

No. 20-928

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IN THE  
**Supreme Court of the United States**

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

*Petitioners,*

v.

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

*Respondents.*

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

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BRIEF OF GEN MICHAEL HAYDEN, GEN  
STANLEY MCCHRYSTAL, LTG CLAUDIA  
KENNEDY, MG RANDY MANNER, MG GALE  
POLLOCK, BGEN STEPHEN CHENEY, BRIG GEN  
CARLOS E. MARTINEZ, BG MARIANNE WATSON,  
RADM JOHN HUTSON, AND RDML HAROLD L.  
ROBINSON AS *AMICI CURIAE* IN SUPPORT OF  
PETITIONERS

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**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici* are retired senior military officers who have devoted countless decades to strengthening America's security interests. They are General Michael Hayden, General Stanley McChrystal, Lieutenant General Claudia Kennedy, Major General Randy Manner, Major General Gale Pollock, Brigadier General Stephen Cheney, Brigadier General Carlos E. Martinez, Brigadier General Marianne Watson, Rear Admiral John Hutson, and Rear Admiral Harold L. Robinson.

In times of peace and in times of hostilities, each *amicus* has been responsible for the readiness of the service members under their command. Some have led those service members in combat, most recently in critical theaters such as Afghanistan and Iraq. They have played crucial roles in shaping policy concerning the readiness of the armed services, across the administrations of both major political parties. And they have personally observed changes in the military over their decades of service.

*Amici* have a unique appreciation for the value of military expertise, an appreciation borne out of years of personal service and sacrifice, often in kinetic environments. They file this brief to offer their

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<sup>1</sup> Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. The parties received timely notice and granted consent to the filing of this *amicus* brief.

perspective to the Court on the military issues implicated by this case. For the reasons set forth below, *amici* concur with Petitioners that the categorical exclusion of women from the selective service is inimical to the Nation's security interests. Having personally observed changed circumstances in the armed services since this Court's 1981 decision in *Rostker v. Goldberg*, 453 U.S. 57 (1981), *amici* believe the foundation of that decision no longer holds.

### INTRODUCTION AND SUMMARY OF ARGUMENT

Forty years ago, this Court considered a constitutional challenge to the Military Selective Service Act, currently codified at 50 U.S.C. § 3802(a). The Court held it was constitutional for that Act to require only men, but not women, to register for the selective service. *Rostker*, 453 U.S. at 83. Key to the Court's ruling was its observation that "[w]omen as a group ... unlike men as a group, are not eligible for combat." *Id.* at 76.

Whatever that rationale's merit in 1981, it is no longer true. Our armed forces draw from the strength of the *entire* Nation, not only its men. Women graduate from the Nation's top service academies, complete the most challenging combat training programs, deploy overseas, serve alongside men, and integrate into basic combat teams, including in the infantry. Indeed, women now comprise 17 percent of the armed forces, filling both combat and noncombat roles. To put that number in context, roughly the same percentage of women serve in the armed forces as in the police department of New

York City.<sup>2</sup> This evolution reflects the military's and policy makers' considered judgment about how the Nation's security needs are best met.

The draft, if ever again instated, ought to reflect that same judgment. The selective service is an insurance policy, meant to guarantee that the United States can muster an adequate force quickly in the event of a large-scale war. Should international events again necessitate conscription, filling roles with the best-qualified candidates, regardless of gender, would support and advance national security. Including women in the selective service would double the pool of candidates available to draft, raising the overall quality of the conscripted force and enabling the Nation to better meet its military needs.

In focusing on the implications of women's ineligibility for combat, the Court in *Rostker* deferred to the military's judgment about who best fit into its ranks, and in what occupations. In the intervening 40 years, just as the nature of conflict has evolved, so too has the military's judgment about the proper composition of its forces. There remains no military justification for maintaining the male-only selective service registration requirement.

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<sup>2</sup> *Data Transparency Initiative: Current NYPD Members of Service*, NYC Civilian Complaint Review Board, <https://www1.nyc.gov/site/ccrb/policy/data-transparency-initiative-mos.page> (last visited Feb. 8, 2021) (“Just over 80% of NYPD officers identify as male (83%) and 17% identify as female.”).

**ARGUMENT****I. THE REALITY OF THE MODERN MILITARY NO LONGER SUPPORTS THE SUPREME COURT'S DECISION IN *ROSTKER V. GOLDBERG*.**

The United States military of the twenty-first century values equal opportunity for *all* qualified individuals to serve—regardless of race,<sup>3</sup> sex, gender identity,<sup>4</sup> or sexual orientation.<sup>5</sup> The modern history of the military bears this out.

Women have long served the United States in times of war. While women unofficially served as nurses and camp followers since the Revolutionary War, the Nation first employed uniformed women as nurses in the Army Nurse Corps and the Navy Nurse corps in 1901 and 1902, respectively.<sup>6</sup> Indeed, President Franklin D. Roosevelt first raised the prospect of drafting women in 1945, when he called on Congress to conscript nurses as part of the Selective Service Act.<sup>7</sup> Beginning in World War II,

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<sup>3</sup> Exec. Order 9981, 13 Fed. Reg. 4313 (July 28, 1948) (officially desegregating the Armed Forces).

<sup>4</sup> Exec. Order No. 14004, 86 Fed. Reg. 7471, 7471 (Jan. 25, 2021) (stating categorically that “gender identity should not be a bar to military service”).

<sup>5</sup> Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515, 3515.

<sup>6</sup> Kristy N. Kamarek, Cong. Rsch. Serv., R44321, *Diversity, Inclusion, and Equal Opportunity in the Armed Services: Background and Issues for Congress* 23 (2019), <https://fas.org/sgp/crs/natsec/R44321.pdf> [hereinafter Kamarek, Diversity].

<sup>7</sup> Pamela D. Toler, *The First Time the U.S. Considered Drafting*



women also began officially serving the military in other roles. In 1942, Congress created the women's auxiliary corps, which became the Women's Army Corps (WAC) in 1943.<sup>8</sup> Women also served in the war as Women Airforce Service Pilots (WASPs), who, though not officially part of the armed services, nonetheless served as pilots of military fighter, bomber, transport, and training aircraft.<sup>9</sup> In total, over 350,000 women served in the Armed Forces during WWII as mechanics, air traffic controllers, instructors, and pilots.<sup>10</sup>

In 1948, Congress made women a permanent part of the military services, though at the same time it excluded women from combat ships and aircraft and established quotas for the number of women who could serve (two percent of the enlisted force and ten percent of the officer corps).<sup>11</sup> In 1976, Congress allowed women to attend U.S. military academies for the first time.<sup>12</sup> The first women graduated from these academies in

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*Women – 75 Years Ago*, Wash. Post (Mar. 21, 2019), <https://www.washingtonpost.com/outlook/2019/03/21/first-time-us-considered-drafting-women-years-ago>. The measure passed the House, but did not pass the Senate. *Id.*

<sup>8</sup> An Act To Establish a Women's Army Auxiliary Corps for Service With The Army of the United States, Pub. L. No. 77-554, ch. 312, 56 Stat. 278 (1942); Kamarck, *Diversity* at 23.

<sup>9</sup> Kamarck, *Diversity* at 24.

<sup>10</sup> *Id.*

<sup>11</sup> Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, ch. 449, 62 Stat. 356, at 357, 364, 371.

<sup>12</sup> Department of Defense Appropriation Authorization Act of 1976, Pub. L. No. 94-106, 89 Stat. 531 (1975).

1980—one year before the Supreme Court decided *Rostker*.

Opportunities for women to fully serve the Nation continued to expand in the 1990s, when Congress repealed statutory restrictions on women serving in combat in the Air Force and Navy and prohibited the Secretary of Defense from establishing “quotas” for how many women were allowed to serve.<sup>13</sup> Since then, female Air Force pilots have flown combat aircraft into enemy territory<sup>14</sup> and piloted bombing strikes launched from aircraft carriers.<sup>15</sup> Women have likewise served alongside men on combat ships in the Navy,<sup>16</sup> and beginning in 2010, aboard submarines.<sup>17</sup>

In 2013, Defense Secretary Leon Panetta announced

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<sup>13</sup> National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, 105 Stat. 1365 (1991); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, Subtitle D, 107 Stat. 1547, 1659 (1993); *cf. Rostker*, 453 U.S. at 76 (“The restrictions on the participation of women in combat in the Navy and Air Force are [S]tatutory.”).

<sup>14</sup> Rebecca Grant, *The Quiet Pioneers*, Air Force Mag. (Dec. 1, 2002), <https://www.airforcemag.com/article/1202pioneer>.

<sup>15</sup> Associated Press, *Female Pilots Dropped Bombs in Iraq Mission*, L.A. Times (Dec. 23, 1998), <https://www.latimes.com/archives/la-xpm-1998-dec-23-mn-56925-story.html>.

<sup>16</sup> *Twenty-five Years of Women Aboard Combatant Vessels*, Naval Hist. & Heritage Command (Aug. 22, 2019), <https://www.history.navy.mil/content/history/nhhc/browse-by-topic/diversity/women-in-the-navy/women-in-combat.html>.

<sup>17</sup> Associated Press, *Ban on Women on Submarines Ends*, N.Y. Times (Feb. 24, 2010), [https://www.nytimes.com/2010/02/24/us/24brfs-BANONWOMENON\\_BRF.html](https://www.nytimes.com/2010/02/24/us/24brfs-BANONWOMENON_BRF.html).

the end of the last official ban on women in combat, stating firmly that “[s]uccess in our military based solely on ability, qualifications, and performance is consistent with our values and enhances military readiness.”<sup>18</sup> Over the next three years, the military services opened over 111,000 jobs to women.<sup>19</sup> And three years later, Secretary Carter opened to women all remaining jobs—over 200,000 in all, combat and non-combat alike.<sup>20</sup>

Contrary to the facts as they existed when this Court decided *Rostker*, women now serve in combat roles in every branch of the U.S. military. In Secretary Carter’s 2016 announcement opening all combat positions to women, he noted that women have played “a critical role” throughout “the past 14 years in combat operations.”<sup>21</sup> And, he stated, the evidence definitively had shown that effective leadership and gender-neutral standards could alleviate any lingering concerns about

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<sup>18</sup> Leon E. Panetta, Sec’y of Def., and Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, Memorandum for Secretaries of the Military Departments Acting Under Secretary of Defense for Personnel and Readiness 1 (Jan. 24, 2013), <https://dod.defense.gov/Portals/1/Documents/WISRJointMemo.pdf> [hereinafter “Panetta Memorandum”].

<sup>19</sup> Ash Carter, Deputy Sec’y of Def., Memorandum for Secretaries of the Military Departments Acting Under Secretary of Defense for Personnel and Readiness 1 (Dec. 3, 2015), <https://dod.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf> [hereinafter “Carter Memorandum”].

<sup>20</sup> Kevin Baron, *No Exceptions: Carter Opens All Military Jobs to Women*, Defense One (Dec. 3, 2015), <https://www.defenseone.com/business/2015/12/carter-open-all-women/124172>.

<sup>21</sup> Carter Memorandum at 2.

combat effectiveness.<sup>22</sup>

**A. Allowing women to serve in combat roles did not lower military standards.**

Those who have resisted the opening of the military's doors often cite fears that greater inclusion will compromise the efficacy or standards of the Nation's armed forces. But the experience of integrating women into combat positions puts the lie to that myth.

In his 2013 memorandum, Secretary Panetta contemplated the possibility that some roles could remain closed to women, *if* such exceptions proved necessary based on rigorous factual findings regarding the knowledge, skills, and abilities necessary for the position.<sup>23</sup> In the three years between Secretary Panetta's announcement that combat restrictions would be lifted and Secretary Carter's full implementation of that directive, the services gradually opened over 111,000 positions to women. During this process, the military independently studied, developed, and verified operationally relevant standards for these positions.<sup>24</sup> By developing and testing these standards, Military Service Chiefs determined precisely what abilities and skills—both physical and mental—each combat arms billet in the armed forces required.<sup>25</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> Panetta Memorandum at 2.

<sup>24</sup> Carter Memorandum at 1.

<sup>25</sup> Leon E. Panetta, *Opinion: I Helped Open All Military Jobs to Women. We Can't Go Backward*, Wash. Post (Mar. 11, 2019), <https://www.washingtonpost.com/opinions/i-helped-open-all-military-jobs->

Ultimately, military leaders found no justification for making categorical exceptions based on gender. Military readiness dictated that anyone who met the rigorous, operationally tailored, and gender-neutral standards would have the opportunity to serve. Thus, when *all* combat positions were opened to women in 2016, the decision was “the continuation of a deliberate, methodical, evidence-based, and iterative process that ensure[d] combat effectiveness and protect[ed] the welfare of the force.”<sup>26</sup> Rather than lowering military standards, fully integrating the armed forces has ensured that each individual, regardless of gender, is thoroughly qualified to meet the specific needs of his or her position.<sup>27</sup> Standards for roles remain high. They are simply now gender-neutral—to the benefit of the entire military force, male and female.<sup>28</sup>

Women have served in combat roles in the Air Force and Navy for nearly three decades, performing with skill, honor, and distinction. It has now been five years since women have been allowed to compete for positions in the Army and Marine Corps alongside their male peers. The United States Military remains, as Secretary Carter put it, “the finest fighting force the world has

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[to-women-we-cant-go-backward/2019/03/11/1d69df9c-4437-11e9-aaf8-4512a6fe3439\\_story.html](https://www.washingtonpost.com/news/defense-and-pentagon/wp/2019/03/11/1d69df9c-4437-11e9-aaf8-4512a6fe3439_story.html) [hereinafter Panetta, Wash. Post].

<sup>26</sup> Carter Memorandum at 1.

<sup>27</sup> *See, e.g., id.* (elaborating on gender-neutral standards).

<sup>28</sup> Panetta, Wash. Post (“By opening all jobs to women, and ensuring that every person in those jobs meets these standards, actual military readiness has improved.”).

ever known.”<sup>29</sup>

**B. Women have graduated from top military training courses, proving sex is no categorical barrier.**

Concerns about placing women in combat arms positions often revolve around differences in physical capabilities between the sexes. This Court has confronted—and rejected—such arguments before.<sup>30</sup> And women have now graduated from some of the military’s toughest and most demanding training academies, proving their ability to meet the military’s highest physical and mental standards. Importantly, these are standards that not all men can meet.<sup>31</sup> Put simply, by virtue of their strength, endurance, intelligence, and resolve, some women are more

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<sup>29</sup> Carter Memorandum at 3.

<sup>30</sup> See *United States v. Virginia*, 518 U.S. 515, 540 (1996) (rejecting argument for maintaining Virginia Military Institute’s single-sex status that “[a]lterations to accommodate women would necessarily be ‘radical,’ so ‘drastic,’ ... as to transform, indeed ‘destroy,’ VMI’s program”); *id.* at 542 n.11 (noting that “[f]orecasts of the same kind were made regarding admission of women to the federal military academies”).

<sup>31</sup> John Spencer, *The Challenges of Ranger School and How to Overcome Them*, Modern Inst. of War, at West Point (Apr. 12, 2016), [https://mwi.usma.edu/challenge-ranger-school-can/#:~:text=The%20United%20States%20Army%20Ranger,attempted%20the%20course%20have%20succeeded; A Look Into Joining the Military’s Elite Forces in the Army, Marine Corps, Navy and Air Force, Military One Source \(June 11, 2020\), https://www.militaryonesource.mil/military-life-cycle/new-to-the-military/military-career/joining-the-military-elite-forces](https://mwi.usma.edu/challenge-ranger-school-can/#:~:text=The%20United%20States%20Army%20Ranger,attempted%20the%20course%20have%20succeeded;A%20Look%20Into%20Joining%20the%20Military%27s%20Elite%20Forces%20in%20the%20Army%2C%20Marine%20Corps%2C%20Navy%20and%20Air%20Force%2C%20Military%20One%20Source%20(June%2011%2C%202020),https://www.militaryonesource.mil/military-life-cycle/new-to-the-military/military-career/joining-the-military-elite-forces).

qualified to serve than some men.<sup>32</sup>

Consider the fifty women who have graduated from the Army's notoriously difficult Ranger School.<sup>33</sup> At the beginning of the school's 62-day course, students must complete 49 strict Army push-ups and 59 sit-ups, run five miles in under 40 minutes, and complete six strict chin-ups. Those physical requirements simply get students through the door. Over the next two months, students must carry 65-90 pounds of combat equipment while travelling hundreds of miles, on zero to five hours of sleep, while eating a restricted-calorie diet. They endure verbal taunting from "[o]ppos[ing] [f]orces" throughout, and face peer evaluations.<sup>34</sup> Fewer than fifty percent pass the course.<sup>35</sup>

Likewise, the three women who have graduated from the Marine Corps' Infantry Officer Course are eminently qualified to command company-grade infantry units, and have succeeded where some of their male counterparts have failed. This course trains

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<sup>32</sup> See *Virginia*, 518 U.S. at 550 (“[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”).

<sup>33</sup> Ellen Haring, Commentary, *Meet the Quiet Trailblazers*, Army Times (May 3, 2020), <https://www.armytimes.com/opinion/commentary/2020/05/03/meet-the-quiet-trailblazers> [hereinafter “Haring, Army Times”].

<sup>34</sup> *Ranger: Airborne and Ranger Training Brigade*, U.S. Army Ranger School, 5, <https://www.benning.army.mil/infantry/ARTB/Student-Information/content/PDF/ARTB%20Ranger%20Course%20Information.pdf>.

<sup>35</sup> *Id.* at 6.

Marine Second Lieutenants to command infantry Marines in combat. The course is infamously grueling. Among other tasks, it requires the strength and stamina to carry equipment weighing more than 150 pounds over rough terrain for long distances. Ten percent of students typically fail the first day. By the end of the course, an average of 25 percent of students wash out.<sup>36</sup>

Other examples abound. In October 2016, the first ten female lieutenants graduated from the Army's Infantry Basic Officer Leader Course,<sup>37</sup> and in March 2020, a woman graduated from the course first in her class.<sup>38</sup> In 2019, a woman completed the two-week Navy Seal officer assessment and selection process.<sup>39</sup> Though she did not go on to become a Navy SEAL—she had listed a different occupational specialty as her first choice—she endured the grueling and rigorous two-week program, including physical stress, sleep deprivation, and tests of strength and endurance.<sup>40</sup> That

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<sup>36</sup> Dan Lamothe, *For the First Time, the Marine Corps Plans to Have a Female Infantry Officer Among Its Ranks*, Wash. Post (Sept. 21, 2017), <https://www.washingtonpost.com/news/checkpoint/wp/2017/09/21/for-the-first-time-the-marine-corps-expects-to-have-a-female-infantry-officer-among-its-ranks>.

<sup>37</sup> AR News, *First 10 Women Graduate Infantry Officer Basic*, U.S. Army (Oct. 29, 2016) [https://www.army.mil/article/177436/first\\_10\\_women\\_graduate\\_infantry\\_officer\\_basic](https://www.army.mil/article/177436/first_10_women_graduate_infantry_officer_basic).

<sup>38</sup> Haring, Army Times.

<sup>39</sup> Hope Hodge Seck, *The First Woman has Made it Through SEAL Officer Screening*, Military.com (Dec. 11, 2019), <https://www.military.com/daily-news/2019/12/11/first-woman-has-made-it-through-seal-officer-screening.html>.

<sup>40</sup> *Id.*; Naval Special Warfare, *Seal Officer Assessment and*



same year, a female Marine non-commissioned officer graduated from the Winter Mountain Leaders Course, where Marines hone their skills in cold weather survival, skiing, snow mobility, and mountain warfare, including maneuvering through chest-deep snow at high altitudes while engaging in mock battles.<sup>41</sup> Frostbite and hypothermia are expected, and endured.

2019 also marked a meaningful breakthrough for the last service force to integrate: the Army Special Forces, colloquially known as the Green Berets. Forty years ago, Capt. Kate Wilder took and passed the Army Special Forces Officer Course, but her superiors denied her graduation based on her sex.<sup>42</sup> Last year, another woman successfully completed the same grueling course. This time, she was awarded her Green Beret.<sup>43</sup>

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*Selection*, Official Naval Special Warfare Website (Mar. 4, 2020), <https://www.sealswcc.com/apply/seal-officer-assessment-selection.html>.

<sup>41</sup> Shawn Snow, *First Female Marine Graduates from Winter Mountain Leaders Course*, Marine Times (Jan. 8, 2019), <https://www.marinecorpstimes.com/news/your-marine-corps/2019/01/08/first-female-marine-graduates-from-winter-mountain-leaders-course/>; Lolita C. Baldor, *Marine Corps Steps up Winter-Warfare Training as Global Threat Shifts*, Marine Times (Mar. 3, 2019), <https://www.marinecorpstimes.com/news/your-marine-corps/2019/03/03/marine-corps-steps-up-winter-warfare-training-as-global-threat-shifts>.

<sup>42</sup> John Ismay, *The True Story of the First Woman to Finish Special Forces Training*, N.Y. Times (Feb. 28, 2020) <https://www.nytimes.com/2020/02/28/magazine/woman-special-forces-green-beret.html>.

<sup>43</sup> Thomas Gibbons-Neff, *First Woman Joins Green Berets After Graduating From Special Forces Training*, N.Y. Times (July 16, 2020), <https://www.nytimes.com/2020/07/09/us/politics/woman->

## II. DRAFTING WOMEN ALONGSIDE MEN WILL IMPROVE THE NATION'S MILITARY READINESS.

As the above illustrates, many women are more than capable of serving in combat arms occupations alongside their male peers. That military reality has changed and improved the voluntary service corps. It should also have significant implications for the selective service and any potential draft.

### A. Doubling the population pool of the draft will improve the caliber of the candidates overall.

The draft will benefit from requiring both men and women to register for the selective service. The Department of Defense regularly evaluates the Nation's "recruitable population," which is the number of youth that meet minimum baseline standards for military service. The Department of Defense establishes these standards based on the needs of the military, including evaluation of age, aptitude, dependents, education, medical needs, character, physical fitness, and drug use among other skills, capabilities, and conditions.<sup>44</sup> In a 2016 assessment, a unit of the Department of Defense determined that 70 percent of American youth ages 17-24 would not meet these minimum standards and

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green-berets-army.html.

<sup>44</sup> *The Target Population for Military Recruitment: Youth Eligible to Enlist Without a Waiver*, Joint Advertising, Market Research, and Studies (JAMRS) 2 (Sept. 2016), <https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/Sept2016/JAMRS%20RFI%202014.pdf?ver=2016-09-09-164855-510> (hereinafter "JAMRS").

therefore would be ineligible to serve. The eligible 30 percent were split evenly between male and female youth.<sup>45</sup>

This Department of Defense assessment highlights the outdated assumptions about military preparedness that undergird the current male-only draft. The same percentage of women are service-eligible as men, based on the criteria the military *actually uses* to determine fitness for service. According to the logic underlying the current draft regime, men are more capable of serving in combat than women. Yet the vast majority of men in fact are not, and—most importantly—have no advantage in readiness over women, who the current statutory scheme forbid from registering. Such a regime makes no sense, either as a matter of Fifth Amendment law or of military planning.

Doubling the pool of potential draftees would do more than give the military an opportunity to draw on a larger pool of qualified candidates to meet its needs in the face of a large-scale conflict. It would also permit the military to select the most qualified civilian candidates available for any given role in the military—meaning, a more qualified woman could be chosen in the place of a less qualified man.<sup>46</sup> Put differently, doubling the pool of potential draftees would raise the overall quality of the candidate pool and, in doing so, increase military

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<sup>45</sup> *Id.* at 9-10.

<sup>46</sup> As noted, volunteer service women have already proven that some women may be more qualified for service than some men by graduating from some of the military's most elite and difficult training courses.

readiness and aid the Nation's security.

In *Rostker*, the Court's discussion of selective service registration and the draft focused on combat. *See, e.g.*, 453 U.S. at 93 (“[A]ny future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops.” (Marshall, J., dissenting) (quotation marks omitted)). That reasoning no longer applies, as women can and do serve in combat.

Moreover, draftees have never filled only combat positions.<sup>47</sup> In World War II, for example, less than half of all conscripted personnel were assigned to combat roles.<sup>48</sup> That would be truer today than at any point in the past, as the theater of war has changed substantially since the country's last conscription. Warfare today requires intelligence and communication specialists, linguists, logisticians, medical personnel, drone and cyber operators, and more. Notably, noncombat positions comprise nearly 80 percent of today's military occupations.<sup>49</sup>

A draft would only be deployed in the event of a large-scale war, which would require an influx of

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<sup>47</sup> Nat'l Comm'n on Military, Nat'l & Pub. Serv., *Inspired to Serve: The Final Report of the National Commission on Military, National, and Public Service* 113 (Mar. 2020), <https://inspire2serve.gov/sites/default/files/final-report/Final%20Report.pdf> [hereinafter Congressional Report on Selective Service].

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 115-16.

conscripts to fill all of these positions.<sup>50</sup> The pool of candidates for this wide variety of roles should be as large as possible, so that the military can draw on the candidates who are most qualified for the job, regardless of sex.

**B. If the United States enters a war that requires mobilization of the draft, women will be necessary to meet the military's needs.**

Adding women to the pool of registrants is crucial to the utility of a draft. The purpose of a draft is to mobilize as many Americans as necessary, as quickly as possible.<sup>51</sup> Over the course of World War II, for example, more than 10 million men were inducted into the Army, Navy, and Marines through the draft.<sup>52</sup> In Korea, though most who served volunteered, 1.5 million men were conscripted into service. And in Vietnam, the last time a draft was called, the military inducted 1.8 million men from a draft pool of 27 million.<sup>53</sup>

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<sup>50</sup> *Id.* at 113.

<sup>51</sup> *Rostker*, 453 U.S. at 75 (quoting Congressional reports indicating that the draft is predicated on the necessity of “an ability to mobilize rapidly” to national security (quotation marks omitted)); Congressional Report on Selective Service at 108 (explaining that the draft is necessary for the military to “rapidly expand” in times of unanticipated strife, and recommending that women be included in the registration requirement).

<sup>52</sup> *Induction Statistics*, U.S. Selective Service System, <https://www.sss.gov/history-and-records/induction-statistics> (last visited Feb. 8, 2021).

<sup>53</sup> *Id.*; see David Cortright, *Peace: A History of Movements and Ideas* 165 (2008).

Over the last fifty years, the percentage of the American population that would be conceivably draft-eligible has shrunk, for numerous reasons. First, population growth in the United States has slowed. Today, the total number of youth aged 18-24, which corresponds with the age of the draft-eligible population (18-25), is 30.6 million. Half of that population is female, and therefore currently ineligible. The pool of potential draftees is thus roughly half of that available during Vietnam. Second, the country's population is increasingly aging, meaning that increasingly fewer Americans can meet age requirements for eligibility.<sup>54</sup> And third, an estimated seven out of 10 young Americans of both sexes are ineligible to serve because of physical, moral, educational, or health standards.<sup>55</sup>

A conscription pool without an adequate number of eligible prospects would be ineffective. Requiring all young Americans to register, regardless of sex, will prevent the selective service from falling into irrelevancy, unable to meet the Nation's national security needs in a time of peril.

**C. The selective service process is more than capable of accommodating the unique needs of women in the event of a draft.**

The draft has always been a *selective* service. Rather than taking everybody, it has chosen only those who best met the military's needs at the time, based on their

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<sup>54</sup> Jonathan Vespa, *The U.S. Joins Other Countries With Large Aging Populations*, U.S. Census Bureau (Mar. 13, 2018), <https://www.census.gov/library/stories/2018/03/graying-america.html>.

<sup>55</sup> JAMRS at 4-10.

physical and mental abilities, skills, and experience. Individuals were randomly selected from the pool of candidates, then examined by the Department of Defense for fitness. Nor was eligibility the final word. Historically, the draft always included exemptions excusing otherwise eligible draftees from service. Considerations included enrollment in higher education, marriage, dependents, caretaking responsibilities, surviving sons and brothers, and other concerns.<sup>56</sup>

There has not been a conscription in nearly 50 years. Nonetheless, if Congress passes a law again allowing Presidents to conscript registrants from the selective service, it is reasonable to expect this precedent to be followed.<sup>57</sup> As such, requiring women to register for the selective service would not mean *all* women would be required to serve, let alone that they would all be required to serve in combat arms occupations or combat itself. Just as is the case with men, individual capabilities would be taken into account. Moreover, the same compensatory policies that exist for the voluntary service force would apply—permitting dual service member families to manage deployment, and permitting deferment and leave for pregnant service members.<sup>58</sup>

In short, the military already has vetted models to

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<sup>56</sup> Congressional Report on Selective Service at 113.

<sup>57</sup> The Military Selective Service Act was amended to preclude conscription after July 1, 1973, therefore requiring an act of Congress to reinstate. 50 U.S.C. § 3815(c).

<sup>58</sup> *Instruction: Family Care Plans*, Dep't of Def. 2-3 (Nov. 30, 2017), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/134219p.pdf>.

govern the unique needs of female service members, and to ensure family units remain intact even if both parents may be called to serve.

**D. Women serve with valor and the selective service should reflect that reality.**

The U.S. military's decision to open all military occupational specialties to any qualified candidate regardless of sex was a milestone in the history of the service. But it also acknowledged a reality that already existed on the ground.<sup>59</sup> Since the Revolutionary War, women have served alongside men, officially as nurses and aides, and unofficially as spies, smugglers, and even in disguise as soldiers.<sup>60</sup> In recent decades, it has become less of an isolated story and more of a standard operating procedure for men to serve alongside women in mortal combat. This was the case even before the military permitted women to be assigned combat arms and combat support designations.

In 1990 and 1991, over 40,000 women deployed to the Persian Gulf during Operations Desert Shield and Desert Storm.<sup>61</sup> They served side by side with their

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<sup>59</sup> See, e.g., Sen. Tammy Duckworth (@SenDuckworth), Twitter (Apr. 29, 2016), <https://twitter.com/senduckworth/status/726080774198452224> (“I didn’t lose my legs in a bar fight. Women have served in combat for a long time—glad more are moving up the ranks.”).

<sup>60</sup> John Ferling, *Almost a Miracle: The American Victory in the War of Independence* 330, 428-29 (2007); Kamarek, *Diversity* at 22-23.

<sup>61</sup> U.S. Gov’t Acct. Off., GAO/NSIAD-93-93, *Report to the Secretary of Defense: Women in the Military--Deployment in the Persian Gulf War*, 2-3 (1993), <http://archive.gao.gov/t2pbat5/149552.pdf>.



male colleagues, in the same rough conditions, facing the same dangers.<sup>62</sup> Since the terrorist attacks of September 11, 2001, over 300,000 women have deployed to Iraq and Afghanistan. In 2015, before the integration of women into combat arms occupations was completed, more than 9,000 female troops had already earned Combat Action Badges. Hundreds had earned valor awards.<sup>63</sup>

Most tellingly, since September 11, 2001, nearly 200 women have died in combat and over 1,000 have been wounded in action.<sup>64</sup> Allowing women to officially compete for combat occupations both recognized and honored the courageous service of these service members, by providing women the same opportunities for advancement accorded to men with similar service records. Requiring women as well as men to register for the selective service would send a clear message that the military values the service of its women equally alongside the service of its men. Indeed, female Armed Forces members told the Congressional Commission studying the draft 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

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<sup>62</sup> *Id.*

<sup>63</sup> Kristy N. Kamarck, Cong. Rsch. Serv., R42075, *Women in Combat: Issues for Congress*, 8-9 (2016), <https://fas.org/sgp/crs/natsec/R42075.pdf> [hereinafter “Kamarck, Women”]; Cong. Rsch. Serv., RL32492, *American War and Military Operations Casualties: Lists and Statistics* (2020), <https://fas.org/sgp/crs/natsec/RL32492.pdf>.

<sup>64</sup> Kamarck, Women at 9.

colleagues.”<sup>65</sup> Equalizing the selective service would recognize that America’s women have the same right, responsibility, and capability to serve their country as America’s men.

The official integration of women into combat followed logically from decades of slow and careful progress. Today, women form an integral part of the U.S. Military, in both combat and noncombat roles.

Requiring both women and men to register for the selective service is a long overdue next step. Indeed, the male-only selective service registration requirement is the last vestige of an American service force that no longer exists. Respectfully, therefore, the Court should revisit its decision in *Rostker* and grant the petition for certiorari.

### CONCLUSION

The petition for a writ of certiorari should be granted.

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<sup>65</sup> Congressional Report on Selective Service at 118.

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