No. 13-56690

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
UNITED STATES OF AMERICA,

NATIONAL COALITION FOR MEN; AND JAMES LESMEISTER,

Plaintiffs-Appellants,

v.

SELECTIVE SERVICE SYSTEM; AND LAURANCE G. ROMO, AS DIRECTOR OF SELECTIVE SERVICE SYSTEM,

Defendants-Appellees.

Appeal from the United States District Court
for the Ninth Circuit
D.C. No. 2:13-cv-02391-DSF-Man

OPENING BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

1. National Coalition For Men, represented by Marc E. Angelucci of the Law Office of Marc E. Angelucci, 11734 Wilshire Blvd., Ste. C903, Los Angeles, CA 90025, 626-319-3081.
2. Selective Service System, and Lawrence G. Romo as Director of Selective Service System, represented by Bryan R. Deiderich of the U.S. Department of Justice, 20 Massachusetts Ave. NW room 7330, Washington, DC, 20001, 202-305-0198.

REQUEST FOR ORAL ARGUMENT

Plaintiffs and Appellants, National Coalition For Men and James Lesmeister, respectfully request oral argument. Oral discussion of the facts and the applicable precedent would benefit the Court.

The underlying action challenges the statutory sex discrimination in the Military Selective Service Registration Act (hereinafter, "MSSA") (50 U.S.C. § 453(a)) as a violation of the Equal Protection Clause of the United States Constitution, particularly in light of the new policy rescinding the ban

on women in combat. The District Court found the action is not ripe because the military has not fully implemented its new policy. Appellants challenge that decision on the grounds that: (1) The District Court erred by granting a Motion to Dismiss based on matters outside the pleadings without granting Plaintiffs' request for time to conduct discovery, in violation of Federal Rule of Civil Procedure (hereinafter, "FRCP") 12(d); (2) The District Court erroneously ruled the case cannot be ripe until women are allowed in *all* combat positions in *all* units; (3) The District Court erred in finding the hardship to Plaintiffs of delaying the constitutional question is *de minimus*; and, (4) The District Court misapplied judicial deference at the expense of its judicial duty to uphold constitutional principles.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this case under the Fifth Amendment of the United States Constitution, and under 28 U.S.C. § 1331, which gives district courts original jurisdiction over civil actions arising under the Constitution, laws, or treaties of the United States. This Court has jurisdiction over this appeal under Federal Rules of Appellate Procedure Title II, Rule 3. The appeal is timely under Rule 4(b) of said Rules because the defendants are federal agencies, the Judgment was entered on July 29, 2013, and the Notice of Appeal was filed on September 26, 2013.

STATEMENT OF THE ISSUES

ISSUE NO. 1: Did the District Court err by granting a Motion to Dismiss on the ground of ripeness based on matters outside the pleadings and without allowing Plaintiffs time for discovery, in violation of FRCP 12(d)?

ISSUE NO. 2: Did the District Court err by ruling the case cannot be ripe because "it is far from certain that all combat positions in all branches will be open to women"?

ISSUE NO. 3: Did the District Court err by finding the hardships to Plaintiffs of withholding court consideration is *de minimus*?

ISSUE NO. 4: Did the District Court misapply judicial deference at the expense of the judicial duty to uphold constitutional principles?

STANDARD OF REVIEW

Findings of fact are reviewed for clear error. *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002). This standard also applies to the application of law to facts where it requires an "essentially factual" review. *Ibid.* Conclusions of law are reviewed *de novo*. *Id.*, at 835. Mixed questions of law and fact are also reviewed *de novo*. *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000). A mixed question of law and fact exists when there is no dispute as to the facts or the rule of law and the only question is whether the facts satisfy the legal rule. *Ibid.*

In this case, the District Court's Order should be reviewed as follows:

1. The District Court's consideration of matters outside the pleadings on a FRCP 12(b) motion to dismiss without complying with FRCP 12(d) by converting the motion into a motion for summary judgment or otherwise allowing Plaintiffs time to conduct discovery as they requested is a question of law and is reviewed *de novo*. *Ritza v. International Longshoremen's and Warehousemen's Union,* 837 F.2d 365, 369 (9th Cir. 1988).
2. The District Court's ruling that the case cannot be ripe until women are allowed in *all* positions in *all* combat units is a question of law and is reviewed *de novo.*
3. The District Court's finding that the hardships to Plaintiffs of withholding court consideration is *de minimus* because "males would still be required to register even if the registration requirement included women" is a question of fact to be reviewed for clear error, or, alternatively, is a question of mixed law and fact to be reviewed *de novo.*
4. The District Court's ruling that judicial deference to Congress on military matters dictates the court must decline to hear the case is a question of fact to be reviewed for clear error.

STATEMENT OF THE CASE

I. THE PARTIES

Plaintiff, James Lesmeister (hereinafter, "Lesmeister"), at the time of the filing of this case, was an 18-year-old male resident and U.S. citizen residing near Houston, Texas and was qualified to register and was registered for the MSSA as is required of him. Lesmeister is concerned about his constitutional right to equal protection relating to his requirement to register with for forced military conscription under the MSSA.

Plaintiff, National Coalition For Men (hereinafter, "NCFM"), is a non-profit, 501(c)(3) educational and civil rights corporation organized under the laws of the State of California and of the United States. NCFM's membership includes, without limitation, men ages 18 to 26 who are United States citizens residing in the United States who qualify for and are required to register for the draft and who are concerned about the violation of their constitutional right to equal protection with regard to the MSSA. NCFM was established in 1976 to examine how sex discrimination adversely affects males, such as in child custody, military conscription, domestic violence services, criminal sentencing, and public benefits. NCFM has had significant impact on laws concerning men. In 2007 NCFM members were the prevailing appellants and attorney in the landmark California Supreme

Court case of *Angelucci v. Century Supper Cluo*, 41 Cal.4th 160 (2007), which held men and other protected groups do not have to first assert their right to equal treatment to an offending business in order to have standing to sue for unlawful discrimination under California's Unruh Civil Rights Act. In another California case, *Woods v. Horton,* 167 Cal.App.4th 658 (2008), NCFM members won a landmark appellate decision on behalf of battered men, as *Woods* held it is unconstitutional for the State of California to exclude male victims from state funded domestic violence services. NCFM also helped draft legislation that brought relief to victims of paternity fraud, and helped represent paternity fraud victims in court, which brought written praise to NCFM from Federal District Court Judge David Hanschen.[1]

Defendant, Selective Service System ("SSS"), is an independent agency within the Executive Branch of the Federal Government of the United States of America. The SSS collects and maintains information on men potentially subject to military conscription and administers the MSSA.

Defendant, Lawrence G. Romo ("Romo"), is Director of the SSS. The Director of SSS is appointed by the President of the United States of America and confirmed by the Senate.

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[1] http://ncfm.org/wp-content/uploads/2012/10/100811-Letter-from-Judge-Hanschen.pdf

II. STATEMENT OF FACTS AND PROCEEDINGS BELOW

Under the MSSA, male U.S. citizens and male immigrant non-citizens between the ages of 18 and 26 are required by law to register with the MSSS within 30 days of their 18th birthdays. 50 U.S.C. § 453(a). After they register, men must notify the SSS within 10 days of any changes to any of the information provided on the registration card, including a change of address, until January 1 of the year they turn 21 years of age. Failure to comply with the MSSA can subject a man to five years in prison, a $10,000 fine, and denial of federal employment or student aid. 50 U.S.C. § 462(a).

In *Rostker v. Goldberg,* 453 U.S. 57 (1981) (hereinafter, *Rostker*), several young men, at least some of whom had already registered for the MSSA, challenged the constitutionality of requiring only men to register. The lower courts ruled in favor of the plaintiffs, finding the case was ripe for review and the sex discrimination violated the men's constitutional right to equal protection under the Fifth Amendment. But in a sharply divided Supreme Court decision in which Justice Thurgood Marshall wrote a vigorous dissent joined by Justices William Brennan and Byron White,[2] the

[2] Justice Marshall's lengthy dissent argued not only that the MSSA violated men's rights to equal protection, but that the majority decision "places its imprimatur on one of the most potent remaining public expressions of 'ancient canards about the proper role of women.'"

Court held the gender discrimination in the MSSA does not violate men's rights to equal protection because women are not allowed in any combat role, therefore men and women are not similarly situated with regard to the MSSA. Specifically, the majority in *Rostker* held:

> Since women are excluded from combat service by statute or military policy, men and women are simply not similarly situated for purposes of a draft or registration for a draft.

Supra, 453 U.S. at 58.

On January 24, 2013 Secretary of Defense Leon E. Panetta and Chairman of the Joint Chiefs of Staff Martin E. Dempsey issued a Memorandum that officially rescinded the 1994 ban on women in combat (hereinafter, "2013 Memorandum"). (Exhibit "B" to Motion to Dismiss.) The 2013 Memorandum gave the military departments until May 15, 2013 to submit "detailed plans for the implementation of this directive" and directed that integration of women into combat positions be completed "as expeditiously as possible" and no later than January 1, 2016. The 2013 Memorandum further directed that any recommendations to keep women out of certain units must be personally approved by the Chairman and by the Secretary of Defense and must be "narrowly tailored" and "based on rigorous analysis of factual data."

As the 2013 Memorandum itself notes, many changes had already occurred between the 1981 *Rostker* decision and the 2013 Memorandum. For example, page one of the 2013 Memorandum states in February 2012 the military opened over 14,000 positions previously closed to women, and that, as of January 24, 2013, thousands of women have served alongside men in Iraq and Afghanistan and were exposed to hostile enemy action.

On April 4, 2013, Plaintiffs filed a lawsuit against the SSS and Romo (hereinafter, "Defendants") for injunctive, declaratory, and other relief ordering Defendants to rescind the MSSA's male-only registration requirement, either by requiring both sexes to register for MSSA or by rescinding the MSSA for both sexes, on the ground that the gender-specific registration requirement violates the constitutional right to equal protection, especially now that the ban on women in combat is officially rescinded.

On June 19, 2013, Defendants filed a Motion to Dismiss (hereinafter, "Motion to Dismiss") under Federal Rule of Civil Procedure 12(b)1, 12(b)3, and 12(b)6. Defendants argued *inter alia* that the case is not ripe because the repeal of the ban on women in combat has not been fully implemented and it is not clear whether all military branches will allow women in combat. Defendants requested judicial notice of the 2013 Memorandum, along with other documentary exhibits predating the 2013 Memorandum.

On July 15, 2013, Plaintiffs filed an opposition to the Motion to Dismiss (hereinafter, "Opposition"). Plaintiffs argued *inter alia*: (1) The court cannot know the status of the implementation of the new policy without allowing time for discovery to make that determination (Opposition, pp. 12-13); (2) The new policy allowing women in combat can be implemented simultaneously with a new gender-neutral MSSA (p. 12); (3) Many other changes have occurred since the *Rostker* decision that make this case ripe; and, (4) Granting the Motion to Dismiss without allowing time for discovery is contrary to judicial economy and the policy of hearing cases on their merits (Opposition, pp. 12-13).

On July 29, 2013 the District Court issued an order granting the Motion to Dismiss (hereinafter, "Order"). The District Court recognized how the role of women in combat has changed since *Rostker* and that the 2013 Memorandum rescinds the 1994 ban on women in combat (Order, pp. 3-4), but held the case is not ripe because the 2013 Memorandum "does not order immediate integration of combat units" and thus "substantial uncertainty exists as to whether women will be integrated into combat units as a result of the 2013 Memorandum," and "it is far from certain that all combat positions in all branches will be open to women." (Order, pp. 5-6.) The District Court also held considerations of prudential ripeness dictate the

court must decline to hear the case. (Order, p. 6.) Finally, the District Court found the hardship to Plaintiffs of withholding court consideration is *de minimus* because "males would still be required to register even if the registration requirement included women." (Order, p. 7.)

On September 26, 2013, Plaintiffs filed a timely Notice of Appeal challenging the constitutionality of the Order.

On or around March 1, 2014, Appellants filed a motion for an extension of time to designate the record and to file an opening brief.

On March 7, 2014, this Court allowed Appellants 21 days to file a designation of the record and until June 27, 2014 to file an opening brief

On March 22, 2014, Appellants filed a designation of the Clerk's Transcript. They did not designate a reporter's transcript because they did not feel one was necessary.

On May 13, 2014, Appellants' counsel called and asked the clerk of the appellate department of the District Court about the status of the Clerk's Transcript. The clerk said the docket sheet was sent to the Court of Appeal and under the new system this is sufficient to constitute a Clerk's Transcript, and there was no need to file the pleadings with the Court of Appeal. Appellants' counsel relied on that representation and believes in good faith that this Court has access to the pleadings that he designated for the record.

SUMMARY OF ARGUMENT

FRCP 12(d) requires that if matters outside the pleadings are presented, the motion must be treated as one for summary judgment and "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." This Court has interpreted "matters outside the pleadings" to include documentary exhibits attached to pleadings and has repeatedly held it is reversible error to consider such exhibits first without converting the motion to dismiss into a motion for summary judgment and allowing both sides to gather and present evidence. *Bonilla v. Oakland Scavenger Company,* 697 F.2d 1297, 1301 (9th Cir. 1982).

In this case, the District Court flatly violated FRCP 12(d) by considering exhibits attached to the Motion to Dismiss and even citing to those exhibits in its Order without having converted the Motion to Dismiss into a motion for summary judgment or allowing Plaintiffs the time for discovery that they requested. The discovery was necessary to determine the actual and current status of the implementation of the new policy allowing women in combat. In fact, the most recent exhibit was the six-month old 2013 Memorandum directing that women be integrated into combat roles "as expeditiously as possible." Without discovery, the District Court could not have possibly known the status of the implementation of the new policy.

Moreover, the District Court erred in ruling the case cannot be ripe until women are allowed in *all* combat positions in *all* units. Prior case law held the sex discrimination in the draft survived a constitutional challenge because women, at that time, were barred from all combat units, and thus men and women were not similarly situated regarding the draft. But today, thousands of women are serving in numerous types of combat units, and that is only going to increase. To suggest the constitutional challenge cannot be ripe until all combat positions are open to women is not true and is contrary to the spirit of equal protection. In fact, such a ruling could perpetually bar a constitutional challenge as long as *one* position is closed to women.

The District Court also erred in finding the harm is *de minimus* because men will still have to register for the draft even if Plaintiffs win. First, this is incorrect, because one way to cure the illegality is to eradicate the draft altogether, and the District Court could not have known which avenue Defendants would take. Second, such a finding ignores the many legal ramifications of failure to register, as well as the dignitary harms.

Finally, the District Court erred in applying judicial deference without actually applying the law under FRCP 12(d) by allowing discovery and evaluating the case on its merits as the District Court is requirement by law to do.