No. 19-20272

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL COALITION FOR MEN; JAMES LESMEISTER, Individually and on behalf of others similarly situated; ANTHONY DAVIS,

Plaintiffs-Appellees

v.

SELECTIVE SERVICE SYSTEM; DONALD BENSON, as Director of Selective Service System,

Defendants-Appellants

On Appeal from

United States District Court for the Southern District of Texas

4:16-CV-3362

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS; AMERICAN CIVIL LIBERTIES UNION; 9TO5, NATIONAL ASSOCIATION OF WORKING WOMEN; A BETTER BALANCE; GENDER JUSTICE; KWH LAW CENTER FOR SOCIAL JUSTICE AND CHANGE; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION; NATIONAL WOMEN'S LAW CENTER; WOMEN'S LAW CENTER OF MARYLAND; and WOMEN'S LAW PROJECT IN SUPPORT OF PLAINTIFFS-APPELLEES

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Pursuant to Fifth Circuit Rules 29.2 and 28.2.1, the undersigned counsel of record for *amici* certify that the parties' list of persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case, and that list is complete, to the best of undersigned counsel's knowledge. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. American Civil Liberties Union Foundation of Texas
2. American Civil Liberties Union
3. 9to5, National Association of Working Women
4. A Better Balance
5. Gender Justice
6. KWH Law Center for Social Justice and Change
7. National Organization for Women Foundation
8. National Women's Law Center
9. Women's Law Center of Maryland
10. Women's Law Project

Dated: October 18, 2019

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INTEREST OF *AMICI CURIAE*

Amici are civil rights groups and public interest organizations committed to preventing, combating, and redressing sex discrimination and protecting equal rights across genders in the United States. More detailed statements of interest are contained in the accompanying appendix.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In this lawsuit, Appellees challenge the requirement in the Mandatory Selective Service Act ("MSSA") that men—and only men—register for the draft as sex-based discrimination forbidden by the Equal Protection Clause. The District Court correctly analyzed the MSSA according to the heightened scrutiny standard long applicable to gender-based classifications, finding that the MSSA was not substantially related to the achievement of an important governmental objective. *Nat'l Coalition for Men v. Selective Serv. Sys.*, 355 F. Supp. 3d 568 (S.D. Tex. 2019) ("Opinion").

For almost half a century, it has been axiomatic that discrimination on the basis of sex triggers the application of the heightened scrutiny test applied by the District Court. However, Appellants now seek to persuade this Court that a different standard of review should reply. They argue for a rational basis approach,

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure and Local Rule 29.1, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

mistakenly arguing that *Rostker v. Goldberg*, 453 U.S. 57 (1981), stands for the proposition that "Congress is entitled to extremely wide deference when it legislates with regard to military affairs, even when Congress draws distinctions that would otherwise trigger heightened scrutiny in the civilian context." Appellants' Br. at 20. Appellants further argue, erroneously, that their hypothesized, *post hoc* justifications about women's interest in and capacity for serving in combat roles survive even heightened scrutiny.

Amici respectfully request that this Court reject Appellants' rational basis argument and affirm the heightened scrutiny approach that was properly used by the District Court below. *Amici* wish to make clear that their submission of this brief in no way implies support for or an endorsement of the broader mission or tactics of Plaintiff-Appellee National Coalition for Men ("NCM"). *Amici* write solely to challenge the government's arguments that this Court should not apply a heightened scrutiny approach in the instant case, and to challenge a selective service system that exempts women due to archaic stereotypes about their interests and capacities.

ARGUMENT

I. The District Court Correctly Held that *Rostker* Does Not Foreclose Appellee's Claim

Decades of precedent, including *Rostker v. Goldberg,* dictate that discrimination on the basis of sex should trigger a heightened scrutiny analysis by

this and every court. Moreover, because the factual premise on which *Rostker* rested—women's exclusion from combat—no longer exists, *Rostker*'s approval of MSSA's gender-based classification is no longer controlling.

a. *Rostker* Applied Heightened Scrutiny to Sex Classifications in the Military

Appellants misleadingly characterize *Rostker* as applying rational basis scrutiny to the government's male-only draft registration requirement. Appellants' Br. at 20. To the contrary, *Rostker* properly applied heightened scrutiny, even though the MSSA concerned military policy. Accordingly, the District Court correctly ruled that the "dispositive question here is whether the MSSA both serves important governmental objectives and is substantially related to the achievement of those objectives." Opinion at 578.

By the time *Rostker* was decided in 1981, the bedrock principle of applying heightened scrutiny to sex-based classifications was already in place, recognizing that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973) (striking down, on equal protection grounds, federal rules granting more generous dependent benefits to male servicemembers than to female servicemembers). Accordingly, the Supreme Court has repeatedly held that "[t]o withstand constitutional challenge . . . classifications by gender must serve

important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976) (rejecting, on equal protection grounds, state law establishing higher drinking age for men than women); *see also Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (rejecting equal protection challenge to civil service statute favoring veterans; "law[s] overtly or covertly designed to prefer" one sex over another "require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment"); *Califano v. Goldfarb*, 430 U.S. 199, 210-11 (1977) (finding rule granting automatic Social Security survivorship benefits to widows but not widowers violates equal protection and due process); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (granting due process challenge to rule granting automatic Social Security dependent survivor benefits to widows with children but not widowers); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (ruling that, by "giv[ing] a mandatory preference to members of either sex over members of the other" for "arbitrary" reasons and "providing dissimilar treatment for men and women who are . . . similarly situated," an Idaho probate code provision favoring men over women "violate[d] the Equal Protection Clause").

The Supreme Court applied such heightened review even when the disputed gender-based classification concerned the military. *See Frontiero*, 411 U.S. at 688,

690 (after affirming that sex classifications are subject to a "stricter standard of review" marking a "departure from 'traditional' rational-basis analysis," ruling that federal rules granting more generous dependent benefits to servicemen than servicewomen, based solely on administrative convenience, "necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution]") (internal citation omitted); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (rejecting due process challenge to federal statute concerning promotion in the Navy because the gender classification at issue was not based on "archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service").[2]

[2] In *United States v. Virginia*, the Supreme Court once again applied heightened scrutiny in the military context, finding that "the most challenging military school in the United States," the Virginia Military Institute, violated the Equal Protection Clause by excluding female cadets. 518 U.S. 515, 548 (1996). Declaring that "all gender-based classifications today warrant heightened scrutiny," *id.* at 555, the Court rejected Virginia's argument that the judiciary should defer to Congress' control of the military. Instead, the Court drew upon decades of precedent to hold that even in the military context, gender-based government action must be supported by an "exceedingly persuasive justification." *Id.* at 531. Of note, Justice Scalia directly relies on *Rostker* for "the reasoning in our other intermediate-scrutiny cases." *Id.* at 573 (Scalia, J., dissenting).

Although the government here attempts to limit the holding of *Virginia* to the "civilian context[]," its interpretation is incorrect. Appellants' Br. at 27. The Court's extensive analysis is framed in the context of the "rigorous military training for which VMI is famed." 518 U.S. at 548. The Court discusses the "physical rigor, mental stress, minute regulation of behavior, and indoctrination in desirable values" that are the "hallmark of VMI's citizen soldier training." *Id.* at 549 (citations omitted). Making a direct comparison with the situation at issue in this case,

The *Rostker* Court expressly referenced—and adopted—such precedents in examining the MSSA. *Rostker*, 453 U.S. at 67, 69-70, 74, 79 (citing *Schlesinger*, *Reed*, *Craig*, *Califano*). The Supreme Court's conclusion that the MSSA's gender-based classification was constitutional rested not, as Appellant contends, on the Court's applying a lower, more deferential standard of review because the case concerned the military, Appellants' Br. at 26-30, but instead on the Court's ruling that "'the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated' in this case" due to women's exclusion from combat roles. 453 U.S. at 79 (citing *Schlesinger*) (quoting *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981)).[3]

In reaching this conclusion, though *Rostker* undeniably referenced the deference due to Congress in the context of national defense and military affairs,

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Justice Scalia states that "the tradition of having government-funded military schools for men is as well rooted in the traditions of this country *as the tradition of sending only men into military combat*." *Id.* at 569 (Scalia, J., dissenting) (emphasis added). *Virginia* reinforces the extensive Supreme Court precedent requiring government sex classifications to be subject to heightened scrutiny, including in the arena of military affairs.

[3] The government grossly mischaracterizes *Schlesinger* as applying rational basis review because of the Court's choice of adjective; the opinion describes Congress' different promotional rules for male and female Navy officers as "quite rational." Appellants' Br. at 28. To the contrary, *Schlesinger* endorsed the *heightened* scrutiny approach required by precedent. *Schlesinger*, 419 U.S. at 508 (citing *Frontiero* and *Reed*). Its refusal to find the promotion policy unconstitutional was based not on the application of a lower scrutiny standard but upon the distinct facts of the case—specifically, the *remedial*, not invidious, nature of the disputed gender classification: "The different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." *Id.* at 508. *Accord Rostker*, 453 U.S. at 71 ("*Schlesinger v. Ballard* did not purport to apply a different equal protection test because of the military context.").

contrary to Appellants' contentions, it did so through a heightened scrutiny lens. The Court first noted, citing *Craig*, that "[n]o one could deny that . . . the Government's interest in raising and supporting armies is an 'important governmental interest.'" *Rostker*, 453 U.S. at 70. It then found that the government had satisfied the second half of the heightened scrutiny analysis:

> Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft. Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. The exemption of women from registration is *not only sufficiently but also closely related* to Congress' purpose in authorizing registration.

Id. at 78-79 (emphasis added). Notwithstanding this conclusion, *Rostker* was emphatic about the limitations of its generosity to the government: "None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. . . . Deference does not mean abdication." *Id.* at 67, 70.

Notably, Appellants fail to acknowledge that the Fifth Circuit already has interpreted *Rostker* as applying heightened scrutiny and has invoked this same standard in every government sex classification that it has considered. Indeed, the government does not cite a single case in which this Court has applied rational basis review to gender-based government action—nor can it, because there are none. In *Prudential Insurance Co. of America v. Moorhead*, the Fifth Circuit explicitly referred to *Rostker* as "an intermediate scrutiny case." 916 F.2d 261, 266 (5th Cir. 1990). The Court upheld part of the Servicemen's Group Life Insurance

Act, which provided that "illegitimate children" may be eligible for life insurance benefits, but only if they take appropriate action during the insured father's lifetime. *Id.* at 263. Citing *Rostker*, the Fifth Circuit explained that "the question we must decide *in an intermediate scrutiny case* is whether the alternative chosen by Congress denies equal protection of the laws." *Id.* at 266 (emphasis added). Thus, this Court has already considered—and implicitly rejected—the premise relied upon by Appellants in the instant case.

For all of the foregoing reasons, even assuming *Rostker*'s outcome is deemed to be controlling—which, as discussed further below, it is not—this Court should examine the MSSA's facial gender-based classification under the heightened scrutiny standard as historically, and appropriately, applied in such cases.

b. Because Women Are No Longer Prohibited from Serving in Combat, *Rostker* Is No Longer Controlling

Because *Rostker*'s conclusion that the MSSA's male-only requirement passed constitutional muster rested squarely on women's exclusion from combat, the fact that such exclusion no longer exists vitiates the decision's controlling force.

In *Rostker*, the Court surveyed the MSSA's legislative history and deemed the combat ban to be the central justification for exempting women from registration:

> The existence of the combat restrictions clearly indicates the basis for Congress' decision to exempt women from registration. The purpose of registration was to prepare for the draft of combat troops. Since women are excluded from combat, Congress concluded that they would not be needed in the event of a draft, and therefore decided not to register them.

453 U.S. at 77. With that recognition, the Court concluded that women's ineligibility for combat "fully justifie[d]" their exclusion. *Id.* at 79. Accordingly, the District Court correctly found that because the combat ban was lifted in 2013, "[t]he dispositive fact in *Rostker*—that women were ineligible for combat—can no longer justify the MSSA's gender-based discrimination." Opinion at 577.

Appellants' insistence that this fundamental policy change "has no bearing on this Court's inquiry" is specious. Appellants' Br. at 22. In assessing whether Congress' stated justification for a gender-based draft was "substantially related" to the important government interest in raising and supporting its armed forces, the Supreme Court relied squarely on women's exclusion from combat roles:

> [I]t is apparent that Congress was fully aware not merely of the many facts and figures presented to it by witnesses who testified before its Committees, *but of the current thinking as to the place of women in the Armed Services*. In such a case, we cannot ignore Congress' broad authority conferred by the Constitution to raise and support armies when we are urged to declare unconstitutional its studied choice of one alternative in preference to another for furthering that goal.

Rostker, 453 U.S. at 70, 71-72 (emphasis added). As the District Court correctly ruled, "if there ever was a time to discuss 'the place of women in the Armed Services,' that time has passed." Opinion at 582.[4]

c. Appellants' Demand for Deferential Review Is Erroneous

Finally, Appellants argue that regardless of the *Rostker* case, this Court owes the government deferential review. Appellants' Br. at 26-30. They put forward two cases in support of this proposition, and both are unavailing. As to *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), which applied rational basis review to the government's travel ban, the case is inapposite for three reasons. First, the Court in *Hawaii* declared the disputed rule "neutral on its face" and "facially neutral toward religion," which the Court expressly noted "inform[ed] [its] standard of review." *Id.* at 2418. Plainly, the MSSA is in no way neutral; it facially distinguishes on the basis of sex. Second, to the extent that *Hawaii* concerned the constitutional rights of United States residents or citizens because their relatives were barred entry under the travel ban, the Court made plain that it had engaged only in a "circumscribed judicial inquiry," citing the President's authority over the

[4] The fact that Congress recently declined to amend the MSSA and instead created a Commission to study the continuing viability of a sex-segregated draft does not undermine this conclusion, as Appellants urge. Appellants' Br. at 33. Rather, this Court should adopt the conclusion of the District Court that those actions are insufficiently illuminating to determine the outcome here. Opinion at 579 n.5 ("[B]ased on the record before the court, Congress generated very little documentation on why it ultimately declined to amend the MSSA. . . . Thus, the court must primarily rely on congressional records from previous debates on the MSSA.")

"admission and exclusion of foreign nationals" to and from the country, an interest that is absent in the present case. *Id.* at 2418-19.[5]

As to the other case relied on by Appellants, *Fiallo v. Bell*, 430 U.S. 787 (1977), their portrayal of the Court having applied a standard "akin to rational basis review in the closely related immigration context, even though the Court was considering a claim of sex discrimination," Appellants' Br. at 29, is also off-base. In that case, the Court analyzed Congress' power to determine who "may lawfully enter the country"—a narrow context, and one not presently at issue. *Fiallo*, 430 U.S. at 794. Appellants' attempt to shoehorn particular immigration cases into the very different context at issue in this case is further undercut by the fact that even in the immigration and citizenship realm, when sex discrimination is involved, the Supreme Court has found heightened scrutiny to be the appropriate standard of review—precedent that Appellants tellingly fail to acknowledge. In *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), for example, the Court found that having different residency requirements for transmitting citizenship to a child born abroad depending on whether the citizen parent was male or female was unconstitutional. In so doing, it relied on the fact that the law at issue was "of the same genre as the classifications we declared unconstitutional in *Reed, Frontiero,*

[5] Since *Hawaii* was issued, a handful of appellate courts and several lower courts have rejected arguments by federal agencies that the decision mandates rational basis review in various contexts, as the District Court correctly did in this case. Opinion at 577.

Wiesenfeld, Goldfarb, and *Westcott*. As in those cases, heightened scrutiny is in order." *Id.* at 1690. Appellants' arguments fail, both in their interpretation of *Hawaii and Fiallo* specifically and in their attempt to analogize to immigration and nationality case law more generally.

II. Under the Appropriate Heightened Scrutiny Analysis, the MSSA Violates the Equal Protection Clause

In support of the MSSA's gender-based distinction, Appellants appear chiefly to rely on "hypothesized or invented *post hoc*" rationalizations about Congress' intentions that have long been recognized to fall short of being "substantially related" to the important government interest of maintaining the armed services. *Virginia*, 518 U.S. at 533. Appellants' suppositions and conjecture are further riddled with precisely the sort of "archaic and overbroad generalizations" about women's capacities that will not satisfy heightened scrutiny, as even *Rostker* agreed. *Rostker*, 453 U.S. at 71 (quoting *Schlesinger*, 419 U.S. at 508). For example, Appellants argue:

- "Congress quite understandably *could have* distinguished between the two sexes for purposes of draft registration," Appellants' Br. at 33 (emphasis added);
- Women's hypothesized unwillingness or inability to serve in combat roles "*could have* particular resonance if military training resources were stretched thin in the event of a sudden and unexpected urgent need to train newly-drafted troops," *id.* at 34 (emphasis added);
- Congress "*could rationally have understood* that making women eligible to volunteer for combat positions would not automatically render them just as

likely as men to serve in all combat positions. That was certainly true in 1980 (as well as today) when Congress *could have expected* that physical differences between men and women might mean that women were less likely to serve effectively in at least certain kinds of combat roles (such as those requiring certain levels of physical strength), even if their sex did not render them categorically ineligible for those roles," *id.* at 34-35 (emphasis added);

- Physical differences between men and women "*likely informed* Congress' decision to 'recognize[ ] and endorse[ ]' the then-current exclusion of women from combat positions," *id.* at 35 (emphasis added);

- Physical differences "also *likely informed* Congress' decision in 1980 not to require that any changes in women's registration status occur in lockstep with changes in women's eligibility for combat positions," *id.* (emphasis added);

- "Even assuming [that concerns that women servicemembers would not be welcome in certain parts of the world] could eventually be mitigated (a premise Congress understandably *could have been* uncertain of), Congress *could rationally have understood* that the issues either had not yet been successfully mitigated, or would require the expenditure of significant resources to mitigate," *id.* at 35-36 (emphasis added).

The District Court correctly concluded that each of Appellants' hypothesized justifications for a male-only draft appears to be the "'accidental by-product of a traditional way of thinking about females,' rather than a robust, studied position," Opinion at 581-82 (internal citations omitted), and therefore do not survive heightened scrutiny. *See also Virginia*, 518 U.S. at 533 (gender-based classifications will not survive constitutional review if they "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Morales-Santana*, 137 S. Ct. at 1690 (to satisfy heightened review, "the

[gender-based] classification must substantially serve an important governmental interest *today*"—it is insufficient that the law served an important interest in the past) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) (emphasis in original)).

Unquestionably, the combat ban that formed the basis of Congress' decision in 1980 itself rested on overbroad generalizations about the different talents, capacities, or preferences of males and females. But the lifting of that ban in 2013 should be seen for what it was: a rejection of such generalizations and an acknowledgment that women are capable of formally assuming all roles in our nation's armed forces.[6] Contrary to Appellants' disingenuous suggestion that when the integration of all branches was ordered in 2015 then-Secretary of Defense Ash Carter "explained how the new policy would *not* result in an immediate 'full integration,'" Appellants' Br. at 35 (emphasis added), Secretary Carter was emphatic that integration should be complete, and should move forward expeditiously. Indeed, Secretary Carter rejected a request by the Marine Corps to maintain its ban on women in combat, instead directing, "[a]nyone, who can meet

[6] Despite the historic restrictions on their participation, women always have served in the military defense of the country. In the Revolutionary and Civil Wars, women served as nurses, spies, and cooks, and some fought, disguising themselves as men. Approximately 34,000 women served in uniform in World War I, mostly as nurses. In World War II, that number increased tenfold to 400,000 women serving in uniform, primarily in separate women's auxiliary and other services. *See generally* Erin Blakemore, "How Women Fought Their Way Into the U.S. Armed Forces," *History.com* (Feb. 26, 2019), *available at* https://www.history.com/news/women-fought-armed-forces-war-service.

operationally relevant and gender-neutral standards, regardless of gender, should have the opportunity to serve in any position." Memorandum from Secretary of Defense to Secretaries of the Military Departments on Implementation Guidance for the Full Integration of Women in the Armed Forces (Dec. 3, 2015), *available at* https://dod.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf. Secretary Carter further directed the Secretaries of the Military to submit final, detailed implementation plans for the opening of all military occupational specialties, career fields, and branches for accession by women for approval no later than January 1, 2016. *Id.*

Plainly, as the District Court concluded, "while historical restrictions on women in the military may have justified past discrimination, men and women are now 'similarly situated for purposes of a draft or registration for a draft.'" Opinion at 582 (quoting *Rostker*, 453 U.S. at 78).

CONCLUSION

For the foregoing reasons, *amici* submit that the Fifth Circuit should affirm the District Court's correct conclusion that heightened scrutiny should apply to this case, and that under that rigorous standard, the MSSA is unconstitutional.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation, as provided in Fed. R. App. P. 29(a)(5) because, exclusive of the exempted portions of the brief, the brief contains 4,909 words.

2. This brief complies with the type-face requirements, as provided in Fed. R. App. P. 32(a)(5), and the type-style requirements, as provided in Fed. R. App. P. 32(a)(6), because the brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

3. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: October 18, 2019

/s/ *Andre Ivan Segura*
Andre Ivan Segura
ACLU FOUNDATION OF TEXAS, INC.

CERTIFICATE OF SERVICE

This will certify that the foregoing brief was filed electronically and served on October 18, 2019 by the Court's ECF system upon all counsel of record.

/s/ *Andre Ivan Segura*
Andre Ivan Segura
ACLU FOUNDATION OF TEXAS, INC.

APPENDIX: INTERESTS OF AMICI CURIAE

The **American Civil Liberties Union Foundation of Texas** ("ACLU of Texas") is a nonpartisan organization with approximately 56,000 members across the state. Founded in 1938, the ACLU of Texas is headquartered in Houston and is one of the largest ACLU affiliates in the nation. The ACLU of Texas is the state's foremost defender of the civil liberties and civil rights of all Texans as guaranteed by the U.S. Constitution and our nation's civil rights laws. The ACLU of Texas regularly files *amicus* briefs on civil rights and constitutional issues, including cases before this Court.

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to defending the principles of liberty and equality embodied in the Constitution. The ACLU Women's Rights Project ("WRP"), co-founded in 1972 by Ruth Bader Ginsburg, is a leader in the effort to ensure women's full equality in American society, including in the armed services and in combat. Under Ginsburg's leadership, beginning with *Reed v. Reed*, 404 U.S. 71 (1971), WRP litigated the foundational Supreme Court jurisprudence that won recognition of the heightened scrutiny applicable to constitutional challenges to gender classifications, including servicewomen's right to receive equal military benefits. *See Frontiero v.*

Richardson, 411 U.S. 677 (1973). As direct counsel and as *amicus*, WRP also long has advanced male litigants' use of the heightened scrutiny doctrine to address sex stereotypes, both inside and outside the military context. *See*, *e.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Struck v. Sec'y of Defense*, 409 U.S. 1071 (1972). Most recently, WRP challenged the U.S. Department of Defense's ban on women serving in combat roles, a lawsuit that remains pending. WRP is dedicated to ensuring that talented, experienced, and skilled women are not excluded from applying or serving in the U.S. military, in any role, solely because of their gender.

9to5, National Association of Working Women is a 47-year-old national membership organization of directly impacted women dedicated to achieving economic justice and ending all forms of discrimination. 9to5 has a long history of supporting local, state, and national measures to combat discrimination. The outcome of this case will directly affect our members' and constituents' rights and economic well-being, and that of their families.

A Better Balance is a national non-profit legal advocacy organization based in New York, NY and Nashville, TN founded with the goal of ensuring that workers can meet the conflicting demands of their jobs and family needs, and that women and mothers can earn the fair and equal wages they deserve, without

compromising their health or safety. Through legislative advocacy, litigation, research, and public education, A Better Balance has advanced many pioneering solutions on the federal, state, and local levels designed to combat gender-based discrimination and level the playing field for women and families. The organization also runs a free legal clinic in which the discriminatory treatment of women in violation of Title VII and other state and local laws can be seen firsthand.

Gender Justice is a nonprofit legal advocacy organization based in Minnesota that works to advance gender equity through the law. As part of its litigation program, Gender Justice provides legal advocacy as *amicus curiae* in cases involving issues of gender discrimination and also represents individuals in litigation. Gender Justice has represented men, women, and non-binary people who have experienced sex discrimination. Gender Justice has an interest in eliminating all forms of gender oppression and knows that people of all genders suffer where there is gender injustice.

KWH Law Center for Social Justice and Change is a non-profit Law Center focused on advancing economic opportunities and equality for women and girls in the South and Southwest. It works to ensure that women and girls have equal access to the full range of protections provided under the United States

Constitution. Accordingly, the Law Center is uniquely qualified to comment on the decision to be rendered in this case.

The **National Organization for Women Foundation** ("NOW Foundation") is a 501(c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing equal opportunity, among other objectives, and works to end sex-based pay discrimination.

The **National Women's Law Center** is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination. Since its founding in 1972, the Center has focused on issues of key importance to women and their families, including economic security, employment, education, and health, with particular focus on the needs of low-income women and those who face multiple and intersecting forms of discrimination. The Center has participated as counsel or *amicus curiae* in a range of cases before the Supreme Court and the federal Courts of Appeals to secure equal treatment and opportunity for women in all aspects of society through enforcement of the Constitution and our laws prohibiting sex discrimination.

The **Women's Law Center of Maryland, Inc**. is a nonprofit, public interest, membership organization of attorneys and community members with a goal of improving and protecting the legal rights of women. Established in 1971, the Women's Law Center achieves its mission through direct legal representation, research, policy analysis, legislative initiatives, education and implementation of innovative legal-services programs to pave the way for systematic change. Its mission is to ensure the physical safety, economic security, and bodily autonomy of women – through increasing access to justice and by ensuring our laws are fairly and justly administered.

The **Women's Law Project** ("WLP") is a non-profit legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, WLP's mission is to create a more just and equitable society by advancing the rights and status of women through high impact litigation, policy advocacy, public education, and individual counseling. Throughout its history, WLP has worked to eliminate discrimination based on sex, sex stereotyping, and sex-based classifications. It brings and supports litigation challenging discriminatory practices prohibited by civil rights laws and the Constitution.