ARGUMENT

I. THE DISTRICT COURT VIOLATED FRCP 12(D).

A. Ripeness

The doctrine of Ripeness addresses when the litigation may occur, and is aimed at cases that *do not yet have a concrete impact on the parties* arising from the dispute. *Bova v. Cit of Medford,* 564 F.3d 1093, 1096 (9th Cir. 2009). Ripeness is drawn both from Article III jurisdictional limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. *National Park Hospitality Ass'n v. Department of Interior,* 538 U.S. 803, 808 (2003). Prudential ripeness requires evaluating "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbot Laboratories v. Gardner,* 387 U.S. 136, 149 (1967) (abrogated on other grounds in *Califano v. Sanders,* 430 U.S. 99, 105, 97 S.Ct. 980, 984 (1977). An evaluation of "fitness" for purposes of ripeness requires *factual information*, not just legal conclusions. *Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 736-737 (1998).

B. Rule 12(d)

Motions to dismiss are strongly discouraged. *See Polich v. Burlington N., Inc.,* 942 F.2d 1467, 1422 (9th Cir. 1991). Thus, under FRP 12(d), if matters outside the pleadings are presented on a motion to dismiss, the court

must convert the motion into one for summary judgment under FRCP 56 and "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." As this Court repeatedly held:

> We have held that a district court commits reversible error when it considers matters extraneous to the pleadings while treating the motion as one to dismiss, rather than as one for summary judgment.

Id., 697 F.2d at 1301 (citations omitted). For example, in *Costen v. Pauline's Sportswear, Inc.*, 391 F.2d 81 (9th Cir. 1968), the defendants filed a motion to dismiss and attached an affidavit consisting of two documentary exhibits. The district court granted the motion to dismiss. On appeal, this Court reversed the district court's decision. This Court noted that it does not appear the District Court dealt with the motions as ones for summary judgment, and yet the record does indicate the court considered the exhibits in its ruling that granted the motion to dismiss. *Id.*, at 84-85. Thus, this Court held:

> When affidavits beyond the pleadings are submitted for the moving party and not excluded by the district Judge, as is the case, here, Fed. Rule Civ. P. 12(b) requires that the motion be treated as one for summary judgment pursuant to Rule 56. The District Court did not so treat appellee's motion. The order of dismissal is therefore reversible error.

Id., at 85.

Likewise, in *Elrich v. Glasner,* 374 F.2d 681 (9th Cir. 1967), a district court granted a motion to dismiss and, in its order, stated that it had "considered all of the written documents filed herein. This Court reversed the district court's ruling, stating:

> The affidavit filed by some of the appellees was not excluded by order of the District Court. Hence, the District Court was required to treat the motions of appellees to dismiss for failure of the amended complaint to state a claim upon which relief could be granted as motions for summary judgment, and dispose of them as provided in Rule 56, and the District Judge was required to give all parties reasonable opportunity to present al material facts made pertinent to such motion by Rule 56. The District Court failed to comply with such provision of Rule 12(b).

Id., at 683. Moreover, the failure to convert such a motion in violation of FRCP 12(d) should be reviewed *de novo. Ritza, supra,* 837 F.2d at 369.

C. The District Court violated Rule 12(d) by granting the Motion to Dismiss based on extraneous evidence without allowing Plaintiffs the requested time to gather and present evidence.

In this case, the trial court granted a Motion to Dismiss by relying on matters outside the pleadings without converting the motion into a motion for summary judgment and without allowing Plaintiffs' request for time to conduct discovery. Such discovery would have included, for example, interrogatories and document demands to determine the current status of the implementation of the new policy and the plans for future implementation.

The Motion to Dismiss was filed on June 19, 2013, and requested judicial notice of various exhibits, including, without limitation, the 2013 Memorandum that was issued on January 24, 2013. 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 units "will occur 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 the Secretary of Defense and must be "narrowly tailored" and "based on rigorous analysis of factual data."

In their Opposition, Plaintiffs pointed out that discovery should be allowed to determine the status of the implementation of the new policy. For example, they would have conducted discovery to find out whether any of the military branches had already submitted their reports on the integration of women into combat, and whether any of them had already fully integrated women into combat roles. They would have inquired as to exactly which positions and units allow women and which do not, and what timetables and plans were in place to comply with the 2013 Memorandum.

Without allowing time for discovery, the District Court granted the Motion to Dismiss on the ground that the 2013 Memorandum "does not

order immediately integration of combat units" and "substantial uncertainty exists as to whether women will be integrated into combat units as a result of the 2013 Memorandum."

The District Court did not even attempt to explain the current status of the integration of women into combat roles. Nor could the District Court have known the status, because the only evidence before the court was at least six months old and the District Court did not grant time for discovery. The 2013 Memorandum does not elaborate on all changes that had occurred other than to briefly mention how statutes barring women from combat aircraft and vessels were already repealed. Thus, there is no way the District Court could know what changes had occurred by the time of the 2013 Memorandum, let alone those that had occurred at the time of the Order. The discovery the Plaintiffs requested would have taken time to conduct, perhaps six months or more, and it is likely at least a year or more would have passed by the time a motion for summary judgment would be decided.

Moreover, Plaintiffs argued that the implementation of new policy can go hand in hand with a gender-neutral SSS, in that the two changes can be implemented simultaneously. This was certainly an issue of fact that would require discovery and inquiry of Defendants for their beliefs and explanations of their positions on this. However, Defendants never showed

any evidence in this regard, and the trial court did not expressly make a finding to the contrary. Discovery was clearly needed, including depositions of Defendants and their experts. to make this determination.

While we cannot know the current status of the implementation of the new policy without discovery, one thing we do know based on the record is that the primary basis upon which *Rostker* relied, *i.e.,* that women are barred from all combat, has been officially rescinded as of January 24, 2013 with an order that the integration of women into combat roles be carried out as expeditiously as possible, and that even before that directive, the ban on women in combat had already been steadily eroding since *Rostker* was decided. The actual status of the implementation of the new policy, however, could not be known without the discovery that Plaintiffs requested.

The District Court's Order violated FRCP 12(d) and was contrary to judicial economy, causing the case to be delayed for an untold period of time, requiring an appeal and possibly multiple filings as Plaintiffs attempt to guess the status of Defendants' new policy, which they cannot even know without a pending case and an opportunity to conduct discovery.

In short, the District Court's granting of the Motion to Dismiss based on matters outside the pleadings without allowing discovery violated FRCP 12(d) and constitutes reversible error.

II. THE COURT ERRED IN PRESUMNG THE CASE IS NOT RIPE UNTIL *ALL* COMBAT POSITIONS ALLOW WOMEN.

The Order granting the Motion to Dismiss was based on a finding that "it is far from certain that all combat positions in all branches will be open to women." While the previous Section herein addressed how discovery was needed to make this finding, this Section challenges the very premise that the case cannot be ripe until women are allowed in *all* combat positions.

Even if the District Court had enough evidence to find that not all combat roles currently allow women (and it did not have such evidence), requiring such a finding before the case is considered ripe contradicts the very principle behind equal protection that all persons must be treated equally under the law, and could even perpetually bar any equal protection challenge as long as even *one* combat position is closed to women (or men, light-skinned or dark-skinned, or Jewish or Islamist soldiers for certain military covert, undercover, or tactical operations), which is absurd.

By analogy, if a federal health program provided health services to the public, and some of those services benefited both sexes while others only benefited men (prostate and testicular cancer, for instance), it could not seriously be argued that barring women from the entire program is justified constitutionally because men and women are not similarly situated regarding

the program, and that a constitutional challenge by women cannot be ripe until women can use every one of the services in the program.

Realistically, this case was ripe as soon as women were allowed in *any* combat role. Again, the *Rostker* decision was based on the fact that women were categorically barred from *any* combat roles. The fact that women are now allowed in some combat roles renders a constitutional challenge ripe for review. Women have already served in hundreds of thousands of tours of duty in the Middle East, and as of April 13, 2014 the Army and Marines are already preparing women for combat roles.[3]

Even if it turns out women are not allowed in *all* combat roles, there is no evidence suggesting Defendants cannot, in the event of a draft, sort female draftees into the roles they *are* allowed in and keep them out of the roles they are barred from (or keep males out of roles they are barred from for certain military covert, undercover, or tactical reasons or operations).

Defendants' website provides that, during World War II, Defendants came close to drafting women as military nurses, and the only reason this did not happen is that there was a surge of volunteerism and a draft of

---

[3] "Army, Marines prepare women for combat," www.foxnews.com/us/2014/04/13/marines-army-prepare-women-for-combat/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+foxnews%2Fnational+%28Internal+-+US+Latest+-+Text%29

women nurses was not needed.[4] Certainly, if Defendants can sort nurses from combat soldiers, they can also sort female and male soldiers into the combat units they are allowed in today.

Similarly, Defendants' website provides that if a draft occurred, Defendants would have to physically and mentally evaluate the men to determine which ones are capable of combat. Specifically, it states:

> It's important to know that even though he is registered, a man will not automatically be inducted into the military. In a crisis requiring a draft, men would be called in sequence determined by random lottery number and year of birth. Then, they would be **examined for mental, physical and moral fitness** by the military before being deferred or exempted from military service or inducted into the Armed Forces.

Id. (emphasis added). If Defendants have to sort capable versus incapable men during a draft, why can they not do the same with women? Tens or hundreds of thousands of women today compete in triathlons, weightlifting and body building contests, marksmanship championships, professional boxing matches, and cage fighting. By contrast, some studies have found men are in a silence health crisis. Today men make the vast majority of homeless adults and suicide deaths and have higher mortality rates than women for almost all 15 leading causes of death. The idea that men in the

---

[4] <www.sss.gov/wmbkgr.htm>

general population are vastly more combat-ready than their female counterparts is an untrue, out-of-date stereotype.

The MSSA even requires disabled men who live at home to register with the MSSA if they can reasonably leave their homes and move about independently.[5] How is it that a disabled man must register but a female professional boxer or cage fighter does not? Page 5 of the 2012 Report expresses an intent to ensure personnel are assigned positions based on abilities rather than gender. Why cannot a draft apply that policy just because some combat positions do not allow women?

Even before the 2013 Memorandum, women were increasingly allowed in combat roles. In fact, Exhibit "A" to Defendants' Motion to Dismiss is a February 2012 Department of Defense Report (hereinafter, "2012 Report") that states Defendants already rescinded many portions of the 1994 policy excluding women from any combat unit below the brigade level, long before the 2013 Memorandum. For example, it states:

> Women are now serving at the same operating locations in Afghanistan as some direct ground combat units, without being assigned to positions restricted by co-location.

Id., p. 3/34. The 2012 Report goes on to explain that modern battlefields no longer have clearly defined front line and safer rear areas, and thus there is

[5] https://www.sss.gov/fswho.htm

"no compelling reason" to preclude women from units or positions that require co-location in ground combat units. *Id.*, p. 3/34. It further provides that, since *Rostker*, statutes prohibiting women from combat aircraft and vessels have mostly been repealed (p. 15/46) and that the Secretary of Defense changed the 1994 policy to allow the Army, Marine Corps, and the Navy to open positions at the battalion level of direct ground combat units in certain specialties (p. i/29). Clearly, women are *already* allowed in combat, and the ruling that the case cannot be ripe until all combat positions and units allow women was erroneous and should be reversed.

III. THE HARDSHIP IS NOT *DE MINIMUS.*

For purposes of ripeness, an evaluation of hardship to the parties "does not mean just anything that makes life harder; it means hardship of a *legal* kind ..." *Colwell v. Department of Health & Human Services,* 558 F.3d 1112, 1128, (9th Cir. 2009) (emphasis added).

In this case, the District Court's finding that the harm to Plaintiffs is *de minimus* simply because males would still be required to register even if the registration requirement included women is incorrect. First, a ruling favorable to Plaintiffs would mean Defendants can cure the illegality either by requiring both sexes to register *or* by eliminating the MSSA, and the trial court cannot know which avenue Defendants would take.

Second, the harms to Plaintiffs are very real and tangible as a matter of law. Men who fail to register can be imprisoned, fined, and denied federal employment and financial aid. And these penalties are not unrealistic. They happen. For example, in *Elgin v. Bush,* 641 F.3d 6 (1st Cir. 2011), three men were terminated from their federal employment for failing to register for the MSSA when they were young. One of them had been homeless most of his life including during the years he was required to register. This is a clear example of indisputable, concrete harm that the MSSA can inflict directly upon men but not on women.

Even aside from legal penalties, there are psychological and dignitary harms. The idea that men are not harmed by the MSSA's requirement entails that no young men ever actually fear they might drafted into a war. This is quite, at best, naïve. And a military draft today is not unrealistic in light of current global affairs such as in Syria, Iraq, the Ukraine, Israel, Israel, and other parts of the world. The likelihood of United States military intervention will increase as the world politically globalizes and warfare technology becomes more and more advanced. In no way it is a *de minimus* harm to require citizens to register to be on-call soldiers in such a world.

In fact, the District Court in *Rostker* clearly recognized this when it ruled in favor of the male plaintiffs. In its analysis of ripeness, the District

Court pointed out, for example, how men must not only register for the draft but must continually report their whereabouts, which the court found enough of an intrusion on citizens' rights that it warranted immediate adjudication of the constitutional question. Specifically, the District Court held:

> Defendants' argument on both standing and ripeness can be reduced to their assertion that registration alone is so inconsequential and so minor a requirement that we should not adjudicate this case at this time. Free people abhor any governmental intrusion into privacy and such intrusions are tolerated only as justified by the needs of society. We will accept no argument that intrusions are inconsequential and beneath the recognition of a federal court. The concept that the government can, without justification, require any group of Americans to register and continually report their whereabouts is constitutionally unacceptable. The reasons for any intrusions by the government must always be open to scrutiny under the Constitution. The justification for registration in the instant case is the need to conscript armed forces in all orderly manner to meet the defense needs of the nation. This purpose is clearly valid. However, the need to register men only, and the need not to register women, is not so apparent. Registration is a sufficient intrusion on the rights of any citizen to allow this court to adjudicate the constitutionality of that registration. We need not wait, and should not wait, until the governmental intrusion on the individuals' civil rights reaches maximum proportions and the nation is in a time of crisis. The case is ripe.

Goldberg v. Rostker, 509 F. Supp. 586, 592 (DC Penn 1980) (overturned on other grounds in *Roster, supra*). While *Rostker* reversed *Goldberg* on other grounds, *Rostker* never addressed ripeness. Thus, although *Goldberg* is not legally binding, its reasoning on ripeness is noteworthy and applicable here,

and the principles expressed therein are no less true today than they were when *Goldberg* was decided in 1980.

Even aside from the intrusions involved in the MSSA's draft requirements, sex discrimination in the law is harmful in and of itself and carries "the baggage of sexual stereotypes." *Orr v. Orr,* 440 U.S. 268, 283 (1979). Legislative gender classifications are inherently suspect and subject to heightened scrutiny. *Frontiero v. Richardson,* 411 U.S. 677, 688 (1973). For example, in *Frontiero,* when the Supreme Court held equal protection requires the military to provide females the same housing and medical benefits as males, Justice William J. Brennan discussed the ruling in light of the long history of sex discrimination in the United States, stating:

> Traditionally such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage.

Id. at 684.

It is precisely because sex discrimination against one sex fosters harmful sexual stereotypes about *both* sexes that in *Rostker* both the National Organization for Women, and Men's Rights, Inc., filed amicus briefs in favor of the male plaintiffs, arguing that equal rights for one sex entails equal rights for the other, or else there is no equality.

Bestselling author Warren Farrell aptly puts it this way:

> Requiring only males to register for the draft in case the country needs more soldiers is as sexist as requiring women to register to get pregnant in case the country needs more babies.

("The Myth of Male Power; Why Men Are the Disposable Sex.")

Similarly, in a rather profound discussion about harmful gender stereotypes, the California Supreme Court unanimously held:

> Men and women alike suffer from the stereotypes perpetrated by sex-based differential treatment. When the law emphasizes irrelevant differences between men and women, it cannot help influencing the content and the tone of the social, as well as the legal, relations between the sexes. ... As long as organized legal systems . . . differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote. When men and women are prevented from recognizing one another's essential humanity by sexual prejudices, nourished by legal as well as social institutions, society as a whole remains less than it could otherwise become.

Koire v. Metro Car Wash, 40 Cal.3d 24, 34-35 (1985). *Koire* held that bars, restaurants, and car washes' "Ladies' Day" or "Ladies' Night" promotions that charged male patrons more than female patrons for the same service violated the Unruh Civil Rights Act, which prohibits unequal treatment based on sex, race, or other protected personal characteristics.

The finding that the harm is *de minimus* overlooked the real harms caused by the MSSA. It was clearly erroneous and should be reversed.

IV. THE COURT MISAPPLIED JUDICIAL DEFERENCE

While *Rostker* applied deference to Congress in military affairs, the Supreme Court in *Rostker* also said: "None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs," and, "We of course do not abdicate our ultimate responsibility to decide the constitutional question . . . ." *supra,* 453 U.S. at 68. In other words, deference to Congress in no way abrogates the judiciary's utmost sworn duty to uphold constitutional principles.

In this case, the District Court cited judicial deference to Congress on military affairs even when the District Court could not know the military's current position absent discovery. Again, the 2013 Memorandum directed that the integration of women into combat roles occur as expeditiously as possible and no later than January 1, 2016, and it provided that any recommendation to keep certain units closed to women must be made in writing by May 15, 2013 and must be "narrowly tailored" and based on "rigorous analysis of factual data." *Id.,* p. 1. If any military branch submitted such a recommendation, there is no way the court could have known, because Plaintiffs' request for time to conduct discovery was not

allowed. Discovery was needed to inquire into the exact positions of the various military branches regarding the integration of women in combat before the District Court could defer to Congress.

To decide such a monumental issue of equal rights on a Motion to Dismiss, without allowing time for discovery, was a clear abdication of the District Court's duty to decide the constitutional question. The Order should be reversed.

CONCLUSION

Just as the sex discrimination against women in combat has been officially rescinded, the sex discrimination against men in the MSSA should also be rescinded. At a minimum, Plaintiffs are entitled to an evidentiary evaluation of the ripeness of their constitutional challenge, and entitled to discovery to gather their evidence.

Respectfully submitted,

Law Office of Marc E. Angelucci

Date: 6/24/14 By: 

Marc E. Angelucci, Esq.
Attorney for Plaintiffs and Appellants,
James Lesmeister and National Coalition For Men

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), undersigned counsel certifies that this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

1. Exclusive of the portions exempted by 5TH CIR. R. 32.2.7(b)(3), this brief Contains 6,662 words printed in a proportionally spaced typeface.

2. This brief is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes produced by Corel WordPerfect 6.1 software.

3. Upon request, undersigned counsel will provide an electronic version of this brief and/or a copy of the word printout to the Court.

4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32.2.7, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

Date: 6/24/14

By: 

Marc E. Angelucci, Esq.

PROOF OF SERVICE

I am over the age of 18 and not a party to this case. I am a resident of or employed in the county where the mailing occurred. My business address is 11734 Wilshire Blvd., Ste. C903, Los Angeles, CA 9025, and my phone number is 626-319-3081. On the date indicated below, I served a true copy of the following documents:

- Appellants' Opening Brief

by way of:

✓ Regular mail: I enclosed said documents in a sealed envelope addressed to each address below and deposited the envelope in the United States mail with first class postage fully prepaid in Los Angeles, California.

___ Overnight mail: I sent the documents by Federal Express overnight mail to:

___ Certified mail: I send the documents certified mail to;

Bryan Diederich, Esq.
U.S. Attorney's Office
Central District of California
312 N. Spring St., Ste. 1200
Los Angeles, CA 90012
Bryan.Diederich@usdoj.gov
(202) 305-0198

U.S. Attorney General
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

Lawrence G. Romo, Director
Selective Service System
1515 Wilson Blvd., Ste. 600
Arlington, VA 22209

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and corrected. Executed at Los Angeles, California.

Date: 6/24/14

Marc E. Angelucci