For Immediate Release

June 7, 2021

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CMR Applauds Supreme Court Denial of Petition Asking for an Order to Include Women in Selective Service Draft Registration Congress Should Consider Facts, Not Exaggerated Claims About "Equality"

The **Center for Military Readiness (CMR)** applauds the unanimous decision of the Supreme Court recognizing that **Congress**, not the federal courts, should decide whether young women should have to register with **Selective Service** for a possible future draft on the same basis as men.

The Supreme Court's unanimous denial of a petition for a *writ of certiorari* filed by a men's rights group reflects the views of an *amicus* brief that the Center for Military Readiness submitted to the Supreme Court of the United States on March 12, together with two additional public policy organizations, six retired general officers, and an expert on physical fitness standards.

The CMR *amicus* brief asked the **SCOTUS** to deny a petition for *certiorari*, which the **National Coalition for Men (NCFM)** had filed after the government successfully appealed a lower court decision finding that male-only Selective Service registration was unconstitutional. The NCFM brief, filed on behalf of two plaintiffs by the **ACLU Foundation**, sought to overrule a landmark 1981 case that upheld Congress' decision to limit draft registration to men.

A federal district court in **Texas** <u>ruled in favor</u> of the NCFM plaintiffs in February 2019, but the **Court of Appeals for the Fifth Circuit** overturned that ruling in August 2020.

In the opinion of the Fifth Circuit Court, the 1981 *Rostker v. Goldberg* landmark Supreme Court decision, which upheld the right of **Congress** to include only men in Selective Service registration requirements, still prevailed.

As CMR and the other *amici* stated in their brief, denying the petition allows the Fifth Circuit Court decision to stand, leaves *Rostker* as the controlling precedent, and keeps the authority to make decisions about **whether to have a draft and who must register** with Congress, where it belongs under **Article 1**, **Section 8** of the **U.S. Constitution**.

The court's denial of the petition agrees with the argument made by the **Department of Justice** as well as CMR: because the U.S. Constitution assigns decision making power on matters involving the military to Congress, not the courts, the Supreme Court should not get involved.

The Department of Justice brief omitted additional facts set forth only in the brief filed by the Center for Military Readiness and fellow *amici*. In particular, *some* women have proved themselves capable of meeting the high standards that combat demands and previous policies regarding women in combat billets have been repealed, but "the **physiological differences between man and women have** *not* **been repealed**." (CMR brief at p. 16, emphasis added).

The CMR *amicus* brief cites several key points of information resulting from a thorough three-year study that the **Marine Corps** conducted from 2012 to 2015. During nine months of field exercises simulating combat requirements, professionally monitored by the **University of Pittsburgh**, the Marine Corps study objectively compared the performance of all-male and mixed-gender units.

A September 2015 <u>Summary</u> of voluminous research findings (included as Appendix A in the *amicus* brief) reported, among other things: "All-male squads, teams and crews demonstrated higher performance levels on **69%** of tasks evaluated (**93 of 134**) as compared to gender-integrated squads, teams, and crews." (CMR brief at p. 17, emphasis added)

Justice Sonia Sotomayor, together with Justices Brett Kavanaugh and Stephen Breyer, wrote a separate statement referring to the few women who have succeeded in Army Ranger and other Special Operations Forces training programs. The CMR amicus brief, however, focused on the primary purpose of a Selective Service draft: to provide a large and ready pool of combat replacements during a time of catastrophic national emergency: "... drafting large numbers of women who cannot meet [combat] standards will hinder the process of providing timely combat replacements." (CMR brief at p. 15, emphasis added)

CMR and *amici* also countered the Plaintiffs' claim that repealing limitations on the assignment of women to combat billets changed the "fundamental premise" of *Rostker v. Goldberg* and warrants overruling it:

"Petitioners misperceive *Rostker*'s fundamental premise, ignore the role, authority, and responsibility of Congress in raising and supporting armies, fail to acknowledge the physiological differences between males and females that bear upon the question of whether men and women are **similarly situated** with regard to filling the combat replacement stream during a national mobilization, and seek to short-circuit the ongoing legislative process, which is considering whether to maintain the current selective service system, abandon it altogether, or create a different paradigm" (CMR brief at p. 4, emphasis added)

Amici joining the brief with the Center for Military Readiness include Eagle Forum and Concerned Women for America, two respected and effective national organizations that advocate for women and families, former Vice Chief of Naval Operations Adm. (Ret.) Jerome Johnson, Lt. Gen. (Ret.) Benjamin R. Mixon, who served as Commander of the U.S. Army Command in the Pacific and the 25th Infantry Division, Lt. Gen. (Ret.) William G. Boykin, former Commander and an original member of the Army's elite Delta Force, Maj. Gen. (Ret.) William K. Suter, who served as Assistant Judge Advocate General of the Army and the 19th Clerk of the Supreme Court, Rear Adm. (Ret.) Hugh P. Scott, a physician and expert in medical physical standards who served as Director, Medical Plans and Policy, Office of the Chief of Naval Operations, and Paul O. Davis,

Ph.D., an expert in physical fitness and employment standards in the public safety sector. The Counsel of Record was **William A. Woodruff**, a retired Army Colonel and Law Professor who served in the Army Judge Advocate Corps.

As the Supreme Court recognized, questions about Selective Service are currently before Congress. The **National Commission on Military, National and Public Service** completed its work last year, and the **Senate Armed Services Committee** conducted a hearing on the Commission's **Final Report** on March 11.

The Center for Military Readiness filed a **Statement for the Record** of that hearing, opposing the National Commission's key recommendations regarding the purpose and eligibility requirements of Selective Service:

Statement for the Record Submitted by Elaine Donnelly, Pres., Center for Military Readiness

CMR also sent a detailed letter to **Sen. James Inhofe**, Ranking Member on the Senate Armed Services Committee, taking issue with several misleading comments made by members of the National Commission during the March 11 hearing.

Letter to Ranking Member James Inhofe from Elaine Donnelly, Pres., CMR

CMR President Elaine Donnelly has summarized the legal debate: "The bottom line is that the Constitution assigns these policy decisions to Congress, not the courts. It is condescending and wrong to suggest that women would not volunteer to serve in a future national emergency, as they always have.

"Now members of the Congress must fulfill their responsibility by reviewing all the empirical evidence supporting an effective Selective Service registration system that exists to defend the country, not to advance ideological goals that would weaken the military, not strengthen it."

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The Center for Military Readiness is an independent, non-partisan, public policy organization that reports on and analyses military social issues. CMR President Elaine Donnelly, who founded CMR in 1993, can be reached at **734/464-9430**. More information is available on the organization's website, www.cmrlink.org.