Nos. 18-676, 18-677 & 18-678

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET AL.,*

Petitioners,

v.

RYAN KARNOSKI, *ET AL.,*

Respondents.

[Additional Case Captions Listed Inside Front Cover]

On Petitions for a Writ of Certiorari before Judgment to the U.S. Court of Appeals for the Ninth and District of Columbia Circuits

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BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE NW
SUITE 700-1A
WASHINGTON, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Amicus Curiae

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET AL.*, *Petitioners*,

v.

JANE DOE 2, *ET AL.*, *Respondents*.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET AL.*, *Petitioners*,

v.

AIDEN STOCKMAN, *ET AL.*, *Respondents*.

QUESTION PRESENTED

In 2018, Secretary of Defense James Mattis announced a new policy concerning military service by transgender individuals. Under the Mattis policy, transgender individuals would be permitted to serve in the military, while individuals with a history of a medical condition called gender dysphoria would be disqualified from military service unless they meet certain conditions. The question presented is:

Whether the district court erred in preliminarily enjoining the military from implementing the Mattis policy nationwide.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF") is an Illinois nonprofit corporation organized in 1981.[1] For over thirty-five years, EFELDF has defended separation-of-powers principles and advocated for a strong military. Phyllis Schlafly, EFELDF's founder, was a leader in the movement against the Equal Rights Amendment in the 1970s and 1980s, and in that capacity was very active in the congressional hearings and public debate about drafting women, which led – *inter alia* – to this Court's rejection of drafting women in *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981). For the foregoing reasons, EFELDF has a direct and vital interest in the issues presented before this Court.

STATEMENT OF THE CASE

Several states and individuals (collectively, the "Plaintiffs") have sued various officials and offices within the Department of Defense ("DOD") and the President (collectively, the "Military") over policies on transgender individuals serving in the armed forces. These suits commenced in 2017, after the President tweeted views and issued a memorandum on the subject. The courts all issued preliminary injunctions

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[1] *Amicus* EFELDF files this brief with the written consent of all parties; in addition, EFELDF advised the parties of its plans to file the same brief concurrently in all three cases, based on advice from the Clerk's Office, and most parties consented with none opposing. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel, contributed monetarily to preparing or submitting this brief.

against that supposed policy, and they refused to lift those injunctions after DOD issued a final policy in 2018 following DOD's internal review.

EFELDF adopts the facts as stated by Petitioners. Pet. at 2-14 (No. 18-676); Pet. at 2-12 (No. 18-677); Pet. at 2-11 (No. 18-678). In particular, EFELDF notes that Secretary Carter's prior inquiry into the same question directed the study group to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness." Pet. App. 84a (Carter memorandum). Even then, the resulting report concluded the policy would increase health-care costs and undermine military readiness and unit cohesion. Rand Corp., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, xi-xii (2016) (Ninth Circuit E.R. 330-31). EFELDF also notes that, after exhaustively reviewing these issues, the DOD reported as follows:

> Based on the work of the Panel and the [DOD]'s best military judgment, [DOD] concludes that there are substantial risks associated with allowing the accession and retention of individuals with a history or diagnosis of gender dysphoria and require, or have already undertaken, a course of treatment to change their gender. Furthermore, [DOD] also finds that exempting such persons from well-established mental health, physical health, and sex-based standards, which apply to all Service members, including transgender Service members without gender dysphoria, could

> undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.

Pet. App. 206a (Mattis memorandum). Based on these findings, Secretary Mattis proposed and the President accepted a revised policy (hereinafter, "Mattis Policy") that sets out the following criteria:

- Those with a history of gender dysphoria can join the military if they have not undergone gender transition, can and will serve in their biological sex, and have three years of stability prior to joining (the "accession standards");
- Existing servicemembers diagnosed with gender dysphoria after entering service could continue to serve if they do not seek to undergo gender transition, can and will serve in their biological sex, and meet deployability requirements (the "retention standards");
- Individuals not meeting the accession or retention standards are ineligible to serve without a waiver;
- Regardless of accession and retention standards, servicemembers diagnosed with gender dysphoria who entered or remained in service under the prior Carter policy are exempt (the "reliance exemption").

See Pet. App. 123a-124a, 200a.

SUMMARY OF ARGUMENT

This Court should reject the lower court's efforts to micromanage the Military because the Constitution and this Court's precedents unambiguously direct the Political Branches to organize and direct the Military, and courts have little competence in the area (Section

I.A). In addition to those general concerns about *any* judicial intervention on Military affairs, this Court's review is required here because these particular cases involve a targeted, fact-based inquiry into Military readiness, as distinct from reflexive or unthinking discrimination based on outmoded prejudice (Section I.B), the policy precedents viewed favorably by the lower courts elevate equity over Military readiness and do not estop the current administration to follow equity-based policies of prior administrations (Section I.C), and the lower courts impermissibly focus on the moot –and likely never justiciable – 2017 presidential tweets and policies, not the currently effective 2018 Mattis Policy (Section I.D). In addition, this Court should resolve the issue of the standard of review – rational basis or elevated scrutiny – that applies to transgender issues (Section I.E).

In addition to the foregoing, granting *certiorari* before judgment is justified here for three reasons. First, review would help curb the overuse of nationwide injunctions, which thwart the orderly percolation of legal issues through the circuits (Section II.A). Second, issuing nationwide injunctions in as-applied challenges defeats the procedural protections for facial-action and class-action defendants (Section II.B). Third, regrettably, judicial review of the Trump administration's policies has begun to have the appearance of having crossed the fine line between independent judicial review of the Executive Branch and open judicial resistance to the 2016 election, thus warranting this Court's exercising its supervisory authority over the lower federal courts (Section II.C).

ARGUMENT

I. THE DECISIONS BELOW ARE WRONG, AND THEY IMPAIR THE NATION'S ABILITY TO DEFEND ITSELF.

In *Rostker*, this Court easily rejected equity-based pleas to weaken the Military by drafting women unfit to serve in combat duty. By seeking to impose their social policy views on the Military – with the resulting negative impact on its combat readiness – the lower courts have overstepped their constitutional bounds. The Political Branches have the right and duty to select the most effective Military of their choosing, without second-guessing from the Judiciary on issues of equity. These cases require this Court's urgent review.

A. This Court should – once again – recognize the deference due the Military and the Judiciary's lack of competence on these issues.

On military preparedness and effectiveness, this Court has recognized not only that the Constitution entrusts those vital issues to the Political Branches but also that the courts themselves lack competence to decide such questions. To try to distinguish strong precedents like *Rostker*, the lower courts emphasize the divide between the congressional hearings there and the President's Twitter feed, but neither the facts nor the law bears that out. The Military informed the views of Congress on drafting women in 1981, and the Military analyzed the transgender issue here.

First, the Court has repeatedly recognized the primacy of *both* Political Branches:

> This Court has recognized that it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress *and with the President*.

Rostker, 453 U.S. at 70-71 (emphasis added, interior quotations and citations omitted). "Judges are not given the task of running the Army," which "rests upon the Congress and *upon the President … and his subordinates*." *Id.* at 71 (emphasis added, interior quotations, alterations, and citations omitted). The sub-delegation to military professionals is extremely relevant here: "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." *Id.* at 65-66 (first emphasis added, interior quotations omitted). As with women and the draft in 1981, so too with transgender volunteers and soldiers today: if military professionals do not see a military reason for taking those soldiers, a Court should not compel the Military to take them on.

Second, in addition to finding the Constitution to delegate military matters to the Political Branches, the Court also has acknowledged both that "the lack of competence on the part of the courts is marked," *Id.* at 65, and that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Rostker*, 453 U.S. at 71 ("Orderly government

requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters") (interior quotations omitted). Now that the lower federal courts have attempted to do what this Court said courts should not do, this Court should use its supervisory power to review that overreach.

B. The Military's targeted and fact-based findings do not rely on overbroad generalizations.

By grouping DOD's analysis of the transgender issue with the impetuousness of a tweet, the lower courts were quick to reject the Military's conclusions on the impact of transgender accession and retention in the Military. As with the congressional analysis of drafting women in *Rostker*, however, the careful DOD analysis differs from "unthinking[]" or "reflexive[]" discrimination that this Court has rejected in other cases. *Rostker*, 453 U.S. at 72. Quite the contrary, Secretary Mattis analyzed the questions, armed with the Military's experience under the Carter Policy and unshackled by presumptions about the outcome.

To the extent that the lower courts held otherwise, the disconnect is their policy preference for the Carter Policy, not an honest dispute over the relative military merits and thoroughness of the two studies. As with "[j]udicial investigation of legislative history" the favoring of one administrative review over another "has a tendency to become … an exercise in looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) (interior quotations omitted). As explained in the next section, Secretary Carter analyzed the wrong

question; as explained in the prior section, this is not the federal courts' role or expertise.

In addition to picking out their friend (Secretary Carter), the lower courts also impermissibly picked out their nemesis (the President), notwithstanding that the President's direct contribution here has been mooted out of the controversy, assuming *arguendo* that it was *ever* justiciable final action. *See* Section I.D, *infra*. As *Rostker* makes clear, the history of the *current* action is the relevant history, not some past action. *Rostker*, 453 U.S. at 74-75 (rejecting argument to focus on original promulgation because "1980 legislative history is … highly relevant in assessing the constitutional validity"). So too here: the courts should have focused on Secretary Mattis and his work, not on President Trump.

C. Like the Carter and Obama Administrations, the lower courts focus on equity, rather than the Military.

Not only the lower court but also Secretary Carter have made the mistake – paraphrasing *Rostker* – of emphasizing equity over the military readiness: "You are talking about equity. I am talking about military." *Rostker*, 453 U.S. 57, 80 (Statement of Rep. Holt) (interior quotations omitted); *accord id.* (Statement of Sen. Nunn). As indicated, Secretary Carter's inquiry started with a biased presumption, Pet. App. 84a (Carter memorandum), which points to the equity issue, not the military readiness issue.

The Obama administration certainly could take that tack, as the Carter administration tried to do in 1980. But the 1980 and 2016 elections intervened, and the equity-based groundwork of the Carter or Obama

administrations provides no legal or equitable basis to compel the government to stay on that trajectory. *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 419-20 (1990) ("equitable estoppel will not lie against the Government"). Without estoppel, the plaintiffs and lower courts are left wanting an administration that prizes equity over military readiness, which is as nonjusticiable as political questions get.

D. The Mattis Policy – not the President's tweets or revoked policy – is at issue.

The district courts considered the Mattis Policy as merely a continuation or implementation of the prior presidential tweets or memorandum. But the tweets were not final agency action, 5 U.S.C. §704, and the prior memorandum was revoked. The only live issue now ongoing and capable of judicial resolution is the Mattis Policy. For a federal court to opine on anything else would be an advisory opinion, *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911), and thus outside Article III's jurisdiction.

When an agency promulgates its final policy or rule, challenges to the interim policy or rule become moot. *Schering Corp. v. Shalala*, 995 F.2d 1103, 1105 (D.C. Cir. 1993) ("action is moot when nothing turns on its outcome"); *Louisiana Forestry Ass'n v. Sec'y United States DOL*, 745 F.3d 653, 667 n.11 (3d Cir. 2014). While the legal *action* itself may not become moot if the new policy or rule continues substantive elements of the prior policy or rule, *Am. Maritime Ass'n v. United States*, 766 F.2d 545, 554 n.14 (D.C. Cir. 1985) (substantive challenges not moot when the interim and final rules share the same substance); *accord Union of Concerned Scientists v. Nuclear*

Regulatory Comm'n, 711 F.2d 370, 377 (D.C. Cir. 1983), going forward the legal action focuses on the *new policy or rule*. The lower courts erred in allowing injunctions against the President's tweets and memorandum to continue against the Mattis Policy.[2]

E. This Court should clarify the scrutiny applicable to equal-protection and due-process claims based on transgender status.

The lower courts imposed elevated scrutiny on a medical issue, which this Court eventually will need to correct. Although perhaps not necessary to decide these cases, Section I.B, *supra*, the level-of-scrutiny issue is important and will remain recurring until this Court resolves it.

As the Government explains, Pet. at 19 (No. 18-676) (*citing Board of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 365-68 (2001)), discrimination – if any occurred here – was based on a medical condition, triggering rational-basis review. Similarly, intermediate scrutiny for sex-based actions would not apply because the Mattis Policy equally applies to male and female transgender candidates or

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[2] In addition to being simply wrong about ongoing challenges to revoked policies, the lower courts also failed to accord DOD and Secretary Mattis the "presumption of regularity." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). While EFELDF suspects that the lower courts' preference for the prior Carter Policy has more to do with policy choices than law, it also suffers from the issue of talking about equity when we should be talking about the Military. *See* Section I.C, *supra*.

(Footnote cont'd on next page)

soldiers, with no intent to discriminate *based on sex*.[3] *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979). This Court eventually will need to decide the level of scrutiny to apply to alleged discrimination based on transgender status, and it could well do so here.

II. THE LOWER-COURT INJUNCTIONS REQUIRE THIS COURT'S SUPERVISORY REVIEW.

In addition to the merits of these cases in their own right, these cases also are part of a trend in which trial courts issue nationwide injunctions, rather than limiting the relief to the parties before the court. *See* Pet. at 25-27 (No. 18-676). This trend requires the Court to exercise its supervisory jurisdiction over the lower federal courts.

A. Overbroad nationwide injunctions deprive this Court of the percolating effect of multiple circuits reaching an issue.

Nationwide injunctions effectively preclude other circuits from ruling on the constitutionality of the enjoined agency action. In addition to conflicting with the principle that federal appellate decisions are binding only within the court's circuit, *see*, *e.g.*, *U.S. v. Glaser*, 14 F.3d 1213, 1216 (7th Cir. 1994), nationwide

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[3] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its line of "stereotype" cases are not to the contrary. These cases concern females' exhibiting masculine traits or males' exhibiting feminine traits. For purposes of her doing her accounting job, it did not matter whether Ms. Hopkins wore dresses or men's suits. However she dressed, she still used the women's restroom and was a woman.

injunctions "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," which deprives this Court of the benefit of decisions from several courts of appeals. *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984). That practical harm is reason enough to trim the nationwide injunctions.

B. Providing facial relief in as-applied challenges frustrates this Court's precedents on facial and class actions.

Overbroad injunctions can convert an as-applied challenge into a facial challenge or class action, without the procedural safeguards that protect defendants in those other two contexts. Allowing such suits to proceed that way would trammel not only the rights of defendants generally, but also – because we deal here with the federal Executive – the separation of powers. The judicial power in the Constitution does not authorize injunctions "simply because the court is unhappy with the result reached." *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978). Regardless of whether "the result reached" that troubles the lower courts is the Mattis Policy or the 2016 election, this Court needs to exercise its supervisory powers to rein in the lower courts.

1. The lower courts are allowing as-applied challenges to act as facial challenges, without the protections afforded to defendants.

When relief reaches beyond the particular parties' circumstances, the party seeking that relief "must … satisfy [the] standards for a facial challenge to the

extent of that reach." *Doe v. Reed*, 561 U.S. 186, 194 (2010). Indeed, where "claims are better read as facial objections" to a law, courts need "not separately address the as-applied claims." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2340 n.3 (2014). Of course, a "facial challenge to a legislative Act is … the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno,* 481 U.S. 739, 745 (1987). Because "[t]he fact that [the law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," *id.,* prevailing in an as-applied challenge is simply not the same as prevailing in a facial challenge. *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 568 (2011). Here, for example, certainly *some* people with gender dysphoria are disturbed enough or in need of enough medical supervision to preclude their combat readiness. Moreover, the Mattis Policy does not exclude *all* transgender candidates or soldiers. Since a facial challenge should *fail*, individual as-applied challenges should not form the basis for nationwide facial relief.

2. <u>The lower courts are allowing these challenges to act as class actions, without the protections afforded to defendants.</u>

Similarly, when plaintiffs purport to represent a class of those similarly situated, the law requires that the protected class indeed be similarly situated. FED. R. CIV. P. 23(a)(1)-(4) (requiring commonality and typicality, as well as numerosity and adequacy of

representation). This Court has "repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (interior quotations omitted). Thus, the rules also contemplate subclasses, FED. R. CIV. P. 23(c)(5), which can even be *required*:

> Where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses….

Amchem Prods. v. Windsor, 521 U.S. 591, 627 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831-32 (1999). As indicated, the Mattis Policy treats different classes of transgender candidates or soldiers differently, so not every such candidate or soldier should benefit from facial relief. Especially where the Mattis Policy allows case-by-case waivers in some circumstances, the lower courts cannot impose nationwide injunctive relief without certified classes, including all relevant certified sub-classes.

C. The Court should grant the petitions for a writ of *certiorari* before judgment as an exercise of this Court's supervisory authority over the lower courts.

While independent judicial review is critical to the separation of powers under our tripartite branches of government, there is a fine line between unbiased and independent judicial review and an attempt to nullify the 2016 election based on the prejudices of some members of the judiciary. In order to preserve public respect for the former, *amicus* EFELDF respectfully

submits that this Court must pay attention to even the *appearance* of the latter. And *amicus* EFELDF respectfully submits that the spate of nationwide injunctions from reliably liberal circuits is well past the appearance stage.

Generally, this Court has preferred that the Courts of Appeals serve as the first line of defense to enforce judicial norms on the lower courts. *See*, *e.g.*, *In re Commerce Dep't*, No. 18A350 (Oct. 5, 2018) (deferring to Second Circuit); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 200 L.Ed.2d 325 (2018) (deferring to Ninth Circuit). In enforcing judicial norms, for example, the Courts of Appeals may adopt "[a]ny procedure … which is sensibly calculated to achieve these dominant ends of avoiding or resolving intra-circuit conflicts." *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. 247, 271 (1941). This Court nonetheless retains a "general power to supervise the administration of justice in the federal courts," and "the responsibility lies with this Court to define [the] requirements and insure their observance." *Western Pacific,* 345 U.S. at 260 (interior quotations omitted). *Amicus* EFELDF respectfully submits that the actions of the lower courts here require this Court's urgent intervention. Without that intervention, the lower courts will obstruct the lawful actions of this Administration, based only on policy disagreements.

CONCLUSION

For the foregoing reasons and those argued by Petitioners, this Court should grant the petitions for a writ of certiorari before judgment in all three cases.

December 19, 2018 Respectfully submitted,

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE NW
SUITE 700-1A
WASHINGTON, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Amicus Curiae