No. 20-928

In the Supreme Court of the United States

NATIONAL COALITION FOR MEN, ET AL., PETITIONERS

v.

SELECTIVE SERVICE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Military Selective Service Act, 50 U.S.C. 3801 *et seq.*, requires nearly all male citizens and residents of the United States to register with the Selective Service System when they turn 18. See 50 U.S.C. 3802(a), 3809(a)(1). In *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), this Court held that the registration requirement does not constitute unlawful sex discrimination under the Due Process Clause of the Fifth Amendment. The question presented is whether this Court should overrule *Rostker* and hold that the registration requirement is unconstitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 969 F.3d 546. The opinion of the district court granting summary judgment to petitioners (Pet. App. 12a-34a) is reported at 355 F. Supp. 3d 568. The opinion of the district court denying petitioners' motion for relief from judgment (Pet. App. 8a-11a) is not published in the Federal Supplement but is available at 2019 WL 1902693. The opinion of the district court denying the government's motion to dismiss (Pet. App. 35a-43a) is not published in the Federal Supplement but is available at 2018 WL 1694906. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 44a-47a), issued before the case was transferred, is not published in the Federal Reporter but is reprinted at 640 Fed. Appx. 664. The opinion of the United States District Court for the Central District of California granting the government's motion to dismiss is not published in

the Federal Supplement but is available at 2013 WL 12096510.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2020. The petition for a writ of certiorari was filed on January 8, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1948, the Military Selective Service Act (MSSA or the Act), 50 U.S.C. 3801 *et seq.*, has, with some exceptions, required male citizens and residents of the United States between the ages of 18 and 26 to register with a federal agency known as the Selective Service System (Selective Service). 50 U.S.C. 3802(a), 3809(a)(1). The Act does not similarly require women to register. See 50 U.S.C. 3802(a). The purpose of the registration requirement "is to facilitate any eventual conscription" into the armed forces in the event of a military draft. *Rostker* v. *Goldberg*, 453 U.S. 57, 59-60 (1981); see 50 U.S.C. 3801.

a. In 1981, in *Rostker* v. *Goldberg*, this Court considered whether the Act's male-only registration requirement amounted to unconstitutional sex discrimination under the Fifth Amendment. See 453 U.S. at 59. As the Court recounted, President Carter and various military leaders had recommended in 1980 that the Act be amended to authorize the registration of both sexes. *Id.* at 60-61, 79. In response, Congress had "considered the question at great length" and had heard "extensive testimony and evidence"—including multiple rounds of hearings, floor debate, and committee proceedings—before deciding to retain the male-only registration requirement. *Id.* at 61, 72. The Court emphasized that Congress had not acted "unthinkingly" or "reflexively,"

id. at 72, and observed that "the Constitution itself requires * * * deference to congressional choice" when military affairs are involved, *id.* at 67. The Court concluded that Congress had "acted well within its constitutional authority when it authorized the registration of men, and not women." *Id.* at 83.

In reaching that conclusion, the *Rostker* Court observed that "the purpose of registration is to develop a pool of potential combat troops," and that statutory prohibitions and military policy restricted the ability of women to serve in combat. 453 U.S. at 77-79. The Court explained that, although some women might nonetheless be inducted into the armed forces in noncombat roles, "Congress simply did not consider it worth the added burdens of including women in draft and registration plans." *Id.* at 81. And the Court approvingly cited Congress's expressed concern that training might be "needlessly burdened" if it included a number of female recruits who could not ultimately be deployed in combat positions. *Ibid.*

b. Since *Rostker*, Congress and the military have lifted several restrictions on women serving in combat positions. In 1991, Congress repealed restrictions on women flying combat aircraft. National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, Div. A, Tit. V, Pt. D, Subpt. 1, § 531, 105 Stat. 1365. In 1993, Congress eliminated a ban on women serving on combat ships. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, Div. A, Tit. V, Subtit. D, § 541, 107 Stat. 1659. And in 2013, the Department of Defense decided that it would soon rescind an earlier policy excluding women from assignment to units and positions whose primary mission is to engage in direct ground combat. C.A. ROA 966. The

agency later announced that the policy change would be implemented in early 2016. *Ibid.* The agency acknowledged, however, that a "declaration that opens all career fields to women is, by itself, not sufficient for their full integration," *id.* at 973, and it noted its concern that, among other things, challenges would persist in fully integrating "the military occupational specialties and positions that were previously closed to women," *id.* at 966.

c. Following the Department of Defense's 2016 policy change, Congress reexamined the MSSA's male-only registration requirement. The version of the National Defense Authorization Act for Fiscal Year 2017 (2017 NDAA), Pub. L. No. 114-328, 130 Stat. 2000, that initially passed the Senate would have required women to register with the Selective Service, and would have created a legislative commission to review the draft as a whole. S. 2943, 114th Cong. § 591 (2016). The version of the bill that initially passed the House of Representatives, by contrast, would have asked the Secretary of Defense to study requiring women to register, and would have required a report to Congress on the matter. H.R. 4909, 114th Cong. § 528 (2016). While the bill was in conference, a group of Senators urged Congress to refrain from requiring women to register and to instead "task an independent commission to study the purpose and utility of the Selective Service System, specifically determining whether the current system is unneeded, if it is sufficient, or if it needs an expanded pool of potential draftees." C.A. ROA 975-976.

Consistent with those Senators' suggestion, the enacted law did not require women to register, and instead created the National Commission on Military, National, and Public Service (the Commission) to study the issue further. See 2017 NDAA §§ 551-557, 130 Stat. 2130-2137.

Congress gave the Commission a broad mandate to "conduct a review of the military selective service process" and to "consider methods to increase participation in military, national, and public service opportunities to address national security and other public service needs." § 555(a), 130 Stat. 2134-2135. That general mandate included, among other specific tasks, an instruction to evaluate whether a selective service process is needed, and if so, whether it should be conducted "without regard to * * * sex." §§ 551, 555, 130 Stat. 2130, 2134-2136. The same law directed the Department of Defense to provide a report to the Commission and Congress about the benefits of mandatory registration, how those benefits would be affected if registration were expanded to include women, and the "feasibility and utility" of modifying the registration system to focus on mass mobilization "of all military occupational specialties" rather than just combat troops. § 552, 130 Stat. 2131-2132.

d. The Department of Defense completed its report in March 2017, C.A. ROA 821, and the Commission commenced its work soon after. Pursuant to its statutory mandate, see 2017 NDAA § 554(a)-(b), 130 Stat. 2134, the Commission held public meetings throughout the United States to "get a range of views" to inform its recommendations. See C.A. ROA 1115-1116 (2018 hearings); 84 Fed. Reg. 801 (Jan. 31, 2019) (2019 hearings). The Commission also offered members of the public an opportunity to submit written comments. See 2017 NDAA § 554(d), 130 Stat. 2134; 83 Fed. Reg. 17,573 (Apr. 20, 2018).

On March 25, 2020, the Commission released its final report. See 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*

(Mar. 2020) (Commission Report), https://www.inspire2serve.gov/reports. That 245-page report contains 49 separate top-level recommendations, as well as numerous sub-level recommendations. See *id.* at 124-139. It addresses a wide variety of topics, including civic education and learning, military recruitment, military-personnel management, federal-civilian-employee hiring and management, and draft-mobilization reform. See generally *ibid.*

As relevant here, the report recommends that Congress "eliminate male-only registration and expand draft eligibility to all individuals of the applicable age cohort." Commission Report 111; see *id.* at 111-123. Although the Commission observed that its recommended expansion of the registration requirement had "evoked a range of passionate and heartfelt views," *id.* at 111, it concluded that extending the registration requirement to women is an appropriate way to increase the pool of available draftees, *id.* at 122. The Commission acknowledged that its recommended extension would increase administrative costs for the government, because it would require updates to Selective Service infrastructure that "are not easy to quickly change." *Id.* at 123. The Commission also noted that extending the registration requirement might trigger the need to reassess existing policies on "deferments, exemptions, and criteria governing eligibility for induction" in the event that the draft were reintroduced, and it "recognize[d] that Congress and the President" might want to address those issues. *Id.* at 112.

The Commission's recommendations are under active consideration in the current Congress. Most recently, on March 11, 2021, the Senate Armed Services Committee held a hearing dedicated to the Commission's recommen-

dations and report, and the Committee Chairman expressed his hope that the Commission's recommendations could be "incorporated into the next" National Defense Authorization Act. United States Senate Comm. on Armed Servs., *Final Recommendations and Report of the National Commission on Military, National, and Public Service*, at 37:15-30 (Mar. 11, 2021) (Sen. Reed), https://www.armed-services.senate.gov/hearings/21-03-11-final-recommendations-and-report-of-the-national-commission-on-military-national-and-public-service.

2. In 2013, petitioner James Lesmeister, a male who alleged that he had recently registered with Selective Service upon turning 18, and petitioner National Coalition for Men (the Coalition) sued Selective Service and its Director, in his official capacity, in the Central District of California. Pet. App. 14a; see C.A. ROA 12-14. They contended that the male-only registration requirement constitutes unlawful sex discrimination in violation of the Fifth Amendment. Pet. App. 2a.

a. The district court dismissed the case as unripe in light of uncertainty surrounding military efforts to integrate women into combat positions. Pet. App. 13a-14a. The Ninth Circuit reversed, explaining that much of that uncertainty had been resolved and that any remaining uncertainty did not render the claims unripe. *Id.* at 45a. The court of appeals also rejected one of the government's standing arguments, stating that the government was "wrong to argue that [petitioners] lack standing because their alleged equality injuries would not be redressed if the burdens they challenge were extended to women." *Id.* at 46a. In the court's view, petitioners' injuries could be redressed by an order that either required women to register or struck down the registration requirement for men. *Id.* at 46a-47a. The court declined

to address the government's other standing arguments, leaving them to the district court to address on remand. *Id.* at 47a.

On remand, the district court concluded that Lesmeister had alleged sufficient facts to support standing but the Coalition had not, and it dismissed the Coalition's claims. C.A. ROA 449-450; see Pet. App. 37a. The court then determined that because Lesmeister was the only plaintiff with standing, venue was improper in the Central District of California and the case should be transferred to the Southern District of Texas, where Lesmeister resided. Pet. App. 37a.

b. After the transfer, Lesmeister amended his complaint to add as plaintiffs the Coalition and petitioner Anthony Davis, a male who alleged that he had registered with Selective Service and was a member of the Coalition. C.A. ROA 530, 533. The government again moved to dismiss, and the district court denied the motion. Pet. App. 35a-43a. The court concluded that Lesmeister and Davis had standing because, although they had already registered before filing suit, they were subject to a continuing requirement to update their information each time their address changed. *Id.* at 40a-41a; see 32 C.F.R. 1621.1(a). The court further concluded that the Coalition had associational standing because Davis was a member. Pet. App. 41a-42a. The court then rejected the government's argument that this Court's decision in *Rostker* required dismissal because, in the district court's view, "the alleged factual circumstances of this case differ from the dispositive facts in *Rostker*." *Id.* at 43a.

The parties filed cross-motions for summary judgment, and the district court granted judgment for petitioners. Pet. App. 13a. The court concluded that the role of women in the armed forces had changed dramatically

since *Rostker* and that those changes had undermined the rationale of the decision. *Id.* at 21a-24a. And after "consider[ing] the constitutionality of the MSSA anew," *id.* at 24a, the court concluded that the government's justifications for the male-only registration requirement were insufficient to satisfy a heightened level of scrutiny. See *id.* at 24a-34a.

Despite ruling for petitioners, the district court granted only declaratory relief. Pet. App. 34a. The court subsequently denied petitioners' Rule 60(b) motion requesting injunctive relief as well. *Id.* at 8a-11a. The court stated that such relief would "place inequitable hardship on [the government] as well as disserve the public interest." *Id.* at 10a. It explained that either of petitioners' proposed remedies—requiring women to register or eliminating registration entirely—would create serious logistical problems and could impair the government's ability to respond to a major military crisis. *Ibid.* The court also noted that *Rostker* had counseled deference to Congress on military issues, and that Congress had been engaged in a dialogue with the Commission on the issue whether women should be required to register. *Id.* at 10a-11a. The court accordingly concluded that "[t]he legislative branch is best equipped—and constitutionally empowered—to reform the draft registration system in light of these important policy considerations." *Id.* at 11a.

3. The government appealed, and the court of appeals reversed and ordered the case dismissed. Pet. App. 1a-7a. The court explained that *Rostker* had "held that the male-only Selective Service registration requirement did not offend due process," and observed that *Rostker*'s "holding is controlling on this court." *Id.* at 4a-5a. The court further explained that, although

"the factual underpinning of the controlling Supreme Court decision has changed, * * * that does not grant a court of appeals license to disregard or overrule that precedent." *Id.* at 6a. Indeed, the court noted that petitioners had not identified any court of appeals decision that had "disregard[ed] a Supreme Court decision as to the constitutionality of the exact statute at issue here because some key facts implicated in the Supreme Court's decision have changed." *Id.* at 7a.

ARGUMENT

Petitioners urge (Pet. 18-37) the Court to grant review to overrule *Rostker* v. *Goldberg*, 453 U.S. 57 (1981). Any reconsideration of the constitutionality of the male-only registration requirement, however, would be premature at this time. Congress is actively considering the scope of the registration requirement, and *Rostker* itself made clear that the Court should defer to Congress where possible in this sensitive military context. In addition, this case would be a poor vehicle in which to reconsider *Rostker* because significant questions exist about petitioners' Article III standing. The petition for a writ of certiorari should therefore be denied.

1. The court of appeals correctly determined that it could not depart from this Court's decision in *Rostker* merely because a factual basis for that decision had changed. See Pet. App. 4a-7a. As this Court has explained, it alone has "the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Unless that occurs, lower courts must "follow the case which directly controls." *Ibid.*; see *Agostini* v. *Felton*, 521 U.S. 203, 237-239 (1997) (reaffirming that lower courts may not conclude that even "a bona fide, significant change in subsequent law" has, "by implication, overruled an earlier

[Supreme Court] precedent"). Petitioners do not dispute that the court of appeals correctly applied this Court's precedents.

2. Instead, petitioners contend (Pet. 18-37) that this Court should reconsider the question resolved in *Rostker* about the constitutionality of the male-only registration requirement. But even if the Court might at some point be inclined to revisit its decision in *Rostker*, strong prudential reasons counsel against doing so now.

a. In *Rostker*, the Court rejected a constitutional challenge to the statute providing for male-only draft registration. See 453 U.S. at 83. The Court explained that the statute had been enacted under Congress's constitutional power to raise and support armies, and that Congress's judgment merited significant deference both because "the scope of Congress' constitutional power in this area is broad" and because "the lack of competence on the part of the courts is marked." *Id.* at 65; see *id.* at 70 (explaining that deference to Congress "is at its apogee" when Congress legislates regarding military affairs). In discussing Congress's "extensive[] consider-[ation]" of the question whether the registration requirement should include women, *id.* at 72, the Court emphasized that men and women were not "similarly situated for purposes of a draft or registration for a draft" because women were not then eligible for combat positions in the military, *id.* at 78. And although the Court recognized that "women could be drafted for noncombat roles," the Court deferred to Congress's judgment that any benefits that would flow from registering both sexes were not "worth the added burdens of including women in draft and registration plans." *Id.* at 81.

Petitioners correctly note (Pet. 19-23) that relevant military conditions have changed markedly since *Rostker*.

In particular, Congress has repealed several combat-related restrictions that were in place in 1981, and women became eligible for all combat positions in 2016. See pp. 3-4, *supra*. Petitioners contend that because all positions are now open to women, *Rostker*'s "central premise * * * is no longer true." Pet. 18; see Pet. 19-23, 29. They thus request that this Court grant review and "hold that the men-only registration requirement is unconstitutional." Pet. 29.

This Court should decline to do so at this time. Some of *Rostker*'s reasoning—in particular, the premise that men and women "are simply not similarly situated" because of categorical "combat restrictions on women," 453 U.S. at 78; see *id.* at 76-82—rests on factual circumstances that have changed. But other portions of the opinion, including the Court's emphasis on deference to considered congressional judgments in the military context, are not limited to the former differences in combat eligibility. See *id.* at 64-75. Although this Court might someday wish to reconsider the constitutionality of the MSSA's registration requirement if that statutory provision remains unchanged, Congress's attention to the question may soon eliminate any need for the Court to grapple with that constitutional question.

As a matter of constitutional authority and institutional competence, Congress is primarily entrusted with the responsibility to determine whether and how to alter the existing registration requirement. As the Court emphasized in *Rostker,* Congress has "broad" constitutional power when legislating about military affairs, and "the lack of competence on the part of the courts is marked" in this area. 453 U.S. at 65. In decisions both before and after *Rostker*, the Court has repeatedly emphasized that deference to the political branches is appropriate in

cases involving military affairs. See, *e.g.*, *Loving* v. *United States*, 517 U.S. 748, 768 (1996); *Weiss* v. *United States*, 510 U.S. 163, 177 (1994); *Goldman* v. *Weinberger*, 475 U.S. 503, 507-508 (1986); *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976); *Schlesinger* v. *Ballard*, 419 U.S. 498, 510 & n.13 (1975). Indeed, petitioners themselves recognize Congress's primary role in this sensitive area, as they currently seek only a declaratory judgment that the registration requirement is unconstitutional and urge that "Congress can choose the path forward" on how to resolve any unconstitutionality—whether through extending the registration requirement to women or invalidating it for men. Pet. 6; see Pet. App. 4a (noting that the government appealed the district court's grant of declaratory relief); Pet. App. 8a-11a, 34a (district court's denial of injunctive relief, from which petitioners did not cross-appeal).

b. Deference to Congress in this area is appropriate at this time because the scope of the MSSA's registration requirement is a matter of active legislative consideration.

Following the opening of combat positions to women, Congress created the Commission to assess and address relevant considerations in determining whether the registration requirement should be modified in light of that change. See 2017 NDAA §§ 551-557, 130 Stat. 2130-2137; see also pp. 4-5, *supra*. After several years of study, the Commission issued its final report in March 2020. The report contains 49 top-level recommendations on a wide variety of topics, as well as numerous sub-level recommendations. See generally Commission Report 124-139. It was accompanied by a 175-page proposed bill (the In-

spire to Serve Act) that would implement all of the Commission's proposals. See Commission Report, *Legislative Annex* 1-175 (Mar. 2020).

This Court should afford Congress a reasonable opportunity to consider the Commission's recommendations, particularly given their breadth and timing. Two days after the Commission issued its report, a bipartisan group of legislators introduced the Inspire to Serve Act in the House. See *Inspire to Serve Act of 2020*, H.R. 6415, 116th Cong. (2020). Because the bill was so comprehensive and dealt with such a wide array of issues, it was referred to 13 different committees, each of which had jurisdiction over a portion of the bill. See 166 Cong. Rec. H1865 (daily ed. Mar. 27, 2020) (noting that the bill was referred to the Committees on Education and Labor, Armed Services, Foreign Affairs, Agriculture, Natural Resources, Ways and Means, Oversight and Reform, Veterans' Affairs, Homeland Security, Intelligence (Permanent Select), House Administration, Judiciary, and Energy and Commerce). The timing of the Commission's finalization of the report—which coincided with the early months of the COVID-19 pandemic—may have interfered with Congress's ability to take immediate action in response to the report. See Subcomm. on Personnel, United States Senate Comm. on Armed Servs., *POSTPONED: Final Recommendations and Report of the National Commission on Military, National, and Public Service* (Mar. 31, 2020), https://www.armed-services.senate.gov/hearings/20-03-31-final-recommendations-and-report-of-the-national-commission-on-military-national-and-public-service (identifying that a hearing to receive testimony on the Commission's recommendations and report scheduled for March 31, 2020, had been postponed);

Kendra Nichols, *Should women also be required to register with selective service?* (Aug. 13, 2020), https://www.abc27.com/news/top-stories/should-women-also-be-required-to-register-with-selective-service/ (describing an interview with the Commission's Chairman, in which he noted that discussion of the Commission's recommendations with Congress had been "delayed due to the pandemic").

In the current Congress, the Commission's recommendations are under active consideration. On March 11, 2021, the Senate Armed Services Committee held a hearing dedicated to the Commission's recommendations and report. The Committee heard testimony from three different members of the Commission. See United States Senate Comm. on Armed Servs., *Final Recommendations and Report of the National Commission on Military, National, and Public Service* (Mar. 11, 2021), https://www.armed-services.senate.gov/hearings/21-03-11-final-recommendations-and-report-of-the-national-commission-on-military-national-and-public-service. And the Committee Chairman expressed his hope that the Commission's recommendations would be "in large part incorporated into the next" National Defense Authorization Act "after appropriate review and debate." *Id.* at 37:15-30 (Sen. Reed); see *id.* at 2:05:30-54 (Sen. Reed) (similar); see also *id.* at 56:18-51 (Sen. Ernst) (expressing support for the Commission's proposal that the registration requirement be extended to women).

c. In urging the Court to reconsider *Rostker* now, petitioners suggest (Pet. 36) that this Court's intervention is necessary because Congress has not yet acted "despite the Commission's recommendation that Congress ex-

tend the registration requirement to women." But Congress has not had even one full legislative cycle to consider whether to adopt the recommendations in the Commission's March 2020 report. Indeed, that report was released just one day before the National Defense Authorization Act for the Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388, was introduced. See H.R. 6395, 116th Cong. (2020). And the portion of 2020 in which Congress could have acted through separate legislation was dominated by legislative attention to the global pandemic. See pp. 14-15, *supra*. It would therefore be premature for this Court to conclude that Congress has in fact declined to act on the recommendations in the Commission's report—particularly given the Senate Armed Services Committee's express consideration of those recommendations in a hearing last month. Affording Congress a more realistic period in which to address the issue would accord with the Court's "usual practice" of "avoid[ing] the unnecessary resolution of constitutional questions." *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 197 (2009). Should Congress fail to act within a reasonable period to address the Committee's recommendations, this Court would, of course, remain free to reconsider *Rostker* in an appropriate future case.[1]

3. Even if the Court were otherwise inclined to revisit *Rostker* now, this case would be a poor vehicle in which to do so. Significant doubt exists about petitioners' standing, which could prevent the Court from reaching

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[1] The government is aware of two other currently pending cases in which plaintiffs have challenged the constitutionality of the male-only registration requirement. See *Kyle-Labell* v. *Selective Service System*, No. 15-cv-5193 (D.N.J. filed July 3, 2015); *Murphy* v. *United States*, No. 09-cv-11496 (D. Mass. filed Sept. 11, 2009).

the question whether the MSSA's registration requirement is constitutional.[2]

To establish Article III standing, a plaintiff bears the burden of showing that: (1) he has suffered an injury-in-fact, which is "concrete and particularized" and "'actual or imminent'"; (2) the injury is "'fairly traceable to the challenged action of the defendant'"; and (3) "it [is] 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (brackets, citations, and ellipsis omitted). At the summary-judgment stage, a plaintiff cannot rest on mere allegations but must instead introduce evidence sufficient to establish all three elements. *Id.* at 561. And that evidence must show that the plaintiff possessed standing at the time the complaint was filed. *Davis* v. *FEC*, 554 U.S. 724, 732-733 (2008).

The lower courts adopted two different theories of Article III injury that the individual petitioners suffered here: (1) that they are required to register or update their registration under an unlawful statute, and (2) that they suffer a stigmatic injury from a discriminatory scheme. See Pet. App. 39a-41a, 46a. But the first theory

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[2] The government did not challenge standing in the Fifth Circuit. But because the Ninth Circuit had previously found that petitioners' "equality injuries" were redressable, Pet. App. 47a, the law-of-the-case doctrine may have limited the government's ability to press certain aspects of the standing issue. See *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (explaining that law of the case "applies as much to the decisions of a coordinate court in the same case as to the court's own decisions"). In any event, because standing implicates this Court's Article III jurisdiction, the Court would be obligated to consider it even if the government were to decline to press the argument. See *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam).

has not been clearly pleaded or proved, and the second theory would require an extension of this Court's equal-protection jurisprudence. And because the Coalition's standing is entirely derivative of Davis's—the sole member it identified—the Coalition lacks standing if Davis does. See *id.* at 42a; see also C.A. ROA 682-683, 699-700.

a. Petitioners suggest (Pet. 16, 35-36) that the individual petitioners are injured by the related requirements that they register with Selective Service and that they update their registration until they turn 26. Their initial registration, however, does not create an ongoing redressable injury. Both individual petitioners had already registered with Selective Service before filing their complaint. C.A. ROA 497-498. Any injury incurred from that registration was a one-time past injury, not a threatened future injury that could be redressed by petitioners' requested declaratory judgment. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 109 (1998); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983).

One of the individual petitioners remains subject to an ongoing legal obligation to update his registration in the event of a change in name, current mailing address, or permanent residence. See 32 C.F.R. 1621.1.[3] At the motion-to-dismiss stage, the district court relied on that continuing obligation to conclude that the individual petitioners had standing. See Pet. App. 40a-41a. But neither individual petitioner introduced any evidence that he is likely to take any action that would trigger the updated-registration obligation. Lesmeister introduced a short affidavit stating that he was then 23 years old, lived

[3] Lesmeister has turned 26, and is therefore no longer required to update his registration. See C.A. ROA 701. But the updated-registration obligation continues to apply to Davis, who is 23. See *id.* at 700.

in Texas, was a male who was required to register with Selective Service, and was "harmed by or subject to the sex-discriminatory registration requirements." C.A. ROA 701. Davis introduced a nearly identical affidavit that differed only in his age (20) and residence (California), and that added that he was a member of the Coalition. *Id.* at 700. Neither affidavit mentioned that the individual had any plans to move or change his name before turning 26. And although it is not difficult to imagine that a person in his early 20s could move at some point within a few-year period, the failure to provide "any description of concrete plans, or indeed any specification of when the some day will be" is fatal to "a finding of the 'actual or imminent' injury that [this Court's] cases require." *Lujan*, 504 U.S. at 564 (emphasis omitted).

b. At an earlier stage in the case, the Ninth Circuit suggested a different theory of standing, based on the stigmatic harm from unequal treatment of men and women. See Pet. App. 46a-47a. The court of appeals reasoned that such "equality injuries" could be redressed "either by extending the burden of registration to women or by striking down the requirement for men." *Ibid.* (citing *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984)). In *Mathews*, this Court concluded that a man had standing to challenge a provision of the Social Security Act, 42 U.S.C. 301 *et seq.*, that gave female spouses greater benefits than male spouses. See 465 U.S. at 738-740. Although Congress had made clear that male spouses would not receive any extra benefits if the statute were held unconstitutional, as a statutory fallback provision instead would reduce the extra benefits for female spouses, this Court nonetheless held that a successful constitutional challenge could still remedy the plaintiff's ongoing injury of unequal treatment. *Id.* at 737-740. As

the Court explained, "when the 'right invoked is that of equal treatment,'" that injury can be remedied "by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id.* at 740 (citation omitted).

Although petitioners might be able to assert a similar stigmatic harm here, the analogy to *Mathews* is imperfect. *Mathews* involved a present, ongoing inequality: The plaintiff in that case was scheduled to receive a lower amount of monthly benefits for the rest of his retirement. See 465 U.S. at 734-735. By contrast, the unequal burden of registration under the MSSA is a one-time event (barring the need to update one's registration, see pp. 18-19, *supra*), and petitioners have already registered. As a result, to apply the *Mathews* theory of standing here, the Court would need to conclude that petitioners continue to suffer some redressable stigmatic harm. The need to consider whether to adopt a largely unexplored extension of existing standing doctrine—whether warranted or not—makes this case an unsuitable vehicle for reviewing petitioners' underlying constitutional challenge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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