No. 25A319

IN THE
Supreme Court of the United States

DONALD J. TRUMP, President of the United States, et al.,

Applicants,

v.

ASHTON ORR, et al.,

Respondents.

On Emergency Application for Stay from the
United States Court of Appeals for the First Circuit

BRIEF OF INDIANA, 25 OTHER STATES, AND THE ARIZONA LEGISLATURE AS AMICI CURIAE IN SUPPORT OF APPLICANTS

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Sex, *American Heritage Dictionary* (online ed.) 3

A New English Dictionary on Historical Principles (Sir James A. H. Murray et al. eds., Oxford at the Clarendon Press 1914) 3

Aditi Bhargava et al., *Considering Sex as a Biological Variable in Basic and Clinical Studies*, 42 Endocrine Reviews 219 (2021) 7, 8

Sex, *Black's Law Dictionary* (2d ed. 1910) 3

Laura Blakeslee et al., *Age and Sex Composition: 2020 Census Briefs* (2023), https://www2.census.gov/library/publications/decennial/2020/census-briefs/c2020br-06.pdf 5

Walter O. Bockting, *Transgender Identity Development*, *in* 1 Am. Psych. Ass'n, *APA Handbook of Sexuality and Psychology* (D.L. Tolman & L.M. Diamond eds., 2014) 8

H.L. Brumberg *et al.*, *History of the Birth Certificate: From Inception to the Future of Electronic Data*, 32 J. of Perinatology 407 (2012) 5

California is the first state to allow gender neutral birth certificates, WTHR (Oct. 19, 2017), https://www.wthr.com/article/news/trending-viral/california-is-the-first-state-to-allow-gender-neutral-birth-certificates/531-bd724a01-10f7-4545-8cfe-d0388abb81ac 6

Sex, *Funk & Wagnalls New Standard Dictionary of the English Language* (Encyclopedia Britannica, Inc. 1960) 3

Alice M. Hetzel, U.S. Dep't of Health & Hum. Servs., *U.S. Vital Statistics System: Major Activities & Developments, 1950–95* (1997) 5

OTHER AUTHORITIES [CONT'D]

Minesh Khatri, *What Is Fluid?*, WebMD (Aug. 10, 2025), https://www www.webmd.com/sex/whatsex/what-is-fluid 8

Michael K. Laidlaw et al., *Letter to the Editor, "Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline"*, 104 J. Clinical Endocrinology & Metabolism 686 (2019) 7, 8

Ian C. Langree, *How Many Genders Are There? List of Gender Identities* (updated June 11, 2025), https://www.disabled-world.com/disability/sexuality/lgbt/genders.php 9

Lisa Littman et al., *Detransition and Desistance Among Previously Trans-Identified Young Adults*, 53 Archives of Sexual Behavior 57 (2024) 8

Sex, *Merriam-Webster's Dictionary* (online ed.) 3

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The Federalist No. 44 (C. Rossiter ed. 1961) (J. Madison) 2

INTEREST OF AMICI CURIAE

This case asks this Court to decide whether the Constitution and federal statutes give passport applicants the right to self-define their "sex." The answer to that question is of significant interest to amici States. All of them keep a variety of state records that list sex and issue state papers, such as birth certificates and driver's licenses, that record persons' sex. For sex to be a useful category of information, States must be able to adopt some consistent definition of the term rather than let individuals be definitions unto themselves. Under respondents' theory, however, the federal government (and presumably States) cannot employ a traditional understanding of sex without violating the Constitution. This Court should grant the stay and clarify that no constitutional principle requires government-issued papers to serve as canvases for self-expression.

SUMMARY OF THE ARGUMENT

In requiring U.S. passports to reflect a traditional understanding of sex, the federal government violated no constitutional principle. To list sex on passports—an action no one disputes the government can take—the government must be able to say what sex is. Understanding sex as the characteristic of being biologically male or female accords with common usage, this Court's precedent, and historical practice. Passport applicants have no right to decide how government-issued documents, which are property of the federal government, describe applicants' sex.

Respondents wrongly argue that the challenged policy discriminates on the basis of sex or transgender identification. Under the policy, no person can request that a passport record a trait other than the person's sex. What respondents demand

is not equal, but preferential, treatment. The Constitution does not require the government to accommodate respondents' desire for passports to record their current identities rather than the historical and biological fact of their sex.

There are, moreover, good reasons to record sex on passports and other papers rather than unverifiable and changeable senses of gender. Directing that all passports reflect sex promotes consistent records and provides an objective trait that can be used for identification purposes while avoiding difficulties that would accompany recording a subjective trait that can change and be expressed in innumerable ways.

ARGUMENT

I. The Constitution permits the government to issue papers that record sex rather than subjective identities

Respondents do not challenge the federal government's decades-old practice of issuing passports that record the bearer's sex. Instead, their quarrel is with how the government understands sex. Respondents want a policy of "full self-selection" under which every passport applicant decides what "sex" means, arguing that it is unconstitutional to treat "sex" as referring to a binary, biological trait. Orr C.A. Stay Resp. 3–4, 10–11; *see* D. Ct. Dkt. 30 at 26–27. But it cannot be that the Constitution empowers the government to issue passports recording applicants' sex, yet withholds the power to define the term. "'No axiom is more clearly established in law, or in reason, than that . . . wherever a general power to do a thing is given, every particular power necessary for doing it is included.'" *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2306 (2025) (quoting *The Federalist No. 44*, p. 285 (C. Rossiter ed. 1961) (J. Madison)).

It thus follows that the government can determine what sex means, including by employing a biological understanding of sex.

In understanding sex biologically, the federal government adopted the "'ordinary and appropriate means'" of determining sex. *Free Speech Coal.*, 145 S. Ct. at 2306–07. Evidence that "sex" ordinarily refers to a biological trait—not an unverifiable internal identity—abounds. *See United States v. Skrmetti*, 145 S. Ct. 1816, 1856 (2025) (Alito, J., concurring). Dictionaries, both old and new, speak of "sex" as referring primarily to "the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures." *Sex*, *Merriam-Webster's Dictionary* (online ed.); *see, e.g.*, *Sex*, *American Heritage Dictionary* (online ed.); *Sex*, 8 *A New English Dictionary on Historical Principles* 577 (Sir James A. H. Murray et al. eds., Oxford at the Clarendon Press 1914) ("[e]ither of the two divisions of organic beings distinguished as male and female respectively; the males or the females (of a species, etc., esp. of the human race) viewed collectively")); *Sex*, 2 *Funk & Wagnalls New Standard Dictionary of the English Language* 1152–53 (Encyclopedia Britannica, Inc. 1960) ("[e]ither of two divisions, male and female, by which organisms are distinguished with reference to the reproductive functions"); *Sex*, *Black's Law Dictionary* 1081 (2d ed. 1910) ('[t]he distinction between male and female; or the property or character by which an animal is male or female").

This Court's decisions also leave no doubt that sex ordinarily refers to being biologically male or female. *See, e.g.*, *Sessions v. Morales-Santana*, 582 U.S. 47, 58

(2017) (using "sex" in discussing legislation distinguishing between "mothers" and "fathers"); *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (using "sex" to discuss "enduring" "[p]hysical differences between men and women"); *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469–70 (1981) (acknowledging differences between "the sexes" when it comes to the "consequences of sexual activity," such as pregnancy); *Frontiero v. Richardson*, 411 U.S. 677, 686, 688 (1973) (describing "sex" as an "immutable characteristic determined solely by the accident of birth"); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (describing how a "sex" classification gives a "preference to members of either sex over members of the other"). It cannot be that the Constitution bars the federal government from employing the same understanding of sex as this Court.

Any argument that the "Constitution requires [the government] to use 'sex' to refer to gender identity" on government documents runs into a host of difficulties. *Gore v. Lee*, 107 F.4th 548, 557 (6th Cir. 2024). For one, there is no deeply rooted, historically established fundamental right to require the government to adopt a particular terminology in keeping records and issuing papers. *See id.* The government must be able to decide "what to say and what not to say" in its own records "for government to work." *Shurtleff v. City of Boston*, 596 U.S. 243, 251 (2022). "How . . . could a government keep uniform records of any sort if the disparate views of its citizens about shifting norms in society controlled the government's choices of language and of what information" to put on government-issued papers? *Gore*, 107 F.4th at 557.

For another, the federal government and States have used the challenged policy's understanding of "sex" ever since the Constitution was adopted. In 1790, for example, the first Congress commissioned a census and directed census takers to "distinguish[]" between "the sexes." Act of Mar. 1, 1790, 1 Stat. 101, 101. Every U.S. census since has likewise collected information about "sex"—meaning whether "an individual [i]s male or female"—not "gender." Laura Blakeslee et al., *Age and Sex Composition: 2020 Census Briefs* (2023), https://www2.census.gov/library/publications/decennial/2020/census-briefs/c2020br-06.pdf; *see* Alice M. Hetzel, U.S. Dep't of Health & Hum. Servs., *U.S. Vital Statistics System: Major Activities & Developments, 1950–95* at 28 tbl. 1 (1997).

States, too, have "consistently" kept birth certificates and other records that reflect sex is a biological concept. *Gore*, 107 F.4th at 555–56. Massachusetts started the practice of recording newborns' sex in 1842, and with federal encouragement, all other States eventually followed. *See id.* at 551–52, 555–56; H.L. Brumberg et al., *History of the Birth Certificate: From Inception to the Future of Electronic Data*, 32 J. of Perinatology 407, 408–09 (2012). "Since 1907," for example, "Indiana has deliberately chosen to record sex—not gender identity—on birth certificates." *L.A. v. Braun*, No. 1:25-cv-596-MPB-TAB, Dkt. 103 at 15 (S.D. Ind. Sep. 26, 2025).

Only in the last few years have some authorities began allowing persons to self-define "sex" on government-issued papers. Before 2017, no State allowed persons to request changes to the sex recorded on birth certificates "based on self-designation alone" or offered "X" as an option for sex on government-issued papers. *Gore*, 107

F.4th at 552; *see* Katy Steinmetz, *M, F, or X: Oregon Becomes First State to Allow Non-Binary Gender Marker on Drivers Licenses*, Time (June 15, 2017), https://time.com/4820930/nonbinary-gender-marker-oregon-drivers-license/; *California is the first state to allow gender neutral birth certificates*, WTHR (Oct. 19, 2017), https://www.wthr.com/article/news/trending-viral/california-is-the-first-state-to-allow-gender-neutral-birth-certificates/531-bd724a01-10f7-4545-8cfe-d0388abb81ac. And the federal government only began allowing passport applicants to self-define sex in 2021. *See* Stay App. 8a. The notion that the Constitution requires the government to continue a policy adopted just four years ago finds no support.

Examining the matter through *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), does not alter the analysis. Again, respondents do not claim there is a problem with recording sex on passports or issuing the sexes passports with different sex markers. Instead, respondents take issue with the decision to issue passports that "'reflect[] only [applicants'] sex.'" Orr C.A. Stay Resp. 10. But the decision to record sex rather than gender identity does not violate equal protection. As *Skrmetti* explains, a policy discriminates based on sex only where it "prohibit[s] conduct for one sex that it permits for the other" or confers a benefit on one sex that it withholds from the other. *Skrmetti*, 145 S. Ct. at 1831; *accord Lange v. Houston Cnty.*, --- F.4th ---, No. 22-13626, 2025 WL 2602633, at *3 (11th Cir. Sep. 9, 2025) (en banc); *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, 121 F.4th 604, 616 (7th Cir. 2024); *Gore*, 107 F.4th at 556. A policy that requires *all* passports to record sex does not "ascribe different benefits and burdens to the sexes." *Gore*, 107 F.4th at 556.

For similar reasons, the challenged policy does not discriminate based on transgender identification—which is not a suspect or quasi-suspect class in any event, *see Skrmetti*, 145 S. Ct. at 1851 (Barrett, J., concurring); *id.* at 1866 (Alito, J., concurring). The government's policy does not create two groups of people, with transgender- and nonbinary-identifying passport applicants in one group and all other applicants in the other. Under the policy, "*no*" applicant can obtain a passport that records a sex different from the applicant's sex. *See id.* at 1831 (majority op.). A female applicant who identifies as female but wishes for her passport to describe her sex as "X" to express disdain for traditional views of gender can no more obtain a passport with an "X" than a female applicant who identifies as non-binary. In short, the challenged policy does not single out either sex or any gender identity for less favorable or more beneficial treatment. It establishes a single rule that applies to everyone.

II. Recording only sex on passports is a legitimate and rational choice

Respondents resort to accusations of animus. Orr C.A. Stay Resp. 8. Surely, however, it is not wholly irrational for the federal government to use the same "consistent, historical, and biologically based definition of sex" that many States use. *Gore*, 107 F.4th at 561. Sex can be objectively verified. *See* Aditi Bhargava et al., *Considering Sex as a Biological Variable in Basic and Clinical Studies*, 42 Endocrine Reviews 219, 220–21 (2021). An inner identity cannot. *See* Michael K. Laidlaw et al., *Letter to the Editor, "Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline"*, 104 J. Clinical

Endocrinology & Metabolism 686, 686 (2019). Sex is also stable. Bhargava et al., *supra*, at 220–21. Identities can—and do—change. *See* Walter O. Bockting, *Transgender Identity Development*, *in* 1 Am. Psych. Ass'n, *APA Handbook of Sexuality and Psychology* 739, 744 (D.L. Tolman & L.M. Diamond eds., 2014); Lisa Littman et al., *Detransition and Desistance Among Previously Trans-Identified Young Adults*, 53 Archives of Sexual Behavior 57, 57 (2024). Indeed, some go so far as to describe their identities as "fluid." Minesh Khatri, *What Is Fluid?*, WebMD (Aug. 10, 2025), https://wwwwww.webmd.com/sex/whatsex/what-is-fluid. That renders it "rational[]" for the government to conclude that "recording . . . [the] objective characteristic of sex better advances the [government's] interest in accurate identification than would recording a person's subjective . . . identity." *Ind. Bureau of Motor Vehicles v. Simmons*, 233 N.E.3d 1016, 1028 (Ind. Ct. App.), *trans. denied*, 248 N.E.3d 1196 (Ind. 2024); *see Corbitt v. Sec'y of the Ala. L. Enf't Agency*, 115 F.4th 1335, 1349–50 (11th Cir. 2024).

Respondents' proffered alternative—treating sex as a self-defined trait—demonstrates the rationality of the challenged policy. If respondents had their way, some U.S. passports "would show biological sex, others gender identity." *Gore*, 107 F.4th at 561. That would perpetuate internally inconsistent recordkeeping. Given that gender identities can change—even "daily," Khatri, *supra*—respondents' approach would create situations in which the information printed in passports does not match the passport holders' current perceptions of themselves. That makes the information recorded less valuable and creates potential logistical complications for the government, which must decide what to do about the inconsistency.

Then there is the problem of manageable limits. While there are two sexes, gender identity is not so limited. Gender identity is a subjective inner perception, which means there can be as many possible identities as people have perceptions of themselves. Some sources say there are dozens of identities, *see* Shaziya Allarakha, *What are the 72 Other Genders*, MedicineNet (Feb. 9, 2024), https://www.medicinenet.com/what_are_the_72_other_genders/article.htm; others many more, *see* Ian C. Langree, *How Many Genders Are There? List of Gender Identities* (updated June 11, 2025), https://www.disabled-world.com/disability/sexuality/lgbt/genders.php. Whatever one makes of those sources, they illustrate the point: administrative considerations make it rational to record "an individual's sex" instead of "reporting a subjective status with innumerable designations." *Simmons*, 233 N.E.3d at 1028.

Perhaps respondents will suggest that the government could offer a limited number of options (say, M, F, and X). But respondents' theory admits no limiting principle. If, as respondents claim, it is a constitutional problem to say that "there are only 'two sexes, male and female,'" Orr C.A. Stay Resp. 11, then it is equally a problem to say that there are only three genders. And if the Constitution requires that the government issue passports with an "M" to females who identify as male, *id.* at 10, logically the government should have to cater to other identities in the same way. Why should the government be able to issue passports with an impersonal "X" to those who feel that the letter does not accurately capture their senses of gender? The answer to that question—and respondents' whole case—is that decisions about which traits to record on passports are the stuff of policy, not constitutional law.

CONCLUSION

The Court should grant a stay.

Respectfully submitted,

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