SSS Hearing Dec. 4, 2018, 1pm, Court 5A

(Italics are DOJ lawyer quotes)

Introduction

Good afternoon Your Honor.

I'm Roy Den Hollander, one of the attorneys for the Plaintiff, Elizabeth Kyle-Labell. I was admitted for this case *pro hac vice*.

As Your Honor may know, our client is now a 21-year-old woman. Yet the DOJ lawyer who wrote this Reply [hold up and shake it] contemptuously denigrated her rights because she is a woman. He wrote:

> "In *Rostker*, the plaintiffs were men who faced civil and criminal penalties if they did not register for the Selective Service. In contrast here, Plaintiff is a female who is not required to register for the draft, nor is she prevented from pursuing military service (including in a combat role) or penalized for not registering." (DOJ. Reply at 7, Ripeness Hardship, D.E. No. 82).
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> That is nothing but an archaic-stereotypical effort by a supercilious lawyer to cheapen my clients' rights just because she is a woman. Insinuating that because she is a woman, the injury to her rights—that Your Honor found existed (Opinion at 5 n.5, 9, 13, D.E. No. 72)—is not as important as that faced by the male plaintiffs in *Rostker* or the two male plaintiffs in the *Nat'l Coal. for Men v. Selective Serv. Sys.*, 4:16-cv-03362 (S.D. Tex. 2016). This haughty lawyer cannot even refer to my client as a woman. His Reply only refers to her as "female."
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> The author of this Reply obviously doesn't understand that "a victim of discrimination [even a woman] suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw." *Hassan v. City of New York*, 804 F.3d 277, 290 (3rd Cir. 2015) (quoting *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1074 (3rd Cir.1995)).
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> How more obvious can it be that the Federal Government—especially these days—is still infested with primitive notions about the value of women in this society. That alone is enough to throw this motion into the gutter where comments like that belong.

Request conversion to Summary Judgment

If not the gutter, then we request that Your Honor convert the Rule 12(b)(6) part of DOJ's motion to one for Summary Judgement.

In *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 284 (3rd Cir. 1991), *certiorari denied* 502 U.S. 939, the Third Cir held that either the pleader or the moving party or both may cause the conversion provision of Rule 12(d) to operate by submitting matter that is outside the

challenged pleading. (Automobile manufacturer brought action alleging copyright and trademark infringement against distributor.)

DOJ introduced in its Exhibit 3 (D.E. No. 80-4) on this motion 130 pages of outside evidence consisting of Government recommendations to the Commission. That evidence comprises additional factual allegations that the SAC does not make but on which the DOJ relies for support to establish its defense of deference.

Furthermore, just 5 days before this hearing, DOJ submitted another exhibit of outside evidence in an effort to bolster its defense. The document was not referenced in the SAC and includes statements by the Commission's chairman—a lobbyist. (D.E. No. 87) (Final Rprt not Interim Rprt will address draft registration at 4 and Interim Rprt will not "indicate Commission's leanings" at 5).

Both exhibits are more appropriate for a summary judgment motion. (DOJ Br. at 8 & 14 (D.E. No. 80-1).

The materials submitted do not have to be affidavits, they can be any written or oral evidence introduced in support of or in opposition to the motion challenging the pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings. *Fed. Prac. & Proc. Civ*. § 1366 (3d ed.).

[Those 130 pages of additional factual allegations also were <u>not</u> part of our Motion to Continue (D.E. No. 58 & 65); Opposition to DOJ motion on standing (D.E. No. 70) or our Opposition to this DOJ motion on ripeness and 12(b)(6) (D.E. No. 81).]

Further, Plaintiff has introduced an affidavit in opposition to the Rule 12(b)(6) motion that is not part of the SAC. (Ex. E, 6/4/2018, D.E. No. 81-6).

In *Hanna v. U. S. Veterans' Admin. Hosp.*, 514 F.2d 1092, 1094 (3d Cir. 1975), Plaintiff's attorney filed a memorandum of law in opposition to defendant's 12(b)(6) motion to which was attached excerpts of testimony pertinent to the case's issues. The Third Cir held this required conversion to a summary judgment motion. (Plaintiff sued the veterans' administration hospital for alleged medical malpractice).

[This Court has complete discretion to determine whether or not to accept any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion. *Fed. Prac. & Proc. Civ*. § 1366 (3d ed.).

[The district court considered material outside the pleadings; therefore, summary judgment was appropriate. *Messer v. Virgin Islands Urban Renewal Bd.*, 623 F.2d 303, 307 (3d Cir. 1980) (plaintiff not entitled to relocation assistance because move prior to government acquiring title).]

The issue in this case

The specific circumstances presented in this case (DOJ Reply at 4, D.E. No. 82) are not whether the Commission can formulate suggestions for the Congress and the Executive branches of government, but whether the MSSA statute as it exists now and the SSS's enforcement of it violate our client's Equal Protection and Substantive Due Process rights.

As Your Honor previously summarized the issue:

> "Plaintiff Elizabeth Kyle-LaBell wants to register for the military draft. She believes it is her right and duty as a United States citizen to do so. But because she is a woman, she is prohibited from registering. She brings this putative class action to challenge the constitutionality of the draft's male-only requirement." (Opinion at 1, Standing, D.E. No. 72).

The Federal agency of the SSS over the passed 3.5 years has enforced the gender-discrimination of the MSSA against the Plaintiff five times by barring her from registering. The most recent was October 2, 2018. [Copy to Court and DOJ] (Opp Mtn Dsmss 4, Kyle-LaBell Aff., D.E. No. 81-6). The SSS is the defendant—NOT the Commission or Congress or President Trump.

This case, here and now, allows this Court to determine whether registration with the SSS will comport "with our Nation's touchstone values of fair and equitable treatment, and equality of opportunity," (DOJ Ex. 2, Pentagon Report at 19, D.E. No. 80-3); whether after nearly 250 years, the Federal Government will finally be required to place women and men on an equal footing.

> Without some definitive, action one way or another, by this Court or the court in the Southern District of Texas, the fortune teller arguments by the DOJ concerning the Commission allow Congress and the President to continue their policy that women do not "count as citizens in our American democracy equal in stature to men." *U.S. v. Virginia*, 518 U.S. 515, 545 (1996).
>
> [Powerful Republicans oppose allowing women into combat and the logical result that women would also have to register for the draft. If they continue to have their way, the last vestige of federal *de jure* discrimination against millions of young women will live for who knows how long.]

Can this Court decided the merits.

Justiciability means an Art III court can decide the merits of a case.

Non-justiciability means an Art III court cannot decide the merits of a case.

> The Third Circuit in *Dillard v. Brown*, 652 F.2d 316, 323-24 (3d Cir. 1981), held that "[i]f the military justification outweighs the infringement of the plaintiff's individual freedom, we may hold for the military on the merits, but we will NOT find the claim to be non-justiciable and therefore not cognizable by a court."
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> The Supreme Court in *Nixon v. U.S.*, 506 U.S. 224, 226 (1993), stated "[B]efore we reach the merits . . . we must decide whether it is 'justiciable,' that is, whether it is a claim that may be resolved by the courts."
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> So before deciding Defendants' Fed. R. Civ. P. 12(b)(6) failure to state a claim, which "is a disposition on the merits," *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980), the issue of justiciability needs to be resolved—can this action be decided by the Court.

DOJ lied when the author of its Reply wrote, *at no point in this litigation have Defendants ever asserted that Plaintiff's claims are non-justiciable.* (DOJ Reply at 1, D.E. No. 82). *Defendants do not contend that this case is not "justiciable."* (DOJ Reply at 4).

> Right from DOJ's first motion on 10/2/2015 (D.E. No. 19, Ripeness, Standing), they've been challenging justiciability by arguing either the case is not ripe or Plaintiff does not have standing.
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> The 3d Circuit has held that:
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> > The case-or-controversy limitation is enforced "through the several justiciability doctrines that cluster about Article III," including "standing, and ripeness, mootness, the political-question doctrine, and the prohibition on advisory opinions." *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 539 (3d Cir. 2017); *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 137 (3d Cir. 2009) (internal quotation marks omitted).
>
> The Supreme Court has held that:
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> > "Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hospitality Ass'n v. U.S. Dep't of Interior*, 538 U.S. 803, 807–08 (2003).

The author of the DOJ Reply knew his ripeness argument was an argument for non-justiciability because he quotes the very last part of that sentence from *Nat'l Park Hospitality Ass'n* in the DOJ Reply at 2: "*effects felt in a concrete way by the challenging parties*." So the author of the Reply made an intentional falsehood—that's a lie, an intentional deception.

How can he be allowed to get away with that?

Further, throughout its Ripeness argument, DOJ relies on deference to the military, Congress and the President to assert this case is not ripe. (DOJ Reply at 2-8, D.E. No. 82). DOJ therefore admits that Deference is a justiciable issue.

The DOJ has opposed this action four (4) times on the ground of ripeness (DOJ Brief at 17, D.E. 19-1; DOJ Brief at 18, D.E. 33-1; DOJ Opp Mtn Continue at 8, D.E. 61; DOJ Brief at 12, D.E. 80-1).

So what is this DOJ lawyer saying now—Never Mind!

If the Reply author's statement of not challenging on non-justiciable grounds is to be believed, the DOJ wasted this Court's time by challenging Plaintiff's standing and is again wasting everyone's time by challenging whether this case is ripe. Or, their statement can be construed as an admission that the case is ripe.

If this Court decides it is powerless to prevent the military from engaging in invidious discrimination on the basis of gender, then such a ruling would end up applying to all protected characteristics, such as race and transgenderism.

The future is uncertain.

The crux of DOJ's argument is that there are a series of preliminary steps that the Commission, Congress and the President have to go through before any law is enacted—if one is enacted. During that time, on which there is no deadline, this Court must sit idly by even though none of those steps carry any legal impact except for possibly an unknown law enacted at some unknown time in the future.

There are many twists and turns in the proceedings of a commission, Congress and the Presidency and even the fortune teller that the Rolling Stones sang about in 1966 cannot foresee.

Here's a sampling of the unforeseeable:

(1) Originally the Commission was required to make its suggestions by November 5, 2019—now the date is March 19, 2020. *See* Pub. L. No. 114-328 § 555(e)(1); Joint Status Report 8/15/17, D.E. No. 68 (Conf Comm had Pentagon to provide by 7/1/2017).

Will the Commission's suggestions be put off longer?

(2) What will Congress do with the Commission's suggestions, and how long will that take?

> Let's not forget that the recommendations from Government commissions have an uncanny ability of landing on the trash heap of history.
>
> The Kerner Commission investigated the 1967 race riots and provided recommendations to avoid such in the future. So what did President Lyndon Johnson do—he ignored its report and rejected its recommendations.
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> In 2002 the 9/11 Commission was set up to provide recommendations designed to guard against future attacks. What did President Bush "43" do—he ignored many of the recommendations to the point that the commissioners actually toured the country to draw attention to their recommendations. The co-chairs even published a book in which they said that the commission had been "set up to fail."
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> Now that is not to say such will happen with the Commission here—but we don't know and neither does the DOJ.
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> > [DOJ takes issue that the Commission here, as with the Kerner and 9/11 Commissions, may simply be a public relations gimmick to quell public concern and give Congressional politicians a place to hide.
> >
> > [DOJ argues that such "runs counter to the well-established precedent that government officials are assumed to execute their duties in good faith. *Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012)." (DOJ Reply at 6, D.E. No. 82).
> >
> > [Tell that to Chief Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia or to Justice Bret Kavanaugh.]

(3) What will President Trump, assuming by then he is still President, do with any legislation from Congress?

> Will he sign it or veto it?

(4) If Pres. Trump vetoes Congressional legislation, will Congress override it and how long will that take?

(5) Before the Commission presents its unknown suggestions or before Congress passes any legislation, will President Trump with the stroke of the pen undo President Obama's policy of opening all combat positions to women?

No one knows the answer to these questions—not even the fortune teller the Rolling Stones sang about in 1966.

Yet the DOJ relies on the vagaries of political fortune to erase Plaintiff's civil rights if the DOJ can just delay a decision by this Court long enough—when Plaintiff turns 26, this case is moot.

[Let's not forget that Pres. Trump in a tweet banned transgender persons from the military, and his administration is currently trying to "roll back recognition and protections of transgender people under federal civil rights law." Erica L. Green, Katie Benner and Robert Pear, *Transgender' Could Be Defined Out of Existence Under Trump Administration,* NYTs, October 21, 2018.

> [Current military policy "specifically bans transgender individuals from serving in the military in a manner consistent with their gender identity. (Mattis Memorandum). It excludes anyone who requires or has undergone gender transition, and requires proof that a person has been stable in their birth sex for the last thirty-six months. In sum, it disadvantages transgender service members "in the same fundamental way [as Trump's initial ban]." *Stockman v. Trump*, 2018 WL 4474768 * 6 (Sept. 18, 2018)]

[DOJ asserts that a revoking of Obama's allowing women in combat is absurd.

[*Plaintiff's claim that the government's strategy is to delay litigation in the hopes that the current administration will reverse its position on the integration of females into combat units, see Pl.'s Opp. at 2, is entirely meritless and is contradicted by declarations filed by the Department of Defense in SWAN, which make clear that the combat integration process is proceeding. See No. 12-cv-6005 EMC (N.D. Cal.), ECF No. 99-1, Declaration of Anthony M. Kurta ¶ 5; ECF No. 113 at 11-16.* (Reply 7 n.3).]

[But not so absurd ~~as to be raised in another case involving the same DOJ attorneys as here and the military but on a different issue of gender discrimination—*SWAN v. Sectary of Defense*, 3:12-cv-06005, N.D. Cal.~~

> ~~In successfully opposing DOJ's motion for dismissal on standing and failure to state a claim, *SWAN* 12-cv-06005, 09/27/18, D.E. No. 133 & 140, Order at D.E. No. 140, SWAN argued intentional discrimination by the military in integrating women into combat positions. SWAN relied, in part, on a recent action by Sec. Defense Mattis and statements by President Trump, Mattis and Chief of Staff Kelly opposing women in combat.~~ Ct did not consider because submitted too late.
>
> [Sept. 2018, Mattis "instituted a review by 'the Chief of Staff of the Army [and] Commandant of the Marine Corps' that will determine whether allowing women into combat positions 'make[s] sense.'" (*SWAN* L.R. 7-3(d) Ex. B at 21, VMI Mattis Q & A, 3:12-cv-06005, 09/26/18, D.E. No. 132).

> [9/26/17, "Secretary Mattis's statement that the 'jury is out' on whether it is 'a strength or a weakness to have women' in combat positions, in part because only a 'few stalwart young ladies' have so far entered combat positions. See Ex. A (9/25/17 CNN article entitled *Mattis: 'The Jury Is Out' on Whether Women Will Be Successful in Combat Roles*)." (*SWAN* L.R. 7-3(d) filing at 1, 3:12-cv-06005, 09/26/18, D.E. No. 132).
>
> [Secretary Mattis also stated that opening up combat positions to women was a policy that he had 'inherited' and that had resulted from 'some people's perspective of what kind of society we want.' Secretary Mattis also explained that infantry soldiers are 'necessarily macho,' while signaling that women are the weaker and more vulnerable sex:
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> > ['In the event of trouble, you're sleeping at night in your family home and you're the dad, mom, whatever. And you hear glass break downstairs, who grabs a baseball bat and gets between the kids' door and whoever broke in and who reaches for the phone to call 9-1-1? In other words, it goes to the almost primitive needs of a society to look out for its most vulnerable.'"
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> (*SWAN* L.R. 7-3(d) filing at 1, 2, 3:12-cv-06005, 09/26/18, D.E. No. 132).]

The author of the DOJ Reply makes a false statement in arguing for more delay by way of a stay prior to judgment:

Indeed, the SWAN litigation to which Plaintiff refers is instructive because the district court there stayed a challenge to the military's exclusion of women from certain combat positions for more than three years pending the political branches' review of the issue and implementation of the integration of women into combat roles. See No. 12-cv-6005 EMC (N.D. Cal.), ECF No. 37. (Reply 8, D.E. No. 82)

The stay was for discovery—not for deference to the political branches.

> "On January 21, 2014, Defendant filed a motion for protective order seeking a stay of all discovery pending a decision on Defendant's motion to dismiss. . . . The Court's May 5, 2014 Order staying the litigation suspended the parties' discovery obligations (other than obligations to preserve relevant information, including information responsive to pending discovery requests) . . . . Defendant's Motion to Dismiss the Third Amended Complaint is fully briefed and pending before the Court. Defendant believes its motion will resolve the present litigation in its entirety and thus the case should remain stayed until the Court resolves that motion. (*SWAN* Jt Case Mngmnt Statmt at 4-6, 3:12-cv-06005, 09/20/18, D.E. No. 130).]

The issue of deference or justiciability comes down to what is more constitutionally important: the rights of young women here and now or crystal ball predictions as to what self-interested politicians may or may not do?

> As the Supreme Court reasoned in *Orr v. Orr*, justiciability still exists even though "we have no way of knowing how the [legislature] will in fact respond," but such is no reason "to hold that underinclusive statutes can never be challenged because *any* plaintiff's success can theoretically be thwarted" by a legislature's subsequent action or inaction. *Orr v. Orr*, 440 U.S. 268, 272 (1979) (emphasis in original); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (to "effectively insulate underinclusive statutes from constitutional challenge [is] a proposition we [have] soundly rejected . . . .").

The DOJ focuses on a future that is impossible to predict while Plaintiff is focused on what is happening now to her rights by a statute that is still on the book and is still being enforced against her.

The DOJ's argument of "wait and maybe we will see someday" would require every Article III court in the country to put on hold any case that involves the military or national security issues because the Executive or Congress are conducting studies while people's rights are being violated?

> Now, we're not arguing that this Court does not owe deference to Congress and the President, we're arguing it does not owe deference to unknown possibilities of what bureaucrats may or may not decide at some indefinite time in the future.
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> > As the *Rostker* Court stated, "Announced degrees of 'deference' to legislative judgments . . . may all too readily become facile [superficial] abstractions used to justify a result." *Rostker*, 57 U.S. at 69-70.
> >
> > That's exactly what the DOJ lawyers are trying to do here.

For this Court not to act—one way or the other—on the equal protection and substantive due process issues would admit that civil rights can be violated as long as the Government might stop violating those rights at some unknown time in the future.

> Perhaps the Board of Education of the City of Topeka, Kansas should have used that argument in 1954.
>
> The problem of course is what's to stop the Government from continuing its violations while asking for more and more time, which is what the DOJ has been doing here and in *Nat'l Coal. for Men v. Selective Serv. Sys.* case (13-2391, C.D. Cal; 16-cv-03362, S.D. Tex.)
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> It would also recognize the legitimacy of the remnants of hostility that existed in 1875 when women could only serve as nurses and cooks in the military while the Supreme

Court unanimously denied women the right to vote. *See Minor v. Happersett*, 88 U.S. 162, 178 (1874).

***Rostker* was decided on the merits.**

According to Rotunda and Nowak, *Treatise on Const. L.* § 18.23(i) (5th ed. 2013):

> "The [*Rostker*] majority opinion, by Justice Rehnquist, stated that the Court should accord Congress great deference when reviewing laws having to do with the establishment or regulation of the military, but went on to find that the gender-based classification would survive scrutiny under the substantial relationship-important interest test."
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> *Rostker*, 453 U.S. at 67, stated "We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice." Here, Congress has not made a choice other than to have a commission conduct a study.

So rather than doing nothing, the *Rostker* Court went on to decide the merits. It found that women and men were not similarly situated—the first element in deciding an Equal Protection violation.

> "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 a 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. . . . 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." *Rostker*, 453 U.S. at 77-78.

Today, the definition of "combat troops" means men and women. So for this Court to give deference to *Rostker* means requiring young women to register because they are now potential "combat troops."

> [DOJ admits that "Historically, Selective Service registration has been relied upon to replace those falling in combat." (Defendant Selective Service System's Objections and Responses to Plaintiffs' First Set of Interrogatories at No. 10 p. 6 Response, filed in *Nat'l Coal. for Men v. Selective Serv. Sys.*, No. H-16-3362 (S.D. Tex., August 30, 2018, Dkt. 76).]

Rostker does not demand deference for a facial challenge to MSSA.

DOJ asserts that *in reviewing a facial challenge to the constitutionality of the MSSA, this Court must give deference to the political branches. See Rostker, 453 U.S. at 70* (DOJ Reply at 4)

What *Rostker* actually stated at 70 was

> "deference does not mean abdication" When a statute "is challenged on equal protection grounds, the question a court must decide is not which alternative it would have chosen, had it been the primary decisionmaker, but whether that chosen by Congress denies equal protection of the laws."

Rostker, no deference when there are merely ongoing discussions in Government.

The Legislative and Executive Branches are currently engaged in their own review of the MSSA (DOJ Reply at 3, D.E. No. 82)

> It is really the Commission that is doing the review and that review has no present impact on the current violation of Plaintiff's rights. If it did, the Commission would be a defendant.

Such deference extends not only to the merits of the question at hand, but also to the process chosen by the political branches for addressing the policy at issue. Rostker, 453 U.S. at 65 (DOJ Reply at 4, D.E. No. 82)

> *Rostker* does not say that nor hold that as the DOJ Reply author states with a cite that lacks a qualification signal.
>
> The only deference that the U.S. Supreme Court in *Rostker* showed Congress was in accepting its decision that "[t]he purpose of registration . . . was to prepare for a draft of *combat troops*." 453 U.S. at 76-77 (emphasis in the original).
>
> The only decision Congress has made here is that a commission will do a study.

Separation of Powers, Courts v. Congress and the President

"The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [*Marbury v. Madison*, 5 U.S. 137 (1803)] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action." *U.S. v. Richardson*, 418 U.S. 166, 192 (Powell, J., concurring) (1974).

> Plaintiff is asking Your Honor for that protection and asking for it NOW.

DOJ argues that the power of Art III courts is limited to statutes after Congress (1) amends a statute that is already on the books, or (2) refuses to amend that statute, or (3) until Congress finally makes up its mind on what to do with that statute already on the books even though the harm caused by that statute is present and continuing.

> Your Honor has already found that Plaintiff is being injured—here and now by the Government preventing her from registering. (Opinion at 5 n.5, 9, 13, D.E. No. 72). If she is currently being injured, how can this Court be prevented from doing anything about it, or be required to wait for who knows how long before doing anything about it.

In 1875, Congress granted federal question jurisdiction to Article III courts primarily to provide "a forum designed to minimize the danger of hostility toward . . . federally created rights." 15 *Moore's Fed. Prac.*, § 103.03 (Matthew Bender 3d ed.).

> As a result, it is "the courts [that] are called upon to decide whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). Here, it is the MSSA.

For this Court to wait for the President and Congress's decision on the Commission's suggestions and then base its decision on that Congressional determination would raise separation of powers issues. Congress would then, in effect, be deciding an existing case, which is an improper interference with the independence of the judiciary. *Cf. U.S v. Klein*, 80 U.S. 128, 145-147 (1871) (separation of powers problem because Congress attempted to decide a case pending in the Supreme Court in which the U.S. Government was a party).

> Plaintiff's Fifth Amendment rights would be violated during the wait because Plaintiff would be denied the opportunity to raise the constitutional issues of Equal Protection and Substantive Due Process in a competent forum. *See Oestereich v. Selective Serv. Sys. Local Bd. No. 11, Cheyenne, Wyo.*, 393 U.S. 233, 243 (1968) (Harlan, J, concurring) ("To withhold pre-induction review . . . would thus deprive petitioner of his liberty without the prior opportunity to present to any competent forum . . . his substantial claim that he was ordered inducted pursuant to an unlawful procedure.").

Due Process Rights v. Military, National Security

The Supreme has held that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties'. . . . Implicit in the term national defense is the notion of defending those values and ideals which set this Nation apart." *U.S. v. Robel*, 389 U.S. 258, 263-264 (1967) (internal quotation *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934)).

> Even if the civilian Plaintiff here would be considered a member of the armed services by registering, the protections of the Due Process Clause would still apply. *U.S. ex rel. Innes v. Hiatt*, 141 F.2d 664, 666 (3d Cir. 1944) ("[a]n individual does not cease to be a person within the protection of the fifth amendment of the Constitution because [s]he had joined the nation's armed forces . . . .")

"When the national government explicitly and deliberately discriminates against historically subordinated groups, the suggestion that judges are incompetent to understand that discrimination betrays a fundamental conception of judicial review that has prevailed for [seventy-five years]." Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499, 580 (1991).

Numerous cases have confirmed that the Federal Courts will not refrain from a decision on the merits based on notions of non-reviewability because the military or national security is involved:

> "The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations." *Hamilton v. Kentucky Distilleries & Warehouse Company*, 251 U.S. 146, 156 (1919) (Brandeis, J.) (citing *Ex parte Milligan*, 4 Wall. 2, 121-127 (1866) (presidential declaration of martial law found unconstitutional)); *accord Duncan v. Kahanamoku*, 327 U.S. 304, 323-324 (1946) (declaration of martial law in Hawaii following the attack on Pearl Harbor held unconstitutional); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893) (power granted by Congress to Secretary of War to take for public use certain property at a predetermined compensation violated the Fifth Amendment).
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> *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) ("Our precedents, old and new, make clear that concerns of national security . . . do not warrant abdication of the judicial role.");
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> *Weiss v. United States*, 510 U.S. 163, 176 (1994) ("Congress . . . is subject to the requirements of the Due Process Clause when legislating in the area of military affairs");
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> *Dow v. Johnson*, 100 U.S. 158, 169 (1879) ("[T]he military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield.");
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> *Marbury*, 5 U.S. at 177 ("the [C]onstitution controls any legislative act repugnant to it").
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> *U.S. v. Virginia*, 518 U.S. 515 (1996) (not discussing justiciability but instead focusing on the merits of whether Virginia's policy of excluding women from enrolling in its historically single-sex military college violated the Equal Protection Clause);
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> *Rostker v. Goldberg*, 453 U.S. 57, 78-79 (1981) (The Court stated that it was "called upon to decide whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred." *Rostker*, 57 U.S. at 69-70.
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> *Brown v. Glines*, 444 U.S. 348, 361 (1980) (First Amendment challenge to regulation limiting circulation of petitions at Air Force base was reviewed on the merits);
>
> *Schlesinger v. Ballard*, 419 U.S. 498, 506-510 (1975) (challenge to Navy promotion time-limits based on sex decided on Equal Protection grounds under the Due Process clause in which the Court found that men and women service members were not similarly situated);

Parker v. Levy, 417 U.S. 733, 757 (1974) (Court-martialed army captain sought discharge from confinement in federal penitentiary. The captain's conduct in publicly urging enlisted personnel to refuse to obey orders which might send them into combat was unprotected under the most expansive notions of the First Amendment);

Frontiero v. Richardson, 411 U.S. 677, 690–691 (1973) (statutes discriminating against women in granting military benefits was found to violate Equal Protection under the Due Process Clause because they were based on archaic and overbroad generalizations).

Gilligan v. Morgan, 413 U.S. 1, 11-12 (1973) (rejecting claims based on the allegedly improper training methods of the Ohio National Guard, but stating that "it should be clear that we neither hold nor imply that . . . there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief. We hold only that no such questions are presented in this case").

Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 109 (3d Cir. 1986) ("The Supreme Court has heard many cases involving claims for injunctive relief against the military without even suggesting that the claims were not reviewable in a civilian court.")

Jaffee v. United States, 663 F.2d 1226, 1237 (3rd Cir. 1981) ("[T]he Rostker opinion certainly does not suggest the courts should abdicate their responsibility to assure military authorities comply with constitutional mandates . . . .").

Dillard v. Brown, 652 F.2d 316, 320-321 (3d Cir. 1981) (The Third Circuit held that it is precisely the role of the courts, not the military, to define the constitutional rights of individuals).

> "Neither [Article I, Section 8 (Congressional power over military) and Article II, Section 2 (Presidential power over military) of the Constitution] expressly or by implication, prevents a federal court from entertaining an appropriate constitutional claim brought against the military. The military has not been exempted from constitutional provisions that protect the rights of individuals, even though the rights of those in the armed forces may differ from those of civilians. *Parker v. Levy*, 417 U.S. 733 (1974); *Raderman v. Kaine*, 411 F.2d 1102 (2d Cir. 1969)."
>
> In *Dillard* a National Guard regulation forbid single parents with minor children from enlisting. A woman service member challenged the regulation as sex discrimination. The Third Circuit found the claim was justiciable.
>
> "Her challenge, unlike that of the plaintiffs in *Gilligan v. Morgan*, 413 U.S. 1 (1973), does not require a court to engage in an ongoing supervision of the National Guard. A court by considering Dillard's claims is not usurping the responsibility constitutionally committed to a coordinate branch. Nor is the court here asked to engage in a task for which it has no competence. Dillard merely

> seeks constitutional review of a regulation by a federal court, a task which traditionally and constitutionally has been committed to such a forum. The claims 'presented and the relief sought are of the type which admit of judicial resolution.' *Powell v. McCormack*, supra, 395 U.S. 486, 516-17 (1969). Consequently in Dillard's case there is present neither the level of intrusion into the responsibilities of the coordinate political branches nor the lack of competence of the judicial branch that was found in Gilligan."
>
> This case is similar to *Dillard*, only here, Plaintiff is not in the military.
>
> ["In *Dillard* we explicitly rejected the test set forth by the Fifth Circuit in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir.1971), for determining whether a court should hear a particular claim involving the military. *Jorden v. Nat'l Guard Bureau,* 799 F.2d 99, 111 n.16 (3d Cir. 1986)."]
>
> [It is clear that *Dillard* was not overruled by either *Chappell v. Wallace*, 462 U.S. 296 (1983) or *Jaffe II*, 663 F.2d at 1240. *Jorden,* 799 F.2d at 111 n.16]

SWAN v. Mattis, Order at 16, 3:12-cv-06005, 05/01/18, N.D. Cal., D.E. No. 118) in finding justiciability, the Court relied, in part, on the Third Circuit case *Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981), *cert. denied sub. nom.*, *Sajer v. Jorden*, 484 U.S. 815 (1987), to distinguish *Gilligan*.

> The SWAN Court quoted the following from Dillard:
>
> "*Gilligan* [*v. Morgan*, 413 U.S. 1 (1973)] does not stand for the proposition that issues concerning the operation of the National Guard are necessarily committed to the coordinate political branches. The Supreme Court held only that a federal court could not exercise continuing regulatory jurisdiction over the National Guard. The plaintiffs in Gilligan were not merely seeking to have the Court hold that certain practices or regulations were unconstitutional. Rather they sought to vest virtual control of the Ohio National Guard in a federal court." *Dillard* at 321.

Emory v. Sec'y of Navy, 819 F.2d 291, 294 (D.C. Cir. 1987) ("The military has not been exempted from constitutional provisions that protect the rights of individuals. *Parker v. Levy*, 417 U.S. 733 (1974). It is precisely the role of the courts to determine whether those rights have been violated. *Dillard v. Brown*, 652 F.2d 316, 320 (3d Cir.1981).")

Doe 1 v. Trump, 275 F. Supp. 3d 167, 210 (D.D.C. 2017) (addressing merits of claims brought by transgender service members and aspiring service members that directives issued by President violated their constitutional rights. "Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals [and, indeed] [i]t is precisely the role of the courts to determine whether those rights have been violated." Quoting *Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987).

> If courts can stop the banning of transgender soldiers, the courts can stop the banning of women from registration. [Four lower-court judges have ruled the White House's transgender ban unconstitutional.]
>
> [*Stockman v. Trump*, 331 F.Supp.3d 990 (C.D. Cal. Sept. 18, 2018) (not entitled to rational-basis review pursuant to the doctrine of military deference); *Karnoski v. Trump*, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018) (preliminary injunction upheld pending appeal by 9th Cir No. 18-35347, Dkt. No. 90.); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017), appeal dismissed, No. 17-2398, 2018 WL 2717050 (4th Cir. Feb. 2, 2018) (preliminary injunction issued, DOJ dismissed its appeal).]

Owens v. Brown, 455 F. Supp. 291, 299, 301 (D.D.C. 1978) (plaintiffs were woman Navy personnel who filed a class action, seeking to remove a statutory bar that prevented them from being assigned to duties aboard Navy vessels. The district court held that the case was justiciable. Defendants read Article I, Section 8 and Article II, Section 2 as signifying an intent to commit decisions regarding the military to the discretion of the legislative and executive branches of government and to leave no room for the third branch to exercise independent review. This argument proves too much. Numerous court decisions have shown "not the slightest hesitancy about reaching the merits even though military affairs were involved." "[A] succession of cases in this circuit and elsewhere has reiterated the proposition that the military is subject to the Bill of Rights and its constitutional implications'").

This action, as in *Dillard* and *SWAN*, is NOT "a call on judicial power to assume continuing regulatory jurisdiction over the activities" of the military's draft registration. *See Gilligan* at 5 (quotation). Rather, this case is a challenge to a facial barrier— "the type of military decision that courts have exercised jurisdiction over," according to the DOJ in *SWAN* (DOJ Mem. at 2, 3:12-cv-06005, 02/16/18, D.E. No. 110).

DOJ admits justiciability—that courts can decide the merits.

DOJ lawyers have already admitted that this Court has justiciability to review the MSSA: *Rostker itself noted that even in a case involving critical issues of military policy, courts "do not abdicate [their] ultimate responsibility to decide the constitutional question." Rostker v. Goldberg, 453 U.S. 57, 67 (1981).* (Reply at 4, D.E. No. 82)

> In *SWAN*, 3:12-cv-06005 (N.D. Cal. 2012) (DOJ Dismissal Mtn Hearing Transcript, April 19, 2018, D.E. No. 115), the DOJ replied to the U.S. district court judge's question on whether a general military exclusion based on gender is justiciable.
>
> *Court*: Does it make a difference whether the policy being challenged is a facial challenge to an explicit group-based policy? In this case, it's gender based. . . . [I]t is gender based on its face. Does that make it—tend to make it more justiciable than one that is kind of an effects case, where you're challenging the impact of something? (Tr. 5-25 to 6-6).

> *DOJ*: It does. I think that's why we never raised it earlier, because a general exclusion based off of also gender, as the first -- as the Direct Combat Rule was, is -- that's typically something that you would -- you would think is justiciable. (Tr. 6-7 to 6-11).
>
> The DOJ's argument in *SWAN* emphasized that its process for integrating women into combat positions does not create a barrier based on gender. If it did, the Government admitted that such a barrier would be justiciable: "[T]his case has transformed from a challenge to a facial barrier on service, the type of military decision that courts have exercised jurisdiction over . . . ." *SWAN* (Gov't Mem. at 2, filed Feb. 16, 2018, D.E. No. 110). "In its prior iterations, this lawsuit did indeed challenge a categorical military policy against females serving in direct combat positions." (*Id.* at 13).
>
> Plaintiff agrees with the DOJ's argument in *SWAN* that the general exclusion of women because of their gender is justiciable when the military is involved. Since registration is part of the military, *Rostker*, 453 U.S. at 68, the exclusion of women there is also justiciable.
>
> The case here challenges just such a "facial barrier," but here, the DOJ takes the opposite of its position in *SWAN*.

The *SWAN* Court still found justiciability of the challenge to the Pentagon's detailed process for integrating women into combat positions, but dismissed w/o prejudice on standing:

> "[t]he military does not have any special expertise on gender integration. . . . Courts regularly assess claims of disparate treatment under the Equal Protection Clause, and scrutiny of discrimination by the military is not uncommon. Justification for class-based exclusions from the military or portions thereof, despite justification based on, *e.g.*, morale or combat readiness, are not beyond the ability of the courts to adjudicate. *See, e.g.*, *Rostker*, 453 U.S. at 57 [citations omitted]. . . . Carried to its logical extent, under the government's position herein, even race-based exclusions from the military or racial segregation within would be immune from judicial review. . . . It is too late in the day for any such argument." *SWAN* Order at 17-18, 3:12-cv-06005, N.D. Cal., 05/01/18, D.E. No. 118)

The Third Circuit in *Yusupov v. Attorney Gen. of U.S.*, 650 F.3d 968, 981 (3d Cir. 2011), quoted the Supreme Court as stating that "concerns of national security and foreign relations do not warrant abdication of the judicial role. *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2727 (2010)."

DOJ's abstract and disingenuous deference arguments for this Court to do nothing.

1. Abstraction

DOJ lawyers continue to do what the *Rostker* Court warned against concerning deference:

> "Announced degrees of 'deference' to legislative judgments . . . may all too readily become facile [superficial] abstractions used to justify a result." *Rostker*, 57 U.S. at 69-70.
>
> DOJ claims that *This lawsuit seeks to draw the Court into this ongoing policymaking process and predetermine its outcome.* (DOJ Reply at 1, D.E. No. 82). *[W]rest from the political branches an issue of military policy that is committed to those branches by the text of the Constitution.* (DOJ Reply at 3, D.E. No. 82). *The entry of judicial relief for Plaintiff at this stage would interfere with, if not negate, the Government's ability to address a fundamental revamping of the Selective Service System to better account for changes in society and warfare as mandated by Congress.* (DOJ Reply at 7, D.E. No. 82).
>
> > The DOJ claims the sky will fall if this Court defends Plaintiff's rights, but doesn't give any specifics—perhaps they exaggerate.

2. Pending legislation

DOJ argues for deference because *Congress is in the midst of a policymaking process . . . .* (DOJ Br. at 1, D.E. No. 80-1). All that Congress is in the "midst of" is waiting—who knows for how long—for the Commission to formulate suggestions.

DOJ cites for support to *Schlesinger v. Ballard*, 419 U.S. at 510 n.13, falsely asserting that case held "deference to Congress is even more appropriate when pending legislation may remedy a challenged classification." (DOJ Br. at 17, D.E. No. 80-1).

> At the time of *Schlesinger v. Ballard*, Congress—not a commission—was considering making the promotion requirements equal for both sexes, but that did not impact the Supreme Court's decision. The Supreme Court reached the merits by holding that the statutes did not violate the male officer's due process rights because men and women service members were not similarly situated.
>
> Here, they are similarly situated, and there is no pending legislation from the Commission before Congress.

The Commission is not a coordinate branch of the Government—it does not make law, it does not execute the law. This Court's authority is not dependent on the existence or activities of a commission that will do who knows what?

3. Political branch decisions

DOJ lawyers advocate *deference to the military decisions of the political branches* (DOJ Reply at 1, D.E. No. 82)

> So what is the Congressional decision? That a commission will do a study—that's it!
>
> > Doing a study is not law, it is not an Executive Order and it is not even policy.
> >
> > Congress and the President may adopt or reject the Commission's suggestions but there has been no decision one way or the other on that.

4. Interference with future Government decisions

DOJ asserts that because Plaintiff is fighting for her rights, she will interfere with future decisions by the most powerful Government in history: *In addition, any relief that could potentially require the Government to spend millions of dollars changing the Selective Service System in response to a court order would impose a considerable hardship at this time, particularly because Congress may wish to change the system in a different manner following the Commission's review* (DOJ Reply at 7, D.E. No. 82)).

> So what is the causal chain to future effects from a decision here? DOJ does not say.
>
> Plaintiff is 21 years-old studying to be a veterinarian. She is simply asking this Court to tell the Government to stop violating her rights—to tell the Government, as Your Honor has so far found to stop injuring her, and to stop doing it now. (Opinion at 5 n.5, 9, 13, D.E. No. 72).
>
> Besides, if this Court decides for Plaintiff, the DOJ will move to stay enforcement pending appeal under Fed. R. Civ. P. 62(c) and, if necessary, under Fed. R. App. P. 8(a)(1)(A). We will not oppose a stay pending appeal.
>
> > And no, we are not agreeing to a stay prior to judgment.
> >
> > If this Court issues a stay now—thereby imprisoning this case in this Court, assuming an appeal of that stay is unsuccessful, those who believe the current trend in equal rights only apply to benefits and well-paying influential jobs but not responsibilities will be shown correct. Such enforcement of political beliefs regardless of the law will not last long. For the S.D. Tex. case is going to end up in the Supreme Court.
>
> Also, if the Third Circuit or the Supreme Court does not like a decision for Plaintiff, they'll overrule it. If not, Congress can always pass a law to overrule a decision for Plaintiff. Congress has done that before.

5. Deference for the composition of the military

DOJ lawyers even go so far as to demand *deference due to those [Govt] branches on questions of the composition of the fighting force* (DOJ Reply at 1, D.E. No. 82)

> Plaintiff is not challenging the composition of the armed forces. Registration and conscription are fundamentally different military processes.
>
> This Court stated that "Plaintiff's injury stems from her exclusion from draft registration, not conscription." (Opinion at 5 n.5, D.E. No. 72).
>
> Defendants even admit that "When SSS registers a person, it does not determine the role that person will serve once inducted. This determination is made by [the Department of Defense] after induction." And that's "composition." *Defendant Selective Service System's Objections and Responses to Plaintiffs' First Set of Interrogatories* at No. 9 p. 6 Response, filed in *Nat'l Coal. for Men v. Selective Serv. Sys.*, Civil Action 16-3362, S.D. Tex., August 30, 2018, D.E. No. 76.
>
> Besides, "composition" of the military is NOT immune from court review. The Third Circuit and other courts have held that Article I, Section 8 and Article II, Section 2 of the Constitution
>
> > "do not provide or intimate that, when statutes or regulations regarding the composition of the military trench upon other constitutional guarantees, the courts are powerless to act. Neither section, expressly or by implication, prevents a federal court from entertaining an appropriate constitutional claim brought against the military. The military has not been exempted from constitutional provisions that protect the rights of individuals, even though the rights of those in the armed forces may differ from those of civilians. *Parker v. Levy*, 417 U.S. 733 (1974). It is the role of the courts, not the military, to define these rights." *Dillard*, 652 F.2d 316, 320 (3d Cir. 1981).
> >
> > In *United States ex rel. Innes v. Hiatt*, 141 F.2d 664, 666 (3d Cir. 1944), the Third Circuit held that "An individual does not cease to be a person within the protection of the Fifth Amendment of the Constitution because he had joined the nation's armed forces . . . ."
> >
> > "[C]onstitutional questions that arise out of military decisions regarding the composition of the armed forces are not committed to the other coordinate branches of government." *Doe 1 v. Trump*, 275 F. Supp. 3d 167 (no pagination) (D.D.C. 2017) (quoting *Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) (The *Doe 1* court issued a preliminary injunction preventing the enforcement of President Trump's transgender ban on "accession and retention" in the military.).

DOJ's cited cases do not prohibit this Court from deciding the merits.

"To be sure, there are extreme circumstances when courts have declined to address the merits of a case, citing non-justiciability." (*SWAN* Court Order Granting DOJ's Motion to Dismiss on Standing at 18, 12-CV-6005, 5/1/2018, D.E. No. 118).

But none of the cases relied on by the DOJ to keep this Court from deciding the merits apply.

Gilligan v. Morgan, 413 U.S. 1 (1973) (DOJ Br. at 16, 22, D.E. No. 80-1; Reply at 13), and *Orloff v. Willoughby*, 345 U.S. 83 (1953):

> "Neither of these cases holds that constitutional questions affecting military decisions or the composition of the armed forces are necessarily and exclusively committed to the other coordinate branches of the government." *Dillard*, 652 F.2d at 320.
>
> *Gilligan* was "a broad call on judicial power to assume continuing regulatory control over the activities of the Ohio National Guard." *Gilligan* at 5. The Third Circuit in *Dillard*, 652 F.2d at 321, found that in *Gilligan*
>
> > "[t]he Supreme Court held only that a federal court could not exercise continuing regulatory jurisdiction over the National Guard. The plaintiffs in *Gilligan* were not merely seeking to have the Court hold that certain practices or regulations were unconstitutional. Rather they sought to vest virtual control of the Ohio National Guard in a federal court. This transfer of control, *Gilligan* held, could not be done."
>
> The *SWAN* Court stated that
>
> > "The result in *Gilligan* was hardly surprising because the breadth of plaintiffs' request for relief would require a court to interfere with the basic, day-to-day functioning of the Ohio National Guard and on a continuing basis." (*SWAN SWAN* Court Order Granting DOJ's Motion to Dismiss at 10, D.E. No. 118). However, where "[t]he relief sought . . . would not require the Court to exercise continuing comprehensive regulatory supervision over a wide range of military decisions," reviewability exists. *Id*. at 15.

Orloff v. Willoughby, 345 U.S. 83 (1953). (DOJ. Br. at 16, D.E. No. 80-1):

> The Third Circuit *Dillard* court held that "*Orloff* stands for the proposition that a constitutional challenge brought against the military, which does not require a court to run the military, is justiciable." *Dillard* at 322.
>
> > "*Orloff* teaches no more than that the exercise of military discretion involving duty assignments will not be reviewed by a court if there has been no statutory or constitutional violation." *Id.*

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 26 (2008) (DOJ. Br. at 16, D.E. No. 80-1; Reply at 5, 10, D.E. No. 82):

> A preliminary injunction case where the Supreme Court did not find non-reviewability but decided the merits that possible harm to marine mammals from sonar was outweighed by the Navy being able to detect enemy submarines.
>
> The *Winter* Court noted that "[o]f course, military interests do not always trump other considerations, and we have not held that they do."

Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (DOJ. Br. at 16, D.E. No. 80-1; Reply at 10):

> Where the Supreme Court did decide the merits but found a military regulation preventing the wearing of the headgear required by a soldier's religious beliefs did not violate the First Amendment.

Deference Conclusion

Plaintiff is not asking this Court to exercise continuing comprehensive regulatory supervision over a wide range of military decisions concerning draft registration, such as, classification status, enforcement. Plaintiff's request is very simple—treat young women and young men equally when it comes to draft registration.

It is up to this Court or the S.D. Tex. Court to allow or not allow, as Army Ranger Lisa A. Jaster wrote, that her kids have "the same opportunities to shape the world they live in, regardless of gender, which includes registering for the draft and serving their country." *Women Deserve The Same Opportunities As Men, Including Registering For The Draft*, Task & Purpose, December 9, 2016.

Ripeness

The ripeness doctrine "determines when a proper party may bring an action." *Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1462 (1994) (citing *see Armstrong World Indus., Inc. v. Adams,* 961 F.2d 405, 411 & nn. 12-13 (3d Cir.1992)).

It is "peculiarly a question of timing." *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 580 (1985) (quoting *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 140 (1974)).

Timing that "centers on whether [an] injury has occurred yet." *Presbytery of New Jersey of Orthodox Presbyterian Church* at 1462 (quoting Erwin Chemerinsky, *Federal Jurisdiction* 99 (1989)).

> Since "ripeness centers on whether [the] injury has occurred yet," and Plaintiff's injury has occurred as this Court found in its Opinion at 5 n.5, 9, 13 (03/29/2018, D.E. No. 72) this case is clearly ripe. (Kyle-Labell Aff. D.E. No. 81-6; Fifth Reg. Attempt 10/2/2018).

Ripeness decisions generally may be found more readily when a court believes that it faces a pure question of law that can be decided without further fact development. Wright & Miller, *Fed. Prac. & Proc. Juris.* § 3531.12.

> There are no further facts to develop. SSS barred Plaintiff from registering for the draft.
>
> That there are no further facts to develop is enforced by DOJ making a facial rather than factual opposition to Plaintiff's standing as this Court concluded. (Opinion at 3-4, 15-cv-05193, 03/29/18, D.E. No. 72).
>
> The only questions here are legal ones: Did the SSS's barring Plaintiff from registering violate her Due Process rights.

Ripeness when Standing

Ripeness focuses more on the question of whether the injury has yet become mature. Ripeness can be seen as providing a time requirement to the standing injury. Wright & Miller, *Fed. Prac. & Proc. Juris.*§ 3531.1.

"In most cases, that a plaintiff has Article III standing is enough to render [her] claim constitutionally ripe." *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 725 F.3d 65, 110 (2d Cir. 2013) (the 2d Cir determination that plaintiff had standing was enough to find constitutional ripeness).

Ripeness overlaps with standing in the "shared requirement that [plaintiff's] injury be [actual] or imminent." *Ross v. Bank of America, N.A.*, 524 F.3d 217, 226 (2d Cir. 2008) (quoted citations omitted).

> In *Ross* the 2d Cir had already found that there existed an "actual and imminent" injury to constitute Article III standing injury in fact. *Ross* at 226. The Court held that "For the same reasons, we find that these alleged injuries are not merely speculative or hypothetical, and that judicial review of the [plaintiff's] claims at this time is appropriate." That is, they are ripe.

DOJ agrees with this concept of ripeness by asserting that governmental "effects [be] felt in a concrete way by the challenging parties." (DOJ Br. at 12, D.E. No. 80-1, quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-808 (2003)).

> This Court has already found that barring Plaintiff from registering resulted in a concrete and particularized injury. (Opinion at at 5 n.5, 9, 13, D.E. No. 72).

In its Reply, the DOJ wrongly relies on *Taylor v. Resolution Tr. Corp.*, 56 F.3d 1497, 1508 (D.C. Cir.), *opinion amended on reh'g*, 66 F.3d 1226 (D.C. Cir. 1995), for its argument that ripeness and standing do not overlap. (DOJ Reply at 6, D.E. No. 82).

> The D.C. Cir did not deal with ripeness but rather a preliminary injunction. In fact, the Court opinion never even mentioned ripeness.
>
> The Court held that plaintiff "has adequately pled facts supporting its standing to bring suit on First Amendment grounds." Then in the next paragraph states, "But to establish the grounds for a preliminary injunction [plaintiff] must show more: it must demonstrate a substantial probability of success on the merits and an irreparable injury that the proposed injunction would avert." 56 F.3d at 1508. Ripeness was not an issue.

DOJ also relies on *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 675 (9th Cir. 1988) (DOJ Reply at 6, D.E. No. 82). *Caribbean* also dealt with a preliminary injunction and held that "Because the threat of civil liability is too attenuated and conjectural to constitute a basis for [plaintiffs'] standing . . . it follows that this injury is too speculative to constitute an irreparable harm justifying injunctive relief."

DOJ is clearly trying to obfuscate by mixing preliminary injunction with ripeness.

Pre-enforcement v. Post-enforcement ripeness for administrative agency decisions

Pre-enforcement test

DOJ relies on the test for ripeness set out in *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977), and *Nat'l Park Hospitality. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003). (DOJ Br. at 22, D.E. No. 80-1; DOJ Reply at 2, D.E. No. 82).

That test does NOT apply to this case because it is the test for administrative agency pre-enforcement actions.

Pre-enforcement actions are where the harm asserted by the plaintiff has not yet occurred.

The Supreme Court in *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003), held that

> "Ripeness is a justiciability doctrine designed . . . to protect the [administrative] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." (citing ***Abbott Labs. v. Gardner***, 387 U.S. 136, 148 (1967)).
>
> The pre-enforcement test "is best seen in a twofold aspect, requiring us to evaluate both the [1] fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration." *Abbott*, 387 U.S. at 149.

In *Abbott*, pharmacies brought a pre-enforcement action challenging Food & Drug Administration regulations concerning advertisements and labels. Before the regulations were enforced, thirty-seven drug manufacturers and their trade association sought review. ***Fed. Prac. & Proc. Juris.*** § 3532.6 (3d ed.). The Supreme Court in this pre-enforcement action found that the two-part test rendered the case ripe.

> The Supreme Court stated, "The first question we consider is whether Congress by the Federal Food, Drug, and Cosmetic Act intended to forbid pre-enforcement review of this sort of regulation promulgated by the Commissioner." *Abbott*, 387 U.S. at 139-40. The Supreme Court concluded pre-enforcement review was allowed, *Abbott*, 387 U.S. at 148, and then cited the reason for the two-part test for determining whether a regulation opposed before enforcement was ripe.
>
> > "The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution. . . . [I]t is fair to say that [ripeness'] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott*, 387 U.S. at 148 (emphasis added).

In *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003), the plaintiff brought a pre-enforcement challenge to a National Park Service regulation concerning concession contracts and was "not litigating any concrete dispute." 538 U.S. at 807. The Court applied the two-part test, 538 U.S. at 808, and found the case NOT ripe.

> There the Supreme Court again held that "Ripeness is a justiciability doctrine designed . . . to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." (Emphasis added). 538 U.S. at 807-08

Post-enforcement test

The counterpart of pre-enforcement is post-enforcement—when an agency has made a final decision and executed on it causing an actual injury. That is, when "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. at 807-08; *Abbott*, 387 U.S. at 148.

The Third Circuit has held in

> *Lauderbaugh v. Hopewell Twp.*, 319 F.3d 568, 575 (3d Cir. 2003), that "the ripeness doctrine prevents judicial interference 'until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" (citing *Abbott Labs., Inc. v. Gardner,* 387 U.S. 136, 149 (1967)).
>
> And that Ripeness exists when a "decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Lauderbaugh v. Hopewell Twp.*, 319 F.3d 568, 575 (3d Cir. 2003)(quoting *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192 (1985)).

The concrete injury to Plaintiff is (1) the denial of equal treatment—she cannot register for the draft because of her sex, and (2) violation of her substantive due process rights—she is treated as a second class citizen.

> The SSS has decided five times so far to bar her from registering. It has, therefore, injured her five times.

In pre-enforcement actions, "courts are left to hypothesize about how the law might be applied." Here, "Plaintiff['s] claims arise from an enforcement action[s] that ha[ve] already occurred." *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012).

Therefore, the *Abbott* and *Nat'l Park Hosp. Ass'n* pre-enforcement test of fitness and hardship are NOT applicable here because the SSS "has arrived at a definitive position on the issue that inflicts an actual, concrete injury," *Lauderbaugh v. Hopewell Twp.*, 319 F.3d at 575; *see Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. at 807-08; *Abbott*, 387 U.S. at 148.

The Third Circuit's modification of the Supreme Court's two-part pre-enforcement test also concerns "circumstances where enforcement actions are ongoing, but where administrative finality is not yet achieved . . . ." *Peachlum v. City of York, Pennsylvania*, 333 F.3d 429, 436 (3d Cir. 2003). Therefore that modification also does not apply here.

> This Court has already found that Plaintiff was injured and that injury was concrete. (Opinion at 5 n.5, 9, 13, D.E. No. 72).
>
> > "[D]iscrimination itself is the legally cognizable injury." *Hassan*, 804 F.3d at 293 (citing *see, e.g., Curtis v. Loether*, 415 U.S. 189, 195 n.10 (1974)).

> [This finality rule, it is not designed to enforce the exhaustion of administrative remedies. *See Williamson Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 192 (1985) ("the question whether administrative remedies must be exhausted is conceptually distinct ... from the question whether an administrative action must be final before it is judicially reviewable.")].

The Third Circuit has stated, "Ripeness . . . prevents the courts from 'entangling themselves in abstract disagreements.' *Thomas v. Union Carbide Agric. Prods Co*., 473 U.S. 568, 580 (1985) (citations omitted)." *Binker v. Com. of Pa.*, 977 F.2d 738, 753 (3d Cir. 1992).

> Whatever the Commission might suggest and Congress and Pres. Trump might do is clearly theoretical—another word for abstract.
>
> But Plaintiff is *not* alleging facts that she will be injured at some time in the future *if* the multiple reports by multiple Government agencies advise to change the MSSA, or they do not; *if* the Commission agrees with those reports, or it does not; *if* Congress accepts the Commission's suggestions, or it does not, and *if* President Trump agrees with Congress, or he does not. Plaintiff alleges a present—*not* a future injury by the SSS.
>
> Now the MSSA and the SSS's role may change so as to no longer discriminate against Plaintiff and all those other young women before they turn 26—but then again, it may not. "Prediction is very difficult, especially if it is about the future."—Niels Bohr.

So unlike in the pre-enforcement actions on which DOJ relies, the SSS has already injured Plaintiff in a concrete way because of a discriminatory statute.

Under Third Circuit's declaratory judgment or pre-enforcement test

In the declaratory judgment or pre-enforcement ripeness review, the Third Cir. refined the *Abbott* fitness and hardship "test because of the difficulty in defining ripeness in actions initiated before an 'accomplished' injury is established." *Armstrong World Indus., Inc. by Wolfson v. Adams*, 961 F.2d 405, 411 (3d Cir. 1992) (citing *Step–Saver Data Sys., Inc. v. Wyse Technology*, 912 F.2d 643, 647 (3d Cir.1990)).

> "[T]he *Step–Saver* analysis is tailored to address *pre-enforcement* actions." *Peachlum v. City of York, Pennsylvania*, 333 F.3d 429, 435 (3d Cir. 2003) (emphasis original) (cites *Presbytery*, 40 F.3d 1454, 1463).
>
> The Third Cir focuses on (1) the adversity of the interests of the parties or conflict between the parties, (2) the conclusiveness of a judicial judgment or a court's ability to resolve the conflict, and (3) the practical utility of a decision or a useful purpose will be served to clarify legal relationships so that Plaintiffs "can turn on the light and take a step" forward. *Step-Saver Data Systems, Inc. v. Wyse Technology*, 912 F.2d 643, 647-50 (3d Cir. 1990).

(1) Adversity or conflict

Adversity requires opposing legal interests. *Lewis v. Alexander*, 685 F.3d 325, 341 (3d Cir. 2012). Here, the interests of the parties are in opposition because the SSS refuses to allow Plaintiff to register for the draft because of her sex.

Although "a Plaintiff need not suffer a completed harm to establish adversity of interest between the parties," but "to protect against a feared future event, the Plaintiff must demonstrate that the probability of that future event occurring is real and substantial, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Pittsburgh Mack Sales & Serv., Inc. v. Int'l Union of Operating Engineers, Local Union No. 66*, 580 F.3d 185, 190 (3d Cir. 2009) (quoting *Armstrong World Indus.*, 961 F.2d at 412)).

Here, Plaintiff actually incurred a completed harm; therefore, adversity of interests exist.

> Plaintiff tried to register but was barred by being treated differently from males.
>
> Discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community . . . can cause serious noneconomic injuries to those persons who are personally denied equal treatment. . . . *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984)(citations omitted) (Brennan, J.).

(2) Conclusivity or the Court's ability to resolve the conflict.

Conclusivity depends on the ability of a court decision to "define and clarify the legal rights or relations of the parties." *Lewis*, 685 F.3d at 341 (quoting *Step–Saver Data Systems, Inc.*, 912 F.2d at 648).

A decision here would determine whether Plaintiff's Equal Protection and Substantive Due Process rights are violated by Defendants refusing to register her.

(3) Practical utility or a decision will serve a useful purpose.

Practical utility means "whether the parties' plans of actions are likely to be affected by a judgment." *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 344 (3d Cir. 2001)(quoting *Step-Saver Data Systems, Inc.*, 912 F.2d at 649 n.9).

> Clearly a decision for Plaintiff will allow her to register and require the SSS to accept her registration, or eliminate registration along with its discrimination based on sex, or make it voluntary—also allowing her to register.
>
> A decision for the SSS will convince her and millions of other young women that they are still second-class citizens and should act accordingly.

Utility also considers the hardship to the parties of withholding a decision. *See Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners*, 44 F.3d 1178, 1189 (3d Cir.1995).

> The hardship visited on Plaintiff of no decision is that a federal court once again maintains the discrimination and second-class status of her and other young women solely because of their sex. That despite all the high-sounding talk of equality when the courts really mean that women are inferior.
>
> The Supreme Court in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984), observed that it
>
> > "has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities."

Under the Supreme Court *Nat'l Park Hospitality* pre-enforcement test

The *Nat'l Park Hosp.* test incorporates consideration of two elements, "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808.

(1) Fitness of issue for a court decision

This Court already held that standing exists, and in doing so concluded that DOJ was not making a factual challenge to standing. (Opinion at 3-4, 2:15-cv-05193, 03/29/18, D.E. No. 72). Such indicates that there are no facts to challenge. Plaintiff tried to register for the draft but was prevented by Defendants—that's it, there's no argument there.

DOJ relies on *Doe v. Bush*, 323 F.3d 133, 139 (1st Cir. 2003), to assert that fitness *"involves an assessment of whether it is appropriate for the court to undertake the task."* (DOJ Reply 4, D.E. No. 82)

> *Doe* was an action for a preliminary injunction to prevent the President of the United States and the Secretary of Defense from initiating a war against Iraq in 2003.
>
> The 1st Cir stated that "[t]he baseline question [for fitness] is whether allowing more time for development of events would 'significantly advance our ability to deal with the legal issues presented [or] aid us in their resolution.' *Duke Power Co. v. Carolina Envtl. Study Group,* 438 U.S. 59, 82 (1978)." *Doe v. Bush*, 323 F.3d 133, 138–39 (1st Cir. 2003).
>
> > In that case the Court found the issue of a preliminary injunction not fit for decision because "[m]any important questions remain unanswered about whether there will be a war, and, if so, under what conditions." *Doe v. Bush*, 323 F.3d at 139.

Here, Plaintiff is not, as the DOJ disingenuously asserts, challenging the existence of the Commission and what it may or may not do; nor is she challenging what Congress and President Trump may or may not do with the Commission's suggestions. (DOJ Br. at 1, D.E. No. 80-1; DOJ Reply at 2-3, D.E. No. 82).

> If she were, this Court could not make a decision unless it had a reliable crystal ball.

She is challenging the present MSSA discrimination against her. The Supreme Court in *Baker v. Carr*, 369 U.S. 186, 226 (1962), stated that "An equal protection challenge is the type of legal issue traditionally resolved by the courts in accordance with judicial standards that "are well developed and familiar."

(2) Hardship to the parties of withholding court consideration

Once again the author of the DOJ Reply engages in deception. He asserts that the "Hardship" requirement is satisfied in the SSS's favor because Supreme Court Justice Brennan, when temporarily sitting as a Third Circuit Judge

> *concluded that the balance of equities tipped heavily in favor of the Government and stayed the injunction put in place by the lower court. Rostker v. Goldberg, 448 U.S. 1306, 1309–10.* (DOJ Reply 6, D.E. No. 82)

The DOJ lawyer's deception is that Justice Brennan was not making a decision on ripeness. He was applying, as he wrote, "The principles that control a Circuit Justice's consideration of in–chambers stay applications . . . ." *Rostker v. Goldberg*, 448 U.S. at 1308. Brennan was deciding whether a decision already made by a court should be stayed pending appeal—not whether the decision was ripe or not.

> No hardship to the SSS.

No decision means the status quo, which is no hardship for the SSS, but Plaintiff is still treated differently as though she is a second class citizen.

If the Court denies DOJ's fourth motion to dismiss, we are willing to go along with a stay of enforcement pending appeal. So there's no hardship to Defendants there. At least not until the Supreme Court makes a decision—maybe.

If DOJ's motion to dismiss is granted, there still is no hardship to Defendants, since they would have won—for now, anyway. But Plaintiff and millions of other young women will still be discriminated against and seen as second class citizens who's rights can be violated by the SSS—at least until the Supreme Court makes a decision.

> Even after the Supreme Court decides in these young women's favor—and everybody here knows it will. The impact of passed discrimination on them will still be felt.

"[A] victim of discrimination suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw." *Hassan v. City of New York*, 804 F.3d 277, 290 (3d Cir. 2015) (quoting *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1074 (3d Cir.1995) (*per curiam*)).

I will bet that at some point or points in time Your Honor felt the dehumanizing blow of discrimination.

I've been discriminated against a few times and have not forgotten. (Ch 5 News reporter story). I've also been slugged on the jaw numerous times—but that's all water under the bridge.

DOJ's alleged hardships are purely speculative and futuristic.

any relief that could potentially require the Government to spend millions of dollars changing the Selective Service System in response to a court order would impose a considerable hardship at this time, (DOJ Reply at 7, D.E. No. 82).

A stay pending appeal will avoid the DOJ's concerns that the three-trillion dollar Government will be put out by spending $37 million to accommodate the registration of women.

Let's not forget that Plaintiff, in the alternative, also requests elimination of draft registration. Such would actually save the Government money.

Also, Congress can simply pass a law overruling a decision for Plaintiff. Of course, it will have to be constitutional.

Congress may wish to change the system in a different manner following the Commission's review (DOJ Reply at 7, D.E. No. 82).

DOJ does not say how this Court's ruling that Plaintiff's Equal Protection and Substantive Due Process rights are being violated will cause—future tense—the Commission to change its suggestions or Congress to change its prospective law—if any.

Neither the Commission nor Congress nor Pres. Trump are parties to this suit.

Any decision for Plaintiff will most likely be stayed pending appeal.

Of course, a decision for Plaintiff that is upheld by the Third Circuit and the U.S. Supreme Court as constitutional will make it difficult for certain archaic members of Congress to continue discriminating against women. But that is the price of bigotry.

Hardship to Plaintiff—Commission will NOT resolve "ultimate" issue.

The author of the DOJ Reply asserts that Plaintiff will not suffer any hardship from the Court withholding a decision because the Commission's *review encompasses . . . the principle (sic) matter at issue in this lawsuit*. (DOJ Reply at 3, D.E. 82)

That is another of his patented deceptions. According to the Magistrate's Order at 4, 07/28/17, D.E. 67, and I quote:

> **WHEREAS**, although the review of the Commission may ultimately impact, or even moot this matter, the current legislative scheme and status provides no certainty as to the resolution of the ultimate issue in this case.

That ultimate issue is whether the MSSA and SSS are presently discriminating against Plaintiff.

Young women's' rights NOT of less value than young men's.

The DOJ Reply author also brushes aside any hardship to Plaintiff and millions of young women if this Court finds the case not ripe because they are women and not men.

> *In Rostker, the plaintiffs were men who faced civil and criminal penalties if they did not register for the Selective Service. Rostker v. Goldberg, 448 U.S. 1306 (1980). In contrast here, Plaintiff is a woman who is not required to register for the draft, nor is she prevented from pursuing military service (including in a combat role) or penalized for not registering.* (DOJ Reply 6, D.E. No. 82).

This DOJ lawyer clearly sees women as having less value than men.

Pursuing a military career is NOT an issue.

DOJ states that *Thus, for purposes of balancing the equities, while Plaintiff desires that the constitutional question be resolved quickly, any delay in its resolution in deference to the political process does not impose any restriction on Plaintiff, including from pursuing a military career.* (DOJ Reply 6, D.E. No. 82).

Your Honor already rejected that argument in the Standing Motion Opinion:

> "Plaintiff explains, her injury "is not that she is kept out of combat positions, not that she may be harmed by future inductions, not that she is prevented from enlisting, and not that possible career opportunities in the military will be hindered *but rather* that she is prevented— solely because of her sex—from *registering for the draft*. (Pl. Opp. Br. at 21) (emphasis in original)." (Opinion at 8, D.E. No. 72).

Bill of Attainder against Plaintiff.

The DOJ Reply author writes that the *balance of equities favors allowing the political branches to complete their review prior to a judicial ruling on the merits of Plaintiff's claims. See Defs.' Mot. 12–18.* (DOJ Reply at 3, D.E. No. 82).

> This is nothing more than a request for the imposition of a Bill of Attainder (specifically Bill of Pains and Penalties) in the form of a statute of limitations that stops Plaintiff's action when she reaches the age of 26.
>
> > The Second Circuit in *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 725 F.3d at 111, warned that a statute of limitations dismissal "would effectively foreclose the possibility of relief—a hardship and inequity of the highest order."

Prudential Ripeness

The test for prudential ripeness in this case is the same as the test for ripeness in a pre-enforcement administrative agency situation.

> DOJ even admits such in its Reply at 2 (D.E. No. 82) where it cites *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003), for "prudential reasons for refusing to exercise jurisdiction."
>
> This case, however, is NOT a pre-enforcement action—it is a post-enforcement action because Plaintiff has been injured by an agency decision that was enforced.

Even so, assuming we get to the Supreme Court, our position is that prudential ripeness has been called into question and that Court should eliminate it.

> The Supreme Court has twice questioned the very existence of prudential limits on justiciability.
>
> In *Lexmark Int'l v. Static Control Components*, 572 U.S. 118, 125-126 (2014), the plaintiff argued that the Supreme Court should decline to adjudicate defendant's claim on grounds that were prudential rather than constitutional. The Court declined stating "That request is in some tension with our recent reaffirmation of the principle that 'a federal court's 'obligation' to hear and decide' cases within its jurisdiction 'is 'virtually unflagging.'" *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584, 591 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).
>
> Moore's *Fed. Prac.* at 101.70(3), p. 101-305, states "reliance on the existence of a prudential ripeness element is risky."
>
> In *Susan Anthony List v. Driehaus*, 189 L.Ed.2d 246, 261 (2014), defendants asserted, as DOJ does here, that the "prudential ripeness" factors of fitness and hardship made the case nonjusticiable.

But the Supreme Court concluded that plaintiffs had alleged a sufficient Article III standing injury—just as Your Honor has done here. The Supreme Court found ripeness because it had found a standing injury in what was a pre-enforcement action against a state statute.

Of course, this case is NOT a pre-enforcement action so prudential concerns of fitness and hardship do not apply. If it is one, then *Susan Anthony* applies.

DOJ's wrong prudential ripeness arguments

DOJ argues *it is just as possible that the process will address the issues fully and provide the basis for a new policy that then would be available for any further judicial review.* (DOJ Reply at 5, D.E. No. 82)

So according to the DOJ lawyers, if a law is on the books that violates a person's rights, her case is not prudentially ripe because there exists the possibility that a new policy—not even a law—but a new policy will result such that she can then sue under the new policy.

Basically, a young women's rights are being violated now by a law. There are bureaucratic proceedings going on that may change policy and that change of policy may allow for suit.

Sounds overly speculative to me. I wonder if the DOJ lawyers would like their rights to depend on such futuristic mumbo-jumbo.

Defendants contend that Plaintiff's claims are not prudentially ripe because proceeding with the litigation at this time would deprive the political branches of the opportunity to apply their judgment and expertise to a matter that is committed to their authority by the text of the Constitution itself. See Defs.' Mot. 12–18. p.5

This case does not challenge what the Commission, Congress or some President might do. It challenges the violation of Plaintiff's constitutional rights.

The courts cannot share their Article III power with the other branches of government. *U.S. v. Nixon*, 418 U.S. 683, 704 (1974). "To prevent the legislature from using the federal courts to accomplish unconstitutional ends, Congress's Article III power must be subject to the due process guarantees of the Fifth Amendment."

DOJ's cases after *Lexmark* confirm the questionable nature of prudential ripeness.

Fourth Corner Credit Union v. Fed. Reserve Bank of Kansas City, 861 F.3d 1052, 1059 n.1 (10th Cir. 2017) (DOJ Reply at 5 n.2, D.E. No. 82).

DOJ includes a quote from *Fourth Corner*, a pre-enforcement action, but intentionally

fails to state or even indicate that *Fourth Corner* relied on another 10th Cir case for the quote "continued to apply." DOJ did not even include a "citation omitted."

> DOJ used the quote in its statement that "the Tenth Circuit has 'continued to apply' the prudential ripeness doctrine." (DOJ Reply at 5 n.2).

Here's the reason DOJ failed to cite to the original case:

> The deleted 10th Cir case is *United States v. Supreme Court of New Mexico*, 839 F.3d 888, 903-04 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 130 (2017), which was also a pre-enforcement action in which the 10th Cir found that New Mexico's "Rule 16–308(E) is preempted with respect to federal prosecutors practicing before grand juries, but is not preempted outside of the grand-jury context."
>
> The full sentence from *New Mexico* is
>
> > Notwithstanding the Court's sensitivity and criticism to the [federal preemption doctrine] doctrine, see also *Sprietsma v. Mercury Marine*, 537 U. S. Reports 51 (2002), the Court has <u>continued to apply</u> it to invalidate state laws that stand as obstacles to the purpose of a particular federal statutory scheme, see Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 648 (6th ed. 2009) (citing Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 Sup. Ct. Rev. 343 (2002)).
>
> Apparently the *Fourth Corner* confused "prudential ripeness" with the federal preemption doctrine." A confusion the DOJ intentionally tried to exploit via its deception of not citing *New Mexico.* Is that allowed?
>
> Further that Court found that "The requirements of standing and <u>constitutional ripeness</u> overlap; if an injury 'is sufficiently 'imminent' to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied.' (quoting *ACLU v. Johnson*, 194 F.3d 1149 , 1155 (10th Cir. 1999)); *see also Susan B. Anthony List v. Driehaus* , 134 S.Ct. 2334 , 2341 n.5 (2014)." *New Mexico*, 839 F.3d at 903-904.

More deception from DOJ on *Fourth Corner*:

> The three judges on the panel all wrote different decisions based on different arguments. The common denominator for two of the judges was remand for dismissal without prejudice. There was no majority decision on ripeness.
>
> DOJ makes no mention of that—I wonder why.
>
> DOJ relies on *dicta* from one of the judges.

Judge Matheson found lack of ripeness because the action had changed into a pre-enforcement one. "[T]his case has become divorced from the factual backdrop that gave rise to the original dispute. As the Reserve Bank points out, the new Credit Union is a "fundamentally different[ ] entity" than the one the Reserve Bank turned down." Matheson, Circuit Judge at 1058.

"The Credit Union's amended complaint reveals this case is no longer based on sufficiently developed facts. In particular, the amended complaint does not and cannot tell us whether the Reserve Bank would grant a master account on the condition that the Credit Union will not serve marijuana businesses unless doing so is legal. It cannot do so because, as the Credit Union explained to the district court, it has never approached the Reserve Bank about obtaining a master account on the terms now alleged." Matheson, Circuit Judge at 1059.

Judge Bacharach, however, found this pre-enforcement case ripe but in doing so raised the question of the continuing validity of prudential ripeness under *Lexmark* and also cited to *Reddy v. Foster* , 845 F.3d 493, 501 n.6 (1st Cir. 2017), that stated in *Susan B. Anthony* the Supreme Court "cast a measure of doubt upon ripeness's prudential dimensions".

Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 2014 WL 3579639, at *10 (W.D. Wash. July 21, 2014) (DOJ Reply at 5 n.2, D.E. No. 82).

In this pre-enforcement action, the DOJ Reply author quotes the court "absent more definitive guidance from the Supreme Court," the district court would apply prudential ripeness. (DOJ Reply at 5 n.2, D.E. No. 82).

(1) This quote from the W.D. Wash decision is out of context.

"The Supreme Court recently called into question the continued viability of the prudential ripeness doctrine. *See Susan B. Anthony List v. Driehaus,* 134 S.Ct. 2334 (U.S.2014). . . . Nonetheless, absent more definitive guidance from the Supreme Court, and out of an abundance of caution, the court addresses prudential ripeness here." *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 2014 WL 3579639, at *10 (W.D. Wash. July 21, 2014).

(2) The W.D. Wash found ripeness even though there was a future contingency necessary to occur because the Court concluded the contingency would most likely happen, so it was imminent. "The only contingency to plaintiff's continued injury by defendants' interference is reception of a research permit for lethal whaling." 2014 WL 3579639, at *9.

This Court is not bound by the DOJ deceptions or decisions that involve pre-enforcement actions.

[DOJ's Ninth Cir. prudential ripeness argument failed.

Defendants made similar prudential ripeness arguments before the Ninth Circuit in *Nat'l Coal. for Men v. Selective Serv. Sys.* (9th Cir. 13-56690, Br. at 8, 08/27/2014, D.E. 22-1) (about the number of positions opened to women).

> [DOJ argued that "Judicial intervention at this stage would be premature and inconsistent with the long tradition of deference to the bodies entrusted with crafting the military and security policy of the United States on issues within their sphere of expertise."

[But the Circuit Court ruled against the DOJ in an unpublished opinion. 640 F. App'x 664 (9th Cir. 2016). The Court held that

> "Even if some uncertainty remains . . . that does not render the . . . claims unripe. The ripeness inquiry asks whether there is a legitimate controversy that is 'fit for adjudication.' *Texas v. United States*, 523 U.S. 296, 300 (1998)). [Plaintiffs point] to numerous specific changes in statutes, policies, and practices that have happened since the Supreme Court's decision in *Rostker v. Goldberg*, 453 U.S. 57 (1981). The Selective Service argues that women's roles have not changed sufficiently to revisit *Rostker*. But whether there has been sufficient change to revisit *Rostker* is a question about the merits of the . . . claims, not about ripeness."]

Level of Review for Ripeness on Constitutional Question

DOJ manipulates to its advantage a quote from *Artway v. Att'y Gen. of State of N.J.*, 81 F.3d 1235, 1249 (3d Cir. 1996), that *"[c]ourts are particularly vigilant to ensure that cases are ripe when constitutional questions are at issue." Artway v. Att'y Gen. of State of N.J., 81 F.3d 1235, 1249 (3d Cir. 1996).* (DOJ Reply at 2, D.E. No. 82).

> This is an intentionally dissembling quote because the DOJ author left out the cases that *Artway* at 1249 relied on for that quote, and that the "particularly vigilant" quote means sufficient factual information.
>
> *Artway* cited *see Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 80-81 (1961):
>
> > "The record here does not show that any present members, affiliates, or contributors of the Party have withdrawn because of the threatened consequences to them of its registration under the Subversive Activities Control Act, or that any prospective members, affiliates, or contributors have been deterred from joining the Party or giving it their support. We cannot know how many, if any, members or prospective members of the Party are also employees or prospective employees of the Government or of defense facilities or labor unions, or how many, if any, contributors to the Party hold government or defense-facility employment. It is thus impossible to say now what effect the provisions of the Act affecting members of a registered organization will have on the Party. *Cf. State of New*

> *Jersey v. Sargent*, 269 U.S. 328 (1926). To pass upon the validity of those provisions would be to make abstract assertions of possible future injury, indefinite in nature and degree, the occasion for constitutional decision. If we did so, we would be straying beyond our judicial bounds."

Artway in the next paragraph stated:

> "Two Supreme Court cases illustrate the need for factual information particularly well."
>
> "In *Socialist Labor Party v. Gilligan*, 406 U. S. 583 (1972) , the Court dismissed as unripe a challenge on First Amendment grounds to a state law that required candidates to swear not to attempt to overthrow the government by violence or force. The Court concluded that "the record ... is extraordinarily skimpy in the sort of proved or admitted facts that would enable us to adjudicate this claim." *Id*. at 587."
>
> "In *California Bankers Association v. Shultz*, 416 U. S. (1974), the Court similarly declared unripe a First Amendment challenge to bank record-keeping and reporting requirements because of an insufficient factual record. *Id.* at 56. "This Court, in the absence of a concrete fact situation in which competing associational and governmental interests can be weighed, is simply not in a position to determine whether an effort to compel disclosure of such records would or would not be barred ...." Id."

Also the DOJ author intentionally left out the *Arway* holding on ripeness, 81 F.3d at 1251:

> "Whether Artway will ever be subject to Megan's Law notification requirements remains a matter of speculation, and the record lacks the factual information necessary for this Court to decide Artway's notification claims consistent with its Article III obligations"

There is no factual speculation here. Plaintiff tried to register and SSS barred her.

Claims on which relief can be granted, Rule 12(b)(6)

The Third Cir "obliges district courts considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6) to engage in a two-part analysis." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir.2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

> The analysis begins with "taking note of the elements a plaintiff must plead to state a claim . . . ," *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1947 (2009), then proceeds in two steps:
>
> 1. Identifying the specific allegations in a complaint that are not entitled to the presumption of truth. *Iqbal*, 129 S.Ct. at 1951. Those are statements that cut and copy the elements of a cause of action; that is, they are conclusory. *Twombly*, 550 U.S. at 555. The allegations should be more than an unadorned: the-defendant-unlawfully-harmed-me accusations. *Iqbal*, 129 S.Ct. at 1949. Some legal conclusions, however, are permissible when the defendants are given notice of the date, time and place of the alleged illegal conduct.
>
> 2. Next, the analysis considers the remaining factual allegations in a complaint as true and determines if they plausibly—not probably but more than possibly— infer that the defendant is liable for the misconduct alleged. *Twombly*, 550 U.S. at 556. In doing so, the courts "draw[] all inferences in favor of the plaintiff," *see McTernan v. City of York, PA.*, 577 F.3d 521, 526 (3d Cir.2009), and a complaint cannot be dismissed based on a judge's disbelief of the factual allegations even if it strikes a judge that actual proof is improbable, *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007) (quoting Twombly, 550 U.S. at 555).
>
> DOJ has failed in satisfying this two-step process for each of the causes of actions.

Plausibility

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Evaluating a motion to dismiss is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 679.

> DOJ does not deny that Plaintiff tried to register for the draft and was barred from registering by Defendants because the MSSA forbids women from registering.
>
> Defendants' alleged misconduct is (1) discriminating against young women in favor of young men when both groups are similarly situated, and (2) failing to treat young women as first-class, full-fledge citizens.
>
> Equal Protection and the Substantive Due Process Irrebuttable Presumption doctrines are cognizable legal theories. *See, e.g., Brower v. County of Inyo*, 489 U.S. 593, 594-595, (1989).

DOJ confuses justiciability and the merits.

"[T]he question whether a plaintiff states a claim for relief 'goes to the merits' . . . not the justiciability of a dispute . . . and conflation of the two concepts can cause confusion." *Bond v. U.S.*, 564 U.S. 211, 219 (2011) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 92 (1998)).

> The DOJ tries to do just that by including its deference or justiciability arguments in its Rule 12(b)(6) sections of its Brief—just check the DOJ Br. table of contents. (DOJ Br. at 21, 05/18/18, D.E. No. 80-1).
>
> Also in its Reply, DOJ continues trying to conflate "claim for relief" with its justiciability argument of deference.
>
> > *Plaintiff cites no authority for the proposition that the Court may disregard the significant deference due to the political branches' choice to further a particular interest in this area, including to weigh the costs and burdens of military policies.* (DOJ Reply at 9, D.E. No. 82).
> >
> > *Future policy concerning draft registration [needs to be resolved first]*. (DOJ Reply at 10, D.E. No. 82).

DOJ's burden

The Third Circuit in *Dillard v. Brown*, 652 F.2d 316, 323-24 (3d Cir. 1981), held that "[i]f the military justification outweighs the infringement of the plaintiff's individual freedom, we may hold for the military on the merits, but we will not find the claim to be non-justiciable and therefore not cognizable by a court."

"The defendant bears the burden of showing that no claim has been presented." *Hedges v. U.S.*, 404 F.3d 744, 750 (3d Cir.2005).

> The DOJ by mixing justiciability with the merits and providing a justification that depends on fortune telling failed to carry its burden on its Rule 12(b)(6) motion.
>
> The uncertainty of what will happen with the Commission and its suggestions does not outweigh what is happening now to the Plaintiff's constitutional rightsq.
>
> [Further, any justification for a continuing ban on women registering for the draft must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *See United States v. Virginia*, 518 U.S. 515, 533 (1996). Both the case in this Court and the S.D. Texas Court started before Congress, well aware of these cases, created the Commission. Such indicates the Commission was invented in response to litigation.]

Equal Protection Claim

"Plaintiff alleges that the MSSA creates an unlawful sex-based difference that violates her and the putative class's equal-protection and substantive-due-process rights under the Fifth Amendment because the MSSA (i) requires males and not females to register, and (ii) forbids females from registering. (*See* [SAC, D.E. No. 54] ¶¶ 2, 59, 67)." (Opinion at 2, D.E. No. 72).

Any statutory classifications that distinguish between men and women are "subject to scrutiny under the Equal Protection Clause," *Craig v. Boren*, 429 U.S. 190, 197 (1976) (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

Few cases have upheld the dismissal of a purposeful discrimination claim for failure to state a claim for relief. *Pryor v. NCAA*, 288 F.3d 548, 565 (3rd Cir. 2002), *ques. on other grounds*, *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 264 (3d Cir. 2013).

Elements of Equal Protection

According to the Third Circuit, a woman's right to equal protection is violated when

> (1) she is treated "differently from others with whom," (2) "she is similarly situated," (3) that "unequal treatment is the result of intentional discrimination," and (4) "'the adequacy of the reasons for that discrimination'" are determined under the intermediate standard of review. *Hassan v. City of New York*, 804 F.3d 277, 298 (3d Cir. 2015), *as amended* (Feb. 2, 2016) (internal quote *SECSYS, LLC v. Vigil*, 666 F.3d 678, 689 (10th Cir.2012)).

(1) The MSSA requires only males to register; therefore, Plaintiff, a woman, is treated differently because of her gender.

(2) The issue of "similarity"

> *Rostker* held that "[T]he purpose of registration is to develop a pool of potential combat troops," *Rostker*, 453 U.S. at 79.
>
> > Both men and women are now serving in combat positions. Therefore, some women who are of age to register are potential combat soldiers while some men of age to register are potential combat soldiers. Since it is impossible to identify solely by their sex which persons are potential combat soldiers, the two sexes are similarly situated with respect to draft registration—but treated differently.
> >
> > *See, e.g., Craig v. Boren*, 429 U.S. 190, 204 (1976) (sex not an "accurate proxy"); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society.").
>
> Plaintiff is requesting this Court adhere to the reasoning in *Rostker*—to follow the reasoning in *Rostker* on the Equal Protection issue of similarity. Today "combat troops"

means both women and men; therefore, both sexes belong in the "pool of potential combat troops."

> "[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist," *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 (1938).
>
> > Even DOJ admits the facts on women in combat have changed: Department of Defense Opens All Combat Billets to Women, DOJ Br. at 6, D.E. No. 80-1.

Similarity determined by combat positions opened to women not how many are in such positions.

The *Rostker* Court, 57 U.S. at 68, quoted from S. Rep. No. 96-826, pp. 157 (1980) that "the starting point for any discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat."

> The door to combat is now open and women are walking through it.

The issue for similarity is one of equal opportunity.

> As former Defense Sec. Carter said, "equal opportunity may not always equate to equal participation."
>
> Former Sec. Defense Panetta said, "In life, as we all know, there are no guarantees of success. Not everyone is going to be able to be a combat soldier. But everyone is entitled to a chance." Jan. 24, 2013, Press Conf.

DOJ admits that the issue of similarity is equal opportunity— not a quota that requires specific numbers from each group to be actually serving in a position.

> In *SWAN v. Sectary of Defense,* 3:12-cv-06005, N.D. Cal., DOJ asserted that equal opportunities for women in combat does not depend on the actual number of women in combat roles. *Case Management Statement* at 17, ln 19-25, January 5, 2017, D.E. No. 89.
>
> > DOJ stated that such a quota argument "is premised on the fallacious assumption that for female Service members to have equal opportunities vis-à-vis combat positions there must be large numbers of female leaders in those positions so that there are a variety of positions from which junior enlisted females may choose." *Id*.

Also, if quotas were required for similarity to exist, then women would not be police officers, fire officers or occupy other positions.

Since all combat roles in the military are now open to women who meet the gender-neutral standards for those positions, young men and women are now similarly situated with respect to draft registration.

(3) "To state an equal-protection claim," Plaintiff must allege "'intentional discrimination.'" *Hassan*, 804 F.3d at 294 (citing ***Washington v. Davis***, 426 U.S. 229, 241 (1976)).

A claim of intentional discrimination does not require a motive of ill will to violate the Equal Protection Clause because intent and motive are not the same. *Hassan* at 297-298.

All that is needed is that the government "*meant* [intended] to single out a plaintiff because of the protected characteristic itself." *Id*. (emphasis in the original) (citing *see e.g., Snyder v. Louisiana*, 552 U.S. 472, 485 (2008).

Just because Defendants "might be able to conjure up some non-discriminatory motive to explain" their actions, such "is not a valid basis for dismissal." *Hassan*, 804 F.3d at 297.

The only explanation Defendants have is that the MSSA requires discrimination.

According to the Supreme Court in *Edwards v. Aguillard*, 482 U.S. 578, 594-595 (1987), a statute's intent is determined by (A) the plain meaning of the statute's words, (B) its legislative history, and (C) historical context.

(A) Here the MSSA language explicitly classifies persons on the basis of sex. Such is direct evidence of intent, regardless of Congress's 1948 or 1980 motives.

(B) As for legislative history, "Congress did not change the MSSA in 1980, but it did thoroughly reconsider the question of exempting women from its provisions, and its basis for doing so.

Rostker, 453 U.S. at 75 found that "[t]he 1980 legislative history is, . . . highly relevant in assessing the constitutional validity of the exemption." Relying on the 1980 legislative history, the *Rostker* Court Found that "[t]he issue was considered at great length, and Congress clearly expressed its purpose and intent." *Rostker*, 453 U.S. at 74.

The *Rostker* Court cites to that legislative history at 75 to 77, where the Senate Report found that

"The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people. It is universally supported by military leaders who have testified before the Committee. . . . Current law and policy exclude women from being assigned to combat in our military

> forces, and the Committee reaffirms this policy." S. Rep. No. 96–826, p. 157, U.S. Code Cong. & Admin. News 1980, 2647.

The legislative history is clear—Congress intended to treat young women and men differently with regard to combat and therefore draft registration.

(C) As for American culture in 1980, "[t]he question of registering women for the draft received considerable national attention and was the subject of wide-ranging public debate . . . ." *Rostker*, 453 U.S. at 72 (1981). Equality lost that debate just as the Equal Rights Amendment was sliding into oblivion.

(4) Intermediate standard of review.

In *Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1690 (2017), the Supreme Court laid out the standard of review:

> The defender of legislation that differentiates on the basis of gender must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); alteration in original); *see Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60 (2001). Moreover, the classification must substantially serve an important governmental interest today, for "in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2603 (2015).

The MSSA registration provision is clearly an important governmental objective. "The registration database itself mitigates risk to the Nation; its very existence would reduce the time required for full defense mobilization. . . . [in] a conflict of global proportions or mammoth national emergency." (*Report on the Purpose and Utility of a Registration System for Military Selective Service* at 10, DOJ Br. Ex. 2, D.E. No. 80-3).

As for substantially serving, the Pentagon has stated that "It would appear imprudent to exclude approximately 50 percent of the population—the woman half—from availability for the draft in the case of a national emergency." (*Report on the Purpose and Utility of a Registration System for Military Selective Service* at 17, DOJ Br. Ex. 2, D.E. No. 80-3).

> So by the Government's own admission, barring young women from registering does not substantially serve the important purpose of registration.

Rostker, 453 U.S. at 79, held that the purpose of draft registration is to create a pool of potential combat soldiers. Women are now combat soldiers, so barring all women from the registration pool of potential combat soldiers would not only not serve registration's objective, but jeopardize its very purpose.

DOJ's mistaken arguments on Equal Protection

1. DOJ asserts that *Rostker* demands this Court actually write in its opinion that because the definition of "combat troops" today includes women that means men and women are still not similarly situated for draft registration.

> According to the DOJ, when application of the law on Equal Protection as to the element of similarity reaches one conclusion under one fact situation—it must reach the same conclusion under all other fact situations no matter how different.
>
> That is false according to the Supreme Court, "[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist," *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 (1938).
>
> If *Rostker* is analyzed under IRAC: issue, rule, application, and conclusion, then its conclusion is the result of applying its rule on similarity to the fact situation that then existed. Applying that same rule to today's fact situation when all the combat restrictions on women have been removed results in a different conclusion—the MSSA violates Plaintiffs' equal protection rights because the absence of combat restrictions mean men and women are now similarly situated. *Cf. Rostker* at 78.

2. DOJ relies on *Rostker* to argue that Plaintiff fails to state an equal protection claim. (Def. Mov. Br. at 19-20, D.E. No. 80-1).

> The Supreme Court did not dismiss *Rostker* for failure to state a claim, but decided the merits on Equal Protection similarity.

3. DOJ uses a quote from Judge Stahl's concurring opinion in *Elgin v. U.S. Dep't of Treasury*, 641 F.3d 6 (1st Cir. 2011), that this Court cannot decide the merits: *"[I]t would not be for this court to determine what, if any, impact these developments had on the continued vitality of Rostker, a task left solely to the Supreme Court."* (DOJ Reply at 9, D.E. No. 82).

> DOJ's use of that quote infers a justiciability issue but Stahl's decision was based on the issue of similarity.
>
> Judge Stahl found men and women were not similarly situated because "women are still precluded from ground combat positions." *Id*. at 23. In 2011, the DGCDAR was still in effect and excluded women from units below the brigade level with a primary mission to engage in direct combat on the ground—today, it is history.
>
> [If this Court believes that Judge Stahl's concurring opinion means only the U.S. Supreme Court can make a decision on the issues here, then grant DOJ's motions, so Plaintiff can start working her way up the ladder to the Supreme Court for a decision.]

4. *The Court's decision in Rostker involved the same law and the same constitutional provision as Plaintiff's current challenge, and this Court should not depart from Rostker's binding precedent.* (DOJ Reply at 1, D.E. No. 82).

> DOJ is right Plaintiff here challenges the same law under the same constitutional provision as challenged in *Rostker* and in the S.D. Texas, *Nat'l Coal. for Men v. Selective Serv. Sys.* 4:16-cv-03362 (S.D. Tex. 2016). But the facts differ, and Plaintiff is asking this Court to apply the rule in *Rostker* on similarity to the new facts—the new definition for combat troops.

5. *the Rostker Court's holding that the MSSA does not violate the Fifth Amendment remains binding on this Court and controls the outcome of this case. To decide Plaintiff's claim would thus require the Court to confront overruling Rostker, an action inconsistent with the well-established principle that lower courts must follow Supreme Court precedent, even when the underpinnings of a decision have been called into question. See Rodriguez de Quijas v. Shearson/Am. Express Inc., 490 U.S. 477, 484 (1989); Agostini v. Felton, 521 U.S. 203, 237 (1997).* (DOJ Reply at 8, 9, D.E. No. 82).

> The DOJ is arguing that when application of the law on Equal Protection reaches one conclusion under one fact situation—it must reach the same conclusion under all other fact situations no matter how different. Today "combat troops" mean men and women.

6. *Plaintiff's argument is premised on her expectation that the Supreme Court today would reason differently than it did in 1981—that it would conclude that because women may now serve in all combat roles, the MSSA cannot be justified on that basis. Plaintiff thus asks this Court to speculate that the Supreme Court would find cause to depart from its reasoning in Rostker.* (DOJ Reply at 9, D.E. No. 82).

> False, Plaintiff relies on the Rostker Court reasoning that "the purpose of registration is to develop a pool of potential combat troops," *Rostker*, 453 U.S. at 79. Potential "combat troops" means women and men today; therefore, they a similarly situated.

7. *Rostker cannot be set aside as binding precedent by this Court based on Plaintiff's prediction as to how the Supreme Court would view other policy changes since that decision.* (DOJ Reply at 10, D.E. No. 82).

> Plaintiff is not predicting what the Commission may or may not do. It can do whatever it wants. She is simply stating that her rights have been violated by the SSS and MSSA over the last three years.

8. *this Court should not depart from Rostker's binding precedent. . . given the present circumstances, where Congress has put in place a process for considering the impact of changed factual conditions regarding the ability of women to serve in combat roles on the Selective Service System.* (DOJ Reply at 1, D.E. No. 82).

DOJ does not specify how the mechanics of women entering into combat roles will be impacted by a decision for the Plaintiff in this case.

Plaintiff is not asking this Court to supervise Congress or the military—she just wants her rights respected and enforced.

Congress and the military will remain able to make whatever decisions they chose—providing they are constitutional.

[However, if Your Honor agrees with the DOJ that *Rostker* demands the equal protection claim be dismissed, then grant DOJ's motion so that when we make it to the Supreme Court, which is where we always intended on going, we'll ask the Court to overrule *Rostker*—assuming, of course, the DOJ is right.]

***Rostker* NOT based on administrative convenience**

DOJ wrongly asserts *that the holding in Rostker was justified . . . by the significant administrative burdens that would likely stem from registering and drafting women.* (DOJ Reply at 9, D.E. No. 82).

(1) *Rostker* never decided whether "administrative convenience" was a sufficiently important issue for justifying discrimination based on sex. To do so would have required overruling prior Supreme Court decisions. Among them, *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) and *Reed v. Reed*, 404 U.S. 71, 76 (1971).

> "In both *Frontiero* and *Reed* the reason asserted to justify the challenged gender-based classifications was administrative convenience and that alone," which failed. *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975).
>
> "Decisions following *Reed* . . . have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications." *Craig v. Boren*, 429 U.S. 190, 198 (1976).
>
> As the dissenters Justice Marshal and Justice Brennan in *Rostker* accurately said, "This Court has repeatedly stated that the administrative convenience of employing a gender classification is not an adequate constitutional justification under the *Craig v. Boren* test." *Rostker*, 453 U.S. at 95.

(2) Before determining whether a justification for discrimination exists, a court determines if the two groups are similarly situated. *See Rostker*, 453 U.S. at 78. *Rostker* concluded young men and women for the purpose of draft registration were <u>not</u> similarly situated. *Id*. At 78. Therefore, the Court never reached the issue of an important purpose substantially served—assuming administrative convenience is an important purpose, which it is not.

(3) Defendants in *Nat'l Coal. for Men*, 4:16-cv-03362 (S.D. Tex. 2016), the very same defendants as here, submitted an exhibit that contradicts that the *Rostker* decision was also based on administrative convenience. (Def. Mov. Ex. 1, *Detailed Legal Analysis* at 1, 2, 8/5/2016, D.E. No. 34-2).

> Under 10 U.S.C. § 652(a)(3)(B), the Pentagon submitted the Detailed Legal Analysis to Congress on December 3, 2015. [The last 10 U.S.C. § 652(a)(3)(B) was filed December 3, 2015. According to DOJ in SWAN, the Congressional notification period expired January 2, 2016.]
>
> On page one, the Pentagon noted that the *Rostker* decision was based on men and women not being similarly situated—not because of administrative burdens in registering women for the draft. On page two, the Analysis stated that "The Court in *Rostker* did not explicitly consider whether other rationales underlying the statute would be sufficient to limit the application of the MSSA to men."
>
> [The DOJ Reply says *"the Supreme Court did not consider whether other rationales were "sufficient" to sustain the MSSA."* (Reply at 10-11). Yet at page 12, the DOJ Reply states *"As Rostker recognized, the MSSA is justified, at a minimum, based on the administrative burdens of registering and drafting women. See 453 U.S. at 81."* So which is it? It's neither.]

(4) Defendant SSS states on its website, "The Selective Service System, if given the mission and modest additional resources, is capable of registering and drafting women with its existing infrastructure." (*Kyle-LaBell*, Pl. Opp. June 4, 2018, Ex. D, D.E. No. 81-5, bottom of page). The SSS's plan for women registration estimates that it would need "$37 million over the first five years of execution." (DOJ *Report on the Purpose and Utility of a Registration System for Military Selective Service*, Ex. 2 at 20, D.E. No. 80-3).

> Neither is an administrative burden for the Government as Defendants have admitted: "SSS is presently unaware of any specific logistical problems that would arise if women were required to register for the Selective Service." (*Defendant Selective Service System's Objections and Responses to Plaintiffs' First Set of Interrogatories* at No. 11 p. 7 Response, filed in *Nat'l Coal. for Men*, 4:16-cv-03362, S.D. Tex. 2016, D.E. No. 76).

DOJ also argues out of the other side of its mouth that *The Supreme Court did not address whether, for example, the administrative burdens of registering and drafting women would alone be a sufficient basis on which to uphold the MSSA. The district court in Nat'l Coal. for Men also did not consider whether the MSSA could be upheld on the basis of the administrative burdens posed by registering and drafting women.* (DOJ Reply at 11, D.E. No. 82).

> That is correct; therefore, the DOJ attorneys must be arguing that administrative burdens alone are sufficient to defeat an equal protection challenge to a statute. Not according to the Supreme Court.

"Decisions following *Reed* . . . have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications." *Craig v. Boren*, 429 U.S. at 198.

DOJ argues that *the administrative concerns described in Rostker encompassed more than pure financial costs, including "[o]ther administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards." 453 U.S. at 81 (quoting S. Rep. No. 96-826, 159, U.S. Code Cong. & Admin. News 1980, 2649)).* (DOJ Reply at 10, D.E. No. 82).

These administrative concerns only involve induction not draft registration where there are no administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards.

Those who register with the SSS are a different group than those inducted into the military. (DOJ Standing Motion Br. at 4-6, D.E. No. 69-1). "Defendants appear to acknowledge that those who register with the SSS compose a different group than those already in the military. (*See* Def. Mov. Br. at 4-6)" (Opinion at 8, D.E. No. 72).

S.D. Texas found an Equal Protection Claim for Relief

For what it is worth, the S.D. Texas court found an Equal Protection claim was stated against the very same defendants as here on the exact same issue as here—sex-discrimination by the registration requirement of the MSSA. *Nat'l Coal. for Men v. Selective Serv. Sys.*, 2018 WL 1694906 (S.D. Tex., April 6, 2018).

This Court is obviously not bound by a decision in the S.D. of Texas, but a sister's district decision on the Equal Protection issue allows this Court to refer to the decision and consider principles applied in that decision. *Alperin v. Vatican Bank*, 410 F.3d 532, 546 n.8 (9th Cir. 2005).

It is clearly more valuable than the assertions of the DOJ lawyers.

In the Texas case, the DOJ argued that the male plaintiffs failed to state a claim because: (1) entry of the relief sought would impermissibly intrude on Congress's authority over military affairs; and (2) the *Rostker* result requires the same result that the case be dismissed.

The Texas Court ruled against both arguments.

(1) On deference, the Texas Court stated

"*Rostker* thoroughly explained the reason to provide deference to Congress when dealing with military affairs. *See* 453 U.S. at 64–67. But "[n]one of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause." *Id.*

at 67. Because *Rostker* explicitly requires Congress to comply with the Constitution in the area of military affairs, and because Plaintiffs allege Defendants did not, Plaintiffs state a claim upon which relief can be granted. *See Rostker*, 453 U.S. at 67." *Nat'l Coal. for Men v. Selective Serv. Sys*., 2018 WL 1694906 *4 (S.D. Tex., April 6, 2018).

(2) On reaching the same result as in *Rostker*

"[T]he factual circumstances of this case are different [from *Rostker*]. . . . Now, women can serve in combat roles. Because the alleged factual circumstances of this case differ from the dispositive facts in *Rostker*, the court cannot conclude, at this stage," that the same outcome is required. *Nat'l Coal. for Men v. Selective Serv. Sys*., 2018 WL 1694906 *4(S.D. Tex., April 6, 2018).

The S.D. Texas court is now considering dueling motions for Summary Judgment and a SSS motion for a stay. Whatever the results in the S.D. Texas court, that case will be appealed to the Fifth Circuit where the Dist Ct reasoning will be accepted, modified or rejected, and then on to the U.S. Supreme Court if it permits.

Substantive Due Process Claim

This case deals with a legislative—not an *ultra vires* executive act.

To state a substantive due process claim in a case challenging a legislative act, the "complaint would have to allege facts that would support a finding of arbitrary or irrational legislative action . . . ," *Pace Res. v. Shrewsbury*, 808 F.2d 1023, 1035 (3rd Cir. 1987), unless a fundamental right is burden, then strict scrutiny is applied, *Alexander v. Whitman*, 114 F.3d 1392, 1403 (3rd Cir.1997).

> The Third Circuit has warned, "It is crucial to keep in mind the distinction between legislative acts and non-legislative or executive acts. As we have previously explained, 'executive acts . . . typically apply to one person or to a limited number of persons, while legislative acts, generally laws and broad executive regulations, apply to large segments of society.'" *Nicholas v. Pa. State*, 227 F.3d 133, 139 n.1 (3rd Cir. 2000), *cert. den.*, 449 U.S. 955 (internal quote citation omitted).
>
> DOJ mistakenly relies on a definition of "arbitrary" to mean "only the most egregious official conduct" that "shocks the conscience." (DOJ Br. at 19, 27, D.E. 80-1). Such is the standard of culpability when executive government officials abuse their power, *United Artists Theatre Circuit, Inc. v. Township of Warrington, PA*, 316 F.3d 392, 399 (3rd Cir. 2003); that is, they act *ultra vires*. Here the SSS is not acting *ultra vires*—it is doing what the MSSA requires.
>
> The SSS even admits that it is acting in accordance with a legislative act—the MSSA. (DOJ Reply at 4, 12, D.E. No. 82). Therefore, the applicable standard is for legislative acts, which requires determining whether a legitimate governmental interest is rationally served or whether a compelling governmental interest is strictly served because a fundamental right is infringed. *Nicholas v. Pa. State*, 227 F.3d at 139; *Malmed v. Thornburgh*, 621 F.2d 565, 575 (3rd Cir. 1980), *cert. den.*, 449 U.S. 955.

The MSSA fails the Irrebuttable Presumption test for Substantive Due Process under both rational and strict scrutiny; therefore, the SAC states a substantive due process claim on which relief can be granted.

Irrebuttable Presumption Doctrine

For the Irrebuttable Presumption Doctrine to apply, the first thing needed is a constitutional right that a government is alleged to be infringing under the Due Process Clause of the Fifth Amendment or the 14th Amendment.

> The alleged infringement is that a statute denies a benefit or places a burden on persons because they possess a particular characteristic. The denial of the benefit or assignment of the burden must then necessarily follow from that characteristic; otherwise, substantive due process is violated. *Malmed v. Thornburgh*, 621 F.2d 565, 573-574 (3rd Cir. 1980), *cert. denied,* 449 U.S. 955.

The doctrine comes from a series of Supreme Court decisions. *Bell v. Burson*, 402 U.S. 535 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Vlandis v. Kline*, 412 U.S. 441 (1973); *U.S. Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); and *Turner v. Dept. of Employment Security*, 423 U.S. 44 (1975).

> Each of these cases involved a statute containing rules that denied a benefit or placed a burden on all individuals possessing a certain characteristic. The characteristic is the basic fact from which a presumed fact is inferred, such as women are not capable of combat.
>
> These decisions held that if it "is not necessarily or universally true" that the basic fact infers the presumed fact, then the statute's irrebuttable presumption infringes substantive due process. *Vlandis v. Kline*, 412 U.S. at 452
>
> The doctrine is but another way of stating that a presumed fact must be based on reason. *Malmed v. Thornburgh*, 621 F.2d 565, 574 (3rd Cir. 1980), *cert. den.*, 449 U.S. 955.
>
> If a plaintiff demonstrates that the presumed fact is not "rationally related" to a particular characteristic; that is, the basic fact, the inference will not pass constitutional muster. The decisions also show that in cases involving fundamental rights, strict scrutiny is the standard of review. The basic fact must strictly serve the presumed fact, which is a compelling state interest as in *Stanley* and *LaFleur*—marriage and family rights.

Applying Irrebuttable doctrine from Third Circuit cases to the MSSA.

In *Gurmankin v. Constanzo*, 556 F.2d 184 (3d Cir. 1977), the policy of the Philadelphia public school system excluded blind teachers from registering for an examination of their ability to teach sighted students. The Third Circuit held:

> "The refusals by the [School] District to permit [Ms. Gurmankin] to take the examination violated due process by subjecting [her] to an irrebuttable presumption that her blindness made her incompetent to teach sighted students. . . . She was, by virtue of the irrebuttable presumption of incompetency, deprived of the opportunity" to register for the examination." *Id*. 556 F.2d at 187-188.
>
> The court used rational analysis to determine that barring her because of her blindness was arbitrary and thereby violated substantive due process. *Id*. 556 F.2d at 188.

The MSSA's male-only registration likewise creates an irrebuttable presumption that because a person is a woman, she cannot register for the draft (as Gurmankin could not register for the teaching test), and, in the case of a national emergency, a woman will not be tested physically and psychologically for whether she is a potential combat soldier (as Gurmankin was barred from being tested as to whether she could teach sighted students).

> The characteristic of being a woman is the basic fact (just as blindness was in *Gurmankin*) from which the presumed fact of being unable to function as a combat

soldier (just as unable to teach sighted students in *Gurmankin*) is inferred; therefore, there is no need to test whether a woman is potentially capable of combat (just as there was no need to test blind teachers for their ability to teach sighted students in *Gurmankin*). The MSSA presumption is not necessarily nor universally true as required by the Supreme Court cases and this Circuit's *Malmed*, 621 F.2d 565, 573.

In *Malmed v. Thornburgh*, 621 F.2d 565 (3rd Cir. 1980), *cert. den*., 449 U.S. 955, five judges of the Court of Common Pleas of First Judicial District of Pennsylvania brought an action challenging Pennsylvania Constitution section requiring retirement of state judges at age 70. The Third Circuit Court of Appeals held that section did not violate equal protection or the due process clause of the Fourteenth Amendment.

> *Malmed* stated that "As with any aspect of substantive due process, a court using the irrebuttable presumption doctrine must apply the rational basis test, or in appropriate cases, strict scrutiny." *Malmed v. Thornburgh*, 621 F.2d 565, 575 (3rd Cir. 1980).

Under the Irrebuttable Presumption Doctrine, since both men and women are currently in combat, there is no rational basis and clearly no compelling reason for preventing them from registering on the grounds that they cannot engage in combat due to their sex.

Continuing validity of Irrebuttable Presumption Doctrine

The irrebuttable presumption "doctrine has not been disavowed by a majority" of the Supreme Court." Rich, *Modern Constitutional Law*, § 22:14, p. 45.

> According to *Toll v. Moreno*, 458 U.S. 1, 6 n.7 (1982), *Weinberger v. Salfi*, 422 U.S. 749 (1975), did not overrule the Irrebuttable Presumption Doctrine because *Toll* at 6 relied on *Vlandis*.
>
> > In *Salfi*, Justice Rehnquist distinguished *LaFleur* and other Irrebuttable Presumption cases on the basis of the interests that were being protected in those cases. [Rights to conceive and to raise children enjoy constitutionally protected status under Due Process, in sharp contrast to a non-contractual claim to receive funds from the public treasury, as asserted in *Salfi*.] Unlike the claims involved in *Stanley* and *LaFleur*, a non-contractual claim to receive funds from the public treasury enjoys no constitutionally protected status. [Where the interest asserted is only claims for disability payments, Congress could rationally conclude that the expense and difficulty of individual determinations justified a broad preventive rule.] Rehnquist did not overrule or reject the Irrebuttable Presumption Doctrine. The Doctrine simply did not apply because there was no constitutionally protected interest at stake.

The Third Cir in *Malmed v. Thornburgh*, 621 F.2d 565, 573 (3rd Cir. 1980), stated about the Irrebuttable Presumption Doctrine that

> (1) "This conceptual framework requires careful analysis for proper application," and

(2) "we do not read the [Supreme Court] irrebuttable presumption decisions as deviating substantially from the traditional tests for violations of the due process clause." *Id.* at 576.

The Court would not have stated such had the doctrine been overruled.

E.D. Pa. Judge John Ditter concluded:

> "It is inconceivable to me that such a doctrine could be somehow negated or overruled by default simply because the Supreme Court has not availed itself of several alleged opportunities to discuss it. From the language and analysis used in the majority opinions, it is clear to me that *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), and *Vance v. Bradley*, 440 U.S. 93 (1979) were decided strictly in an equal protection context. They should not, therefore, be read as impliedly overruling a doctrine developed within the scope of due process." *Malmed v. Thornburgh*, 478 F.Supp. 998, 1012 (E.D. Pa. 1979), *rev'd on other grounds*, 621 F.2d 565 (1980) (Third Circuit applied the Irrebuttable Presumption Doctrine as did the district court but reached the opposite result due to defendants incompetence at defending).

The Supreme Court has applied the Irrebuttable Presumption Doctrine in cases subsequent to *Turner v. Dept. of Employment Security*, 423 U.S. 44 (1975), but found it was not satisfied—the Court did not overrule the doctrine's validity. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989) (natural father had no constitutional right to a parental-child relationship with the illegitimate child he fathered); *U.S. v. Locke*, 471 U.S. 84, 107 (1985) (no violation of constitutional right because not a taking); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-23 (1976) (found *Stanley* and *Vlandis* inapplicable to that fact situation); *Weinberger v. Salfi*, 422 U.S. 749, 771-772 (1975) ("Unlike the claims involved in *Stanley* and *LaFleur*, a non-contractual claim to receive funds from the public treasury enjoys no constitutionally protected status . . . .").

In 2011, the Third Circuit in *B & G Const. Co., Inc. v. Dir., Off. Workers' Comp. Prog.*, 662 F.3d 233, 254 (3rd Cir. 2011) considered the Irrebuttable Presumption Doctrine but found in inapplicable because that case concerned procedural due process not substantive due process.

> The DOJ lawyers continue playing their sleigh-of-hand game this time by deleting from their quote the sentence to which their quote refers.
>
> DOJ quotes from B & G,
>
> > "A plurality of the Supreme Court has rejected the theory that a legislature's use of an irrebuttable presumption automatically violates the Due Process Clause." (Citing *B & G Const. Co., Inc. v. Dir., Office of Workers' Comp. Prog.*, 662 F.3d 233, 254 (3d Cir. 2011), DOJ Reply at 12, D.E. No. 82).
> >
> > The sentence they intentionally left out that precedes their quote makes clear the quote refers to "procedural due process"—not "substantive due process"

> "Even assuming we agreed, which, as we explain below we do not do, with B & G's characterization of section 1556 as creating an irrebuttable presumption, we would disagree with the argument that such a presumption would violate B & G's procedural due process rights."

B & G also cites to *Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989), as a procedural due process case. *B & G Const. Co. v. Dir., Office of Workers' Comp. Programs*, 662 F.3d at 254.

No court in the Third Circuit has overturned the Irrebuttable Presumption Doctrine because as DOJ asserts, *It is well established that the lower courts are bound to follow Supreme Court precedent, even when the underpinnings of a decision have been called into question. See Rodriguez de Quijas v. Shearson, 490 U.S. 477, 484 (1989).* (DOJ Reply at 8-9, D.E. No. 82).

Cases in other Circuits cite Supreme Court Irrebuttable Presumption Cases.

The following cases have cited for authority to the core Supreme Court irrebuttable presumption cases without noting they were no longer viable:

Franceschi v. Yee, 887 F.3d 927, 935 (9th Cir. 2018), cites *see Bell v. Burson*, 402 U.S. 535, 539 (1971) for the Due Process Clause applies to the deprivation of a driver's license by the State. (Taxpayer challenged suspension of driver's license for failure to pay state taxes, suspension constitutional).

Smith v. City of Wyoming, 821 F.3d 697, 707 (6th Cir. 2016), as amended (May 18, 2016), states "the police conduct in this case did not interfere with Smith's family relationships in violation of the Constitution. The officers' actions were a far cry from those found to have violated" substantive due process in *Stanley v. Illinois*, 405 U.S. 645 (1972). (Mother brought § 1983 action and state-law claims against city and police officers, relating to officers' responses to reports of possible abuse or neglect of mother's minor children in her home, including four warrantless entries to mother's home.)

Dragovich v. U.S. Dep't of the Treasury, 848 F. Supp. 2d 1091, 1104–05 (N.D. Cal. 2012), considered *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 639 (1974), but ultimately relied on other cases because the law challenged in *La Fleur* was a more significant intrusion, in that the pregnant teachers there could not work during the mandatory leave period. It did not mention that the Irrebuttable Presumption Doctrine had been rejected. (Challenge to Cal insurance plan barring same-sex couples. Plaintiffs alleged equal protection and substantive due process claims)

Fundamental right to be treated as a first-class, full-fledge citizen, strict scrutiny.

Where the constitutional right in issue is a fundamental one, such as personal choice in matters of marriage and family life as in *Stanley*, 405 U.S. 645, and *LaFleur*, 414 U.S. 632, then the analysis for determining whether the statute violates substantive due process is strict scrutiny. *Malmed*, 621 F.2d at 575.

Plaintiff asserts that her right to be treated as "first-class, full-fledged citizen" is a fundamental right, and requests this Court use strict scrutiny in deciding whether the MSSA violates Substantive Due Process under the Irrebuttable Presumption Doctrine.

> The Supreme Court in *U.S. v. Virginia*, 518 U.S. 515, 532 (1996) ruled that federal or state government acts cannot deny "to women, simply because they are women, full citizenship stature" to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.

"[F]ull citizenship stature" or as we denote it in our papers as "first-class, full-fledge citizenship" clearly includes registering with the SSS.

> Bella Abzug once said, "Until women [have] equal rights and responsibilities with respect to military service, they [will] be 'denied the status of full citizenship, and the respect that goes with that status.'" Jill Elaine Hasday, Fighting Women: *The Military, Sex, and Extrajudicial Constitutional*, 93 Minn. L.Rev. 96, 111 (2008) (internal quote from Bella Abzug).
>
> Blythe Leszkay, First Lt., U.S. Army Reserves, in *Feminism on the Front Lines*, 27 Hastings Women's L. J. 259, 297 (2016), wrote "Only when we are allowed to fulfill our equal obligations will we have the chance to claim our equal rights."
>
> [Other quotes only if needed:
>
> Air Force Maj. Mary Jennings Hegar said, "The question isn't whether we want our daughters to be drafted, but what kind of world we want them to inhabit: one where they're infantilized as passive objects of chivalry or one where they're empowered to achieve their potential as genuinely equal citizens?" Rachel Natelson, *Selective Service Is an Obligation of Citizenship, Including Women*, U.S. News & World Report, February 12, 2013.
>
> Congresswoman Jackie Speier, in her unsuccessful effort to have the Republican controlled House of Representatives Armed Services Committee include women in SSS registration, said, "We're trying to establish greater equality in every respect in this country and with that equality comes rights and responsibilities." Anshu Siripurapu, *Will your daughters have to register for the draft? No, Republicans say*, July 7, 2017, Miami Herald.

> Judy Goldsmith, Congressional testimony of National Organization for Women (1980): "[O]mission from the registration and draft ultimately robs women of the right to first-class citizenship and paves the way to underpaying women all the days of their lives. Moreover, because men exclude women here, they justify excluding women from the decision-making of our nation."
>
> The ACLU has stated that "Until both the responsibilities and the rights of citizenship are shared on a gender-neutral basis, women will continue to be considered less than first class, full-fledged citizens." www.aclu.org/feature/ combat-exclusion-policy-women.
>
> President Theodore Roosevelt once said, "The first requisite of a good citizen in this Republic of ours is that [s]he shall be able and willing to pull [her] weight that [s]he shall not be a mere passenger." Speech before New York State Chamber of Commerce, November 11, 1902.
>
> Registration "remind[s] our youth that public service is a valuable part of American citizenship." Former Defense Secretary Chuck Hagel, May 2013, *Report on the Purpose and Utility of a Registration System for Military Selective Service* at 12.
>
> Bella Abzug once observed that "[i]n the Congress of the United States and in the political life of this Nation, political choices and debate <u>often reflect a belief that men who have fought for their country have a special right to wield political power and make political decisions</u>." Jill Elaine Hasday, Fighting Women: *The Military, Sex, and Extrajudicial Constitutional*, 93 Minn. L.Rev. 96, 111 (2008).

The right to be treated as "first-class, full-fledged citizens" is like the fundamental right of voting—a privilege of national citizenship that owes its existence to the Federal Government.

> Women can vote and one of the policies behind allowing persons to vote in a democracy is that it gives them a stake in the government they may have to defend with their lives. Both are conditions of first-class, full-fledged citizenship and respect.

<u>Determining a fundamental right</u>

The Supreme Court has stated that "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955)

"[H]istory and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry." *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J. and O'Connor, J., concurring).

The Privilege and Immunities Clause of Art. IV, § 2 of the U.S. Constitution "protects those fundamental rights which 'belong to the citizens of all free governments.'" William J. Rich, *Modern Constitutional Law* § 19.1 at 713-714 (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551-552 (1823)); *see also Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 377 (1978) (fundamental rights are "protected as a privilege and an immunity under the Constitution's Art. IV, § 2.").

> [*Corfield* "delineated the scope of rights under the Privileges and Immunities Clause . . . not the equal protection component of the Due Process Clause." *Apache Bend Apartments, Ltd. v. U.S. Through I.R.S.*, 964 F.2d 1556, 1563 n.9 (5th Cir. 1992), *on reh'g*, 987 F.2d 1174 (5th Cir. 1993).]

The protection provided by Article IV, § 2 is "'[o]nly with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity . . . .'" *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279 (1985) (quoting *Baldwin*, 436 U.S. at 383).

The Supreme Court in the *Slaughter-House Cases*, 83 U.S. 36, 79-80 (1872), *superseded on other grounds, U.S. v. Ruiz*, 961 F. Supp. 1524, 1530 (C.D. Utah 1997), held that privileges and immunities "are dependent upon citizenship of the United States," and include the rights "to engage in administering [the Federal government's] functions . . . for all the great purposes for which the Federal government was established . . . ."

> One such function of the Federal Government bearing on the nation's "vitality" is military defense by raising and supporting Armies, *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012), which includes the citizenship privilege of registering for the national defense to stand ready and willing to fight in case of a national emergency.
>
> Registration is the first step 'in a united and continuous process designed to raise an army speedily and efficiently . . . .'" *Rostker*, 453 U.S. at 75 (quoting *Falbo v. U.S.*, 320 U.S. 549, 553 (1944)). The MSSA prevents women from registering for the national defense; therefore, it denies them a privilege of citizenship by not treating them as first-class, full-fledged citizens.

Plaintiff requests that this Court *not* follow the reasoning in *Minor v. Happersett*, 88 U.S. 162 (1874), which held that women did not have the right to vote as a privilege and immunity of citizenship. *Id*. at 178. According to the *Minor* Court, women had always been citizens, but citizenship for them meant being denied the vote. The Court, therefore, excluded women from first-class, full-fledged citizenship because they had always been excluded with respect to the vote.

> Today, the right to vote is a fundamental right of full-fledge citizenship. *Modern Constitutional Law*, § 14.2, p. 548 (3d ed. 2011). So the determination of "fundamental liberty interests should not be confined by rules that existed at a time when women were treated as chattel." *Id*. 2:11, p. 63.

But when it comes to draft-registration, the MSSA harkens back to the 1800s. Under all the legalese, the DOJ lawyers are really arguing that women have always been excluded from draft registration; therefore, they should still be excluded because their citizenship is something less than men, and that this Court cannot change that.

> Not unlike the 1857 *Dred Scot v. Sanford*, 60 U.S. 1857, decision where blacks were ruled as something less than full-fledge citizens. I believe it was four-fifths a citizen.

DOJ's misplaced arguments about the Privileges and Immunities Clause.

DOJ Reply at 13 (D.E. No. 82) claims the Privileges and Immunities Clause only applies to states dealing with citizens of other states but that is wrong.

The Privileges and Immunities Clause purpose was "to help fuse into one Nation a collection of independent, sovereign States," *Toomer v. Witsell*, 334 U.S. 385, 395 (1948),— "to constitute the citizens of the United States as one people," *Paul v. Virginia*, 8 Wall. 168, 180 (1868), *overruled on other grounds*, *U.S. v. South-Eastern Underwriters Ass'n*, 64 S. Ct. 1162 (1944).

DOJ wrongly states that *Hicklin v. Orbeck*, 437 U.S. 518, 526 (1978), held that the Privilege & Immunities Clause was only *designed to prevent a state from discriminating against citizens from other states*. (DOJ Reply at 13, D.E. No. 82).

> The *Hicklin* Court applied the Privilege & Immunities Clause to a dispute over an Alaskan statute favoring residents over non-residents for employment and found that statute did not substantially serve its purported end. *Hicklin*, 437 U.S. 518, 527-528.
>
> The *Hicklin* Court cited to the "mutually reinforcing relationship between the Privilege & Immunities Clause and the Commerce Clause . . . that stems from their . . . shared vision of federalism . . ." as support for its decision. *Hicklin*, 437 U.S. at 532.
>
> > The Commerce Clause gives Congress the power to regulate the nation's foreign trade and trade among the states. It does not address trade solely within a state.
> >
> > Federalism means power shared by the national and state governments—it is not limited to state power.
> >
> > Alexander Hamilton wrote in Federalist No. 80 that the Privilege & Immunities Clause of the proposed Constitution was "the basis of the union."

Additionally, section one of the 14th Amendment, which applies only to the states includes the phrase "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S."

If the Privilege & Immunities Clause only applied to the states as DOJ asserts, then there would have been no need for this phrase in § 1 of the 14th Amendment.

DOJ also relies on a footnote taken out of context in *Chase Manhattan Bank v. South Acres Development Co.*, 434 U.S. 236 (1978). (DOJ Reply at 13, D.E. No. 82) ("we have never held that the Privileges and Immunities Clauses of Art. IV, § 2, cl. 1, and the Fourteenth Amendment restrict congressional − as opposed to state − action.").

The issue in Chase was the interpretation of 48 U.S.C. § 1421b(u) over whether Congress had granted Guam's district court diversity jurisdiction. The Supreme held that the statute did not grant such jurisdiction.

The Court's remarks about the Privileges and Immunities Clause was to note that the Clause did <u>not limit</u> Congressional power to withhold diversity jurisdiction.

The case did not concern the fundamental rights of citizens.

Strict Scrutiny Test

Since a fundamental right is infringed, the strict scrutiny test requires determining whether a compelling governmental interest is strictly served by requiring only males to register because they are the only ones who are potential combat troops. *See Nicholas v. Pa. State*, 227 F.3d at 139; *Malmed*, 621 F.2d 565, 575 (3rd Cir. 1980), *cert. den.*, 449 U.S. 955.

There are women in combat today and those women were previously potential combat troops but were kept out of the pool of potential combat troops by prohibiting them from registering. They were barred not because they did not qualify for combat, but solely because they were women.

Additionally, not all women who would qualify for combat positions ended up joining the military; yet they were potential combat troops but also barred from the registration pool because of their sex.

Clearly a more effective method of creating a registration pool of potential combat troops would be to allow young women to register for the draft—including Plaintiff.

By failing to treat women as first-class, full-fledged citizens when it comes to registration, it does <u>not</u> serve the Government's interest in draft registration.

Unable to stick to the SAC allegation, the DOJ lawyers attempt to re-write it to their own advantage by wrongly saying, "*the relevant question, properly posed, is whether Plaintiff*

possesses a fundamental right for her name to be listed on the Selective Service registry." (DOJ Reply at 12, D.E. No. 82).

> Our papers repeatedly state that the Strict Scrutiny question is whether the right to be treated as a "first-class, full-fledged citizen" is a fundamental right. (*See* SAC at 3, D.E. 54-1; Opposition to Standing Motion at 34, D.E. 70; Opposition Current Motion Dismiss at 34, D.E. 81).
>
> Can't these guys read?

Rational relationship test

Even if this Court decides that the test for the inference from the characteristic of woman to the presumed fact of incapable of being a potential combat soldier is one of a rational relationship, the inference that women are not potential combat soldiers fails because they are serving as combat soldiers today and all combat positions are now open to them.

So the claim that their gender alone prevents them from becoming potential combat troops is arbitrary and irrational for a legislative act and violates the substantive due process rights of the putative class of young women.

Equal Protection and Substantive Due Process permitted in the same case.

DOJ clearly wants this Court to ignore the substantive due process cause of action as analyzed under the Irrebuttable Presumption Doctrine because it would hand DOJ a clear defeat.

> Such, however, is contrary to modern-day pleading— "If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient." Fed. R. Civ. P. 8(d)(2).

The Supreme Court has held that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

There is no bar for considering equal protection and substantive due process causes of action in the same case.

> The Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), used substantive due process to invalidate a sodomy statute challenged under equal protection for discriminating against gays. *Id*. at 563. The Court explained that when a law infringing liberty "remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons." *Id*. at 575. Justice O'Connor, who concurred in the result, used an equal protection analysis rather than substantive due process, thereby showing that the use of one analysis does not prevent the use of the other. *Id*. at 579.
>
> *Malmed v. Thornburgh*, 621 F.2d 565, 575 (3rd Cir. 1980), *cert. den*., 449 U.S. 955, made its decision on both equal protection and due process clauses of the Fourteenth Amendment.
>
> The Third Circuit district court case, *Kelly v. Ford Motor Co.*, 1996 WL 639832 *3-7 (E.D. Pa. Oct. 29, 1996), actually considered both equal protection and substantive due process but found neither applied.

DOJ's wrong arguments that an Equal Protection claim prevents Substantive Due Process claim.

While there is a bar to a Due Process Clause action when the government uses excessive physical force and its use violates the Fourth Amendment—such is not the case here.

Still DOJ deceptively tries to bootstrap this rule into one that states: Whenever one Constitutional amendment provides explicit protection another amendment providing protection cannot be pleaded. (DOJ Br. at 24, D.E. No 80-1; DOJ Reply at 12 n.4, D.E. No. 82).

DOJ relies on *Graham v. Connor,* 490 U.S. 386 (1989), but it only held "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395 (emphasis in original)."

The D.N.J. has agreed that such was the only holding in *Graham. See Fagan v. City of Vineland*, 804 F.Supp. 591, 597 (1992), *rev'd in part*, 22 F.3d 1283 (3d Cir. 1994), and *aff'd in part*, 22 F.3d 1296 (3d Cir. 1994).

The DOJ lawyer's most artful deception comes with their gerrymandering quotes from *Graham v. Connor,* 490 U.S. 386, 395 (1989).

> In the DOJ Brief at 24 (D.E. No. 80-1), they mis-quote *Graham*. The DOJ lawyer's mis-quote is
>
> "[W]hen a particular Amendment "provides an explicit textual source of constitutional protection against" a particular sort of governmental behavior, "that Amendment, not the more generalized notion of substantive due process must be the guide for analyzing these claims.") (Internal citations omitted)."

What the *Graham* Court actually stated, 490 U.S. at 395, was

> "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims. N.10"
>
> The DOJ author of the Brief deceptively left out "Because the Fourth Amendment" and "this sort of physically intrusive governmental conduct," and the footnote 10. Isn't that perjury?
>
> > N. 10 A "seizure" triggering the Fourth Amendment's protections occurs only when government actors have, "by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen," *Terry v. Ohio*, 392 U.S. 1, 19 , n. 16 (1968); see *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).
> >
> > [Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today. It is clear, however, that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment. *See Bell v. Wolfish*, 441 U.S. 520, 535 -539 (1979).]

[*Graham* at 395 n.10 even gave an example of where two amendments apply—the Due Process Clause and the Eighth Amendment:

> [After conviction, the Eighth Amendment "serves as the primary source of substantive protection . . . in cases . . . where the deliberate use of force is challenged as excessive and unjustified." *Whitley v. Albers*, 475 U.S., at 327. Any protection that "substantive due process" affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment. *Ibid*.
>
> [The Supreme Court in *Whitley v. Albers*, 475 U.S. 312, 327 (1986) stated:
>
> > "It would indeed be surprising if, in the context of forceful prison security measures, "conduct that shocks the conscience" or "afford[s] brutality the cloak of law," and so violates the Fourteenth Amendment, *Rochin v. California,* 342 U.S. 165, 172, 173, 72 S.Ct. 205, 210, 96 L.Ed. 183 (1952), were not also punishment "inconsistent with contemporary standards of decency" and "'repugnant to the conscience of mankind,'" in violation of the Eighth."]

Likely, emboldened by the deception in his Brief, the author of the DOJ Reply at 12 n.4, falsely attributes the following quote to *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992):

> "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (*quoting Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) and *Albright v. Oliver*, 510 U.S. 266, 273 (1994) and citing *Graham*, 490 at 395).

That quote actually is an amalgam of quotes from *Albright v. Oliver*, 510 U.S. 266, 273 (1994), which in turn cited for such from—guess what case—*Graham*, 490 U.S. at 395.

> *Collins v. Harper Heights*, 503 U.S. 115 (1992), dealt with 42 U.S.C. 1983 liability of a municipality.
>
> > The Fourth Amendment was not involved, *Graham* was not cited, there was no physically intrusive city conduct (503 U.S. at 125), and the Court held that the Due Process Clause of the Fourteenth Amendment does not impose on municipalities certain minimum levels of safety and security for its employees.
> >
> > Plaintiff here does not alleged "physically intrusive conduct" nor is she an employee of a city alleged to have injured her.

Other courts also disagree with DOJ's interpretation of *Graham* by making clear the limited nature of *Graham's* application to only excessive governmental force used in making seizures.

> In *Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1546 (2017), the Supreme Court held that *Graham* "sets forth a settled and exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment."
>
> > "If there is no excessive force claim under *Graham*, there is no excessive force claim at all." *Cty. of Los Angeles*, at 1547.
>
> In *Carroll v. Borough of State Coll.*, 854 F. Supp. 1184, 1192 (M.D. Pa. 1994), *aff'd*, 47 F.3d 1160 (3d Cir. 1995):
>
> > n.8 "Because we have found that there was no "seizure" and, hence, no claim under the Fourth Amendment, the Supreme Court's requirement, stated in *Graham v. Connor*, 490 U.S. 386, 388 (1989), that all claims invoking the Fourth Amendment be analyzed under that amendment only and not under a general substantive due process approach does not apply. Since we found that plaintiff has no claim under the Fourth Amendment, we are not precluded by *Graham*, from considering whether he has a due process claim under the Fourteenth Amendment. *See: Fagan*, supra, 804 F.Supp. at 597."

DOJ's cases do NOT support barring the Substantive Due Process claim.

DOJ cites to cases in its Br. at 25 (D.E. No. 80-1) and referenced by the DOJ Reply at 12 n.4 (D.E. No. 82)). Those cases do not support DOJ's position that a Substantive Due Process analysis is barred here.

> In *Eby-Brown Co. v. Wis. Dep't of Agric.*, 295 F.3d 749, 755-756 (7th Cir. 2002), both Substantive Due Process and Equal Protection analyses were used to find the Wisconsin's Unfair Sales Act did not violate the Constitution.
>
> In *Tenenbaum v. Williams*, 193 F.3d 581, 600 (2d Cir. 1999), the court held that plaintiff was subject to a seizure and search so her claims were analyzed under the Fourth Amendment.
>
> *Yassini v. City of Sunnyvale*, 103 F.3d 143 (9th Cir. 1996), is an unpublished opinion. Regardless, the Court found that requiring Yassini's restaurant to close at midnight under a noise ordinance did not "trammel fundamental personal rights" and was "rationally related to the legitimate state interest of preventing excessive noise." Such is a Substantive Due Process analysis. Memorandum at 2, N.D. Cal. 94-20576, 2/11/1997, D.E. No. 113.
>
> > Your Honor, I would like to know why the DOJ author failed to indicate this case was unpublished and failed to give its docket number. Was this another trick?

In *Gehl Grp. v. Koby*, 63 F.3d 1528, 1539 (10th Cir. 1995), *overruled on other grounds by Currier v. Doran*, 242 F.3d 905, 916 (10th Cir.2001), the Court found that the actions of executive officials of the government did not shock the conscience as is required under Substantive Due Process when executive official's acts are questioned. It also found no protected liberty interest was violated without procedural due process.

In *Hogan v. State of Conn. Judicial Branch*, 220 F. Supp.2d 111 (D. Conn. 2002), the Court considered both Equal Protection and Substantive Due Process claims.

It found there was no Equal Protection violation because there was no disparate treatment. 220 F. Supp.2d at 122.

The Court also found no Substantive Due Process violation because plaintiff's termination by an executive official did not shock the conscience or violate civilized conduct. 220 F. Supp.2d at 123

Since the case before this Court does not involve governmental use of force, nor the Fourth Amendment, analysis under the Substantive Due Process Clause is appropriate.

Constitutional Claims in General

DOJ argues that for the Court to make a decision *would violate precepts of constitutional avoidance by "ruling on [a] federal constitutional matter[] in advance of the necessity of deciding [it]." Armstrong, 961 F.2d at 413; see Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 474 (1982) (a court's power to declare a statute unconstitutional should be "a tool of last resort").* (DOJ Reply at 3, D.E. No. 82).

> DOJ fails to state what the *Valley Forge* case actually held, which was the requirement of a particularized injury for standing puposes.
>
> > The Supreme Court found no constitutional violation of the Establishment Clause because the plaintiffs had no connection to the conveyance of real property to a religiously affiliated nonprofit college.
> >
> > "Respondents complain of a transfer of property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer through a news release. Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsmen of the general welfare." 454 U.S. 464, 486-87 (1982).
> >
> > Here this Court has already found a particularized injury. (Opinion at 10-11, D.E. No. 72).
>
> And *Armstrong* is a pre-enforcement action whereas this case involves post-enforcement action by an administrative agency.

Additionally, as the Third Circuit held in *Robinson v. New Jersey*, 806 F.2d 442, 446 (3rd. Cir. 1986) *cert. denied* 481 U.S. 1070 (1987), courts will not invalidate a statute on its face simply because it may be applied unconstitutionally, but only if it cannot be applied consistently with the Constitution. Here the MSSA cannot be applied consistent with the Constitution.

In *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 467 (1989), the Supreme Court stated:

> To be sure, "[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States v. Locke*, 471 U.S. 84, 96 (1985) (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)).
>
> Such is what the DOJ asks for here.

Relief Sought

"Plaintiff seeks a declaratory judgment that the MSSA's draft registration is unconstitutional. (SAC ¶ 13). Plaintiff also seeks (i) to enjoin Defendants from registering only males; or (ii) to require that females register with the SSS; or (iii) to require that registration be voluntary for both sexes. (*See* SAC ¶ 14)." (Opinion at 2, D.E. No. 72).

DOJ complains that *Plaintiff's proposed remedies present further potential hardships to the Government, as well as likely hardships to non-parties require the involuntary registration of millions of other females not before this Court who may disagree with Plaintiff's views on the issue. Pl.'s Sec. Am. Compl. ¶ 70, ECF No. 54. Were the Court to require women to register, that remedy in itself would impose a significant burden on a major portion of the country's population.* (DOJ Reply at 7-8, D.E. No. 82).

> The Ku Klux Klan should have thought of that argument when it opposed the integration of schools based on *Brown v. Board of Education*. Students would have to be bused here and there, buses would have to be rented and drivers hired at the expense to local governments. All imposing "a significant burden on a major portion of the country's population" that was not before the courts. Yet the courts required it.
>
> Why? Because in situations, "when the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by" extending a statute to the excluded class, or a court can withdraw the statute's operation from the favored class. *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (emphasis in original) (internal quote *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931) (Brandeis, J.)).
> If found unconstitutional, then all those men who turn 18 will not have to bother registering.

the relief [Plaintiff] requests would intrude on the political branches' constitutional powers to shape military policy. . . . would have profound implications on the military, (Reply at 13, D.E. No. 82).

> DOJ does not spell out those alleged "profound implications."
>
> The Third Circuit in *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99, 108 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987), stated that "The Supreme Court has heard many cases involving claims for injunctive relief against the military without even suggesting that the claims were not reviewable in a civilian court."
>
> > The Third Circuit Court of Appeals has held that federal courts have jurisdiction to consider "suits for injunctive relief against the military." *Jorden v. National Guard Bureau*, 799 F.2d 99, 109 (3d Cir.1986), *cert. denied*, 484 U.S. 815 (1987).
> >
> > "[T]he law in this circuit, established in *Dillard v. Brown*, 652 F.2d 316, 321 (3d Cir.1981), heavily disfavors finding injunctive claims against the military non-reviewable." *Jorden v. Nat'l Guard Bureau*, 799 F.2d at 110.

> The Supreme Court has cited injunctive actions as indicative of the type of relief service members may seek in the civilian courts. *See, e.g., Chappell v. Wallace*, 462 U.S. 296, 304-305 (1983); *Brown v. Glines*, 444 U.S. 348 (1980); *Parker v. Levy*, 417 U.S. 733 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

DOJ indicates that if this Court does issue an injunction, it will request a stay pending appeal, so the Court should not issue an injunction. (*See* DOJ Br. at 23, D.E. No. 80-1). This is the same as arguing that if they lose, they will make a motion, so the Court should rule in their favor to avoid the motion. Just because judicial procedure allows Defendants to do something, does not mean this Court cannot issue the relief requested.

> Besides, if they do request a stay of enforcement after a decision for Plaintiff, we will not oppose it—pending appeal all the way to the U.S. Supreme Court.
>
> > Such will protect the fearful Federal Government from a college co-ed and minimize the chance that the courts of these United States will abdicate their role in protecting the rights of citizens.
> >
> > DOJ can move this Court under Fed. R. Civ. P. 62(c) (application to stay injunction must first be brought in district court).
> >
> > > In a case involving a judgment or injunction the district court is in the best position to balance the equities and determine whether to stay or suspend the judgment because of its familiarity with the case. *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission*, 260 U.S. 212, 219 (1922).
> > >
> > > If denied, the DOJ can use Fed. R. App. P. 8(a)(1)(A) to request a stay from the Court of Appeals.

<u>Providing the relief sought would further the Executive and Congress's objectives of gender-neutrally for the military as a whole</u>.

Although the SSS is an independent civilian agency within the Executive Branch of the U.S. Government and not part of the Department of Defense, *Rostker* held and DOJ agrees that "[r]egistration is not an end in itself in the civilian world but rather the first step in the induction process into the military one . . . ." *Rostker*, at 68; (SSS Br. at 23 n.7, D.E. No. 33-1).

Since registration is an integral part of the military and national defense, it would be strange indeed that every branch of the military must integrate women except for the SSS's registration pool of potential combat troops. To permit the SSS to continue discriminating against women because it is a civilian agency is a paradox that should not be permitted to exist.

Lies, Prevarications and Dissemblances by DOJ lawyers

The DOJ Reply provides multiple false, prevaricating or dissembling statements that given whoever wrote it, must have made such statements intentionally to mislead this Court. Apparently the author believes that by falsifying the facts, claims and law, he can win the day in court. For example:

1. DOJ states [The Commission's] *review encompasses* [includes] . . . *the principle matter at issue in this lawsuit.* That implies that the Commission will resolve the ultimate issue here. (DOJ Reply 3, D.E. No. 82).

That is a dissemblance. According to the Magistrate's Order of 07/28/17 (D.E. 67):

WHEREAS, although the review of the Commission may ultimately impact, or even moot this matter, the current legislative scheme and status provides no certainty as to the resolution of the ultimate issue in this case.

The issue here is whether the MSSA and SSS is has discriminated against Plaintiff—not what a commission may do in the future. There are no allegations against the Commission and it has not been joined as a party.

2. The DOJ falsely states *Plaintiff argues that the MSSA is ripe for review because the Commission may not accomplish anything. See Pl.'s Opp. at 26.* (DOJ Reply at 5-6, D.E.No. 82).

The DOJ Reply author cites our Opposition Brief at 26, which to any fifth grader states that what the Commission "may or may not do is unknown."

But that is not the Ripeness issue. The Ripeness issue is that the SSS acting under the MSSA mandate has five times made "an administrative decision [that] has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hospitality Ass'n v. U.S. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–149 (1967).

Plaintiff's most recent affidavit documents the SSS decisions on four occasions, D.E. No. 81-6, and since then she tried to register for a fifth time with the same result on 10/2/18.

3. The DOJ falsely states *Plaintiff . . . asks this Court to speculate that the Supreme Court would find cause to depart from its reasoning in Rostker.* (DOJ Reply at 9, D.E. No. 82).

How many times do we have to say that we are <u>not</u> asking this Court to depart from the reasoning in *Rostker*, but to apply it on the Equal Protection issue of similarity to the fact that "combat troops" now include women.

> *Rostker* ruled that "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." *Rostker*, 453 U.S. at 78.
>
> > Plaintiff is not asking this Court to overrule *Rostker* but to apply its holding on similarity to the facts of this case." (Opposition at 8, 29 (D.E. 81).
>
> Plaintiff has repeatedly—repeatedly emphasized that she is <u>not</u> asking this Court to overrule or disregard *Rostker v. Goldberg*, 453 U.S. 57, but rather to apply it to modern times. (Motion to Continue Br. at 18, D.E. 58; Opposition to Standing Motion at 6, D.E. 70).
>
> The DOJ lawyers keep repeating the same falsehood but with different words that communicate the same falsity. How many more times are they going to be allowed to waste this Court's time with the same *ad nauseam* argument?
>
> In effect, the DOJ Reply author ludicrously argues that when the application of the law on Equal Protection similarity reaches one conclusion under one fact situation—it must reach the same conclusion under all other fact situations no matter how different.

4. DOJ states that *Rostker cannot be set aside as binding precedent by this Court based on Plaintiff's prediction as to how the Supreme Court would view other policy changes since that decision.* (Reply at 10, D.E. No. 82)

> Basically the same blatant falsehood using different verbiage that once decision X is made on fact situation Y, then in any other fact situation, the same decision X must be reached. The Reply author repeats over and over the same arguments in order to fill space and waste everyone's time.
>
> Plaintiff is not predicting what the Supreme Court's holding will be on this case. She is simply trying to get to the Supreme Court for a decision despite the DOJ lawyers seemingly eternal delays.

DOJ Strategy of Delay

The DOJ Reply doesn't raise anything new, it just wastes our time with arguments already made in the Brief. The Reply actually cites to the Brief in this motion eight (8) times.

The DOJ is focused on a future that is impossible to predict while Plaintiff is focused on what is happening now. Naturally, the DOJ continues to delay these proceedings in the hope that the future they want actually occurs while this case is still in the District Court. So far, the DOJ has been successful.

> Over the past three years, it has been Wait, and Wait, and Wait some more.
>
> Plaintiff is simply asking this Court to decide whether she has been discriminated against by the Defendants in violation of her equal protection and substantive due process rights under the Fifth Amendment to the U.S. Constitution.
>
> > Let's face it Your Honor, if you were her age and tried to register—the most powerful government in the history of the world would discriminate against you, and the DOJ would be arguing that's okay.

Plato once said:

> "There is therefore no pursuit connected with [government] which belongs to woman because she is a woman, or to a man because he is a man, but various natures are scattered in the same way among both kinds of persons . . . . Shall we then assign them all to men, and none to a woman? How can we? . . . . One may be athletic or warlike, while another is not warlike and has no love of athletics . . . . So one woman may have a guardian nature, the other not. Was it not a nature with these qualities which we selected among men for our male guardians too? . . . Such women must then be chosen along with such men to live with them and share their guardianship, since they are qualified and akin to them by nature."
>
> That was 2,000 years ago. Plato, *The Republic* 117-18 (360 B.C.E.)(G.M.A. Grube trans. Hackett Publishing 1974).
>
> DOJ is simply arguing that if women have waited this long—let them wait some more, or in Orwellian fashion—NOW really means later.

This is the fourth time the DOJ has argued before this Court a lack of Ripeness. (DOJ Brief at 17, D.E. 19-1; DOJ Brief at 18, D.E. 33-1; DOJ Opp Mtn Continue at 8, D.E. 61; DOJ Brief at 12, D.E. 80-1).

DOJ lawyers have opposed this case four (4) times on Standing grounds (DOJ Brief at 12, D.E. 19-1; DOJ Brief at 11, D.E. 33-1; DOJ Opp Mtn Continue at 10, D.E. 61; DOJ Brief Standing Mtn at 11, D.E. 69).

This is the third time the DOJ has argued before this Court a Failure to State a Claim. (DOJ Brief at 23, D.E. 19-1; DOJ Brief at 24, D.E. 33-1; DOJ Brief at 18, D.E. 80-1)).

> How many do-overs does DOJ get?
>
> Plaintiff had just graduated from high school when she brought this case. Now she is half-way through her senior year in college.

Over the past three years, DOJ has repeatedly argued that this Court must stand idly by and wait

> *First*, for when Sec. Defense Carter made his decision on whether to open the remaining combat positions to women, which he made on Dec. 3, 2015;
>
> *Second,* for Congress not to object within 30 days under 10 U.S.C. § 652, it did not;
>
> *Third*, for when Carter approved the final plans from the military service branches and the U.S. Special Operations Command to begin integrating woman combat soldiers, which he did on 3/10/16.
>
> *Fourth*, for a dysfunctional Congress to decide in 2016 whether to continue the last vestige of *de jure* discrimination against women in the Federal Government—which it never did decide. Congress simply engaged in a passive-aggressive denial of women's rights, then punted to a commission for more delay.
>
> > Had the House Republicans ignored the issue by not even calling for the time-delaying commission study, they believed they would have been preempted by the judicial branch—a fact that a House Armed Services aide acknowledged. "The courts could act at any moment and send this in a direction that Congress doesn't like." (Austin Wright, *Women's draft bid gains in Senate, stalls in House*, Politico, May 17, 2016);
>
> *Fifth*, for possible Commission suggestions to be made by November 5, 2019, but then surprise, the date was pushed back to March 2020;
>
> *Sixth*, for Congress to pass a bill correcting the unconstitutionality of the MSSA by including the term "women." Of course, Congress may do nothing and just let the Commission's suggestions die the way it did the Kerner and 9/11 Commission recommendations.
>
> > Since 2003, at least eight bills have been introduced in Congress to amend the MSSA's male-only registration requirement. (SSS Br. at 27 n.9, Dkt. No. 33-1). Congress chose not to act. Therefore, a strong inference exists that Congress is now just continuing its prior procrastination or even obstruction of deciding that with regards to the military—women are equal to men.
>
> *Seventh*, for Trump, or whoever is President, to sign or veto a bill; and

Eighth, if vetoed, wait for Congress to override the veto, assuming that is even possible considering the split between Democrats and Republicans.

[DOJ's first motion, 10/2/2015, to dismiss argued that under 10 U.S.C. § 652(a)(3)(B), the Secretary of Defense provides Congress "with a detailed analysis of the effect of the change on the constitutionality of the MSSA's male-only registration requirement." (SSS Br. at 1, 9, 20, D.E. No. 19). Therefore, "the political branches are engaging in [an] ongoing dialogue by evaluating the impact on the draft [registration] of the changes being made with respect to combat positions" and the Court should not "short-circuit" this "process" by deciding this case. (SSS Br. at 18, 22, D.E. No. 19).]

> [There the DOJ was arguing that this Court must wait—not only until all or mostly all combat positions are open to women but also until Congress actually gets around to amending the MSSA to include the word "women." Defendants were really asserting, as they do now, that the judicial review established by *Marbury v. Madison*, 5 U.S. 137 (1803), is limited to acts after Congress amends an act or refuses to amend an act, regardless of the harm the act is presently causing.]

[DOJ's second motion, 11/23/2015, to dismiss tried for more delay by falsely asserting that in 2013 Secretary Panetta gave the military until January 1, 2016, "to develop implementation plans for the integration of women." (SSS Br. at 3, D.E. No. 33-1). Panetta actually gave the military until May 15, 2013, to develop its implementation plans (which it did with Congress's approval) and directed that the "[i]ntegration of women into newly opened positions and units will occur as expeditiously as possible . . . but must be completed no later than January 1, 2016." (SSS Br. Ex. A at 1, Panetta's 1/24/2013 Memo, D.E. No. 33-2, emphasis added).

> [DOJ's second motion also argued that Congress cannot make a decision on women's registration until America's plethora of wars reach a point where the draft, which means conscription into the military, is reinstated. (SSS. Br. at 20-23, D.E. No. 33-1). Congress eliminated the draft over 40 years ago. Since then, America has been involved in 17 armed conflicts, including its longest, and Congress did not reinstate the draft. So by this argument, it is impossible to say when Congress will bring back the draft—if ever, which means the constitutional rights of young women depend on a government activity occurring or not occurring at some indefinite time in the future—not very reassuring for members of a democracy. This is just another argument for delay.]

[DOJ's Opposition to Plaintiff's motion to continue specifically requested a stay. (SSS Resp. at 13-15, D.E. No. 61). It was not granted. (*See* Opinion at 5, D.E. No. 67).]

[DOJ's third motion to dismiss (restricted to standing) again argued that because a commission was in the process of formulating suggestions for the SSS that Plaintiff was interfering with the political branches. (SSS Br. at 20, D.E. No. 69-1).]

[DOJ's fourth motion to dismiss again requests a stay—now called "abeyance." (SSS Br. at 2, 3, 12, 18, 27, D.E. No. 80-1).]

DOJ argues that *any delay . . . does not impose any restriction on Plaintiff, including from pursuing a military career.* (DOJ Reply 6, D.E. No. 82)

False. The MSSA prevents her from registering for the draft and functioning as a first-class, full-fledged citizen. More importantly, "equal treatment under law is a judicially cognizable interest . . . even if it brings no tangible benefit to the party asserting it." *Davis v. Guam*, 785 F.3d 1311, 1315 (9th Cir. 2015).

Also as this Court already found, "Plaintiff explains, her injury

> is *not* that she is kept out of combat positions, *not* that she may be harmed by future inductions, *not* that she is prevented from enlisting, and *not* that possible career opportunities in the military will be hindered *but rather* that she is prevented—solely because of her sex—from *registering for the draft*.

(Pl. Opp. Br. at 21) (emphasis in original)." (Opinion at 8. D.E. 72).

This case only deals with registering with the SSS or "draft registration,"—not pursuing a military career. Why is it that the DOJ lawyers cannot seem to comprehend that?

Two district courts and one Court of Appeals refused to put up with the DOJ delaying tactics or issue a stay on a challenge to the MSSA's discrimination.

Nat'l Coal. for Men v. Selective Serv. Sys. case (13-2391, C.D. Cal; 16-cv-03362, S.D. Tex.)

U.S. Dist. Courts in Cal and Texas and the 9th Cir Ct of Appeals did not delay rendering justice even though the same defendants there as here argued for such. That case also challenges the male-only registration provision of the MSSA on equal protection grounds for discrimination based on sex.

Before the Texas Court, DOJ moved to dismiss for failure to state a claim for relief under 12(b)(6). DOJ made the same argument it does here that the court is bound by deference to the political branches because the "MSSA in light of present military conditions has been and continues to be the subject of explicit consideration by the political branches. Most notably . . . Congress has established a commission to review, within a specific time period and with statutorily mandated input from the Executive branches, the needs of and for the SSS—including expanding registration to women." (SSS Br. at 18, 4:16-cv-03362, S.D. Tex. 10/06/17, D.E. No. 63).

The Texas Court denied DOJ's motion. It did not stay or delay the case because of the ongoing work of the Commission. The Court held, "Because Rostker explicitly requires Congress to comply with the Constitution in the area of military affairs, and because Plaintiffs allege Defendants did not, Plaintiffs state a claim upon which relief can be

granted. *See Rostker*, 453 U.S. at 67." (Opinion at 7, 4:16-cv-03362, S.D. Tex. 04/06/18, D.E. No. 66).

From C.D. Cal. to the 9th Cir Court of Appeals back to the C.D. Cal. then on to the S.D. Texas, the DOJ has argued without success first for delay because all combat position were not open to women, then for delay because Congress was engaged in a charade of granting equal rights to young women, then for delay because a Commission was researching suggestions for the SSS. Each and every court rejected those delaying arguments.

Now the NCFM case is in the summary judgment stage after the Court set a tight schedule for submission of those papers, refusing to put up with anymore of the DOJ's delaying tactics.

DOJ had tried to push back the final summary paper filing two months to Dec. 14, 2018 but the Court refused. (SSS Mtn Extension Time, 4:16-cv-03362, S.D. Tex. 08/28/18, D.E. No. 74).

Those facts make a joke of the DOJ's position that it is not angling for delay.

Possibility of closing combat positions to women.

Another reason for the DOJ dragging its heels in this case is that the Trump Administration may simply reverse the Obama Administration's policy that opened all combat positions to women.

Stay

If DOJ isn't trying to delay this case, why does it keep requesting a stay prior to judgment—now calling it an "abeyance." (DOJ Br. at 2, 3, 12, 18, 27, D.E. No. 80-1; Reply at 2, 8, 14, No. 82).

This Court has already denied a stay requested by the DOJ. (*See* Magistrate Order at 5, D.E. No. 67, 7/28/17).

One reason why DOJ lawyers want a stay prior to judgment is they hope Plaintiff will turn 26 before this case reaches the U.S. Supreme Court. At which time it becomes moot.

When this case started, Plaintiff was just out of high school, now she is 21 and we are still in the first inning in this District Court. So considering what has yet to be done, there's a decent chance she will turn 26 before we reach the Supreme Court.

Plaintiff would rather have this Court dismiss her complaint so that she can get on with her appeal before this case, as the DOJ hopes, becomes moot when she turns 26, or some other unforeseen circumstance arises to derail the justice she seeks.

DOJ also ridiculously argues for a stay prior to judgment because any decision by this Court for Plaintiff would wreak havoc on the most affluent and powerful government in the history of the world.

The Government on the other hand faces immediate and potentially significant hardships. The entry of judicial relief for Plaintiff at this stage would interfere with, if not negate, the Government's ability to address a fundamental revamping of the Selective Service System to better account for changes in society and warfare as mandated by Congress. See Pub. L. No. 114-328 § 551(b). In addition, any relief that could potentially require the Government to spend millions of dollars changing the Selective Service System in response to a court order would impose a considerable hardship at this time, particularly because Congress may wish to change the system in a different manner following the Commission's review. (DOJ Reply at 7, D.E. No. 82).

Plaintiff is a college senior studying to be a veterinarian. She does not want to destroy the U.S. Government. So if this Court rules in her favor, she is willing to agree to a stay pending appeal all the way to the U.S. Supreme Court under Fed. R. Civ. P. 62(c) or Fed. R. App. P. 8(a)(1)(A).

Chronology of case pertinent events

07/03/2015	1	Compl. filed
10/02/2015	19	Govt first motion to dismiss filed
10/22/2015	26	Plaintiff's first amended compl. filed, added Pinto
11/23/2015	33	Govt second motion to dismiss filed
12/21/2015	41	Plaintiff's opposition filed.
01/07/2016	43	Govt reply filed.
6/21/2016	47	Telephone conference
6/29/2016	48	Order requiring submissions regarding recent activity in Congress
9/29/2016	54	SAC, no change from First Amended Compl other than using Elizabeth's real name.
12/21/2016	57	Joint status report on Congress and Commission
1/10/2017	58	Plaintiff motion to continue
2/7/2017	61	DOJ opposition to continue
2/20/2017	65	Plaintiff's reply to continue
7/28/2017	67	Magistrates Order to continue and allowing motion on standing

8/15/2017	68	Joint status report on the Commission
8/25/2017	69	Motion dismiss SAC on standing
9/5/2017	70	Pl. opposition
9/11/2017	71	DOJ reply
3/29/2018	72	Opinion, Pl. has standing
5/2/2018	79	Order DOJ can move on ripeness and failure to state a claim
5/18/2018	80	DOJ motion dismiss on ripe and state a claim
6/4/2018	81	Pl. Opposition
6/11/2018	82	DOJ reply

Joint Status Report December 21, 2016 (D.E. No. 57):

April 27, 2016, the House Armed Services Committee approved the 2017 National Defense Authorization Act ("NDAA") which included a provision to require woman citizens of the United States and woman persons residing in the United States who attain the age of 18 years on or after January 1, 2018, to register with the Selective Service System ("SSS").

May 16, 2016, the House Rules Committee deleted from the House Armed Services Committee's 2017 NDAA the provision requiring females to register with the SSS.

May 18, 2016, the House passed its version of the NDAA (H.R. 4909) which included a provision for the Secretary of Defense to study the efficacy of the SSS. (Exhibit A).

May 18, 2016, the Senate Armed Services Committee sent to the full Senate its 2017 NDAA (S. 2943) which included a provision to require females to register with the SSS.

June 14, 2016, the Senate passed the 2017 NDAA with a provision requiring females to register. (Exhibit B). The Senate and House bills were then sent to a Senate-House Conference Committee.

November 29, 2016, the Senate and House Conference agreed on a 2017 NDAA, S. 2943, that eliminated the Senate's provision for females to register with the SSS and, instead, adopted the House's provision requiring a study of the efficacy of the SSS and the Senate's provisions creating a Commission to review the military selective service process (§§ 551-557 (Exhibit C)).

The Commission is to be established under the Executive Branch and shall be considered an independent establishment of the Federal Government as defined by 5 U.S.C. §104 and a

temporary organization under 5 U.S.C. § 3161. S. 2943 § 553. Members of the Commission will be appointed by the President and leaders of Congress. S. 2943 § 553(b).

The 2017 NDAA requires the Secretary of Defense to submit to the Committees on Armed Services of the Senate and the House of Representatives and to the Commission, a report "on the current and future need for a centralized registration system under the Military Selective Service Act (50 U.S.C. 3801 et seq.) . . . [and on] expanding registration to include women" by not later than July 1, 2017. S. 2943 § 552(a)(1) & (b)(1)(C). The 2017 NDAA requires that not later than three months after the Commission establishment date, the President shall establish and transmit to the Commission and Congress, principles for the reform of the military selective service process. S. 2943 § 555(c)(1).

Among those principles is a requirement for the Commission to address: Whether, in light of the current and predicted global security environment and the changing nature of warfare, there continues to be a continuous or potential need for a military selective service process designed to produce large numbers of combat members of the Armed Forces, and if so, whether such a system should include mandatory registration by all citizens and residents, regardless of sex. S.2943 § 555(c)(2)(A).

The 2017 NDAA requires that not later than seven months after the Commission establishment date, the Secretary of Defense, Attorney General, the Secretary of Homeland Security, the Secretary of Labor, and such other Government officials, and such experts, as the President shall designate, shall jointly transmit to the Commission and Congress recommendations for the reform of the military selective service process and military, national, and public service in connection with that process. S. 2943 § 555(d).

The Commission has 30 months from its establishment date to conduct a review of the SSS and report its recommendations to Congress and the President. S. 2943 § 555(e)(1).
On December 1, 2016, USA Today reported that a spokesman for the White House National Security Council stated that the Obama administration supported females registering for the draft. See http://www.usatoday.com/story/news/politics/2016/12/01/obama-supportsregistering-women-military-draft/90449708/ last checked on December 21, 2016.

December 2, 2016, the House adopted the Conference Report.

December 8, 2016, the Senate adopted the Conference Report.

December 14, 2016, the 2017 NDAA was presented to President Obama.

Joint Status Report Aug. 15, 2017, (D.E. No. 68):

On December 23, 2016, the 2017 National Defense Authorization Act ("2017 NDAA"), Pub. L. No. 114-328 was signed into law. Sections 551-557 of the 2017 NDAA established the National Commission on Military, National, and Public Service ("Commission") to review the military selective service process, including the current and future need for a centralized registration system and expanding registration to include women. The law required certain actions be taken by the President, various departments of the Executive Branch, and certain members of Congress.

The President, leaders of Congress and the Chairmen and ranking minority members of the Senate and House of Representatives Armed Services Committees have appointed the required 11 members of the Commission.

On April 3, 2017, the President established and transmitted to the Commission and Congress, principles for the reform of the military selective service process, as required by Pub. L. No. 114-328 § 555(c)(1).

On July 13, 2017, the Secretary of Defense submitted to the Committees on Armed Services of the Senate and the House of Representatives and to the Commission, a report "on the current and future need for a centralized registration system under the Military Selective Service Act . . . [and on] expanding registration to include women," as required by Pub. L. No. 114-328 § 552(a)(1) & (b)(1)(C).

Pub. L. No. 114-328 § 552(c) requires that not later than December 1, 2017, the Comptroller General of the United States shall submit to the Committees on Armed Services of the Senate and the House of Representatives and to the Commission a review of the procedures used by the Department of Defense in evaluating selective service requirements.

Pub. L. No. 114-328 § 555(d) requires that by December 5, 2017, the Secretary of Defense, Attorney General, the Secretary of Homeland Security, the Secretary of Labor, and such other Government officials, and such experts, as the President shall designate, shall jointly transmit to the Commission and Congress recommendations for the reform of the military selective service process and military, national, and public service in connection with that process.

The Commission has 30 months from its establishment date of May 5, 2017, or until November 5, 2019, to conduct a review of the Selective Service System and report its recommendations to Congress and the President. Pub. L. No. 114-328 § 555(e)(1).

[Multi-District Litigation]

28 USC 1407(a) requires (1) common facts and (2) convenience of the parties.

[Consolidation]

The NCFM case was raised by the DOJ in its first motion to dismiss (D.E. 19) at 29 and its second motion to dismiss (D.E. 33) at 31, 10/2/2015.

Cases should [not] be consolidated

To transfer actions to a different district court under 28 USC 1404(a) requires that

> *Venue* must be proper based on an examination of facts and circumstances existing at the time of the lawsuit—not at the time of the transfer. *Moore's Federal Practice* § 42.11(b).
>
> > Under 28 USC 1391(e)(1), residency for SSS was Arlington, Va.; the events giving rise to the Cal case took place in Cal via NCFM members and Texas for the individual males; the events in this case took place in NJ; plaintiffs in the Cal case reside in Cal and Tx; Ms. Kyle-LaBell resides in NJ. So venue for both cases was not proper in either district court when the cases were commenced.
>
> Also, when the Cal case was brought, Ms. Kyle-LaBell was 15 years old, which may have caused some problems for the Cal CD.

Additionally, consolidation requires the party requesting such show *common questions of fact or law*.

> The factual questions in the two cases are different.
>
> The question in the Texas case is whether the equal protection rights of young men are violated by requiring them to register for the draft. Here the issue is whether by barring the class of young women from registering for the draft, their equal protection rights are violated.

Further, I do not believe that Ms. Kyle-LaBell, the putative class representative, will consent to the inconvenience of personal jurisdiction of the Tex SD and dealing with the attorney for that case who

(1) in his complaint against the SSS actually brought a 14th Amendment cause of action. We all learned in our first year in law school that the 14th Amendment applies only to state and municipal governments—not federal agencies. This brings into question the attorney's legal ability by committing such an obvious Constitutional error;
(2) sends a letter to a federal judge based on a "cursory reading" (p. 1 ¶ 2) of the papers in this case that resulted in the false assumption that the Cal case had not been brought to Your Honor's attention; and

(3) is a member of an apparently misogynist organization.]

Events on women in combat

The combat restrictions on women in 1981 included:

1. 10 U.S.C. § 8549 prevented women from being assigned to duty in aircraft engaged in combat (repealed 1991);
2. 10 U.S.C. § 6015 prevented women in the Navy from being assigned to duty on vessels engaged in combat missions (repealed 1993);
3. The Army kept women out of combat and away from the theater of fighting as a matter of established policy, *Goldberg v. Rostker*, 509 F. Supp. 586, 598 (E.D. Pa. 1980)(citing *Requiring Reinstitution of Registration for Certain Persons Under the Military Selective Service Act, and for Other Purposes*, Report No. 96-226 to accompany S.109 at 8-9 (9th Cong. 1st Sess.));
4. Congress recognized and endorsed the exclusion of women in combat and combat support roles, *id.*;
5. 42 percent of all positions filled by enlisted personnel in the Army were in specialties, skills or units not available to women, *id.*;
6. The military had administrative problems concerning housing for women, *id.*;
7. The performance of sexually mixed units was still in the experimental stage, *id.*;
8. The societal belief was that the assignment of women to combat would weaken the national resolve once images of the atrocities of war visited on women became public, *id.*;
9. Mobilizing women through the draft would cause strains on training facilities and administrative services, *id.*; and
10. The nature of the battlefront was more limited, more confined and relatively well defined, *Report to Congress on the Review of Laws, Policies and Regulations Restricting the Service of Woman Members in the U.S. Armed Forces* at 3, February 2012.

1993, Sec. Defense Aspin imposed a new rule (1994 Direct Ground Combat Definition and Assignment Rule) where all service members were eligible to be assigned to all positions for which they were qualified, except that women would be excluded from assignment to units below the brigade level whose primary mission was to engage in direct combat on the ground.

May 1994, President Clinton asked the Secretary of Defense for a report on women and draft registration. The Secretary's report recognized the vastly increased role being played by women in each of the Armed Services, and concluded that "[b]ecause of this change in the makeup of the Armed Forces, much of the congressional debate which, in the [Supreme] court's [1981] opinion, provided adequate congressional scrutiny of the issue . . . would be inappropriate today." *Backgrounder: Women and the Draft in America*, www.sss.gov.

February 2012, the Department of Defense "announced a series of modifications to [the 1994 Direct Ground Combat Definition and Assignment Rule] which opened up more than 14,000 new positions to women, including positions that were collocated with ground combat units and certain positions in ground combat units below the brigade level whose primary missions were to

engage in direct combat on the ground," former Secretary of Defense Panetta Press Conference, January 24, 2013.

1/24/2013, Pentagon's announcement officially rescinded the remainder of the 1994 Direct Ground Combat Definition and Assignment Rule.

> Sec. Defense Panetta directed that the "[i]ntegration of women into newly opened positions and units will occur as expeditiously as possible . . . but must be completed no later than January 1, 2016." (SSS Br. Ex. A at 1, Panetta Memo, D.E. No. 33-2, emphasis added). Sec. Defense Carter fulfilled that order on December 3, 2015.

2/2/2016, *U.S. military generals want women to register for draft*, Jennifer Rizzo, CNN.

Marine Corps Commandant Gen. Robert Neller and Army Chief of Staff Gen. Mark Milley agreed that the current policy, which requires only males register for the Selective Service System, should be changed after restrictions that barred women from trying out for combat jobs were lifted last year. [In 1980, military generals wanted the same but Congress did not go along.]

2/4/2016, *It's Time To Register For The Military Draft, Ladies*, Amber Smith—combat veteran Iraq, Afghanistan, The Federalist.

You don't get to pick and chose when equality applies to you. Not quotas, not double standards, not separate physical standards or lowered selection criteria. The responsibility of the military draft lies equally with both men and women. Equal opportunities mean equal responsibilities, and when it comes to defending this nation, no one is exempt merely based on his or her sex.

2/5/2016, *There's a rift opening on how the U.S. should handle women and military drafts*, Dan Lamothe.

One proposal to alter the law has been proposed this week. Rep. Duncan D. Hunter (R.-Calif.), a Marine Corps veteran, and Rep. Ryan Zinke (R.-Mont.), a former Navy SEAL, introduced the Draft America's Daughters Act of 2016. They signaled that they were likely to vote against their own bill. Hunter's chief of staff, Joe Kasper made clear the political purpose: "Every member of Congress should have to go on the record on whether or not he or she supports sending America's 'daughters and sisters' into harm's way."

2/16/2016, *Women in combat and the draft: answers to your biggest questions*
By Lolita C. Baldor, Associated Press.

Four U.S. House members introduced legislation to abolish the Selective Service, saying that the all-volunteer force is working—it went nowhere.
Two members of Congress introduced legislation requiring women to register but said they actually opposed their own bill—deep sixth in House Rules Comm.

The Pentagon had made no recommendation on women registering with the SSS, but the department said it will consult with the Justice Department when needed.

3/3/2016, Lolita C. Baldor, Associated Press

The military services are already beginning to recruit women for combat jobs, including as Navy SEALs, and could see them serving in previously male-only Army and Marine Corps infantry units by this fall.

All of the services say they have made required changes to base bathrooms and other facilities to accommodate women.

The top Army and Marine Corps generals told senators last month that it will take up to three years to fully integrate women into all combat jobs.

The military services have put together plans outlining exactly how they will incorporate women into the male-only units.

The first Army officers will start training in June, and could graduate in October. The first woman enlisted soldiers will begin moving into ground combat units in May 2017.

The bulk of the male-only units are in the Army and Marine Corps. Only a few of the Navy and Air Force units excluded women.

03/11/2016, *Defense Secretary Ashton Carter OKs final strategy for women in combat*, Kellan Howell, The Washington Times, 3/11/2016

Defense Secretary Ashton Carter approved Thursday final plans from military service branches and the U.S. Special Operations Command to begin integrating woman combat soldiers "right away." All of the services submitted their plan to integrate women into combat roles by Jan. 1.

03/11/2016, *Sec. Carter's Statement*.

"Sec. Carter approved all the services and special operation forces plans on integrating women into all military positions.

Integration does not guarantee women will be promoted at any specific number or at any set rate, as adherence to a merit-based system must continue to be paramount.

We have to remember that it takes decades to grow a general or flag officer, so it will take time to see these results. It won't all happen overnight."

3/18/2016, *U.S. general Lori Robinson to become first woman to lead combatant command*, Reuters (Senate approved 4/26/2016)

The first woman to head a U.S. combatant command named. The Northern Command is responsible for preventing attacks against the United States.

4/7/2016, *44 Women Have Volunteered to Become Army Infantry Officers*, Matthew Cox, Military.com

April 2017 will see woman infantry and armor officers, non-commissioned officers and junior soldiers in those Army combat units.

4/15/2016, *Army Approves 22 Women to Become Infantry and Armor Officers*, Matthew Cox, Military.com

4/30/2016, *House defense policy bill would require women to register for draft*, Wall Street Journal

The House Armed Services Committee approved an annual defense policy bill that includes a provision that would require women to register with the Selective Service System.

5/13/2016, *Coming soon: A military draft for women?* Richard Lardner, AP.

The Senate Armed Services Comm. stated that any justification for barring women from draft registration was erased last year, when the Pentagon announced that all military jobs would be open to women. It's annual defense policy bill includes a provision to require women to register for the draft.

The White House has declined to say whether President Barack Obama would sign into law legislation that expands the draft to include women.

5/17/2016, *Women's draft bid gains in Senate, stalls in House*, Austin Wright

Senate Majority Leader Mitch McConnell supports requiring women to register for the military draft — a surprise announcement that breaks with House GOP leaders who've made clear they want to avoid an election-year vote on the politically sensitive issue.

House leaders blocked Hunter's draft registration amendment to a defense spending provision, which they called a "reckless policy."

This means the ultimate decision could come in House-Senate conference negotiations later this year to craft a final version of the National Defense Authorization Act, an annual measure that sets defense policy.

If lawmakers delay action on the issue, they could end up being preempted by the judicial branch — a fact that a House Armed Services aide acknowledged. "The courts could act at any moment and send this in a direction that Congress doesn't like."

The Selective Service's annual budget of $23 million would have to be increased by $8.6 million in the first year, but those costs would drop as the number of women registering each year leveled off. An additional 39 employees would be needed to process the increase in draft registrations, he added.

5/20/2016, *The Unseemly Death of an Amendment to Draft Women*, Nicholas Clairmont, The Atlantic.

Hunter, a vocal opponent of women serving in combat, offered the amendment as a dare, confident that progressives on gender equality in the service were all talk. That, in theory, should have sent it and the larger bill on for a vote on the House floor. Meanwhile the same measure made it through the committee's counterpart in the Senate, chaired by John McCain, where it found surprisingly strong support, including from Majority Leader Mitch McConnell.

Hunter and Thornberry had agreed that Hunter would propose the amendment to make a point and then offer to withdraw it before a vote—a sort of parliamentary ritual designed to let him register his opinion. But Hunter didn't withdraw, and it sent Thornberry scrambling for legislatively murkier options for killing the measure before it could hit House floor, where it was predicted to pass.

The Rules Comm. chairman, wanting to protect "young women from being mandated to submit their personal information to the federal government to sign up for the selective service," used the authority of his office to exploit a quirk of parliamentary procedure. So even though Thornberry's amendment to delete Hunter's draft provision was voted down by the Rules Committee, Sessions wrote its language into the original language of the bill, which makes it "considered as adopted" by the Committee.

The Senate's version of the defense-funding bill still contains the draft expansion. Somehow, both houses of Congress have to agree on an identical bill. And once they do, then there's a good chance President Obama will veto it over a separate funding fight anyway: The House bill appropriates the funds marked for foreign wars to keep bases that the Pentagon wants to shutter open, and the White House has already threatened to send it back unsigned.

6/11/2016, *Women and the draft: Sign of equality, or potential consequence of it?* By Katie Leslie, Dallas Morning News

Congress has been at odds over the issue for months after Sen. John McCain, the Arizona Republican and chairman of the Senate Armed Services committee, added language to the annual defense spending bill that would require women ages 18 to 26 to register for the Selective Service.

The new requirement would affect as many as 11 to 15 million women, according to a nonpartisan Congressional Research Service report in April. Women who turn 18 on or after Jan. 1, 2018, would be required to sign up.

Cruz backed an unsuccessful move by fellow conservative Sen. Mike Lee, R-Utah, to strip the requirement from the National Defense Authorization Act while it was still in committee.

House Rules Chrmn Sessions said in May, "We don't need every little girl giving their information to the federal government at a time when the federal government does not actively use the information ... because we don't have a draft."

If it is approved with the Selective Service measure intact, Senate and House leaders will convene to reach a compromise.

6/14/2016, *U.S. Senate passes $602 billion defense authorization bill*, Reuters.

The U.S. Senate voted overwhelmingly on Tuesday to pass a $602 billion defense authorization bill [National Defense Authorization Act 85-13], despite President Barack Obama's threat to veto the annual policy measure over issues including a ban on closing the Guantanamo military prison.

The bill included the Armed Services Comm. provision to draft women and now must be reconciled with one the House of Representatives passed last month before it can be sent to Obama.

The House bill also faces a veto threat.

6/14/2016, *Senate Votes to Require Women to Register for the Draft*, Jennifer Steinhauer, NYTs.

The Senate approved an expansive military policy bill that would for the first time require young women to register for the draft.

Under the Senate bill passed on Tuesday, women turning 18 on or after Jan. 1, 2018, would be forced to register for Selective Service, as men must do now.

The debate will now pit the Senate against the House, where the policy change has support but was not included in that chamber's version of the bill. The two bills will now be reconciled in a conference committee between the House and the Senate, where a contentious debate is expected.

6/14/2016, *Senate Approves Defense Policy Bill, Baiting Veto*, Joe Gould, Defense News

President Obama has threatened to veto the House and Senate versions of the bills — the House bill over its unorthodox treatment of overseas contingency operations (OCO) funds, and the Senate bill over its acquisition reform provisions and limits it would place on the closure of the Guantanamo military detainment facility in Cuba.
The House and Senate bills face significant differences for lawmakers to debate in conference, chiefly their approaches to defense acquisitions reform, where the Senate takes a more aggressive tack, and defense funding.

With few days on Congress' election-year calendar, lawmakers will have to act quickly to send the final version of the bill to Obama's desk before the end of the fiscal year on Sept. 30.

Obama has threatened to veto seven annual authorization bills, and did so last year.

06/14/16, *Senate passes defense bill including women in draft*, Jeremy Herb, Connor O'Brien, Politico

Tuesday's final vote on the Senate bill was enough to override a veto threat from the White House, which has blasted the measure for attempting to "micromanage" the administration's conduct of national security policy through reductions in the White House National Security Council staff, organizational changes to the Pentagon and limits on the closure of the U.S. military prison at Guantanamo Bay, Cuba.

06/14/2016, *Senate Passes Defense Bill, Defying White House Veto Threat*, WSJ

There is agreement in both chambers on key policy provisions—such as keeping Guantanamo open—that puts Congress on a collision course with President Barack Obama. The House and Senate also have agreed not to allow military bases to be closed.

July 7, 2016, the House amended a different spending bill to prevent the SSS from using any money to open registration to women.

November 29, 2016, the Senate and House Conference agreed on a 2017 NDAA that eliminated the Senate's provision for young women to register with the SSS and adopted the House's provision to require the Secretary of Defense to submit a study by July 1, 2017, on whether the SSS was still realistic and cost-effective.

December 1, 2016, President Obama announced his support for women registering for the draft.

December 2, 2016, the House agreed to the Conference Report.

December 8, 2016, Senate agreed to the Conference Report and the 2017 NDAA went to President Obama to sign or veto.

1/8/2017, *Three woman Marines just became the first women in a ground combat unit*, Sarah Lee, The Blaze

[T]hree women stationed at Camp Lejeune in Jacksonville, N.C., are set to make history serving as the first woman Marines in a combat unit. One of the woman infantry will serve as a riflewoman, one as a machine gunner and one as a mortar Marine. All three women graduated from the School of Infantry and were part of the Marines' gender integration research:

Secretary of Defense, Retired Marine Gen. James Mattis, told Military Times in September that "shortsighted social programs" could make the U.S. military less effective.

1/18/2017, *This woman will be the first to join the Army's elite 75th Ranger Regiment*, Meghann Myers

A woman officer has completed the Army's rigorous selection process for its storied 75th Ranger Regiment and is on her way to joining a unit in the next few months, according to a spokesman for Army Special Operations Command.

The first woman Ranger passed the three-week long selection course designed for staff sergeants and above, as well as officers. She will wear the legendary Ranger scroll and the distinctive tan beret and when she reports to the regiment.

1/19/2017, *NO LOWERED STANDARDS FOR WOMEN IN COMBAT*, Association of the U.S. Army

5/19/2017, 18 women graduate from the Army's first gender-integrated infantry basic training, Meghann Myers,

Eighteen of the 32 women who reported to infantry one station unit training in February have earned their blue cords and will soon be joining the rest of the force as the Army's first junior enlisted woman infantrymen.

5/26/2017, *For Army Infantry, Fist Women*, David Philipps, NYTs

The first group of women graduated from United States Army infantry training last week

8/9/2017, *Almost 300 Woman Marines in Previously Closed Combat Jobs*, Hope Hodge Seck, Military.com

There are 278 woman Marines now filling jobs formerly reserved for men, with 40 woman recruits additionally under contract for these jobs, the assistant commandant of the Marine Corps told reporters at the Pentagon on Tuesday.

A year and a half after all previously closed ground combat and special operations jobs across the Defense Department opened to women in keeping with a Pentagon mandate

These include two woman lieutenants who graduated with honors from Army Field Artillery School at Fort Sill, Oklahoma, in May 2016, and the Marines' first woman tank officer, 2nd Lt. Lillian Polatchek, who graduated at the top of the Army's Armor Basic Officer Leaders Course at Fort Benning, Georgia, in April.

There are at least three women currently serving in actual enlisted infantry jobs. The Marine Corps revealed in January that a woman rifleman, mortarman, and machine gunner were being assigned to 1st Battalion, 8th Marines, out of Camp Lejeune, North Carolina.

8/25/2017, *Woman Soldiers making more strides in combat career fields*, Joe Lacdan, Army News Service

This summer, women made history at Fort Benning, Georgia, graduating as the first woman cavalry scouts and M1 tank crew members.

The integration of women into armor and infantry began last year with officers leading the way so that woman leaders would be in place at units when the first woman enlisted arrived.

The Armor Basic Officer Leader Course at Fort Benning, Georgia, has graduated 32 woman Soldiers and one woman Marine from its three-phase program. Also at Fort Benning, 21 woman infantry officers graduated this year.

Eight enlisted women have graduated so far as 19D cavalry scouts at Fort Benning while 10 women completed M1 armor crewman training.

At the Army's prestigious Ranger School, seven woman graduates made the cut since April 2016.

In all, the Army opened 138,000 combat positions to women in 2016.

To date, 567 woman Soldiers have graduated from Fort Sill in artillery occupational specialties since the field was opened to women. A total of 601 women have become combat engineers after graduating from training at Fort Leonard Wood, Missouri since 2015.

9/26/2017, *US Marines get first woman infantry officer*,

A woman US Marine has made history by becoming the first woman to complete the Corps' famously gruelling infantry officer training.

10/15/2017, *Commission for modern military to consider skills-based draft, women's roles, millennial recruitment***,** Rowan Scarborough - The Washington Times

A survey finds that 40 percent of American women approve of the idea of being included in the U.S. military draft.

Commission has an initial $15 million budget

10/24/2017, *Pentagon advocates requiring women to sign up for military draf*t, Rowan Scarborough - The Washington Times

The Pentagon says the country should stick with mandatory registration for a military draft, and it advocates a requirement for women to sign up for the first time in the nation's history.
"It appears that, for the most part, expanding registration for the draft to include women would enhance further the benefits presently associated with the Selective Service System," the Pentagon report states.

The report says registration should stay because of a number of benefits.

For one, it sends a strong message to world adversaries that, if necessary, the U.S. can conduct a mass mobilization.

“Eliminating military selective service could be interpreted by adversaries of the United States as a potential weakness, thus emboldening existing or potential enemies,” the Pentagon says.

The report quotes Ronald Reagan, who referred to registration as an “insurance policy.”