opinion/commentary/2020/05/03/meet-the-quiet-trailblazers/>..... 18
- Sean Kimmons, *More Women Than Expected Pursuing Combat Arms Positions*, U.S. Army (Dec. 19, 2016), https://www.army.mil/article/179741/more_women_than_expected_pursuing_combat_arms_positions 18

- Gayle Tzemach Lemmon, *Ashley's War: The Untold Story of a Team of Women Soldiers on the Special Ops Battlefield* (3rd ed. 2015)..... 15
- Laura McGowan, *The Women of Explosive Ordnance Disposal*, U.S. Air Force (Mar. 22, 2010), <https://www.af.mil/News/Features/Display/Article/143004/the-women-of-explosive-ordnance-disposal/> 14
- William H. McMichael, *Military Gay Ban on Trial*, Daily Press (May 11, 1993) 24
- Memorandum from Assistant Sec'y of War Robert Patterson to President Franklin Roosevelt (Oct. 8, 1940), <https://www.trumanlibrary.gov/library/research-files/digest-war-department-policy-pertaining-negro-military-personnel-js-leonard>..... 23
- Mil. Leadership & Diversity Comm., *Final Report: From Representation to Inclusion: Diversity Leadership in the 21st Century Military* (2011), https://diversity.defense.gov/Portals/51/Documents/Special%20Feature/MLDC_Final_Report.pdf..... 16, 17
- Emma Moore, *Women in Combat: Five-Year Status Update*, Ctr. For New Am. Sec. (Mar. 31, 2020), <https://www.cnas.org/publications/commentary/women-in-combat-five-year-status-update>..... 18

- Julie Moreau, *Year After Trans Military Ban, Legal Battle Rages On*, NBC News (Apr. 11, 2020, 12:00 PM), <https://www.nbcnews.com/feature/nbc-out/year-after-trans-military-ban-legal-battle-rages-n1181906>..... 21
- Mike Mullen, Address at the Institute of Peace Women and War Conference (Nov. 4, 2010), <https://www.usip.org/sites/default/files/November%204%20Speech%20By%20Admiral%20Mullen.pdf> 13
- Nat'l Comm'n on Mil., Nat'l, and Pub. Serv., *The Final Report of the National Commission on Military, National, and Public Service* (Mar. 2020), <https://inspire2serve.gov/sites/default/files/final-report/Final%20Report.pdf> *passim*
- Nat'l Pub. Radio, *Bomb Techs Work Through 'Dark Spots' To Brighter Lives* (Nov. 7, 2014) <https://www.npr.org/2014/11/07/362010372/bomb-techs-work-through-dark-spots-to-brighter-lives>..... 14
- Off. of the Under Sec'y of Def. for Pers. & Readiness, U.S. Dep't of Def., *Report on the Purpose and Utility of a Registration System for Military Selective Service* (2013)..... 20
- Cheryl Pellerin, *Carter Opens All Military Occupations, Positions to Women*, U.S. Dep't of Def. (Dec. 3, 2015), <https://www.defense.gov/Explore/News/Article/Article/632536/carter-opens-all-military-occupations-positions-to-women/> 17

- Eyder Peralta, *Panetta is Lifting Ban on Women in Combat Roles*, Nat'l Pub. Radio (Jan. 23, 2013), <https://www.npr.org/sections/thetwo-way/2013/01/23/170093351/panetta-is-lifting-ban-on-women-in-combat-roles> 17
- Dave Phillips, *New Rule for Transgender Troops: Stick to Your Birth Sex, or Leave*, N.Y. Times (Mar. 13, 2019) 25
- Presidential Commission On the Assignment of Women in the Armed Forces: Report to the President* (1992), <https://catalog.hathitrust.org/Record/002635968>. 9
- Lori Robinson & Michael E. O'Hanlon, *Women Warriors: The Ongoing Story of Integrating and Diversifying the American Armed Forces*, Brookings Inst. (May 2020), <https://www.brookings.edu/essay/women-warriors-the-ongoing-story-of-integrating-and-diversifying-the-armed-forces/> 22
- Service Women's Action Network, *Women in the Military* (10th ed. 2019), <https://www.servicewomen.org/wp-content/uploads/2019/04/SWAN-Where-we-stand-2019-0416revised.pdf> 13
- Richard Sisk, *Women in Combat: Silver Stars, Combat Action Badges and Casualties*, Military.com (Aug. 31, 2015) <https://www.military.com/daily-news/2015/08/31/women-in-combat-silver-stars-combat-action-badges-casualties.html> 14

U.S. Dep't of Def., *2019 Demographics Report: Profile of the Military Community* (2020), <https://download.militaryonesource.mil/12038/MOS/Reports/2019-demographics-report.pdf>..... 20

U.S. Gov't Accountability Off., GAO/NSIAD-99-7, *Gender Issues: Information on DOD's Assignment Policy and Direct Ground Combat Definition* (1998), <https://www.gao.gov/archive/1999/ns99007.pdf>..... 7

INTEREST OF THE *AMICI CURIAE*¹

Amici curiae are veterans' organizations dedicated to improving our military and fighting discrimination in the Armed Forces.² Many have filed lawsuits and submitted amicus briefs in prior cases involving servicemembers' liberty and equality. *See, e.g., Jane Doe v. United States*, No. 20-559. *Amici* have a vital interest in this case because the question presented—whether the Selective Service System (“SSS”) may continue to exclude some Americans based on sex or gender—involves an important issue that affects them, their members, and the constituencies they serve.

SUMMARY OF ARGUMENT

Since the nation's founding, groups of disenfranchised Americans have been excluded from equal participation in military service based on the same rhetoric and prejudices that have been used to deny members of these groups their basic rights and liberties in civilian society. This exclusion occurred even while these Americans fought and died alongside fellow servicemembers. Time and again, the government has defended prejudice-based discrimination in the military under the pretext of military necessity.

African Americans were segregated and restricted from advancement in the military under the institu-

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

² A list of *amici* is attached as Appendix A.

tions of slavery and Jim Crow laws despite serving through a century-and-a-half of American conflicts at home and abroad. In World War I, members of many American Indian nations were excluded from the draft for the same reason they were denied the right to vote, even while they volunteered and served in disproportionate numbers.

Well into recent decades and even today, LGBT servicemembers who served honorably—many risking their lives during multiple deployments—have faced institutionalized persecution, silencing, and discrimination based on fierce animus.

For women, assumptions about their capabilities and proper role in society significantly limited the military positions and opportunities open to them well into the 20th century. In particular, when women were first inducted into the regular armed services after World War II, they were barred from service on most ships and aircraft, their total numbers were capped at two percent of all servicemembers, and they were generally precluded from exercising command authority, especially over men. Against the backdrop of these strict restrictions, Congress enacted the men-only³ registration requirement in the Military Selective Service Act of 1948 (“MSSA”).⁴

Over the next several decades, women’s participation in the U.S. military broadened. Increasing num-

³ For consistency with the petition, *amici* use the term “men-only” to describe the Selective Service registration requirement while recognizing that, as currently interpreted, it requires cisgender men and transgender women to register but excludes both transgender men and cisgender women.

⁴ Pub. L. No. 80-759, 62 Stat. 604.

bers of women were deployed into combat zones and took on responsibilities and risks akin to their male counterparts. Yet restrictions remained. Until 2016, women were categorically excluded from serving in certain “combat” roles, barring them from membership in infantry and special operations units, even when women were attached to those units and participated in their operations. It was this “combat exclusion” policy that Congress cited as the primary basis for preserving men-only registration in 1980, and that led this Court to uphold that provision of the MSSA in *Rostker v. Goldberg*, 453 U.S. 57 (1981). Because women were excluded from combat roles, this Court reasoned that they were not “similarly situated” to men for purposes of military service, and that their exclusion therefore did not violate the Due Process Clause. *Id.* at 78.

Today, after decades of experience in the Global War on Terror, the military itself no longer defends the rationale of the combat-exclusion policy for women, nor does it defend men-only registration. For good reason: the changing nature of modern warfare and the proven contributions of servicewomen in recent conflicts have persuaded senior military leaders and civilian defense experts that women are essential to all aspects of American military operations. In the face of this evidence, Congress has nonetheless elected to preserve men-only registration, perpetuating prejudices about women’s role in society and denigrating the reality of their role in defending the nation’s security. This legislation can no longer withstand rational review, much less survive the heightened scrutiny applied to sex-based classifications. Now is the time to overturn *Rostker*.

ARGUMENT

I. **Congress Enacted and Preserved Men-Only Registration Based on Assumptions About Women’s Proper Role in the Military and in Society.**

Throughout the 19th century and into the 20th, widely held assumptions about women’s capabilities and place in society limited their military participation to nursing soldiers and tending encampments—all in a civilian capacity. American women first officially entered military service when Congress established the Army Nurse Corps in 1901.⁵ Since then, additional military roles and occupations have gradually opened to women because of military needs, women’s demonstrated skills, and evolving views of women’s role in civilian society and the military. These changes, however, were slow in coming.

A. **Congress Enacted the MSAA Against a Backdrop of Significant Restrictions on Women’s Military Service.**

There is not a member of the House Committee on Armed Services who has not received a telephone call or a call in person from enlisted men objecting to the idea of having to take orders from a [female] officer. Put yourself in the position of an enlisted man and I’m sure you will agree with them.

— Rep. Van Zandt (June 2, 1948)⁶

Until 1948—the year Congress enacted the men-only registration requirement of the MSSA—women

⁵ Army Reorganization Act of 1901, ch. 192, 31 Stat. 753.

⁶ 94 Cong. Rec. 6970 (1948).

outside the Nurse Corps could not serve as permanent members of the armed services. Instead, the 150,000 women who joined the auxiliary corps during World War II—filling jobs such as stenographers, clerks, weather forecasters, cryptographers, radio operators, sheet metal workers, parachute riggers, bombsight maintenance specialists, and aerial photograph analysts—were expected to leave military service after the war.

But then, with the Women’s Armed Services Integration Act of 1948 (WASIA), Congress authorized the enlistment and commissioning of women into the regular services.⁷ The introduction of women into the services came with substantial restrictions on their roles and numbers, though. First, women were barred from serving aboard most Navy vessels and any aircraft that could be assigned to a combat mission. One member of Congress assured his colleagues during debate that women’s roles under the new law would be limited to—in his words—“housekeeping” positions: “All these positions that will be filled by women ... are of a so-called housekeeping nature such as your excellent secretaries in many of your offices or women in official capacities as stenographers, clerks, and telephone operators.”⁸

Women could constitute no more than two percent of each service, and of that two percent, no more than ten percent could serve as commissioned or warrant officers.⁹ While the Secretary of War was charged with determining the command authority granted to women officers, it was assumed that very few women would be

⁷ Pub. L. No. 80-625, 62 Stat. 356.

⁸ 94 Cong. Rec. 6969 (1948) (Rep. Andrews).

⁹ See WASIA § 202, 62 Stat. 356.

in an assignment “where the authority to command is of any importance whatever,” especially over men.¹⁰

It was also assumed that women could not join the services if they were responsible for the care of minor children, and pregnant servicewomen would be discharged.¹¹ Husbands and children of servicewomen, unlike the wives and children of servicemen, were denied dependent benefits, unless they could establish they were financially dependent on the servicewoman.¹² It was not until 1972 that the services would withdraw their policy of mandatory discharge for pregnant servicemembers, and not until 1973 that the Court finally struck down the military’s discriminatory spousal-benefits provision as unconstitutional, both due to the advocacy of the late Justice Ruth Bader Ginsburg.¹³

These restrictions on women in the armed services in 1948 illustrate the basic assumptions that informed Congress’s enactment of the men-only registration requirement that same year. Congress assumed that women’s contribution to the mission was auxiliary and administrative, and that their military service would

¹⁰ 94 Cong. Rec. 6967 (1948) (Rep. Andrews).

¹¹ 94 Cong. Rec. 6968-6969 (1948) (Rep. Buck).

¹² See WASIA § 109(b), 62 Stat. 356.

¹³ See Jessica Glenza & Alana Casanova-Burgess, *The US Air Force Gave Her a Choice: Your Baby or Your Job*, The Guardian (Dec. 13, 2019, 5:30 AM), <https://www.theguardian.com/world/2019/dec/13/us-air-force-pregnancy-susan-struck-abortion-motherhood-america>; *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (concluding that “achieving administrative convenience” could not justify differential treatment of male and female servicemembers under the Due Process Clause).

give way to their expected role as parents and caregivers.

Although opportunities for women in the military expanded over the next decades, these assumptions persisted in the form of ongoing restrictions against women in combat positions and in Congress's decision in 1980 to maintain a men-only registration system.

B. Congress Preserved Men-Only Registration Based on the Assumption that Women Are Unsuitable for Combat.

“[T]he starting point for any discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat. The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people.”

—S. Rep. No. 96-826, at 157 (1980).

When Congress considered expanding registration in 1980, women were still prohibited from serving on warships and combat aircraft. Over the next several decades, as more positions opened to women based on military need and women's demonstrated capability, Congress and the Department of Defense (“DOD”) adopted evolving definitions of “combat” to justify the exclusion of women from some positions but not others.

In 1988, DOD adopted and applied a policy called the Risk Rule. It excluded women from units or missions if the risks of exposure to direct combat, hostile fire, or capture were equal to or greater than the risk in the combat units they supported.¹⁴

¹⁴ U.S. Gov't Accountability Off., GAO/NSIAD-99-7, *Gender Issues: Information on DOD's Assignment Policy and Direct*

DOD repealed the Risk Rule in 1994 after determining that it was no longer appropriate or workable in light of experience in Operation Desert Storm, where “everyone in the theater of operation was at risk.”¹⁵ In its place, DOD adopted a new rule allowing women to serve in all positions, regardless of risk, except for positions in units below the brigade level where the primary mission was to engage in “direct ground combat.” “Direct ground combat” was defined as combat taking place “well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.”¹⁶ As a GAO report later remarked, this definition of combat was linked to a particular location on a clearly delineated battlefield—*i.e.*, “well forward”; the definition failed to account for non-linear battlefields that lacked a clearly defined “forward” area, a situation that would become the norm during the counterinsurgency operations in the Global War on Terror.¹⁷

During the same time that Congress and DOD shifted their definitions for the universe of “combat” positions in the military, they continued to defend the principle that women should be excluded from those positions. The record from this period reflects two primary concerns behind the exclusion of women from participation in combat and, in turn, selective-service registration.

Ground Combat Definition 2 (1998), <https://www.gao.gov/archive/1999/ns99007.pdf>.

¹⁵ *Id.*

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 9-10.

The first was a concern about the unknown effects of gender integration on the readiness and morale of combat units. A 1992 report from the Presidential Commission on the Assignment of Women in the Armed Forces concluded that integration would unjustifiably “distract[]” from and “dilut[e]” military effectiveness:

Unnecessary distraction or any dilution of the combat effectiveness puts the mission and lives in jeopardy.... Risking the lives of a military unit in combat to provide career opportunities or accommodate the personal desires or interests of an individual, or group of individuals, is more than bad military judgment. It is morally wrong.¹⁸

A 1979 Senate Report expressed a similar concern that extending registration to women would entail a dangerous war-time experiment in gender integration:

Registering women for assignment to combat or assigning women to combat positions in peacetime then would leave the actual performance of sexually mixed units as an experiment to be conducted in war with unknown risk.¹⁹

Alongside this concern about integration and morale in the military, members of Congress also expressed concern about the “strain on family life” that

¹⁸ *Presidential Commission On the Assignment of Women in the Armed Forces: Report to the President 45* (1992), <https://catalog.hathitrust.org/Record/002635968>.

¹⁹ S. Rep. No. 96-226, at 9 (1979).

would result from women's participation in armed conflict. The 1980 Senate Report on registration expansion characterized the scenario of mothers at war and fathers at home as both "unwise and unacceptable":

A decision which would result in a young mother being drafted and a young father remaining home with the family in a time of national emergency cannot be taken lightly, nor its broader implications ignored.... [S]uch a result, which would occur if women were registered and inducted under the administration plan, is unwise and unacceptable to a large majority of our people.²⁰

Notably, even in 1980, the Service Chiefs, when questioned about their opinions on selective registration of women, testified that the issue was ultimately a political question of equity and was beyond "military ken."²¹

Thus, the decision to exclude women from both combat and registration rested largely on political assumptions about gender dynamics in the military and on social norms prevalent at the time.

²⁰ S. Rep. No. 96-826, at 159 (1980).

²¹ S. Rep. No. 96-226, at 14-15, 28.

II. Recent Experience Shows that Women Are Not Only Suitable for Combat but Also Critical to All Aspects of the Military’s Mission.

I went to war in Afghanistan where I flew daily combat missions in support of my colleagues fighting on the ground. A generation prior, a woman’s ability to fly, shoot, and stay calm under fire was hotly debated; for my generation, it is simply expected.”

— Maj. Katelyn van Dam, U.S. Marine Corps combat veteran²²

In the thirty years since *Rostker* and the congressional hearings and reports on which the Court relied in upholding men-only registration, the role of women in the U.S. military has undeniably changed.

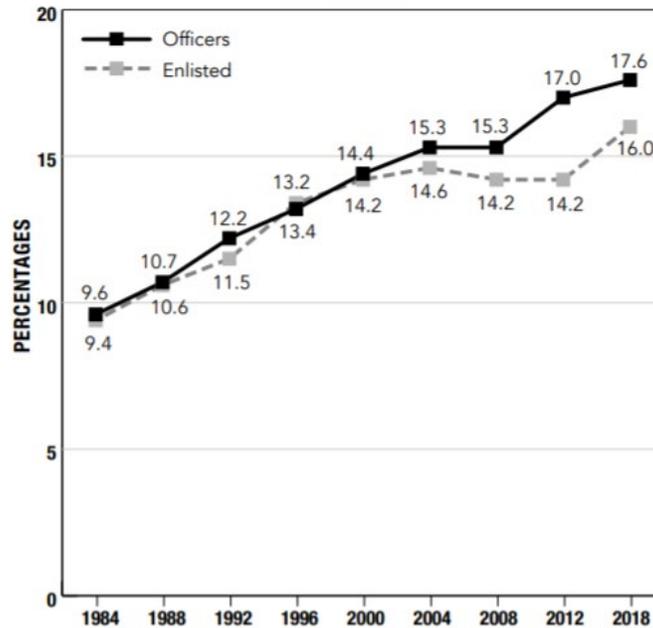
A. Women’s Participation in the Military Expanded after *Rostker*.

Since the 1980s, the percentage of women in the Armed Forces has increased dramatically, especially among commissioned officers. As shown in Figure 1 below, in 2018, women made up nearly 18 percent of commissioned officers and 16 percent of enlisted servicemembers on active duty. In comparison, in the 1980s, women made up fewer than 10 percent of the active-duty component. The increase is even more dramatic when compared to the two-percent limit Con-

²² Nat’l Comm’n on Mil., Nat’l, and Pub. Serv., *The Final Report of the National Commission on Military, National, and Public Service* 115 (Mar. 2020) (“Service Commission Report”), <https://inspire2serve.gov/sites/default/files/final-report/Final%20Report.pdf>.

gress set in 1948 for the initial integration of women into the armed services.

FIGURE 1: Active-Duty Servicewomen in the DoD Services by Officer/Enlisted Status (in Percentages) 1984-2018



Source: Defense Manpower Data Center, unpublished data from 1984, 1988, 1992, 2000, 2004, 2008, 2012, 2018.
Compiled by: Service Women's Action Network (SWAN), August 2018.

Qualitatively, women's role in American combat operations expanded significantly during conflicts throughout the 1980s and 1990s. In 1983, 170 women deployed for the invasion of Grenada in Operation Urgent Fury. In 1989, 770 servicewomen participated in the invasion of Panama in Operation Just Cause, including women flying Black Hawk helicopters under fire. Just a few years later, 40,782 women deployed for the Persian Gulf War, including fifteen who were killed. Twelve hundred women deployed for peacekeeping operations in Haiti in 1993. In 1998, during

Operation Desert Fox, for the first time American women aviators flew and served on aircraft crews for combat missions to enforce the no-fly zone in Iraq. Women aviators executed similar combat missions in Kosovo the following year.²³

B. Post-9/11 Conflicts in Iraq and Afghanistan Highlighted the Need for Women in Ground Combat Operations.

[The] women [who] have served in Iraq and Afghanistan ... have given us a competitive advantage.... In a war where there is no longer a clear delineation between the frontlines and the sidelines, where the war can come at you from any direction. This will be the first generation of veterans where large segments of women returning will have been exposed to some form of combat.... I'd be hard pressed to say that any woman who serves in Afghanistan today or who's served in Iraq over the last few years did so without facing the same risks of their male counterparts.

—Admiral Mike Mullen²⁴

The changing needs of the military and the need for women's participation in combat operations further came to light after September 11, 2001, during the Global War on Terror.

²³ See Service Women's Action Network, *Women in the Military* (10th ed. 2019), <https://www.servicewomen.org/wp-content/uploads/2019/04/SWAN-Where-we-stand-2019-0416revised.pdf>.

²⁴ Mike Mullen, *Address at the Institute of Peace Women and War Conference 2-3* (Nov. 4, 2010), <https://www.usip.org/sites/default/files/November%204%20Speech%20By%20Admiral%20Mullen.pdf>.

In the two decades since September 11, more than 300,000 servicewomen have served in the ongoing military operations in Afghanistan and Iraq. In conflicts without clear front lines, these women faced the dangers of combat while running convoys and security patrols, flying close air support missions, leading engineering platoons, and while serving as interpreters, explosive ordnance disposal techs, military police, artillery officers, and more.²⁵ They served in hostile battlegrounds in Fallujah, Ramadi, and Sangin, amidst ambushes, suicide bombers, and roadside bombs.²⁶ Over 170 servicewomen have been killed in action, and more than 1,000 have been wounded,²⁷ including now-Senator Tammy Duckworth. By 2015, more than 9,000 women had earned combat action badges.²⁸

The nature of the counterinsurgency operations during these conflicts, during which raids and fire-fights regularly took place among civilians, further

²⁵ See Laura McGowan, *The Women of Explosive Ordnance Disposal*, U.S. Air Force (Mar. 22, 2010), <https://www.af.mil/News/Features/Display/Article/143004/the-women-of-explosive-ordnance-disposal/>; Nat'l Pub. Radio, *Bomb Techs Work Through 'Dark Spots' To Brighter Lives* (Nov. 7, 2014) <https://www.npr.org/2014/11/07/362010372/bomb-techs-work-through-dark-spots-to-brighter-lives>.

²⁶ *The Implementation of the Decision to Open All Ground Combat Units to Women: Hearing Before the S. Comm. on Armed Serv.*, 114th Cong. 6 (2016) (statement of Raymond E. Mabus).

²⁷ Cong. Res. Serv., RL32492, *American War and Military Operations Casualties: Lists and Statistics* (2020), <https://fas.org/sgp/crs/natsec/RL32492.pdf>.

²⁸ Richard Sisk, *Women in Combat: Silver Stars, Combat Action Badges and Casualties*, Military.com (Aug. 31, 2015) <https://www.military.com/daily-news/2015/08/31/women-in-combat-silver-stars-combat-action-badges-casualties.html>.

highlighted the strategic need for women's participation in ground combat. Cultural barriers made it unacceptable for male servicemembers to complete checkpoint searches of local women for weapons and explosives, creating a vulnerability that was exploited by enemy forces.²⁹ These barriers also made it difficult for troops conducting door-to-door raids to obtain intelligence from locals about the location of weapons and enemy combatants.

In response, the services devised programs in which women Soldiers, Marines, and Sailors accompanied ground combat units on their missions. Starting in 2004 in Iraq, the Lioness program assigned women Soldiers, and later women Marines and Sailors, to join ground combat units on raids. In 2009, a Marine Task Force in Afghanistan established Female Engagement Teams that were attached to ground combat units to engage with local women at checkpoints and other critical locations. In 2010, the Special Operations Command began training women Soldiers to be members of Cultural Support Teams that embedded with Army Ranger and Navy SEAL units in Afghanistan.³⁰ In short, women have been serving critical roles in combat missions for nearly two decades—long before they were

²⁹ *The Implementation of the Decision to Open All Ground Combat Units to Women: Hearing Before the S. Comm. on Armed Serv.*, 114th Cong. 13 (statement of Raymond E. Mabus).

³⁰ Terri Moon Cronk, *Cultural Support Team Women Serve with Distinction*, U.S. Army (Apr. 30, 2015), https://www.army.mil/article/147493/cultural_support_team_women_serve_with_distinction; Gayle Tzemach Lemmon, *Ashley's War: The Untold Story of a Team of Women Soldiers on the Special Ops Battlefield* (3rd ed. 2015).

officially afforded the opportunity to hold ground combat roles.

C. Since 2016, Women Have Officially Served in Ground Combat Positions.

Having served with women in combat, and having seen their courage and skills, I can personally say I have ZERO concerns about women on the front lines in combat units.

—Lieutenant General (Ret.) Mark Hertling³¹

The significant role played by servicewomen in the post-9/11 conflicts generated momentum within and outside the military to officially open ground combat positions to women. In 2011, a congressionally authorized Military Diversity Commission released a report recommending that women be fully integrated into all positions in the armed services.³² The report included detailed findings that the combat exclusion was no longer justified in light of present military realities. It found that gender-based exclusions unnecessarily restricted career advancement opportunities for highly qualified servicewomen.³³ It also found little evidence justifying previous concerns about the impact of gender integration on unit cohesion. To the contrary, studies showed that women had a “positive effect on mission accomplishment” in combat operations in Afghanistan

³¹ Service Commission Report, *supra*, at 116.

³² Mil. Leadership & Diversity Comm., *Final Report: From Representation to Inclusion: Diversity Leadership in the 21st Century Military* (2011), https://diversity.defense.gov/Portals/51/Documents/Special%20Feature/MLDC_Final_Report.pdf.

³³ *Id.* at 71-72.

and Iraq.³⁴ The Diversity Commission also noted that concerns voiced decades earlier about the impact of racial integration were not born out by subsequent experience.³⁵ Moreover, military leaders had expressed their belief that opening up positions to women helped ensure that the most qualified individuals would be selected for critical positions throughout the services.³⁶

In 2013, Congress and Secretary of Defense Leon Panetta announced a plan to lift the ban on women in ground combat.³⁷ All positions in the armed services were officially opened to women beginning January 2016.³⁸

By fall of 2015, the first three women had already graduated from the Army's Ranger School. In 2016, the first women officers graduated from the Army's infantry and armor officer training courses. Initial enrollment of women in previously men-only combat arms exceeded the expectations of Army leaders, with more than 300 women successfully recruited or trans-

³⁴ *Id.* at 72.

³⁵ *Id.* at 71.

³⁶ *Id.*

³⁷ Eyder Peralta, *Panetta is Lifting Ban on Women in Combat Roles*, Nat'l Pub. Radio (Jan. 23, 2013), <https://www.npr.org/sections/thetwo-way/2013/01/23/170093351/panetta-is-lifting-ban-on-women-in-combat-roles>.

³⁸ Cheryl Pellerin, *Carter Opens All Military Occupations, Positions to Women*, U.S. Dep't of Def. (Dec. 3, 2015), <https://www.defense.gov/Explore/News/Article/Article/632536/carter-opens-all-military-occupations-positions-to-women/>. There do remain, however, systemic barriers to women's mobility and advancement in combat roles. See Third Am Compl. 11-20, *Serv. Women's Active Network v. Esper*, No. 12-CV-06005 EMC (N.D. Cal. June 28, 2018), ECF No. 122.

ferred into infantry, armor, field artillery and Special Forces positions in 2016. Initial data from the integrated infantry and armor courses at Fort Benning, Georgia showed no significant difference between male and female student performance and attrition rates. Reviewing these numbers, Major General Hugh Van Roosen commented that “[t]hese are women who are physically fit and absolutely prepared for this.”³⁹ Since then, at least 50 women successfully completed U.S. Army Ranger School⁴⁰; 46 women have graduated from Infantry Basic Officer Leader Course; 72 women have graduated from the Armor Basic Officer Leader Course; and 270 enlisted women have graduated from Infantry and Armor One Station Unit Training. As of October 2019, a total of at least 1,055 women had entered Army combat specialties.⁴¹

Outside the Army, in 2019, women recruits reached a milestone by forming one of five platoons in the incoming basic training class for the Marine’s 3rd battalion. In the Navy, women and men have shown nearly

³⁹ Sean Kimmons, *More Women Than Expected Pursuing Combat Arms Positions*, U.S. Army (Dec. 19, 2016), https://www.army.mil/article/179741/more_women_than_expected_pursuing_combat_arms_positions.

⁴⁰ Ellen Harin, *Meet the Quiet Trailblazers*, Army Times (May 3, 2020), <https://www.armytimes.com/opinion/commentary/2020/05/03/meet-the-quiet-trailblazers/>.

⁴¹ Emma Moore, *Women in Combat: Five-Year Status Update*, Ctr. For New Am. Sec. (Mar. 31, 2020), <https://www.cnas.org/publications/commentary/women-in-combat-five-year-status-update>.

identical attrition rates for both nuclear and non-nuclear officer and enlisted submarine ratings.⁴²

D. Other Changes in the Military Have Further Undermined the Basis for Sex-Based Registration.

The needs and realities of today's military undermine the assumptions motivating men-only registration in additional ways. First, while Congress assumed in 1980 that any draft would primarily serve the purpose of replenishing ground combat troops, that assumption may no longer reflect the realities of modern warfare. In recommending the expansion of registration, the National Commission on Military, National, and Public Service (the "Service Commission") concluded that a modern draft would need to achieve "adequate armed strength" in a variety of combat and non-combat positions.⁴³ The Service Commission's report noted that "although much of the public discourse related to whether to expand Selective Service registration to women is focused on comparing women and

⁴² *Id.*; Advisory Comm. on Women in the Servs., *Commander, Submarine Force Atlantic Director, Manpower and Personnel* (Dec. 4, 2019), <https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/Dec2019/USN%20RFI%207%20SUBFOR.pdf?ver=2019-11-25-135917-070>.

⁴³ Indeed, historical analysis shows that conscripts have been assigned to meet a range of military needs during conflict. For example, a comparison of the number of personnel inducted during World War II and the total assigned to combat roles reveals that less than half of all conscripts were assigned to ground combat roles in that conflict. *See*, Service Commission Report, *supra*, at 113.

men in combat positions, nearly 80 percent of today's military positions are classified as noncombat."⁴⁴

Based on its evaluation, the Service Commission concluded that "[s]hould a national emergency require Congress and the President to activate a draft, the military would process and assign inductees based on individual qualifications to meet its many needs" and that "[t]hese needs would include a wide range of positions, not solely combat roles."⁴⁵ This conclusion underscores the need for a registration system that captures a broader segment of the population—there are simply not enough qualified young men to meet all of the military's needs in the event of a national emergency.⁴⁶

Second, the family demographics of today's military disprove Congress's earlier assumption that family caregiving obligations are incompatible with military service. In particular, roughly 37 percent of today's active duty servicemembers have children; approximately 4 percent are single parents; and approximately 7 percent of military personnel are married to another

⁴⁴ *Id.* at 115-16.

⁴⁵ *Id.* at 113.

⁴⁶ See Off. of the Under Sec'y of Def. for Pers. & Readiness, U.S. Dep't of Def., *Report on the Purpose and Utility of a Registration System for Military Selective Service* 16 (2013) ("Recruiting studies estimate that only 29% of today's youth qualify for entry into the military, for a variety of educational, medical, criminal justice and other reasons. In rough proportion, were the United States to draft only 5 million of the 17 million men of primary draft age, the resultant force would far exceed the foreseeable manpower requirements of all but the most global of conflicts.").

member of the Armed Forces.⁴⁷ For decades, both men and women responsible for the care of children and other family members have served and deployed in the armed forces.

Additionally, since June 2016, many transgender service members have served openly in the military—even amidst shifting policies and executive orders—under their true gender.⁴⁸ A registration system based solely on sex assigned at birth—thereby requiring transwomen to register but not transmen—both undermines the long-dead justifications for the system and demonstrates its irrationality.

Ultimately, times have changed for women and for the military as a whole, and the assumptions that may have seemed rational in the early 1980s are no longer so today.

III. Men-Only Registration Perpetuates Assumptions that Denigrate Women and Other Marginalized Americans in the Military and in Society.

The services now have decades of experience with women successfully and heroically serving in combat, and several years of transgender people openly doing the same. The real debate over sex-based selective service registration is no longer about military readiness. Sex-based classifications in the military under-

⁴⁷ U.S. Dep't of Def., *2019 Demographics Report: Profile of the Military Community* (2020), <https://download.militaryonesource.mil/12038/MOS/Reports/2019-demographics-report.pdf>.

⁴⁸ Julie Moreau, *Year After Trans Military Ban, Legal Battle Rages On*, NBC News (Apr. 11, 2020, 12:00 PM), <https://www.nbcnews.com/feature/nbc-out/year-after-trans-military-ban-legal-battle-rages-n1181906>.

mine national security—and perpetuate assumptions that harm women, transgender people, and others who may fall outside traditional social norms.

As the Service Commission concluded in 2020, “Male-only registration sends a message to women 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.” This was not simply speculation—the Commission heard from servicewomen who “indicated that their disparate treatment with respect to registration was yet another way in which the Government signaled that their contributions and sacrifices were not as valued as those of their male colleagues.”⁴⁹ These perceptions are all-the-more problematic at a time when servicewomen continue to face high rates of harassment, hostility, and assault by their male counterparts.⁵⁰

An individual’s right and obligation to serve in the military is often perceived as fundamental to their standing to participate in the civic debate over the decision to go to war.⁵¹ Indeed, although military service has rarely fulfilled its promise of ensuring the full rights of citizenship to marginalized Americans, the government’s restrictions on the ability of marginalized

⁴⁹ Service Commission Report, *supra*, at 118.

⁵⁰ See, e.g., Lori Robinson & Michael E. O’Hanlon, *Women Warriors: The Ongoing Story of Integrating and Diversifying the American Armed Forces*, Brookings Inst. (May 2020), <https://www.brookings.edu/essay/women-warriors-the-ongoing-story-of-integrating-and-diversifying-the-armed-forces/>; Douglas W. Bristol & Heather M. Stur, *Integrating the US Military: Race, Gender, and Sexual Orientation Since World War II* (John Hopkin Univ. Press 2017).

⁵¹ Service Commission Report, *supra*, at 118.

groups to serve fully and equally in the military has long reflected and reinforced perceptions against their full and equal standing in society.

These prejudice-based perceptions are evident from the concerns raised by those who opposed expanding selective registration to women in 1980. The 1979 Senate Report's warnings about the dangers of a gender integration "experiment" on unit morale⁵² echoed the rhetoric used to justify continued segregation of black servicemembers during World War II. In 1944, faced with the question of whether to integrate, the War Department issued a confidential memorandum to President Roosevelt warning about the dangers of "interming[ling]" forces:

The policy of the War Department is not to intermingle colored and white enlisted personnel [T]o make changes would produce situations destructive to morale and detrimental to the preparation for national defense It is the opinion of the War Department that no experiments should be tried with the organizational set-up of these units at this critical time.⁵³

The portrayal of integration as dangerous also pervaded the prejudice-based rhetoric used to exclude and silence LGBT servicemembers in 1993, when Congress

⁵² S. Rep. No. 96-226, at 9 (1979).

⁵³ Memorandum from Assistant Sec'y of War Robert Patterson to President Franklin Roosevelt (Oct. 8, 1940), <https://www.trumanlibrary.gov/library/research-files/digest-war-department-policy-pertaining-negro-military-personnel-js-leonard>).

relied on the following “finding” in enacting the Policy Concerning Homosexuality in the Military (known as “Don’t Ask, Don’t Tell”):

[T]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.⁵⁴

Notably, during the debates and investigations surrounding adoption of Don’t Ask Don’t Tell, concerns about the impact of openly lesbian, gay, and bisexual servicemembers on military readiness bled discernibly into judgments about the morality of departing from social norms. This was vividly illustrated during a public hearing at Norfolk Air Force Base, during which Senator Thurmond berated two testifying servicemembers facing discharge for their homosexuality, telling them, “[Y]our lifestyle is not normal,” and asking if they had considered seeking “professional help.”⁵⁵ Senator Sam Nunn, who at the time chaired the Armed Service Committee and was instrumental in negotiating the anti-gay legislation in 1993, would later public-

⁵⁴ National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160 § 571, 107 Stat. 1547, 1670 (1993) (previously codified at 10 U.S.C. § 654(a)(15)).

⁵⁵ William H. McMichael, *Military Gay Ban on Trial*, Daily Press (May 11, 1993), <https://www.dailypress.com/news/dp-xpm-19930511-1993-05-11-9305110012-story.html>.

ly support its reconsideration based on changes in American society since its enactment.⁵⁶

But even after de jure exclusion of LGB people ended with the 2011 repeal of Don't Ask Don't Tell, the government continued to restrict open service by transgender people. In defending a DOD policy in 2017 that prohibited transgender servicemembers from serving openly, the White House press secretary recycled the now-familiar justification: integrating openly serving trans people would “erode[] military readiness and unit cohesion.”⁵⁷ When the ban was challenged in litigation, a senior DOD official announced in 2019 that trans people would be permitted to serve, but only “so long as they adhere to the standards of their biological sex.”⁵⁸

Though the military has improved on the inclusion of and equality for women and trans people, “men-only” registration continues to harm these populations: The SSS explicitly misgenders trans people, stating it “bases the registration requirement on gender assigned at birth and not on gender identity or on gender reas-

⁵⁶ See Marc Ambinder, *Sam Nunn Urges Rethink Of Don't Ask, Don't Tell*, Atlantic (June 3, 2008), <https://www.theatlantic.com/politics/archive/2008/06/sam-nunn-urges-rethink-of-dont-ask-dont-tell/53393/>.

⁵⁷ Nathaniel Frank, “Unit Cohesion” Isn't a Real Reason to Ban Trans People from the Military, Slate (Aug. 1, 2017; 8:35 AM), <https://slate.com/human-interest/2017/08/unit-cohesion-is-a-fake-rationale-for-the-transgender-military-ban.html>.

⁵⁸ Dave Phillips, *New Rule for Transgender Troops: Stick to Your Birth Sex, or Leave*, N.Y. Times (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/us/transgender-troops-ban.html>.

signment.”⁵⁹ Women and transmen are precluded from registering; transwomen are required to despite knowing that (until recently) they would be excluded from serving. This needs to change. Throughout history, the government’s willingness to recognize and honor the contributions of servicemembers from marginalized groups has shifted in accordance with the country’s willingness to recognize their equal status as citizens. In testimony before the Commission, Dr. Jason Dempsey, an Army infantry veteran and leading expert on civil-military relations, stressed that eliminating sex-based registration for selective service “is more than an argument for fairness. This is an argument about fully utilizing the talent and potential of American citizens to meet the challenges of a changing, yet continually dangerous, world. America is simply stronger when we all engage in the obligations of citizenship.”⁶⁰

The SSS, which was meant to embody the collective obligations of Americans to defend their country in times of need, has instead been legislated and implemented to amplify disparities and prejudices that separate Americans along lines of race, sex, and class. The sex-based criteria for registration serves as one of the lingering injustices of the system. In a time when all people have proven their essential role in America’s combat operations, sex-based registration irrationally ignores and denigrates the contributions of trans people and women in defending the nation’s security and denies them equal standing as citizens.

⁵⁹ *Frequently Asked Questions*, Selective Service System, <https://www.sss.gov/faq/#who-needs-to-register>.

⁶⁰ Service Commission Report, *supra*, at 118.

IV. Now is the Time for the Court to Hold Sex-Based Registration Unconstitutional.

Decades of experience have fundamentally undermined the assumptions that once allegedly justified men-only registration. There is no reason for the Court to delay reconsidering *Roskter* and declaring the MSSA unconstitutional; indeed waiting to do so could cause significant harm to the nation's national security interests.

A definitive ruling now would afford Congress, DOD, and the SSS adequate time to act—and to do so thoughtfully, well before any military need. Whether Congress reacts by expanding registration or abolishing it in favor of another gender-neutral means for ensuring an adequate force in war time, it should do so at a time of relative peace to allow careful implementation of the chosen path forward.

As the Service Commission concluded in response to comments advocating delay, “waiting until the moment when the Nation must exercise that contingency [of a draft] would undermine the preparations required to successfully insure against inadequate military strength. Building a robust, efficient draft contingency plan requires the immediate implementation of difficult policy decisions—such as extending registration to women.”⁶¹

⁶¹ Service Commission Report, *supra*, at 123.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PETER E. PERKOWSKI
Modern Military Association
of America
1725 I Street, NW
Suite 300
Washington, DC 20006
peter@modernmilitary.org

*Counsel for Modern Military
Association of America*

February 11, 2021

JAIME A. SANTOS
Counsel of Record
JENNY ZHANG
JACQUELINE ODUM
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4000

jsantos@goodwinlaw.com

Counsel for Amici Curiae

Appendix A – List of *Amici*

Modern Military Association of America

<https://modernmilitary.org/about>

Service Women’s Action Network

<https://www.servicewomen.org/who-we-are/#about>

Protect our Defenders

<https://www.protectourdefenders.com/about/>

**Reserve Officers Association, d/b/a Reserve
Organization of America**

<https://www.roa.org/page/AboutROA>

**Enlisted Association of the National Guard of the
United States**

<https://eangus.org/organization/>