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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NATIONAL COALITION FOR MEN *et al.*,

Plaintiffs,

v.

SELECTIVE SERVICE SYSTEM *et al.*,

Defendants.

Case No: 13-cv-2391 DSF (MANx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Date: October 24, 2016
Time: 1:30 pm
Location: Federal Roybal Bldg
255 East Temple St.
Los Angeles, CA 90012
Courtroom: 840
Judge: Hon. Dale S. Fischer

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INTRODUCTION

Nearly four months after the Ninth Circuit issued its mandate returning this case to this Court, plaintiffs have failed to remedy any of the multiple deficiencies in their Complaint that the Court did not reach in its ruling on defendants' first motion to dismiss. Plaintiffs still lack standing because they have not established that either the National Coalition for Men ("NCFM") or James Lesmeister suffered an injury in fact from the requirement that only men register for the Selective Service. The case is still in the wrong venue, as none of the parties or events at issue has any connections to this district. And although the Ninth Circuit held that this action is now ripe, plaintiffs' Complaint still fails to state a claim upon which relief can be granted.

The Constitution vests Congress and the Executive with broad discretion over military affairs, particularly with respect to regulation of the composition of the armed forces, as recognized by the Supreme Court in *Rostker v. Goldberg*, 453 U.S. 57 (1981). The military is still in the process of implementing the full integration of women into combat roles, and Congress is considering a provision in the Senate's currently pending defense authorization bill that would require women to register for the Selective Service. In accord with *Rostker*, the Court should defer to the ongoing policy discussions of the political branches in this sensitive area.

For these reasons, set forth further below, the Court should once again dismiss this action.

BACKGROUND

I. The Military Selective Service Act

In 1948 Congress enacted the Military Selective Service Act, 50 U.S.C. § 451 *et seq.*, which provides, in pertinent part, that

> it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who . . . is between the ages of eighteen and twenty-six, to present himself for and submit to registration

> at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

Id. § 453(a) (1948), *currently codified at* 50 U.S.C. § 3802(a). The MSSA's registration provision is intended to facilitate conscription into the armed forces if a draft is reinstated, and its sole purpose is to provide a pool of potential combat troops for subsequent induction. *Rostker*, 453 U.S. at 59-60.

The Selective Service System became inactive in 1975 when President Ford discontinued draft registration. In 1980, Congress reactivated the registration process at the request of President Carter, who also recommended that Congress amend the MSSA to authorize the registration and conscription of women. *See id.*at 59. After extensively considering the question of female-registration in multiple rounds of hearings, floor debate, and committee, Congress declined to amend the Act. *Id.* at 72. Congress explained that "the primary manpower need[ed]" in the event of a draft "would be for combat replacements," and because women were ineligible to serve in combat, they should be exempted from the registration requirement. *Id.* at 76-82. Thereafter, on July 2, 1980, President Carter reinstated the male-only registration requirement. Proclamation No. 4771, 45 Fed. Reg. 45,247 (July 2, 1980).

Registration for the Selective Service can be accomplished in a variety of ways. The registrant is required to provide no more than his "name, date of birth, sex, Social Security Account Number (SSAN), current mailing address, permanent residence, telephone number, date signed, and signature, if requested …." 32 C.F.R. § 1615.4(a). The estimated time to fill out the form is less than two minutes. *See* Forms Submitted to the Office of Management & Budget for Extension of Clearance, 73 Fed. Reg. 50391 (Aug. 26, 2008). Failure to register when required can have consequences, including criminal liability or bans on federal student aid or employment. *See* 50 U.S.C. § 3811(a) and (f); 5 U.S.C. § 3328; 34 C.F.R. § 668.37.

II. *Rostker*: The Supreme Court Holds that Male-Only Draft Registration Is Constitutional

In *Rostker v. Goldberg*, the Supreme Court considered whether the MSSA's male-only registration requirement violated the equal protection component of the Fifth Amendment. The case came to the Court on direct appeal from a three-judge district court, which — after independently evaluating the evidence collected by Congress — concluded that "the MSSA unconstitutionally discriminates between males and females." *Goldberg v. Rostker*, 509 F. Supp. 86, 605 (E.D. Pa. 1980). The Supreme Court reversed, explaining that courts must accord "great weight to the decisions of Congress," particularly in the "context of Congress' authority over national defense and military affairs," where the "lack of competence on the part of the courts is marked." *Rostker*, 453 U.S. at 64-65 (citation omitted). The Court emphasized that judicial deference "is at its apogee when legislative action under the congressional authority to raise and support armies" is challenged, as the "constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *Id.* at 65, 70 (citation omitted). The Court further noted that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.* at 65-66 (citation omitted). The Supreme Court admonished the lower court for conducting its own assessment of congressional evidence, emphasizing that the judiciary must be "particularly careful not to substitute [its] judgment of what is desirable for that of Congress, or [its] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Id.* at 68.

In light of the substantial deference owed to Congress, the Supreme Court concluded that exempting women from the registration requirement did not violate the Fifth Amendment. "Congress did not act unthinkingly or reflexively" in choosing to exempt women from registration, the Court explained; rather, the question "not only received considerable national attention and was the subject of

wide-ranging public debate, but also was extensively considered by Congress in hearings, floor debate, and in committee." *Id.* at 72-73. Moreover, exempting women from the registration requirement was not based on an invidious gender classification, "but rather realistically reflects the fact that the sexes are not similarly situated" for purposes of a draft or registration for a draft. *Id.* at 78-79. Because Congress had determined that the purpose of registration "was to prepare for a draft of combat troops," and women "as a group, . . . are not eligible for combat," the Court concluded that "[t]he exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration." *Id.* at 76-79.

III. Evolving Role of Women in Combat

Since *Rostker*, Congress and the military have eased the restrictions on women's eligibility for combat positions. By 1993, Congress had repealed statutory prohibitions on assigning women to duty on aircraft and ships engaged in combat, *see* 10 U.S.C. §§ 6015, 8549, and in 1994, the Secretary of Defense issued the "Direct Ground Combat Definition and Assignment Rule" ("DGCDAR"), which opened some units and positions previously closed to women. *See* Office of the Under Secretary, Report to Congress on the Review of Laws, Policies and Regulations Restricting the Service of Female Members in the U.S. Armed Forces at 17-18 (Feb. 2012). In 2012, the Department of Defense ("DoD") approved an exception to the DGCDAR that made women eligible for direct ground combat units in specific occupations at the battalion level and above. *See id.* at 19-22. It also rescinded its collocation restriction. In January 2013, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff rescinded the DGCDAR, thereby removing the last remaining barriers to assigning women to direct ground combat positions and units. Mem. on Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule (Jan 24. 2013), attached as Ex. B to Defs.' 1st Mot. to Dismiss (ECF No. 11-2 at 1-2). He directed the military

departments to develop implementation plans for the review of service-level policies and standards, and to move forward expeditiously with the integration of women into combat roles on a timeline to be completed no later than January 1, 2016. *Id.* Exceptions to the directive could be requested but were to be "narrowly tailored and based on a rigorous analysis of factual data regarding the knowledge, skills and abilities needed for the position" and personally approved first by the Chairman of the Joint Chiefs of Staff and then by the Secretary. *Id.*

On December 3, 2015, the Secretary announced his "determin[ation] that no exceptions are warranted to the full implementation of the rescission of the '1994 Direct Ground Combat Definition and Assignment Rule'" and that "[a]nyone, who can meet operationally relevant and gender neutral standards, regardless of gender, should have the opportunity to serve in any position." *See* Mem. from Sec'y of Def. on Implementation Guidance for the Full Integration of Women in the Armed Forces, *available at* http://www.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf. The Secretary further directed the Secretaries of the Military Departments and the Chiefs of the Military Services to submit final, detailed implementation plans for the opening of all military occupational specialties, career fields, and branches for accession by women for approval no later than January 1, 2016. *Id.*

The Military Services (Army, Navy, Air Force and Marine Corps) and the U.S. Special Operations Command ("USSOCOM") complied with the deadline, and on March 9, 2016, the Secretary approved each of the Services' and USSOCOM's final implementation plans. *See* Mem. from Sec'y of Def. to Secretaries of the Military Dep'ts on Approval of Final Implementation Plans for the Full Integration of Women in the Armed Forces, *available at* http://www.defense.gov/Portals/1/Documents/pubs/SIGNED_SD_WISR_Implementation_Memo.pdf. The final implementation plans are available publicly on DoD's website: http://www.defense.gov/News/Publications. The Services and

USSOCOM are currently executing their implementation plans.

Additionally, Congress continues to exercise active oversight of implementation of the rescission of the DGCDAR. On February 2, 2016, the Senate Armed Services Committee held a hearing on the opening to women of previously closed combat units and positions. *See* Sen. Comm. on Armed Services, Implementation of the Decision to Open All Ground Combat Units to Women (Feb. 2, 2016), http://www.armed-services.senate.gov/hearings/16-02-02-implementation-of-the-decision-to-open-all-ground-combat-units-to-women.

By law, DoD was required to notify Congress 30 days before any new direct combat position or military occupational specialty was opened to women. That notice had to include "a detailed description of, and justification for, the proposed change," as well as "a detailed analysis of legal implication of the proposed change with respect to the constitutionality of the application of the Military Selective Service Act . . . to males only." 10 U.S.C. § 652(a)(3). In its most recent and final notice to Congress, submitted on December 3, 2015, the Secretary of Defense notified Congress that DoD intended to assign women to previously closed positions and units across all Services and USSOCOM. The notice observed that while "[t]he opening of all direct ground combat positions to women further alters the factual backdrop to the…decision in *Rostker*," the Supreme Court "did not explicitly consider whether other rationales underlying the statute would be sufficient to limit the application of the MSSA to men," and that DoD would consult with the Department of Justice as appropriate on these issues. *See* Appellees' Citation of Supp. Authorities, *NCFM v. Selective Service System*, No. 13-56690 (9th Cir.), ECF No. 28 (excerpts attached hereto as Exhibit 1).

On May 4, 2016, the House Armed Services Committee reported the National Defense Authorization Act for fiscal year 2017 ("NDAA FY17"). The reported version of the bill would have required women to register for the Selective Service. *See* H.R. Rep. No. 114-537 at 157 (as reported by House Comm. on

Armed Servs., May 4, 2016). On the floor of the House, the bill was amended to require a "report on the purpose and utility" of the Selective Service, including whether the Selective Service should be retained at all. *See* H.R. 4909, 114th Cong., Title V, § 528 (as passed by House, May 18, 2016). On June 14, 2016, the U.S. Senate passed its NDAA FY17, including a provision requiring women to register for the Selective Service under the same terms currently required for men. *See* S. 2943, 114th Cong., Title IV, § 591 (as passed by Senate, June 14, 2016); *see also* Jennifer Steinhauer, *Senate Votes to Require Women to Register for the Draft*, N.Y. Times (June 14, 2016), *available at* http://www.nytimes.com/2016/06/15/us/politics/congress-women-military-draft.html?_r=0. The Senate and House versions of the bill are currently in conference.

IV. Plaintiffs' Challenge

On or about April 4, 2013, the National Coalition for Men and James Lesmeister filed suit alleging that the Selective Service System's restriction of its registration requirement to males violated their equal protection rights under the Fifth and Fourteenth Amendments and seeking injunctive and declaratory relief "for Defendants to treat women and men equally by requiring both women and men to register for the U.S. military draft." Compl. at 1-2.[1] Plaintiffs asserted that in light of the Secretary's January 2013 announcement lifting the ban on women in combat, *Rostker* no longer applies. *Id.* ¶ 19.

The Government moved to dismiss the original and still pending Complaint on the grounds that the suit was not ripe and that plaintiffs lacked standing, had brought suit in the wrong venue, and had failed to state a claim upon which relief

[1] As discussed below, and as this Court has previously noted, plaintiffs cannot state a claim under the Fourteenth Amendment or 42 U.S.C. § 1983, given that the Fourteenth Amendment and § 1983 apply only to state action, not action by the federal government.

could be granted. ECF No. 11. The Court agreed that the action was not ripe and granted the motion without reaching the government's other arguments, ECF No. 20, and plaintiffs appealed. On February 19, 2016, the Ninth Circuit reversed and remanded, holding that plaintiffs' claims were ripe for adjudication. *Nat'l Coalition for Men v. Selective Serv. Sys.* ("*NCFM*"), No. 13-56690, 640 F. App'x. 664, 665 (9th Cir. 2016). The Court of Appeals noted that "much of [the] uncertainty has passed" with respect to which positions in combat would be open to women, and that "whether there has been sufficient change to revisit *Rostker* is a question about the merits of [plaintiffs'] claims, not about ripeness." *Id.* at 665-66. The court also indicated that it did not find persuasive the government's argument that plaintiffs' alleged injury would not be redressed by extending the registration requirement to women. *Id.* at 666.

After the Ninth Circuit issued its mandate on April 14, 2016, this Court ordered defendants to respond to the Complaint by June 13. ECF Nos. 30, 31. With the Court's approval, the parties stipulated to extend the government's deadline to respond to August 5, 2016. ECF Nos. 32, 33.

ARGUMENT

Although the Ninth Circuit has held that this suit is ripe, the Complaint should still be dismissed on the other grounds that the Court did not reach in ruling on the government's first motion to dismiss. Notably, even with ample time since the return of the case to this Court, plaintiffs have taken no steps to cure the deficiencies in their Complaint.

First, neither Lesmeister nor NCFM have established standing to bring this claim. Second, there is no reason for this suit—brought by a Plaintiff from Texas and a corporation that appears to have its base of operations in San Diego against a federal agency located in the Washington, D.C. area—to be heard in the Central District of California. Finally, even if plaintiffs could overcome these barriers to proceeding, their action must be dismissed for failure to state a claim. Two of the

three counts in plaintiffs' Complaint concern laws that govern state officials, not the federal government—a point that plaintiffs' counsel conceded at oral argument on the Government's first motion to dismiss but has not attempted to address by moving to amend the Complaint. Plaintiffs' remaining claim that the current Selective Service registration process violates the equal protection clause of the Fifth Amendment must be dismissed because the Court cannot grant the relief sought by plaintiffs without curtailing a long tradition of deference to the judgment of Congress and the military as they proceed to implement changes to the role of women in combat and consider the impact of these changes on Selective Service registration.

I. Both Plaintiffs Lack Standing.

In order to invoke the Court's jurisdiction, plaintiffs Lesmeister and NCFM "must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). As part of this threshold, plaintiffs must show that they have standing to bring suit. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). To satisfy Article III's standing requirement, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). A plaintiff cannot satisfy these standards by merely reciting "a bare legal conclusion." *Maya*, 658 F.3d at 1068. The standing inquiry is particularly rigorous where, as here, a court is asked to find the actions of the other branches of government unconstitutional. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

Here, aside from boilerplate assertions that this Court has jurisdiction and that a case or controversy exists, *see* Compl. ¶¶ 2, 24, the Complaint is bereft of any allegation that would demonstrate that either Lesmeister or NCFM has standing to invoke this Court's jurisdiction. Nor have plaintiffs sought to amend their Complaint to address these deficiencies, despite the Ninth Circuit's suggestion that "[a] full consideration of the case-specific standing issues may benefit from amendment of the complaint and factual development." *NCFM*, 640 F. App'x. at 666.

A. James Lesmeister Has Suffered No Injury From the Male-Only Registration Requirement.

Plaintiff Lesmeister has failed to establish standing because he has failed to allege an injury-in-fact. There is only a single paragraph about Lesmeister in the Complaint, and it does not allege that he has suffered any injury at all, let alone a concrete personal injury linked to the change in military policy on women in combat announced in January 2013. *See* Compl. ¶ 10.

Nor is there any possibility that he can demonstrate any concrete harm cognizable under Article III. Because Lesmeister had already registered with Selective Service at the time the Complaint was filed, he neither was nor currently is subject to any action to enforce the requirements of the MSSA. *See, e.g.*, *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 853 (1984) (noting that non-registrant becomes eligible for student aid as soon as he registers). Nor can he credibly argue that the prospect of being drafted constitutes a concrete harm. Whether there would ever be a war that would prompt Congress to reinstate draft procedures is entirely speculative and therefore cannot support standing. *See Clapper*, 133 S. Ct. at 1142.

Ultimately, the mere desire that the government adopt policies consistent with Lesmeister's view of the Constitution is not sufficient to confer standing under Article III. *See Allen v. Wright*, 468 U.S. 737, 754 (1984) ("This Court has

repeatedly held that an asserted right to have the Government act in accordance with the law is not sufficient, standing alone, to confer jurisdiction on a federal court."). Article III does not create "publicly funded forums for the ventilation of public grievances," *see Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S.464, 473 (1982), nor are the federal courts an appropriate forum for plaintiffs merely to obtain policy changes they prefer. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998) (plaintiff lacks standing based on "'undifferentiated public interest' in faithful execution of [a statute]") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992). As discussed at greater length below, the appropriate forum for debating the future of the Selective Service is in Congress. Lesmeister lacks standing to turn that policy debate into a justiciable case for this Court.

B. NCFM Cannot Show Organizational or Associational Standing.

Although NCFM asserts that it has organizational standing, the Complaint does not set forth sufficient allegations to support such standing. The Ninth Circuit has held that an organization may establish an injury in fact to sue on its own behalf if it shows that it has suffered "both a diversion of its resources and a frustration of its mission" as a result of the challenged conduct. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding organizational plaintiff's claim that it had to devote "significant resources" to identifying and counteracting defendants' racially discriminatory practices was sufficient to confer organizational standing). NCFM has not, however, alleged that the limitation of Selective Service registration to males frustrates its organizational mission or that it has diverted any resources to counteracting the effects of this practice.[2]

[2] If plaintiff seeks to argue that it has diverted resources to the expenses of bringing this litigation, the Ninth Circuit has made clear that this does not suffice. *See La Asociacion de* (cont'd)

To the extent that NCFM means to claim that it has *associational* standing to seek relief on behalf of its members, it must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Associated Gen. Contractors of Am. v. Cal. Dep't. of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013). NCFM merely recites the legal conclusion that it meets these standards while providing virtually no details to show that its claim is even plausible. *See* Compl. ¶ 9. The MSSA exempts from registration certain non-citizens, members of the military, students at certain military academies, and certain members of the military reserves from the registration requirement. *See* 50 U.S.C. §§ 3802(a), 3806(a). Aside from asserting that some members of NCFM are males of registration age, the Complaint provides no allegation that would allow the Court to discern whether these members of NCFM are, for example, U.S. citizens, members of military, or students at military academies. Accordingly, NCFM has failed to plead facts sufficient to show that "its members would have standing to sue in their own right." *See Associated Gen. Contractors*, 713 F.3d at 1194-95.

More fundamentally, NCFM's bid for organizational standing fails because it has not identified a single individual member who has standing. In order to establish organizational standing, the Supreme Court has "required plaintiff-organizations to make specific allegations establishing that *at least one* identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555

Trabajadores de Lake Forest v. City of Lake Forest, 624 F.3d 1083, 1088 (9th Cir. 2010) (organization "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all … It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem.") (internal citation omitted).

U.S. 488, 497-98 (2009) (emphasis added). This task, which should not be difficult where an organization claims that "many" of its members are injured, is necessary to assist the Court in fulfilling its independent obligation to assure that standing exists. *See* 555 U.S. at 499-500. NCFM's complete failure to allege any facts that show that a single member has standing is fatal to its attempt to invoke the Court's jurisdiction. *See Associated Gen. Contractors*, 713 F.3d at 1195 (general allegations in unverified complaint failed to establish standing).

II. This Case Has Been Brought in the Wrong Venue.

Plaintiffs' suit should also be dismissed because it has been brought in the wrong venue. Plaintiffs cite the wrong provision of the venue statute, 28 U.S.C. § 1391(b), and then cursorily repeat the text of the statute to assert that venue is proper in this Court. In fact, venue in actions against a federal defendant is governed by 28 U.S.C. § 1391(e). There are three potential venues for such a suit: "any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred … or (C) the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e)(1). This district satisfies none of these tests. Both the federal defendants and the events at issue in the Complaint occurred far away from the Central District of California. The federal defendants are deemed to reside where they perform their official duties—Washington, D.C. or Northern Virginia. *See, e.g., Rangel v. Holder*, No. CV 10-00129 DDP (FMOx), 2012 WL 1164080, at *1 (C.D. Cal. Apr. 9, 2012); *Zhang v. Chertoff*, No. C 08-02589 JW, 2008 WL 5271995, at *3 (N.D. Cal. Dec. 15, 2008) ("Federal defendants are generally deemed to reside in the District of Columbia"). Further, none of the events described in the Complaint occurred in the Central District of California—the laws and regulations concerning the Selective Service System were promulgated and are administered from Washington, D.C. (Compl. ¶¶ 17-18), and the government's

decisions with respect to women in combat occurred in Washington, D.C. (Compl ¶¶ 19-22). Accordingly, plaintiffs cannot rely on 28 U.S.C. § 1391(d)(1)(A) or (B) as vesting venue in this judicial district.

Nor have plaintiffs pled facts sufficient to show that either of them reside in this district for purposes of 28 U.S.C. § 1391(d)(1)(C). Lesmeister admits that he lives in Texas. *See* Compl. ¶ 10. NCFM does not make any allegations as to where it is based, beyond asserting that it is a "501(c)(3) educational and civil rights corporation organized under the laws of the State of California," and that it is "registered with the Combined Federal Campaign for non-profit organizations." Compl. ¶¶ 5-6. Based on publicly available records and information, NCFM has no apparent connection to the Central District of California. A search of the Internal Revenue Service's publicly available records of registered 501(c)(3) organizations reveals that there is an organization called the Coalition of Free Men Inc. doing business as "National Coalition for Men NCFM," and the mailing address and address for the principal officer of the organization are in San Diego, California. *See* Request for Judicial Notice, Ex. A.[3] A search of the California Secretary of State's corporations database returns no result for "National Coalition for Men" or "NCFM," but does return an entity called the Coalition of Free Men that is listed as a New York corporation registered in California and lists the same San Diego address as the address for its registered agent. *See* Request for Judicial Notice, Ex. B. A further search of the New York Secretary of State's database reveals that there is, indeed, a corporation called the Coalition of Free Men, Inc., listing an address in Manhattan. *See* Request for Judicial Notice, Ex. C.[4]

[3] The same address and principal officer are identified on what appears to be NCFM's website. *See* www.ncfm.org (last visited August 4, 2016).

[4] The National Coalition for Men apparently has a Los Angeles chapter, but that appears to be a separate entity, as it has filed documents in legal proceedings as "National Coalition of Free (cont'd)

As a general matter, a corporation like NCFM is deemed to reside in its principal place of business, which is usually where it is headquartered. *See* 28 U.S.C. § 1391(c)(2); *Hertz Corp. v. Friend*, 559 U.S. 77, 91-92 (2010) (for diversity jurisdiction purposes, principal place of business is usually headquarters); *L'Garde, Inc. v. Raytheon Space & Airborne Sys.*, 805 F. Supp. 2d 932, 940 (C.D. Cal. 2011). There are no allegations in the Complaint that would support the conclusion that NCFM is headquartered in the Central District of California and the available public information described above suggests that it is not. Plaintiffs' Complaint therefore fails to demonstrate that venue is proper in this Court, and should be dismissed. *See* 28 U.S.C. § 1406(a) (court may dismiss for improper venue).

III. Plaintiffs Have Failed to State a Claim Upon Which Relief Can be Granted.

Assuming *arguendo* that the Court has jurisdiction over this case and that it is properly brought in this venue, the Court should nonetheless dismiss this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because plaintiffs fail to state a claim upon which relief can be granted. As an initial matter, Counts II and III are brought on legal theories that have nothing whatsoever to do with federal defendants. Plaintiffs' central equal protection challenge in Count I fails because the law is clear that courts should defer to the military and political branches as it develops policies related to the armed forces. Moreover, a district court may not overturn a directly controlling precedent of the Supreme Court alleged to be outdated but rather must defer to the Supreme Court to review its own decisions.

Men, Los Angeles Chapter." *See* Amicus Curiae Br. and Pet. to File Amicus Curiae Br. by Nat'l Coalition of Free Men, Los Angeles Chapter, *Angelucci v. Century Supper Club*, No. S136154, 2006 WL 5164105 (Cal. May 8, 2006).

A. Counts II & III Cannot be Brought Against Federal Actors.

Counts II and III of the Complaint, to the extent that plaintiffs continue to pursue them, should be dismissed outright. While the Complaint, which plaintiff has not amended, purports to assert claims under the Fourteenth Amendment of the Constitution (Count II) and "28 U.S.C. § 1983" (Count III), Compl. ¶¶ 28-31, neither provides a basis for action against federal defendants. It is beyond dispute that the Fourteenth Amendment, which prohibits *states* from denying equal protection to individuals, does not provide an independent basis for action against the Federal Government. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987). Likewise, plaintiffs improperly assert a cause of action under "28 U.S.C. § 1983," by which they presumably intended to invoke 42 U.S.C. § 1983. That statute, however, is addressed to violations of rights "under color of any statute, ordinance, regulation, custom, or usage, of *any State or Territory* or the District of Columbia ," 42 U.S.C. § 1983 (emphasis added), and does not apply to the "actions of the Federal Government and its officers." *Dist. of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973). Accordingly, both counts should be dismissed. *See also* ECF No. 20 (July 29, 2013 order dismissing case) at 7 n.7 (noting that plaintiffs' counsel admitted at oral argument that plaintiffs could not assert a claim under the Fourteenth Amendment or § 1983).

B. Plaintiffs Fail to State a Valid Equal Protection Claim.

Count I of plaintiffs' Complaint, which asserts that the government violated the equal protection clause of the Fifth Amendment, also fails to state a claim upon which relief can be granted. While there have been substantial changes to women's roles in combat since *Rostker* was decided, *Rostker* nonetheless makes plain that courts should accord Congress and the Executive the utmost deference in matters implicating their constitutional powers to raise and support armies. Here,

the relief plaintiffs seek plainly would intrude on the political branches' constitutional power to raise and regulate the armed forces.

1. Entry of the Relief Sought Would Impermissibly Intrude on the Political Branches' Constitutional Authority over Military Affairs.

The Supreme Court's holding in *Rostker* that courts must defer to the political branches in the development of military personnel policy remains good law that should govern this case. Here, as in *Rostker*, the role of the MSSA in light of present military conditions has been and continues to be the subject of explicit consideration by the political branches. The Senate recently passed a version of the annual NDAA bill that includes a provision requiring women to register with the Selective Service System. This bill is still awaiting reconciliation with the House version of the bill, which replaced a similar provision with a provision requiring a report on whether the Selective Service should continue to exist at all.

Adjudicating the constitutionality of an Act of Congress is "the gravest and most delicate duty that [a] Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring). Thus, when a court "is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President . . . it should only do so for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384 (1989) (citation omitted). This principle applies with special force in the context of military affairs, where courts owe substantial deference to Congress and the Executive. Plaintiffs ask this Court to interfere in an area that is constitutionally committed to the discretion of the political branches and has not yet been fully addressed by those branches. Indeed, "it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Gilligan v.*

Morgan, 413 U.S. 1, 10 (1973); *see also Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1511 (D.C. Cir. 1989).

Because the Constitution clearly states that the governance of military affairs is a shared responsibility of Congress and the President, deference by the courts to military-related judgments by Congress and the Executive is deeply embedded in Supreme Court case law.[5] *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010); *Loving v. United States*, 517 U.S. 748, 768 (1996); *Weiss v. United States*, 510 U.S. 163, 177 (1994); *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988). Not only "is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Rostker*, 453 U.S. at 65. Courts must therefore be "particularly careful not to substitute [their] judgment of what is desirable for that of Congress, or [their] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Id.* at 68. Deference by the courts is due not only to the political branches, but also to the "considered professional judgment" of military officials, *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986), particularly regarding "complex . . . decisions as to the composition" of the military, *Rostker*, 453 U.S. at 65 (citation omitted).

Pursuant to these well-settled principles, the Court should defer to the policymaking process presently underway in Congress and the Executive branch concerning the role of women in the military. Plaintiffs cannot establish, nor should the Court attempt to predict, the effect that the changed policies will have

[5] Specifically, Article I gives Congress the authority "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cls. 12-14. *See also United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."). The Constitution also vests responsibility for the military services in the President, naming him explicitly in Article II, section 2, as the Commander in Chief of the Army and Navy of the United States. U.S. Const. art. II, § 2, cl. 1; *see also Lebron v. Rumsfeld*, 670 F.3d 540, 549 (4th Cir. 2012).

on overall military needs if a draft is reinstated. *See Rostker*, 453 U.S. at 75 (explaining that "Congress rather clearly linked the need for" Selective Service registration and "the character of a subsequent draft"). The policy changes are still in the process of being fully implemented and Congress is considering their impact on the Selective Service registration system. In these circumstances, the Court should not substitute its judgment for that of Congress or take any action in a significant matter concerning military affairs until the political branches have had an opportunity to finalize not only the role of women in combat, but the distinct questions of conscription and registration for conscription. *See Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) ("[I]t is the primary business of armies and navies to fight [wars] . . . . The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress and with the President.") (citations omitted); *id.* at n.13 (deference to Congress is even more appropriate when pending legislation may remedy a challenged classification).

Granting plaintiffs the relief they seek would fundamentally intrude on the exercise of that authority and would be plainly inconsistent with the substantial deference that courts owe the political branches regarding military affairs. Granting such relief would further deprive Congress and the military of the opportunity to apply their judgment and expertise in determining the impact of recent changes in military structure on the system of registration for conscription.

2. The Supreme Court's Decision in *Rostker* Remains Binding.

Finally, even though circumstances have changed significantly since *Rostker* was decided, that decision remains binding on this Court. 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); *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000). While the prohibition on women serving in

combat has now been lifted, that policy is still in the process of being implemented, and Congress has yet to decide whether women should be required to register for the Selective Service. Under these circumstances, *Rostker* governs, with no need for further inquiry. *See Elgin v. U.S. Dep't of Treasury*, 641 F.3d 6, 24 (1st Cir. 2011) (Stahl, J., concurring) ("[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."). Accordingly, the Court should decline plaintiffs' invitation to disregard binding Supreme Court precedent and instead allow the political branches an adequate opportunity to consider these complicated questions before interfering in a matter that is within their constitutional discretion.

CONCLUSION

For the foregoing reasons, the Court should grant the government's motion and dismiss this action in its entirety.

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