

NATIONAL LAWYERS GUILD
MILITARY LAW TASK FORCE



**MLTF statement opposing
California SB 1081**

The Military Law Task Force of the National Lawyers Guild opposes California Senate Bill 1081, which would automatically register draft-age and some younger male¹ applicants for California driver’s licenses with the U.S. Selective Service System for a possible military draft.²

The Military Law Task Force (MLTF) is a standing national committee, headquartered in California, of the National Lawyers Guild (NLG). Like the NLG as a whole, the MLTF includes attorneys, legal workers, law students, jailhouse and barracks lawyers, and GI rights advocates.

As we said in our testimony to a public hearing of the National Commission on Military, National, and Public Service in 2019, “No person should be denied their right to... a driver’s license... because they refused to comply with the demands of the Selective Service.”³

By resolution adopted at our national convention in 2019, the NLG “declares its opposition to... draft registration... as a form of involuntary servitude, to the poverty draft resulting from the denial of job opportunities in the civilian economy, resulting in the channeling of poor and minority youth into the military, [and] to the law... that automatically registers men over 18 with Selective Service when they apply for driver’s licenses or identification cards....

“As a matter of principle, our organization expresses its intention to work alongside other human rights organizations in providing legal support for those people who may face penalties for failing to register for the draft.”

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- 1 The Selective Service System (SSS) has announced that it interprets the Military Selective Service Act and the Presidential proclamation ordering certain “males” to register with the Selective Service System (Proclamation 4771 of July 2, 1980) as applying to males as assigned at birth, without regard for current gender. “Selective Service bases the registration requirement on gender assigned at birth and not on gender identity or on gender reassignment. Individuals who are born male and changed their gender to female are still required to register. Individuals who are born female and changed their gender to male are not required to register.... Presidential Proclamation 4771 refers to ‘males’ who were ‘born’ on or after January 1, 1960. Thus, Selective Service interprets the MSSA as applying to gender at birth.” SSS, “Frequently Asked Questions:... I’m a transgender/non-binary person. Am I required to register?”, at <<https://www.sss.gov/faq/#who-needs-to-register>>. So far as we know, no court has reviewed, much less upheld, this interpretation of the MSSA or Proclamation 4771.
 - 2 “An act to amend Sections 12800 and 13000 of, and to add Section 12801.3 to, the Vehicle Code, relating to vehicles”, introduced by Senator Archuleta, February 12, 2024, <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB1081>.
 - 3 “Statement by the Military Law Task Force of the National Lawyers Guild to the National Commission on Military, National, and Public Service”, June 20, 2019, Hyde Park, NY, <<https://nlgmltf.org/military-law/2019/mltf-files-statement-opposing-draft-with-the-ncmmps/>>.

Our philosophy is that, “As fundamentally antiwar and anti-imperialist organizations, the National Lawyers Guild and its Military Law Task Force oppose the military draft in all its forms. We oppose the current mandatory registration with the Selective Service System for a possible future draft and any attempt to expand draft registration or reinstate a draft. We also oppose the ‘poverty draft’ where high schools are encouraged to direct low income and minority students to the military as a vehicle for education and jobs....

“The NLG and the MLTF oppose the current draft registration requirement and the current criminal and civil penalties for non-registration. We oppose reinstatement of any form of military draft, and we support the Selective Service Repeal Act.

“We believe that compulsory military service is unconstitutional, and that a draft is most likely to be used to fight illegal and immoral wars, as with the last draft in the U.S. during the war in Indochina. Even when a draft is not active, draft registration and contingency planning and preparations for a draft encourage a mistaken belief that the draft is always available as a ‘fallback’ option. This emboldens war planners and enables military adventurism.”⁴

Registration with the Selective Service System for a possible military draft

The Selective Service System (SSS) exists for one and only one purpose: to plan, prepare, and maintain readiness to carry out a military draft whenever Congress might decide to activate it.⁵ Aside from its use as a source of leads for military recruiters, the list of registrants and their addresses maintained by the SSS is intended to be used solely to send out induction notices to registrants selected by lottery in the event of activation of a military draft.

The system of SSS registration is part of ongoing preparations for a draft which also include local draft boards appointed and trained by the SSS for each county in California and throughout the U.S., a state Selective Service appeal board for each state, and military reservists detailed to assist the SSS with registration and with carrying out a draft on demand.⁶

4 “Anti-Draft Program Work: Our philosophy”, <<https://nlgmltf.org/mltfs-anti-draft-program-work/>>.

5 “The Agency is required to manage a conscription program to deliver personnel to DoD [Department of Defense] if authorized by Congress and the President. To accomplish this, SSS will execute a national draft lottery; contact registrants selected through the lottery; and arrange for their transportation to a Military Entrance Processing Station for testing and evaluation before induction into military service.” *Selective Service System Strategic Plan, Fiscal Years 2024-2026*, November 15, 2023, <<https://www.sss.gov/wp-content/uploads/2023/11/SSS-Strategic-Plan-2024-2026-FINAL.pdf>>.

6 See lists of Selective Service board members, Selective Service registrars, and Selective Service Reserve Force officers released by the SSS in response to Freedom Of Information Act requests at <<https://hasbrouck.org/draft/advice/draft-board.html>>.

The state of California shouldn't be enacting measures to induce California residents to register with the SSS for a possible military draft unless the California legislature believes (1) that the U.S. can Constitutionally, and should as a policy choice, be carrying out ongoing planning and preparations for military conscription at the present time when there is no declared war, and (2) that this is a lawful and appropriate matter for state legislation and use of state funds, and can be carried out in a manner that respects the presumption of innocence and the right to due process of law.

We believe that none of these conditions is met. The current draft registration program is subject to multiple potential legal challenges – challenges which we would support and assist individuals in pursuing – pursuant to both the U.S.⁷ and the California⁸ constitutions, undesirable as a policy choice, and opposed by most Californians.⁹ Supporting preparations for military conscription is neither a permissible nor a desirable use of California state motor vehicle funds.¹⁰ SB 1081 would deprive individuals of their right to due process and their right against self-incrimination.

Draft registration is not needed.¹¹ Proponents of Selective Service registration have been unable to present any credible scenario for a war that the U.S. should be actively preparing to fight, but for which there would be so few volunteers that a draft would be necessary.¹²

7 As discussed below, by declining to prosecute any draft registration resisters the Federal government has for decades evaded any judicial review of the Constitutionality of the registration requirement.

8 See the discussion below of the applicability of the registration requirement to men but not women and the restrictions on use of California motor vehicle funds for unrelated purposes.

9 The most recent national poll on this issue found that despite concern about military recruiting shortfalls, only 27% of U.S. voters believe that the U.S. should have a military draft, while more than twice as many, 55%, believe that the U.S. should not have a military draft. Rasmussen Reports, “Military Recruiting Woes Worry Voters, But Most Still Oppose Draft”, November 1, 2023, <https://www.rasmussenreports.com/public_content/politics/biden_administration/military_recruiting_woes_worry_voters_but_most_still_oppose_draft>. We suspect that opposition to the draft and draft registration is even greater in California, which has long been a center of both antiwar and civil libertarian opposition to the draft and draft registration.

10 As discussed below, SB 1081 could not be effective without ongoing state funding.

11 “When asked about the political feasibility of a large-scale mobilization, one SASC [Senate Armed Services Committee] staff member responded that SSS is kept around largely for political reasons, but no one realistically thinks it will be used.... He remarked that the draft is currently designed to replace large numbers of infantry overseas; however, such numbers are not likely to be needed in the future and the current lead time for training and skills development for various occupations needed to fight modern wars makes the SSS model less practical.” Internal notes by staff of the NCMNPS on a meeting with SASC staff, October 1, 2018, released by the National Archives and Records Administration in response to a Freedom Of Information Act request after the expiration of the NCMNPS, <<https://hasbrouck.org/draft/FOIA/RAW-INT-NotesFromSASCMeeting-1001-v2.docx>>.

12 The unrealistic scenarios invoked to justify draft registration are exemplified by the hypothetical question posed by the Chair of the National Commission on Military, National, and Public Service (NCMNPS), Brig. Genl. Joseph Heck, to witnesses at one of its hearings on Selective Service in 2019: “Yesterday, we heard from individuals that talked about the changing threats that we face; that the homeland is no longer a sanctuary; that future warfare will probably require different skillsets than folks picking up a rifle and going off to battle. So, I want to pose a hypothetical scenario and ask your

A draft enables the government to mobilize for war without needing to consider whether people believe the war is justified. It's emblematic of the poor judgment the U.S. government has demonstrated in choosing in which foreign wars to intervene, and on which side(s), that the Selective Service registration requirement still in effect today, and which SB 1081 is intended to bolster, was promulgated in order to "demonstrate" U.S. readiness to send U.S. troops to fight in support of those forces the U.S. was then backing in Afghanistan, who were then known in the U.S. as the "mujahideen" but who would come to call themselves the Taliban and Al Qaeda.¹³

Compliance and noncompliance with Selective Service registration

Selective Service registration has failed. Compliance with Selective Service registration is low, and the high level of noncompliance would make the current registration database unusable for any draft that would withstand the inevitable legal challenges to its fairness.

The SSS grossly overstates the level of "compliance" by counting as "in compliance" anyone who registers with the SSS, at any address, at any time before their 26th birthday. This includes people who register years after their peak eligibility for a draft, if it were activated, and people who have long since moved without notice to the SSS. But the Military Selective Service Act (MSSA) and Presidential Proclamation 4771 require all male citizens and most male residents of the U.S. to register within 30 days of their 18th birthday and to report to the SSS within 10 days of each change of address until their 26th birthday. Few young men do so.

Dr. Bernard Rostker, Californian and Director of the SSS from 1979 to 1981, testified in 2019 before the National Commission on Military, National, and Public Service (NCMNPS) that, "The current system of registration is ineffective and frankly less than useless. It does not provide a comprehensive nor an accurate database upon which to implement conscription.... It systematically lacks large segments of the eligible male population. And for those that are

response. So,... we're in a Red Dawn scenario where we are being attacked through both Canada and Mexico. There is no Selective Service System. The All-Volunteer Force is insufficient. There's been a Presidential/Congressional call for volunteers; for people to step up. However, the response has not been enough to meet the threat, the actual threat to our homeland; not an overseas operation. How would you propose to meet the demand?" NCMNPS, "Selective Service Hearing: How to Meet Potential National Mobilization Needs", Transcript, April 24, 2019, available at <https://hasbrouck.org/draft/FOIA/NCMNPS-Transcript-24APR2019pm.pdf>.

- 13 "Soviet troops are attempting to subjugate the fiercely independent and deeply religious people of Afghanistan.... The implications of the Soviet invasion of Afghanistan could pose the most serious threat to the peace since the Second World War.... The region which is now threatened by Soviet troops in Afghanistan is of great strategic importance: It contains more than two-thirds of the world's exportable oil.... I have determined that the Selective Service System must now be revitalized. I will send legislation and budget proposals to the Congress next month so that we can begin registration and then meet future mobilization needs rapidly if they arise." President Jimmy Carter, State of the Union Address, January 23, 1980, <https://www.jimmycarterlibrary.gov/the-carters/selected-speeches/jimmy-carter-state-of-the-union-address-1980>.

included, the currency of information contained is questionable.... So, my bottom line is there is no need to continue to register people for a draft... and no military need to retain the MSSA.”¹⁴

In another interview in 2017, Dr. Rostker noted the likelihood of successful legal challenges to any induction orders based on the current registration database: “The list that they have I doubt could pass the legal definition of a complete and objective list, because it is structurally flawed and Selective Service knows it. It’s a list that I’m sure the courts would throw out immediately because it’s not accurate.”¹⁵

In his comments introducing a 2021 hearing with members of the NCMNPS, Rep. Adam Smith, Chair of the House Armed Service Committee, noted that, “Under the law you are required to basically let the government know where you are between the ages of 18 and 26, which I can assure you virtually nobody does. Virtually nobody? Absolutely nobody might be a better way to put it. I moved quite a bit between the ages of 18 and 26, and... I am absolutely certain that nobody told the government where I was living.”¹⁶

The SSS has pointed to its collection of e-mail addresses and phone numbers as mitigating the problems that would be caused by out-of-date postal addresses. But because, as discussed further below, criminal prosecution requires proof of “knowledge and willfulness”, induction orders must be delivered by *provable* means, such as certified mail with a signed return receipt, or hand delivery by Federal agents if a registrant doesn’t sign for a certified letter. E-mail and phone calls, which don’t generate proof of delivery, are useless for this purpose.

There has been no audit of the SSS registration database since 1982.¹⁷ But an internal SSS summary of “Significant Issues” identified in a 2018 induction exercise, prepared by the SSS Deputy Associate Director for Operations and released in response to a Freedom Of Information Act (FOIA) request, predicted that, “Almost 50% of inductees WILL NOT receive Reporting Orders.... Results will be massive Undeliverable/Returned to Sender.”¹⁸

14 NCMNPS, “Selective Service Hearing: Should Registration be Expanded to All Americans?”, Transcript, April 25, 2019, available at <<https://hasbrouck.org/draft/FOIA/NCMNPS-Transcript-25APR2019am.pdf>>.

15 Dr. Bernard Rostker, in a podcast interview with Lillian Cunningham of the *Washington Post*, December 4, 2017, <<https://www.washingtonpost.com/news/on-leadership/wp/2017/12/04/episode-12-of-the-constitutional-podcast-the-common-defense/>>.

16 H.A.S.C. No. 117-34, “Recommendations of the National Commission on Military, National, and Public Service”, Committee on Armed Services, House of Representatives, 117th Congress, 1st Session, Hearing held May 19, 2021, available at <<https://hasbrouck.org/draft/HASC-19MAY2021.pdf>>.

17 “Failure Of Registrants To Report Address Changes Would Diminish Fairness Of Induction Processing”, report by the U.S. General Accounting Office to the Director of the Selective Service System, GAO/FPCD-82-45, September 24, 1982, <<https://www.gao.gov/assets/fpcd-82-45.pdf>>.

18 Selective Service System, “Call and Deliver Phase 2 Induction Exercise: Confirmation Brief”, April 20, 2018, available at <<https://hasbrouck.org/draft/SSS-induction-exercise-2018.pdf>>.

In this context, SB 1081 should be understood and evaluated as an attempt – an improper and inevitably futile attempt, we believe – to get the state of California, and specifically the Department of Motor Vehicles, to try to salvage this failed Federal program.

Federal criminal sanctions for nonregistration with the Selective Service System

To understand the reasons why the SSS is promoting state laws like SB 1081, it's necessary to understand why the Federal government isn't bringing Federal criminal prosecutions to enforce the Federal criminal law requiring registration with the SSS.

Although the SSS falsely states on its website, without qualification, that, "Failure to register is a felony,"¹⁹ in fact only "knowing and willful" failure to register is actually a crime.²⁰

Most nonregistrants didn't know they were required to register with the SSS, or assumed they were registered automatically. In either case, they did not have the requisite "specific intent",²¹ and thus have committed no crime.²² For this reason, threats of criminal sanctions are hollow, in most cases, and have proven of little use in inducing potential draftees to register.

In the early 1980s, when the initial rate of noncompliance with renewed Selective Service registration far exceeded the government's expectations, the government prosecuted 20 nonregistrants selected from those whose public statements and/or letters to the government could be used in court to prove that their refusal to register was "knowing and willful".

Most of those 20 nonregistrants selected for indictment who didn't register after being indicted were convicted, although one of those convictions was overturned on appeal because the

19 Selective Service System, "Men 26 and Older", <<https://www.sss.gov/register/men-26-and-older/>>.

20 Military Selective Service Act, 50 U.S.C. 3811.

21 "The government presented no evidence that defendant ever received actual notice of his obligation to register for the military draft but merely presented evidence describing general dissemination of information about military registration requirements.... He appeals, contending that the evidence adduced by the Government did not prove that he knowingly failed to register. We agree and reverse the conviction. The evidence as introduced by the Government at the trial disclosed that Klotz did not register with the Selective Service System for more than two years following his eighteenth birthday.... In addition to these facts, the Government introduced testimony describing the general dissemination of information about registration requirements.... Klotz did not testify, and the Government introduced no evidence that Klotz had ever received actual notice of his obligation to register for the military draft...It is a well-settled principle that in prosecuting suits... for knowingly failing or neglecting to perform a duty under the Selective Service Act the Government must prove a culpably criminal intent. The determination of defendant's intent here rested on a presumption, and not on proof of the essential fact of knowledge necessary to sustain the conviction. Accordingly,... we must set aside the conviction." *U.S. v. Mark David Albert Klotz*, 500 F.2d 580 (8th Cir. 1974).

22 "One who fails to register must 'knowingly' do so before he is guilty of an offense." *U.S. v. Gary John Eklund*, 733 F.2d 1287 (8th Cir. 1984).

trial judge hadn't instructed the jury adequately as to the requirement for the government to prove "knowledge and willfulness" as an element of the offense.²³

But the Federal government was unable or unwilling to prosecute most nonregistrants, not just because their numbers far exceeded the prosecutorial resources of the Department of Justice but because, as discussed above, most nonregistrants haven't actually violated the law. The government has, with respect to almost all nonregistrants, no evidence of specific intent, and has been reluctant to give nonregistrants an opportunity to present challenges to the Constitutionality of draft registration or a draft for the current undeclared U.S. wars.

Nonregistrants got the message. They correctly understood that a program of selective prosecution exclusively targeting those whose public statements or letters to the government could be used against them as evidence of "knowledge and willfulness" posed no threat to those who kept silent about their intentions or their knowledge of the registration requirement.²⁴

As a result, show trials of those nonregistrants the government considered the "most vocal" proved ineffective, indeed counterproductive, as a deterrent to nonregistration.

The last indictment for knowing and willful refusal to register with the SSS was in 1986. In 1988, having concluded that prosecutions were ineffective as a deterrent and a waste of resources, the Department of Justice (DOJ) informed the SSS that it would no longer investigate or prosecute suspected nonregistrants, even if they publicized their actions.²⁵

23 "Kerley argues that these instructions allowed the jury to convict him for failing to register even if he didn't know he had a duty to register.... We have no doubt that the statute should be interpreted to require that the defendant had knowledge of the duty to register. See, e.g., *United States v. Klotz*, 500 F.2d 580 (8th Cir. 1974) (per curiam); *United States v. Rabb*, 394 F.2d 230 (3d Cir. 1968); *United States v. Boucher*, 509 F.2d 991 (8th Cir. 1975); cf. *Wayte v. United States*, 470 U.S. 598, 612-13 and n. 13, 105 S. Ct. 1524, 1533 and n. 13, 84 L. Ed. 2d 547 (1985); *United States v. Borkenhagen*, 468 F.2d 43, 50 (7th Cir. 1972). It surely was not Congress's intention to impose criminal liability on eighteen-year-olds who do not register because they don't know they have to.... [W]e believe that the instructions in the present case failed to place the issue of guilty knowledge adequately before the jury.... [T]he jury may not have realized that a mistaken belief that there is no duty to register is also a defense.... Kerley is entitled to a new trial.... [T]he district judge... erred in failing to make clear in his instructions to the jury that to be found guilty of the crime of refusing registration in the armed forces... Kerley had to have known that he had a duty to register, that is, had to have acted willfully; it was not enough to tell the jury that it had to find that Kerley had known he had not registered." *U.S. v. Gillam Kerley*, 838 F.2d 932 (7th Cir. 1988), Supplemental Opinion of March 23, 1988, amended April 5, 1988.

24 "Apparently the moral of the government's policy is: if you want to evade the draft registration law, do nothing, say nothing, and you will not be prosecuted. Only those with the courage and candor to write the government refusing to register will be punished." *U.S. v. Eklund*, 733 F.2d 1287, 8th Circuit, 1984, en banc, Lay, Chief Judge, dissenting.

25 "In the late '80s the Justice Department discontinued prosecutions. Dick Flahavan, a spokesman for the Selective Service who was with the agency at the time, recalls the Justice Department 'decided that... there are limited resources and the FBI's time would be better spent chasing white collar crime than some Mennonite kid through Pennsylvania. We said, 'Fine, we understand,' and that's why it ended in '88,' he says. 'The [Selective Service] agency did agree to what the Justice Department

Since 1988, in order to add artistic verisimilitude to its otherwise empty threats, the SSS has referred millions of names identified from other government lists and commercial data brokers as possible nonregistrants to the Department of Justice for “investigation and possible prosecution”²⁶, without regard for whether their nonregistration was knowing or willful, i.e. in the absence of any evidence of one of the elements of the crime of which they were “suspected”.

In Federal Fiscal Year 2021, the most recent year for which figures have been released, the SSS referred 238,679 “suspected violators” of the registration law to the DOJ.²⁷ None of these referrals or any other nonregistration cases were investigated or prosecuted by the DOJ.

The DOJ has no budget or plan for resumption of enforcement of the registration requirement, and the NCMNPS did not include any enforcement plan or budget in its report.²⁸

proposed, a suspension of prosecutions [during peace time]. Since they did the prosecutions we didn't have much leverage anyway.”... Flahavan says the Selective Service had hoped for a much stronger approach from federal prosecutors, but was rebuffed.... ‘What we would have preferred was every year in all 95 judicial districts there be a prosecution to keep the heat on and the publicity going,’ he says. “But they couldn't sustain that.’ If someone registered just before trial, the prosecution would be dropped, Flahavan notes, making the pursuit of resisters ‘really a losing proposition for the feds’ and often ‘a big waste of time.’... ‘I think they were happy to walk away from it and we understand why,’ Flahavan says. ‘It was very labor intensive and very little came of it, although the government won.’” Steven Nelson, “Gender-Neutral Draft Registration Would Create Millions of Female Felons”, *U.S. News & World Report*, May 3, 2016, <<https://www.usnews.com/news/articles/2016-05-03/gender-neutral-draft-registration-would-create-millions-of-female-felons>>.

26 “Threatening letters from the Selective Service System”, *On Watch: Critical Perspectives on Military Law*, National Lawyers Guild, Military Law Task Force, vol. 33, no. 4, Fall 2022, p. 7, <<https://nlgmtf.org/wp-content/uploads/2023/11/MLTF-On-Watch-2022-33.4.pdf>>.

27 Micheal A. Migliara, Chief FOIA Officer, Selective Service System, response to FOIA request 22-45, August 17, 2022, <<https://hasbrouck.org/draft/FOIA/SSS-FOIA-response-17AUG2022.pdf>>.

28 “Mr. KHANNA: Does the NCMNPS proposal include any plan or budget for enforcing an expanded Selective Service registration requirement? Dr. HECK: The Commission did not include any plan or budget for enforcing an expanded Selective Service registration requirement in its report. Mr. KHANNA. Did the NCMNPS consult the Department of Justice ... concerning whether, how, and/or at what cost the DOJ is prepared to enforce an expanded registration requirement, or whether such an enforcement plan would be more effective than the registration enforcement program the DOJ abandoned in 1988? Dr. HECK. The Commission requested such information from the DOJ, however no information was provided.” Response of Maj. Genl. Joseph Heck, Chair of the NCMNPS, to written questions from Rep. Ro Khanna. H.A.S.C. No. 117-34, “Recommendations of the National Commission on Military, National, and Public Service”, hearing before the Committee on Armed Services, House of Representatives, 117th Congress, 1st Session, May 19, 2021, at 96, <<https://www.congress.gov/117/chrg/CHRG-117hrg47820/CHRG-117hrg47820.pdf>>.

Collateral civil sanctions for nonregistration with the Selective Service System

Faced with the decision by the DOJ to abandon enforcement of the criminal penalties for knowing and willful nonregistration, the SSS has turned to a variety of collateral civil sanctions for nonregistration. SB 1081, which would automatically register male applicants for California driver's licenses or state IDs with the SSS (even if they believe – correctly, we would argue -- that the registration requirement is unconstitutional) is the latest proposal for such sanctions.

While courts have upheld a variety of collateral sanctions including disqualification from government programs for those *convicted* of crimes, we question the Constitutionality of imposing such “collateral” sanctions for actions that would constitute a crime, when the individual subjected to those sanctions has not been charged or convicted of that crime.²⁹

California legislators need to ask why they should use state law and state funds to try to induce compliance with a Federal law that the Federal government has not enforced for decades.

It would be especially inappropriate for California to enact new sanctions for nonregistration with the SSS now, when not only is Congress considering legislation to end draft registration entirely and abolish the SSS³⁰, but both Congress and the California legislature have recently repealed some of the other collateral sanctions for nonregistration with the SSS.

For many years, applicants for Federal aid for higher education were required by Federal law to certify that they had registered with the SSS or were not required to do so. But Congress eliminated that requirement in 2020 as part of the FAFSA Simplification Act.³¹ All questions about registration with the SSS have been removed from the Free Application for Federal Student Aid (FAFSA) form, starting with the current 2023-2024 school year, and the data-sharing agreement between the SSS and the U.S. Department of Education has been terminated.

According to the SSS annual report for 2022 (the most recent SSS annual report to have been released), “Since this method of registration historically accounted for up to 20 percent of all annual registrations, SSS expects the national registration rate to further decrease.”³²

Cal Grants for higher education were similarly contingent on registration with the SSS. But California repealed that requirement in 2021, following the change in Federal law. As part of SB 169, approved by vote of 75-1 in the Assembly and 38-0 in the Senate and signed into law by

29 So far as we know, this issue has not yet reached the Supreme Court in the context of Federal or state laws conditioning eligibility for other government programs on consent to be registered with the SSS.

30 See multiple proposals introduced in Congress including the Selective Service Repeal Act, H.R. 2509 and S. 1139, 117th Congress, <<https://www.congress.gov/bill/117th-congress/house-bill/2509/>>, and the currently pending Military Selective Service Repeal Act of 2023, H.R. 6100, 118th Congress, <<https://www.congress.gov/bill/118th-congress/house-bill/6100/>>.

31 Included as Title VII, Sec. 701 *et seq.* of the Consolidated Appropriations Act, 2021, P.L. 116-260, <<https://www.congress.gov/bill/116th-congress/house-bill/133/>>.

32 Selective Service System, Annual Report to Congress for Calendar Year 2022, <<https://www.sss.gov/wp-content/uploads/2023/09/Annual-Report-2022-Digital.pdf>>

the Governor on September 23, 2021, “Any accompanying regulations or formal policy to verify Selective Service registration is waived for applicants eligible for Cal Grants.”³³

Why should registration with the SSS be tied to driver’s licenses, but not to student aid?

There are some other Federal collateral sanctions for nonregistration, but (1) like the Federal criminal statute, they apply only to those whose nonregistration was “knowing and willful”, and (2) in almost all cases, they have no impact on individuals age 26 or older.

The SSS says on its website that, “non-registrants may be denied the following benefits for life” including Federal jobs and “Up to a 5-year delay of U.S. citizenship proceedings for immigrants”.³⁴ But such denials generally only occur if a nonregistrant is unaware of their legal rights or has inadequate legal assistance.

Pursuant to Federal law, an individual age 26 or older (i.e. too old to be required or eligible to register with the SSS) can only be denied Federal employment on the basis of prior nonregistration if their nonregistration was “knowing and willful”, in line with the criminal statute. An individual challenging the denial of Federal employment must show by a preponderance of the evidence that their nonregistration was not knowing and willful.³⁵

In practice, most nonregistrants 26 or older either didn’t know they were required to register until it was too late to register, or assumed that they had been registered automatically. In almost all of these cases, the government has no evidence of actual knowledge or willfulness.

In the absence of any evidence of knowledge or willfulness, *any* evidence at all of lack of knowledge or willfulness is sufficient to satisfy the “preponderance of the evidence” standard for eligibility of a nonregistrant for Federal employment. Typically, evidence of lack of knowledge and willfulness is provided in the form of a declaration by the individual that they didn’t know they were required to register or thought that they had been registered automatically.³⁶

33 <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB169>. See also Special Alert GSA 2022-34 from the California Student Aid Commission, May 24, 2022: “Selective Service registration is no longer a requirement for financial aid in California.... This change is in line with changes made by the [U.S. Department of Education] in 2021.” <https://www.csac.ca.gov/sites/main/files/file-attachments/gsa_2022-34.pdf>.

34 Selective Service System, “Men 26 and Older”, <<https://www.sss.gov/register/men-26-and-older/>>.

35 We question the legality of this reversal of the burden of proof, which so far as we know has not been ruled on by any court. The burden of proof of knowledge and willfulness, as an element of the basis for denial of employment, should lie with the agency denying employment. The Constitutionality of the law denying Federal employment to nonregistrants was challenged in *Elgin et al. v. U.S. Treasury et al.*, 567 U.S. 1 (2012), but the U.S. Supreme Court decided that case on jurisdictional and procedural grounds, without reaching the Constitutional questions, which remain unresolved.

36 Proposed revisions to Federal regulations would change the procedures for making and for review of these determinations, but not the substantive criteria or the “preponderance of the evidence” standard, which are fixed by Federal statute. See, Office of Personnel Management (OPM), “Bar to Appointment of Persons Who Fail To Register Under Selective Service Law: Proposed Rule”, Docket ID OPM-2023-0014, RIN 3206-AO37, 89 *Federal Register* 8352-8360, February 7, 2024,

According to a notice published in the *Federal Register* in February 2024 by the Office of Personnel Management (OPM), which handles appeals of denial or termination of Federal employment on the basis of nonregistration with the SSS, “For cases received by OPM to adjudicate, approximately one percent of these individuals are removed or denied employment per year on average over the past three years.”³⁷

In other words, 99 times out of 100, nonregistrants are able to get or keep Federal jobs if they know to submit a declaration of lack of knowledge and/or willfulness and appeal any initial adverse decision to OPM. To the extent that there is any “lifetime” barrier to Federal employment by nonregistrants over age 26, the barrier is the lack of adequate legal advice. This is a reason for Federal agencies to do a better job of informing applicants for employment of their legal rights, not a reason for California to enact a measure such as SB 1081.

As for delay in naturalization as U.S. citizens, U.S. Citizenship and Immigration Services (USCIS) treats “knowing and willful” nonregistration during the previous five years as evidence of a lack of “attachment to the Constitution” which provides a basis for denial of naturalization.³⁸ Because men under age 26 are eligible to register, but not those 26 and older, and USCIS only assesses “attachment to the Constitution” during the previous five years, only those ages 26-30 are potentially subject to a delay in naturalization on this basis.

But even for those of ages 26 through 30, “USCIS will allow the applicant an opportunity to show that he did not knowingly or willfully fail to register.” As with Federal employment, in almost all such cases the sole evidence with respect to knowledge and willfulness, and thus the preponderance of the evidence, is provided by the applicant’s own sworn declaration that they did not know that they were required to register.³⁹

If USCIS is failing to inform applicants for naturalization of their rights, or misapplying the preponderance of the evidence standard with respect to knowledge and willfulness of nonregistration with the SSS, that is a basis for reform of USCIS practices and better legal services for applicants for naturalization, not for new California legislation such as SB 1081.

If the Federal government believes that certain nonregistrants have acted “knowingly and willfully” in violation of Federal law, the proper action is to (1) charge them with a Federal crime, (2) give them their day in court and the opportunity to contest both the factual allegations against them and the Constitutionality of the registration requirement, on its face and as applied; and (3) present evidence sufficient to prove to a jury, beyond a reasonable doubt, each of the elements of that crime including that their failure to register was “knowing and willful”.

<<https://www.govinfo.gov/content/pkg/FR-2024-02-07/pdf/2024-02402.pdf>>.

37 89 *Federal Register* 8356-8357, February 7, 2024.

38 *USCIS Policy Manual*, Chapter 7 – Attachment to the Constitution, <<https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-7>>.

39 As with federal employment, we question the legality of putting this burden of proof on an applicant for naturalization who has not been convicted of knowing and willful failure to register. So far as we know, no court has ruled on this USCIS policy.

Selective Service registration has failed to generate a database that is fit for its purpose of prompt and provable delivery of induction notices, whenever a draft might be activated, to all men of draft age. The U.S. Department of Justice has declined to enforce the criminal penalties for knowing and willful nonregistration, and would find it difficult or impossible to do so even if it tried. Congress has declined to appropriate any funding for enforcement of the registration requirement, or for state programs to induce draft-age men to register such as proposed by SB 1081. On the contrary, Congress has recently repealed one of the most significant collateral Federal civil sanctions for nonregistration – ineligibility for Federal student aid – and is actively considering proposals to end the registration program and abolish the SSS.

Rather than accepting this reality, the SSS has turned to California and other states in a last ditch, legally dubious effort to salvage its failed mission and justify its continued existence.

It is both misguided and legally improper to ask California and other states to impose collateral state sanctions on nonregistrants for presumptively having violated a Federal criminal law, when (1) they have not, in fact, committed any crime (because, in most cases, they didn't know they were supposed to register and thus lack the requisite specific intent of "knowledge and willfulness"); (2) they have not been charged with, much less convicted of, any crime; and (3) they have had, and would have, no opportunity to challenge the registration requirement.

Nonregistrants who have not been convicted of Federal crimes should not be subject to California state action on the presumption that their actions have violated Federal law.

We are currently seeing, in some other states, efforts by state authorities to invoke "states' rights" to carry out state actions to enforce, as those states see fit, Federal law as those states see it, such as measures by Texas to enforce its interpretation of Federal immigration law. This is not a model for state action, or a rationale for it, that should be adopted by the California.

Additional issues with SB 10181 and California law

SB 1081 would require activities that would entail costs for the California Department of Motor Vehicles (DMV). SB 1081 would provide that, "Implementation of this section shall be contingent upon the department's receipt of federal funds to pay \$_____ of the initial startup costs to implement this section." But Congress has never appropriated any funds for such use by California or any other state. And the ongoing data exchanges between the DMV and the SSS which would be required by SB 1081 would have ongoing costs, not just one-time start-up costs.

This would almost certainly result in violations of Article 19, Section 3, of the California Constitution, which prohibits diversion of motor vehicle revenues for unrelated purposes. Selective Service registration is not a use of funds permitted by Cal. Const., Art. 19, Sec. 3.

SB 1081 should not be enacted without a secure source of ongoing Federal funding to the state of California for Selective Service registration, which does not exist. If Congress doesn't think this Federal program is worth its cost, why should the state of California fund it?

SB 1081 would purport to offer applicants for driver's licenses or state ID cards the opportunity to opt out of being registered with the SSS, without penalty, on signed written request and after being informed on the same form that they are required by law to register.

But this "opt-out" option is both a sham and a trap.

SB 1081 would provide that, "Refusal to grant authority [to register the applicant for a driver's license or ID with the SSS] as provided in this section is not a basis for the department, or any other related government agency, to discriminate against the applicant."

SB 1081 would further provide that, "(1) The department shall not compile, develop, or maintain a list of applicants who declined to grant the department authority to transmit their information to the United States Selective Service System unless it is necessary for the administration and operation of the department. (2) The department shall not distribute or make available to a person, governmental entity, or nongovernmental entity a list of applicants who declined to grant the department authority to transmit their information to the United States Selective Service System."

But the DMV would necessarily have records of those individuals to whom driver's licenses or IDs were issued, and those whose information had been transmitted to the SSS. Those who appear on the first list, but not the second, would be those who opted out of being registered with the SSS. Whether or not such a list were maintained on an ongoing basis, generating it on demand would be a trivial data matching task for anyone with access to the two lists.

Evidence of having signed a DMV form giving notice of the requirement to register with the SSS would, of course, be evidence of knowledge of the requirement to register with the SSS. This is one of the elements of the crime of knowing and willful failure to register. As such, these DMV records would, in most cases, be the only evidence of that element of a crime that would otherwise be hardest to prove in a prosecution for knowing and willful failure to register.

This DMV evidence would thus be critical, otherwise unavailable, incriminating evidence against driver's license or state ID applicants who opt out of being registered with the SSS. It would also be readily available to Federal prosecutors by subpoena. The provision of SB 1081 that this information not be distributed or made available would have no force or effect as against a Federal subpoena for evidence of a Federal crime.

Were the Federal government to resume prosecution of nonregistrants, perhaps because a draft was being activated, Federal prosecutors would almost certainly subpoena these records from the DMV, and the DMV would be required to provide them, as a source of individuals to investigate for knowing and willful nonregistration and as a source of evidence against them.

By pretending that this information would not be used against driver's license applicants and would not be handed over to other government agencies, when in fact this information could be obtained on demand by Federal prosecutors and used as evidence of knowledge and willfulness, SB 1018 amounts to an attempt to trick applicants into signing self-incriminating confessions of an element of a Federal crime, without benefit of counsel or Miranda warnings.

This is not an appropriate role for the state of California or the DMV.

"Opt-out" from being registered with the SSS, as a condition of obtaining a California driver's license or state ID to which the applicant is otherwise entitled, would require signing what would amount to a confession of a Federal crime with which the applicant for a license or ID has not been charged. If the applicant were questioned about this criminal allegation, they would have the right to remain silent, and any criminal defense attorney would advise them to remain silent. SB 1081 would improperly condition issuance of a driver's license or state ID on the waiver of other fundamental rights to remain silent and to the presumption of innocence.

In addition, whether the current gendered Federal requirement for men but not women to register with the Selective Service System for a possible military draft is consistent with the U.S. Constitution – a question which remains unresolved in the wake of the U.S. Supreme Court's denial of *certiorari* in 2021 in *National Coalition For Men v. Selective Service System*⁴⁰ – is not dispositive of whether the proposed requirement in SB 1081 for men but not women to consent to registration with the SSS in order to apply for a California driver's license or state ID is consistent with the California Constitution. No California court has had the opportunity to address this question yet, but litigation on this issue would seem all but inevitable if SB 1081 is enacted.

We urge the legislature to reject SB 1081. Leave the enforcement or nonenforcement of Federal criminal laws to Federal law enforcement authorities and Federal courts.

Members of the MLTF would be happy to discuss these issues with you or your staff.

40 In that case, the U.S. District Court for the Southern District of Texas found (*NCFM v. SSS*, 355 F. Supp. 3d 568, February 22, 2019) that the current male-only registration requirement is unconstitutional. The U.S. Court of Appeals for the 5th Circuit reversed (*NCFM v. SSS*, 969 F.3d 546, August 13, 2020) without reaching the Constitutional issues, solely on the grounds that only the U.S. Supreme Court could overturn the Supreme Court precedent in *Rostker v. Goldberg*, 453 U.S. 57 (1981). The Supreme Court denied *certiorari* (593 US ____, June 7, 2021). We believe that the District Court ruling on the merits was correct, and that if and when the issue is reviewed on the merits by the Supreme Court, the current program will be found unconstitutional. The uncertain Constitutionality or validity of the current registration requirement is a further reason for California not to take on a role in trying to induce compliance with this gender-discriminatory law.

Respectfully submitted,

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