No. 25A319

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Applicants,

—— v. ——

ASHTON ORR, *et al.*,

Respondents.

TO THE HONORABLE KETANJI BROWN JACKSON, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIRST CIRCUIT

RESPONDENTS' OPPOSITION TO APPLICATION FOR STAY

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INTRODUCTION

The Plaintiffs in this suit seek the same thing millions of Americans take for granted: passports that allow them to travel without fear of misidentification, harassment, or violence. By classifying people based on sex assigned at birth and exclusively issuing sex markers on passports based on that sex classification, the State Department deprives Plaintiffs of a usable identification document and the ability to travel safely. That is an abrupt reversal of more than thirty years of Department policy, across five administrations, permitting changes to passport sex markers to align with individuals' actual and apparent gender identity, and it is a reversal of years of policy permitting selection of an unspecified ("X") sex marker, as many U.S. states and other countries permit on their identity documents.

This new policy puts transgender, nonbinary, and intersex people in potential danger whenever they use a passport, as the district court found based on unrebutted evidence. It is arbitrary and capricious in violation of the Administrative Procedure Act ("APA"). It also classifies based on sex and cannot survive heightened scrutiny. Under any standard of review, it violates equal protection because it does not serve any legitimate governmental interest and was driven by impermissible animus. And so, in reasoned opinions that sometimes agreed with Plaintiffs, sometimes agreed with the government, but always carefully and faithfully applied this Court's precedents, the district court enjoined enforcement of the policy as applied to members of two certified classes of transgender, intersex, and nonbinary people.

The government's stay application provides no reason to upend, in an

emergency posture, the status quo that has been in place since the June 17, 2025 class-wide injunction, particularly when this Court may address questions the government raises here on its merits docket this term, in *Little v. Hecox*, No. 24-38, and *West Virginia v. B.P.J.*, No. 24-43.

At the threshold, the government has not demonstrated a likelihood of success on the merits on any of the three independent bases for the injunction, much less on all of them as required to obtain the extraordinary relief of a stay.

Defendants argue that their Passport Policy is not reviewable because it implements an executive order that, they say, is based on plenary presidential power. But that contravenes this Court's precedents addressing the constitutionality of passport restrictions, notwithstanding the President's asserted foreign-affairs prerogatives. Moreover, the government has never explained how passport sex markers that align with gender identity, including the sex the person lives as and outwardly expresses, could possibly affect foreign relations—when the challenged policy undermines the very purpose of passports as identity documents that officials check against the bearer's appearance. The government's argument would create a significant, unwarranted loophole in the APA's statutory requirements.

The Passport Policy is arbitrary and capricious and therefore violates the APA because it was adopted and implemented with no reasoned decision-making and no reasonable explanation—in violation of basic administrative-law requirements. The government does not contest the district court's findings on those points, instead relying solely on its misguided argument regarding presidential power.

On the equal protection claims, the district court's order faithfully applies this Court's precedents to the record below. The Passport Policy violates equal protection in two distinct ways. *First*, the Passport Policy discriminates based on sex. It facially classifies on the basis of sex assigned at birth, requiring everyone assigned male at birth to always have an M designation on their passport and everyone assigned female at birth to always have an F. Accordingly, the policy must survive heightened scrutiny. The government failed to show that the policy serves an important government interest. Because the government does not defend the policy under heightened scrutiny, a stay can be denied on this basis alone.

Second, the Passport Policy fails any level of constitutional review for two independent reasons: (1) It does not pass muster even under rational basis review because it irrationally undermines the very purpose of passports—identifying a U.S. citizen when they travel, *see* 22 C.F.R. § 51.1; and (2) it is motivated by anti-transgender animus. The district court made extensive factual findings demonstrating animus. Indeed, the government all but admitted below an intent to harm transgender people, arguing that the "outing of transgender, intersex, and nonbinary individuals" was "core to the Policy." Resp. App. 171a (quoting Resp. App. 80a). Here, the government ignores almost all the evidence the district court relied on and inappropriately asks this Court to consider extra-record evidence or simply second-guess the district court's factual findings.

This Court's decision in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), does not change the government's likelihood of success on the merits here. The injunction

is entirely consistent with the Court's reasoning in *Skrmetti* because the Passport Policy facially classifies based on sex rather than medical use and because the policy is irrational and was motivated by animus against transgender people.

The government fails to meet the other stay factors as well. The only irreparable injury it points to is, once more, an amorphous reference to foreign affairs. This is plain misdirection: This Court has held that the President is obligated to follow statutes and the Constitution when exercising foreign-affairs powers. On the other side of the scale, the courts below found that the class members protected by the injunction would suffer grave, concrete injuries if it were stayed.

This Court and individual Justices have made clear that transgender people "cannot be treated as social outcasts or as inferior in dignity and worth." *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 780 (2020) (Kavanaugh, J., dissenting) (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 631 (2018)). But the Department's policy does just that: It is aimed at the "rejection of the identity of an entire group—transgender Americans—who have always existed." SG App. 42a. And it exposes them to danger every time they use their passports. This Court should not allow the preliminary injunction's protections against such harms to be swept aside in the government's haste to signal that one group of its citizens is unequal to the rest. The government's stay application should be denied.

STATEMENT

A. Factual Background

1. The history of sex markers on passports.

For the first two hundred years of U.S. history, passports did not have sex markers. U.S. passports first featured sex markers in 1976. SG App. 7a ¶ 5. Contrary to the government's suggestion that the Passport Policy reverses a recent policy change, the Department has permitted some form of self-selection of, or change to, sex markers on passports for over thirty years—more than half the time passports have had sex markers. In 1992, the Department first promulgated a policy that permitted applicants to choose a sex marker different from their sex assigned at birth. *See* SG App. 18a–20a. Applicants seeking to change their sex marker initially were required to submit various forms of medical documentation, but such requirements were eventually eliminated in favor of full self-selection. *Id.* In 2021, the Department joined many other countries and U.S. states in permitting X sex markers on passports, a change particularly important to some intersex and nonbinary Americans. *See id.*[1]

2. The Passport Policy.

On his first day in office, the President issued Executive Order 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025), entitled "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government" (the "EO").

[1] International technical guidelines on passport conformity that permit M, F, *and* X sex markers were adopted in 1980. *See* SG App. 6a–7a¶ 4; Resp. App. 205a ¶ 82 & n.12.

See SG App. 1a–4a. For purposes of federal law and administration policy, the EO purports to define sex by reference to the capacity to produce a large or small reproductive cell "at conception." EO § 2; *see* SG App. 22a.[2] Only two days later, the Department began implementing a new policy removing the option of a passport with a sex marker reflecting the applicant's gender identity and the option to obtain a passport with an X sex marker. Instead of using the EO's definition of sex, however, the Department required that passports reflect an applicant's sex assigned at birth (the "Passport Policy") because, as the Department recognized below, it is impossible to determine sex on the basis set forth in the EO. *See* SG App. 11a ¶¶ 14–15.

B. Procedural Background

1. The district court enjoins the Passport Policy as applied to named Plaintiffs.

Shortly after the Department announced its new Passport Policy, seven transgender or nonbinary Plaintiffs filed this class action on behalf of themselves and others similarly situated. Five more named Plaintiffs, including intersex individuals, subsequently joined. The named Plaintiffs—and the classes they represent—are transgender, intersex, and nonbinary Americans who want the same thing as their fellow citizens: usable passports that enable them to travel without harassment or violence. Prior to the injunction's entry, each of them had or was considering travel

[2] The evidence in this case demonstrates that the EO's definition of sex at conception contradicts basic biology. *See* Resp. App. 81a–82a ("[E]mbryos have undifferentiated reproductive cells during the period immediately following conception. Further, this definition ignores the biological reality that some intersex individuals do not at conception, and may never, belong to a sex that produces either a large or small reproductive cell." (citations omitted) (citing expert evidence at Resp. App. 104a, 110a)).

plans requiring a passport. One Plaintiff needed to travel abroad for a medical procedure and had to postpone those plans. *See* Resp. App. 96a. Another needed to travel for her work. *Id.* A third is an American student enrolled at a Canadian university. *Id.* And the others were similarly positioned, forced to forgo other family-, work-, or education-related travel. *See id.*; *see also* SG App. 63a.

The Plaintiffs asserted claims for denial of equal protection under the Fifth Amendment because the Passport Policy is a sex classification that fails heightened scrutiny and was driven by impermissible animus; violation of the Fifth Amendment right to travel; violation of the Fifth Amendment right to informational privacy; violation of the First Amendment right against compelled speech; and (against the Department and Secretary of State) violations of the APA based on the Passport Policy being (i) arbitrary and capricious, (ii) adopted without observance of procedure required by law, and (iii) unconstitutional. *See generally* Resp. App. 1a–59a (Complaint), 189a–259a (First Amended Complaint).

On April 18, 2025, the district court granted Plaintiffs' motion to enjoin enforcement of the Passport Policy with respect to all but one Plaintiff. *See generally* SG App. 15a–70a. The injunction was based on three independent findings of Plaintiffs' likelihood of success on the merits. *First*, the district court found that Plaintiffs were likely to succeed on their claims that the Passport Policy was arbitrary and capricious in violation of the APA. *See* SG App. 47a–60a. *Second*, it held that the Passport Policy classifies on the basis of sex and that the government failed to show it would likely satisfy heightened scrutiny. *Id.* at 30a–39a *Third*, it found that

the Passport Policy was likely motivated by improper animus towards transgender and nonbinary Americans, rendering it invalid under even rational basis review. *Id.* at 40a–46a.

The district court also found that the change in application forms accompanying the Passport Policy likely violated the statutory requirements of the Paperwork Reduction Act, 44 U.S.C. § 3506 ("PRA"). *See* SG App. 58a–60a. Without following the procedures required by statute, the Department withdrew the passport application forms then in use and replaced them with expired forms that offered only M and F sex markers. *Id.* at 9.[3]

The unrebutted expert evidence demonstrated that being forced to use passports with a sex marker inconsistent with one's gender identity increases the risk that transgender and nonbinary people "experienc[e] harassment or violence when traveling, particularly to countries that criminalize transgender expression." SG App. 104a. That uncontradicted evidence demonstrates that having a passport with a sex marker discordant with the bearer's gender identity doubles the risk of "suicidal ideation" and increases the risk of "serious psychological distress." *Id.* A passport with a sex marker that does not align with an individual's gender identity can also interfere with treating gender dysphoria. *Id.* These risks have led many transgender, nonbinary, and intersex applicants to forgo international travel plans. *Id.* at 105a. By contrast, when an applicant who is transgender, nonbinary, or

[3] Belatedly, the Department issued a 30-day comment notice announcing the update and release of new forms that reflect the Passport Policy, SG App. 23a, which still failed to comply with the PRA.

intersex receives identity documents that align with their gender identity, the evidence demonstrates that the applicant is "significantly less likely" to experience these harms and faces fewer obstacles in medical treatment. *Id.* at 104a.

The district court found that six named Plaintiffs faced irreparable injuries because they did not possess passports with sex markers that aligned with their respective gender identity. *See* SG App. 61a–64a.[4] It determined the Passport Policy forced the Plaintiffs to either travel with passports that exposed them to misidentification, harassment, and violence, or not travel at all. *See id.* at 60a–63a.

Many of the named Plaintiffs have in fact suffered such harms, including harassment and mistreatment as a result of having sex markers on identity documents that did not match their gender identity. *See id.* at 62a–63. One was "accused by TSA agents of presenting a 'fake identification document' because his [prior] passport bore a female sex marker whereas his driver's license bore a male sex marker." *Id.* Another was "detained by TSA agents and strip searched when she presented a driver's license displaying her sex assigned at birth." *Id.* And a third experienced "'significant harassment' when airport employees noticed the disjunction between her gender expression and the sex marker on her driver's license, including pat downs by TSA agents seeking to confirm her gender." *Id.*

Finally, the district court found that the balance of the equities and public interest favored Plaintiffs because, among other things, the harms they faced were

[4] The seventh Plaintiff possesses a valid passport that would not expire for several years, so the district court thought it was unlikely he would face irreparable injury "prior to the full adjudication of this case." SG App. 64a.

immediate and grave, while the government's only asserted burdens were unsupported by evidence. Indeed, there was no "evidence that the [] Department's functioning was impaired during the nearly three years that it processed and issued passports in precisely the manner requested by the plaintiffs." *Id.* at 65a.

2. The district court certifies classes and enters class-wide injunctive relief.

On June 17, 2025, the district court granted Plaintiffs' motion for class certification, certifying two classes, one for those who sought M or F markers and one for those who sought X markers. *See* SG App. 111a. The government has not appealed the class certification order. Once the classes were certified, the district court extended the injunction to the classes. *See id.* at 112a.[5] The government did not dispute that the same likelihood-of-success analysis applied to the class-based relief as for the individual relief, and the district court found that the classes were likely to succeed on the merits of their APA and equal protection claims. *See id.* at 100a–101a. The district court also found that the classes faced the same irreparable injuries as the named Plaintiffs—including increased risk of harassment and violence—based on uncontested expert evidence of class-wide harms and representative evidence from the class representatives that the district court found likely to apply to all class members. *See id.* at 101a–107a. Finally, the district court found that the balance of equities and public interest favored class-wide relief,

[5] The district court extended the injunction to a Preliminary Injunction Class of class members who, essentially, lacked a valid passport that aligned with their gender identity or would soon have such a passport expire. *See* SG App. 112a–113a ¶ 1. This brief refers to the injunction as "class-wide" or applying "to the classes."

rejecting the government's vague invocation of the Executive's foreign-affairs power. *See id.* at 107a–110a.

3. The lower courts reject the government's requests for a stay of the injunction pending appeal.

Rather than promptly seeking a stay pending appeal, the Department represented that it was fully implementing the injunction. *See id.* at 118a–121a ¶¶ 8–15. On July 9, 2025—three weeks after the district court entered the class-wide preliminary injunction—the government moved the district court to stay and dissolve it. *See* Resp. App. 309a. The government argued that this Court's decision in *Skrmetti* undermined the district court's holding that the Passport Policy was subject to heightened scrutiny. *See* Resp. App. 314a–315a. The district court denied the motion, explaining that, even if *Skrmetti* affected a portion of the equal protection claim (an issue the district court did not reach), the injunction rested on two independent bases that would not be impacted: the findings that the Passport Policy likely violated the APA and that it likely was motivated by impermissible animus. *See* SG App. 142a–143a.

A month after the district court's class-wide injunction went into effect, the government filed a stay motion in the First Circuit, largely recycling the *Skrmetti* arguments already rejected by the district court. *See* Mot. for Stay Pending Appeal, *Orr v. Trump*, No. 25-1579, at 3 (1st Cir. July 18, 2025). The First Circuit unanimously denied the stay request. *See* Order on Mot. for Stay Pending Appeal, *Orr*, No. 25-1579 (1st Cir. Sept. 4, 2025). The First Circuit held the government had failed to demonstrate "that the balance of harms favors upending the status quo and

subjecting the plaintiffs to the immediate harms identified by the district court." SG App. 4 (internal quotation marks and citations omitted) (quoting *NetChoice, LLC v. Fitch*, 145 S. Ct. 2658 (2025) (Kavanaugh, J., concurring)). As the First Circuit explained, even if the government's argument about *Skrmetti* were correct, it would not affect the district court's APA and animus findings, which were independent bases for the injunction. *See id.* at 3 n.1. The First Circuit then rejected the government's arguments about the APA and animus claims and found that any injuries the government asserted were outweighed by "uncontroverted," "immediate," and "irreparable harms on a class-wide basis" absent injunctive relief. *Id.* at 3–4.

ARGUMENT

The government has failed to show that the preliminary injunction—grounded in faithful application of this Court's precedents and firmly based on factual findings on this record—should be stayed pending appeal. The government must make a "strong showing that [it] is likely to succeed on the merits," "will be irreparably injured absent a stay," and that the balance of harms and public interest favor a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009). And it must show at least a "reasonable probability" the Court will grant certiorari. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1301 (2014) (Roberts, C.J., in chambers). It fails at each step.

I. THE GOVERNMENT HAS NOT MADE A STRONG SHOWING THAT IT IS LIKELY TO SUCCEED ON THE MERITS.

To receive a stay, the government must make a strong showing that it is likely to succeed on all three independent grounds that support the injunction: that the Passport Policy violates the APA and violates equal protection both because it

discriminates based on sex and survives neither heightened scrutiny nor rational basis review, and because it is motivated by anti-transgender animus. The government has failed to show a likelihood of success on any of them.

A. The Government's Invocation of "Foreign Affairs" Is Unavailing.

As a threshold matter, the subject of this case—passports—does not justify sweeping aside statutory and constitutional constraints on the government's power. The government sprinkles references to its foreign-affairs prerogatives throughout the stay application, and its precise argument as to why those powers are doctrinally relevant shifts throughout. No matter what form this argument takes, it is not an escape hatch from the Passport Policy's various failings.

To start, Article III courts are empowered to decide statutory and constitutional questions regarding the contents of passports, notwithstanding passports' connection to foreign affairs. *Cf. Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 229–30 (1986) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." (citation modified)). In fact, this Court has already held as much. *Zivotofsky v. Clinton*, 566 U.S. 189, 191 (2012) ("*Zivotofsky I*"), concerned a politically charged question of foreign affairs: whether the executive branch could ignore a federal statute providing that an American born in Jerusalem may elect to have "Israel" listed as their place of birth on their passport. This Court rejected the assertion that the courts could not decide that question, holding that it turned on legal and factual determinations courts were "fully capable" of making. *Id.*

Zivotofsky I should resolve any questions about whether the claims in this case are susceptible to meaningful judicial review. And that case is no one-off. The Court has long recognized that, while the authority granted by the Passport Act "is expressed in broad terms," the Secretary of State does not have "unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." *Kent v. Dulles*, 357 U.S. 116, 127–28 (1958). The Court has accordingly rejected the government's justiciability arguments in cases concerning passport-related actions and has invalidated those actions when they are unlawful. *Id.* at 128–29; *see also Aptheker v. Sec'y of State*, 378 U.S. 500, 514 (1964) (invalidating on constitutional grounds statute denying passports); *cf. Dep't of Com. v. New York*, 588 U.S. 752, 772 (2019) (the APA's agency-discretion exception does not apply when the Court has previously entertained similar challenges).[6] *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) (courts scrutinize claims of "conclusive and preclusive" executive power "with caution").

Next, the government's foreign-affairs powers do not nullify its obligation to follow statutes. When the President acts contrary to statutes enacted by Congress, his power is at its "lowest ebb" and he must justify his exercise of authority as falling

[6] Lower courts have likewise entertained APA and similar challenges to passport-related decisions. *See, e.g.*, *Zzyym v. Pompeo*, 958 F.3d 1014, 1023–25, 1027–31 (10th Cir. 2020) (deciding under the APA that the administrative record did not support the Department's refusal to list an X sex marker on an intersex individual's passport); *see also, e.g.*, *Shachtman v. Dulles*, 225 F.2d 938, 941 (D.C. Cir. 1955) (due process arbitrariness challenge).

"within his domain and beyond control by Congress." *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring). The President has no such power here. As Justice Scalia explained in *Zivotofsky v. Kerry*, 576 U.S. 1 (2015) ("*Zivotofsky II*"), in a passage consonant with the majority's holding, the history of passports "discredit[s] any claim that, in the 'Anglo–American legal tradition,' travel documents have 'consistently been issued *and controlled* by the body exercising executive power.'" *Id.* at 82 (Scalia, J., dissenting). Rather, passports are a domain where the President's "exclusive" power applies "quite narrow[ly]," limited to his enumerated authority to recognize foreign sovereigns. *Id.* at 29–30 (maj. op.).

Sex markers on passports do not implicate that Article II recognition power. Congress therefore has a role to play here, too. And Congress has carried out that role by constraining the Executive's delegated authority through the APA and PRA's procedural requirements—requirements the government never satisfied. If anything, then, this is a scenario where the Executive has "take[n] measures incompatible with the expressed . . . will of Congress," and so its power is "at its lowest ebb." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

In all events, the Executive is never free to ignore constraints imposed by the *Constitution*—regardless of whether it is exercising plenary or delegated authority. The government suggests it is "implausible" that "equal protection principles" limit Executive power in this context. Stay Appl. 15. The government cites no authority to justify such a radical departure from basic constitutional constraints. None exists: The "Federal Government's 'inherent foreign affairs power,' like every other

governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Fuld v. Palestine Liberation Org.*, 606 U.S. 1, 19 (2025) (quoting *Am. Ins. Assn. v Garamendi*, 539 U.S. 396, 416–417 n. 9 (2003); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)) (citation modified). On the government's logic, it would have the unreviewable authority to withhold passports on the basis of race or religion. That cannot be the law.

Even setting all of that aside, the government's reliance on foreign affairs faces a more fundamental problem. The government has not explained—let alone supported with evidence—how sex markers on passports could possibly implicate America's relations with other countries. *See* SG App. 52a. In the district court, the government put forward multiple declarations to defend its position. None ever mentioned any concrete foreign-policy considerations addressed by the Passport Policy. *See id.* at 5a–14a; 74a–79a. The government permitted self-selection and X sex markers for years before the Passport Policy, and there is no indication that ever impacted foreign affairs. The government also accepts passports with X markers from the many countries that permit them. *See* Resp. App. 83a & nn.9–10. Put simply, the government's repeated invocation of foreign affairs considerations does not support its extraordinary assertion of an unreviewable, special license to ignore statutory and constitutional constraints.

B. The District Court Correctly Held that the Passport Policy Likely Violates the APA.

The Passport Policy is a textbook example of an arbitrary and capricious agency action: The Department issued it just days into the new administration

without any reasoned explanation and failed to consider numerous material aspects of the issue at all, much less fully consider its "important aspect[s]." *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Unable to defend its actions under the rubric of ordinary arbitrary and capricious review, the government pivots to two related assertions: that the agency's actions are not reviewable *at all* because they implement an executive order, and the agency's actions *cannot* be arbitrary and capricious because they implement an executive order. Both arguments are wrong on the law and, if embraced, would be a stunning and unwarranted expansion of administrative-agency authority, "improperly strip[ping] courts of judicial power by simultaneously increasing the power of executive agencies." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 416 (2024) (Thomas, J., concurring). If allowed, any agency could insulate its actions from judicial review and the APA's requirements so long as the President signed an executive order on the issue. That is not the law.

1. The Passport Policy is subject to APA review.

The government argues that the Passport Policy is not subject to review under the APA because—as a policy driven by an executive order ostensibly carrying out the President's authority under the Passport Act—it does not qualify as agency action. *See* Stay Appl. 26–27. This is wrong: Agency actions are subject to APA review even when they respond to presidential directives, and the text of the Passport Act does not alter this basic principle of administrative law.

It is axiomatic that "agency action[s]" are subject to APA review. 5 U.S.C. § 704. This is the case even when they are guided by or implement the President's

directives. That is true as a matter of the plain text of the APA. *See id.* (judicial review available for all "final agency action[s]"). It is required by the "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986). And it is reflected in this Court's cases, which frequently conduct APA review of agency actions that implement presidential directives. *See, e.g.*, *Garland v. Cargill*, 602 U.S. 406 (2024) (reviewing regulations implementing Presidential Memorandum No. 7949, 83 Fed. Reg. 7949 (Feb. 20, 2018)); *Biden v. Texas*, 597 U.S. 785, 793 (2022) (reviewing actions implementing Exec. Order No. 14010, 86 Fed. Reg. 8269 (Feb. 2, 2021)).

The existence of an on-point executive order does not require otherwise. As the Ninth Circuit recently explained, withdrawing from APA review any agency policy that purports to carry out an executive order would "allow presidential administrations to issue agency regulations that evade APA-mandated accountability by simply issuing an executive order first," ducking the "public involvement, transparency, and deliberation required under the APA." *State v. Su*, 121 F.4th 1, 16 (9th Cir. 2024). That would "def[y] fundamental principles of administrative law" and conflict with "the plain language of the APA and existing precedent." *Id.* at 15. Tellingly, the government cannot point to a single precedent of this Court supporting this radical position, which courts have rejected. *See New York v. Trump*, 133 F.4th 51, 70 n.17 (1st Cir. 2025); *Su*, 121 F.4th at 15; *Chamber of Com. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996). The Court should not break new ground by reading such a gaping loophole into the APA—and certainly not on an emergency application.

Nor does this statutory scheme fall within the limited carveout articulated in *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992), which bars equitable relief against the President personally under the APA. The government contorts *Franklin* to cover an agency implementing presidential directives, but "expanding *Franklin* to cover such actions—taken by an agency—contradicts the text of the APA," is "undermine[d]" by "[e]ven a purposive approach to interpreting the APA," and "is not supported by existing precedent." *Su*, 121 F.4th at 15. Instead, *Franklin* concerns only a specific set of circumstances: Executive actions that "Congress had committed to the sole discretion of the President, separate from and subsequent to agency involvement." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2351 (2001). Or, as *Franklin* itself put it, the critical question for the purpose of identifying a "final agency action" subject to the APA's judicial review provision, 5 U.S.C. § 704, is when "the target stops moving." *Franklin*, 505 U.S. at 798. If the President, rather than an agency-level subordinate like the Secretary of State, "takes the final action" that affects a litigant's rights, then the action was not taken by an agency and APA review is unavailable. *Franklin*, 505 U.S. at 799. This is not the case here. *Franklin*'s narrow holding derives from constitutional limits on equitable remedies against the President. It reflects "the view," "implicit in the separation of powers," that "the President" himself cannot be "ordered to perform" specific exercises of executive power "at the behest of the Judiciary." *Franklin*, 505 U.S. at 827 (Scalia, J., concurring). But it does not disturb the preexisting practice of subjecting subordinate officials to equitable constraints. *Id.*

Neither the text nor the structure of the Passport Act is analogous to *Franklin*. There, the final governmental action ripe for review was the President's own transmission of apportionments determinations to Congress. Under the relevant statutory scheme, the agency solely participated earlier in the decision-making process: It was directed only to "send [its] results to the President, who makes the calculations and sends the final apportionment to Congress." *Franklin*, 505 U.S. at 800. The agency action "carrie[d] no direct consequences" and "serve[d] more like a tentative recommendation." *Id.* at 798. The President alone made the "determinate" and "final" action affecting the plaintiffs' rights. *Franklin*, 505 U.S. at 799.

The Passport Act is different. Its text contemplates a role for the President at the outset to "designate and prescribe" "rules." 22 U.S.C. § 211a. But this language merely codifies the general presumption that the President *always* sets rules that "guide the assistants or deputies subject to his superintendence." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 502 (2010) (internal quotation marks and alteration omitted). And the statute does not end there. It vests the authority to actually "grant and issue passports" in "[t]he Secretary of State" and Department "employees," using the Department's "systems." 22 U.S.C. § 211a. In other words, the Passport Act provides that the "target stops moving" at the agency level, *see Franklin*, 505 U.S. at 798, not with the President.[7]

[7] Additionally, for over half a century, the Executive has operated pursuant to Executive Order 11295, 31 Fed. Reg. 10603 (Aug. 9, 1966), which provides that "[t]he Secretary of State is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, the authority conferred upon (continued…)

The record here demonstrates that the Department, not the President, took the final actions enjoined below. The Department's declaration certifying compliance with the injunction confirms that it binds the agency, not the President: "*[T]he Department* fully understands *its* obligations to comply with the Court Order," and the Department "has been working diligently to stand up a viable process" for compliance. SG App. 118 ¶ 8 (emphases added). *Franklin* has nothing to say about such an injunction. *Cf.* 505 U.S. at 828 (Scalia, J., concurring).

Regardless, the Department also exercised substantial independent judgment when it promulgated the Passport Policy, separate and apart from whatever the EO purported to require. The district court—relying on the government's own evidence—found that the agency made multiple "independent determinations in formulating the Passport Policy." SG App. 50a Most notably, the Department "evaluat[ed] how to implement this policy" before determining it should adopt "[the Department of Health and Human Services'] guidance" to require passport markers based on "[s]ex at birth, which can generally be adjudicated using a birth certificate." *Id.* at 50a–51a (quoting *id.* at 11a, 12a ¶¶ 14–15, 18) (citation modified). This marked a conscious departure from EO 14168, which embraces the concept of "sex at conception," something the Department lacks "the capacity to adjudicate." *Id.* (citation modified). The government's argument that these are mere "details," Stay Appl. 18, about

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the President" by the Passport Act. *Id.* at 10603. EO 14168 did not purport to disturb EO 11295. This longstanding and undisturbed delegation of authority to the agency further confirms the availability of APA review for the Department's determinations under the Passport Act.

implementation is not grounded in law and contradicts the district court's findings. Because the EO left the Department with significant discretion—including by overriding the EO's core definition of sex to account for its unworkability—this further confirms that "[t]he final step of executive action that directly affected the plaintiffs was the Passport Policy, not [the EO]," SG App. 49a, meaning APA review is available.

2. The Passport Policy is arbitrary and capricious.

On the merits, the government's APA arguments also fail. "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation marks and citation omitted). It must examine "important aspect[s] of the problem." *Id.* And when, as here, an agency changes its prior position, it must provide "a reasoned explanation for the change" and adequately "take[] into account" the "serious reliance interests" that prior "policies may have engendered." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (internal quotation marks and citation omitted).

The district court found that "[t]he record contains no evidence that the [Department] fulfilled these obligations" and, to the contrary, "the record indicates that the State Department considered virtually nothing aside from the Executive Order's directive when it developed the Passport Policy." SG App. 55a–56a. At no point in the decision-making process, which was hurriedly undertaken in a matter of

days, did the Department examine the issues, explain why it was abruptly changing course from years of prior policy, or address the reliance interests affected by its sudden reversal. *See id.* There was, in other words, no attempt to provide the required "satisfactory explanation for its action." *State Farm*, 463 U.S. at 43.

As it did below, the government fails to engage meaningfully with the district court's findings—much less demonstrate that the district court committed clear error—which should be enough to deny the extraordinary remedy of a stay. *See* SG App. 145a. Its sole argument is that because the Passport Policy implements the EO, it is not arbitrary and capricious because the Department lacked any discretion about whether (or how) to comply. *See* Stay Appl. 28–30.

This repackaged version of the government's reviewability arguments similarly ignores bedrock principles of law. *See supra* I.B.1. If adherence to a presidential directive were enough to excuse agencies from compliance with the APA's procedural requirements, it would "contravene settled precedent and . . . improperly insulate wide swaths of agency action from judicial review." SG App. 57a. For example, the agency could not have bypassed the APA's procedural requirements in *Overton Park* had the President ordered that an interstate be built on the park, nor in *State Farm* if it had relied exclusively on a presidential command to remove airbags from new cars. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *State Farm*, 463 U.S. at 29. Yet the government's position suggests courts must rubber-stamp any agency action that in any way "implements" a presidential order. *But see, e.g.*, *Biden*, 597 U.S. at 800–08 (reviewing agency

actions implementing presidential order under APA); *id.* at 814–16 (Kavanaugh, J., concurring) (further analysis); *id.* at 834 (Alito, J., dissenting) ("The District Court should assess . . . whether it is 'arbitrary and capricious' for DHS to refuse to [take certain actions]."). Put plainly, agencies cannot violate the APA simply because the President tells them to.[8]

Again, the text of the Passport Act does not alter this analysis. Agencies that wield executive power must virtually always obey "rules" that have been "designate[d] and prescribe[d]" by the President. 22 U.S.C. § 211a. That is true where Congress inserts explicit statutory language recognizing the President's authority, as it has with the Passport Act. But it is equally true where Congress has done the opposite and imposed *limits* on the President's control over an agency. *Cf. Trump v. Wilcox*, 605 U.S. ___, slip. op. at 1 (2025). Put differently, the Passport Act merely confirms that the President sets rules for agencies. This does not nullify the procedural requirements of the APA. The Passport Act provides the Secretary of State, who is subject to the APA, with authority to grant and issue passports. *See* 22 U.S.C. § 211a. When the Secretary does so, he must follow the APA. *See supra* I.B.1. The government does not cite any authority for its view that agencies automatically meet the APA's procedural requirements when they implement President's policy views. These arguments provide no basis to grant extraordinary mid-suit relief.[9]

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[8] In addition, as explained above, the Department in fact exercised meaningful discretion in formulating and implementing the Passport Policy. *See supra* I.B.1.

[9] Plaintiffs maintain their APA claim that the Passport Policy violated the PRA. The government seeks to supplement the injunction record and moot the claim based on (continued…)

C. The District Court Correctly Found that the Passport Policy Likely Violates Equal Protection.

The Passport Policy violates equal protection. It classifies passport applicants by their sex assigned at birth and thus triggers the heightened scrutiny that "attends all gender-based classifications." *Sessions v. Morales-Santana*, 582 U.S. 47, 57 (2017) (internal quotation marks and citations omitted). Nothing in *Skrmetti* changes that. But ultimately, the Passport Policy does not even pass muster under rational basis review. It irrationally undermines the utility of passports as identity documents; and, as the lower courts made clear, it was motivated by anti-transgender animus, violating equal protection under any level of constitutional scrutiny. The government provides no reason to disturb those holdings in this emergency posture.

1. The Passport Policy imposes sex classifications, triggering heightened scrutiny.

The Passport Policy draws sex classifications on its face in two ways. "These sex-based classifications are not incidental to the Passport Policy; rather, the sex-based line drawing is the very purpose of the EO and Passport Policy." *See* SG App. 34a. *First*, it "allows applicants to obtain a passport reflecting only their sex assigned at birth." *Id.* at 32a. That "draw[s a] classification[] based on sex" because "applicants are explicitly treated differently based on their sex assigned at birth." *Id.* Accordingly,

> [a] person who identifies as female can receive a passport marked "F" if her sex assigned at birth was female, but not if her sex assigned at birth

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post-injunction developments. That is procedurally improper, the government has not shown mootness, and the parties are set to brief motions for summary judgment on the non-constitutional APA claims in the district court, *see* Resp. App. 360a, which is the proper venue for initial consideration of this issue.

> was male. Likewise, a person who identifies as male can receive a passport marked "M" if his sex assigned at birth was male, but not if his sex assigned at birth was female.

Id. As a result, an applicant's sex assigned at birth is a but-for cause of the denial of a passport reflecting their gender identity. *Id.* at 35a.

Second, "the Passport Policy was designed and intended to enforce conformity to an individual's sex assigned at birth." SG App. 24a (quoting EO §§ 1–2). As the district court explained, "where [the government] once allowed non-binary, intersex, and gender nonconforming applicants to obtain a passport with an 'X' sex marker, it has now eliminated that option," instead tethering applicants to the government's preferred conception of how a person should express their gender identity based on their sex assigned at birth. *Id.* at 32a. This Court applies heightened scrutiny where government policies are based on such "overbroad generalizations about the way men and women are"—or how they should be. *Morales-Santana*, 582 U.S. at 57.

None of the government's arguments for applying rational basis review instead of heightened scrutiny can be squared with this Court's precedents.[10] Contrary to the government's suggestion, Stay Appl. 16, the fact that the Passport Policy subjects everyone to a sex-based classification does not immunize it from heightened scrutiny. *See, e.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135–42 (1994) (applying heightened scrutiny to invalidate gender-based peremptory challenges in face of

[10] The government argues that the Passport Policy does not discriminate based on transgender status and that transgender status is not a quasi-suspect classification, Stay Appl. 18–19, even though the district court did not decide these issues. This Court should not answer those questions in this emergency posture, particularly when it will have the opportunity to address them in cases currently pending before the Court.

arguments that jury strikes applied to both men and women); *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (rejecting argument that "the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations").

This Court held the law in *Skrmetti* was sex-neutral because it turned on medical use, not because it imposed a sex classification equally on both birth-assigned males and birth-assigned females. 145 S. Ct. at 1830. Nothing in *Skrmetti* changed the general rule that "classifications do not become legitimate on the assumption that all persons suffer them in equal degree." *Powers v. Ohio*, 499 U.S. 400, 410 (1991). This Court should decline the government's invitation to disregard decades of precedent.

Likewise, this Court's determination that the law at issue in *Skrmetti* was sex-neutral does not make the Passport Policy sex-neutral. The Tennessee law at issue in *Skrmetti* banned certain medical treatments when they were prescribed in a manner "inconsistent" with a person's sex assigned at birth. 145 S. Ct. at 1826–27. The *Skrmetti* Court concluded that the law classified based on medical use but not sex "because changing the minor's sex [from female] to male [or vice versa] does not automatically change the operation of SB1." 145 S. Ct. at 1835. But that is not the case here. A person assigned male at birth can get an M designation on a passport, but a person assigned female at birth cannot, and a person assigned female at birth can receive an F designation while a person assigned male at birth cannot. Keeping everything else constant, a person's sex assigned at birth is a but-for cause of whether

they can receive a particular sex designation. This analysis is consistent with *Bostock*'s logic, but this Court need not decide whether *Bostock* applies to equal protection analysis because heightened scrutiny is triggered based on a straightforward application of this Court's sex-discrimination precedents.

The government next attacks a straw man, claiming that mere reference to sex does not trigger heightened scrutiny. Stay Appl. 16. The Passport Policy does not just reference sex: It imposes differential treatment based on a person's sex assigned at birth. That is the differential treatment the Plaintiffs challenge. Plaintiffs do not challenge the government's definition of sex, *id.*, but rather the denial of a passport reflecting their gender identity solely because of their sex assigned at birth.

2. The Passport Policy fails heightened scrutiny.

Because the Policy classifies on the basis of sex, it is subject to heightened scrutiny. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*"). Under this Court's precedents, the presence of a sex classification "does not require invalidation of the policy; it simply requires the government to justify its adoption of the policy under intermediate scrutiny." SG App. 36a. Under that standard, the government bears the burden of showing that its classification is "substantially related" to an "exceedingly persuasive" justification. *VMI*, 518 U.S. at 533 (internal quotation marks and citations omitted). The government does not attempt to meet its burden under heightened scrutiny, arguing only that the policy survives rational basis review, which is not the correct standard for a policy that classifies based on sex. *See* Stay Appl. 20–25. That alone warrants denying a stay.

The district court correctly held that the Passport Policy likely fails heightened scrutiny. *See* SG App. 36a–39a. Under heightened scrutiny, the government's justifications for the Policy "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *VMI*, 518 U.S. at 533. The only justifications the government provided for the abrupt reversal of decades of federal policy permitting sex designation changes on passports are those found in the "gender ideology" EO. *See* Stay Appl. 20–21, 23. The EO set out various purposes, like combatting "ideologues who deny the biological reality of sex," protecting "intimate single-sex spaces and activities designed for women," preventing "depriv[ation of women's] . . . dignity, safety, and well-being," and stopping "erasure of sex in language and policy." EO §§ 1–2.

But "[t]he government does not attempt to justify the Passport Policy by reference to any of these express purposes of the Executive Order." SG App. 37a. And even if it did, the Passport Policy "has no relation to any claimed interest in keeping transgender women out of women's domestic abuse shelters, women's workplace showers, and other intimate single-sex places" or preventing "any deprivation of cisgender women's 'dignity, safety, and well-being.'" *Id.* at 37a–38a (citations omitted). This is necessarily true: "The sex listed on one person's passport has nothing to do with the dignity, safety, or wellbeing of another person." *Id.*

Instead of relying on the EO's rationales, the government put forward below a different, lone purported justification for the Passport Policy: data consistency across the government by using one definition of sex. *See id.* at 38a. But "[s]ettled precedent

instructs that a mere claim that a discriminatory policy is justified by an administrative convenience, like a desire for uniformity in data, cannot justify sex- and gender-based classifications." *Id.* at 38a–39a (citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152 (1980); *Craig v. Boren*, 429 U.S. 190, 198 (1976)). Even assuming that uniformity and convenience were sufficiently important governmental interests, the government failed to explain why preventing transgender, nonbinary and intersex applicants from having passports that reflect their gender identity substantially advances it. "The government has introduced no evidence that, to the extent the definition of sex varied across federal agencies before the Executive Order, significant problems emerged" or that there is any "substantial relationship between the Passport Policy and the asserted governmental interest in maintaining a consistent definition of sex across the federal government." SG App. 39a.

Before this Court, the government claims for the first time that the Passport Policy is justified by an interest in a biological definition of sex.[11] Stay Appl. 23. In its telling, "internal and subjective sense of self, disconnected from biological reality and sex and existing on an infinite continuum," "does not provide a meaningful basis for identification." *Id.* This argument fails twice over. *First*, the prior policy did not allow for sex designation "existing on an infinite continuum," but allowed an applicant to select among three sex designations—M, F, or X—for their passport. And as the district court found, the government offered no evidence to suggest that the

[11]As noted above, the Passport Policy does not even incorporate the EO's unscientific and impossible-to-apply definition of sex. *See supra* Statement, A.2. Instead, the Passport Policy uses sex assigned at birth.

prior policy posed any problems. SG App. 57a. *Second*, justifying the Passport Policy by claiming it advances an interest in defining sex based on "immutable biological reality," Stay Appl. 15–17, is circular. This Court has already rejected the same circular arguments in prior cases. In *VMI*, the defendants argued that excluding women from the Virginia Military Institute served the "important governmental objective" in "[s]ingle-sex education." 518 U.S. at 545. This Court held that such "notably circular" reasoning "bent and bowed" the heightened scrutiny test, recognizing that accepting such an argument would give states a blank check to engage in invidious discrimination by claiming an interest in doing so. *Id.* The government should not be allowed to do so here.

3. The Passport Policy fails rational basis review.

Even if rational basis review applied, the Passport Policy would fail because it is wholly irrational. The government's central argument is that the Passport Policy survives rational basis review because it provides "a meaningful basis for identification." Stay Appl. 20. But the Policy actually undermines that interest. It requires issuance of passports with sex markers that do not match the bearer's gender identity and how they appear to officials when presenting the passport. The experience of several Plaintiffs bears this out, as government officials questioned the authenticity of the passport or the individual's identity. *See supra* Statement, B.1. Indeed, the evidence on this record—which the government has never disputed—is that "[f]or purposes of identity documents, including passports, a person's gender identity is the most accurate and least problematic characteristic for determining what their sex is." Resp. App. 270a (expert declaration).

4. The district court correctly found that the Passport Policy was likely motivated by animus.

The Passport Policy also violates equal protection because, as the district court correctly found, it was likely motivated by impermissible animus against transgender people. "The Constitution's guarantee of equality must at the very least mean that a bare [] desire to harm a politically unpopular group cannot justify disparate treatment of that group." *United States v. Windsor*, 570 U.S. 744, 770 (2013); *see also Romer v. Evans*, 517 U.S. 620, 634 (1996); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47, (1985); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

The district court applied that well-established law to the specific facts both parties introduced during preliminary-injunction proceedings; it found that the Passport Policy was "built on a foundation of irrational prejudice" and cannot survive "under any standard of review." SG App. 46a. Those are factual findings subject to clear error review. *See, e.g.*, *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) ("Because a finding of intentional discrimination is a finding of fact," it "shall not be set aside unless clearly erroneous."). The government cannot point to any errors, let alone clear ones warranting a stay.

The district court's finding was based on the EO's facial animus, the Passport Policy's purpose and effect of harming transgender people, and other related, contemporaneous governmental actions demonstrating animus against transgender people. To start, from its very text, the EO "is candid in its rejection of the identity of an entire group—transgender Americans—who have always existed and have long been recognized in, among other fields, law and the medical profession." SG App. 42a

(citations omitted); *see also Skrmetti*, 145 S. Ct. at 1824 (recognizing that more than 1.5 million Americans identify as transgender). Among other things, the EO seeks to "eradicate" references to transgender people across the federal government and otherwise "facially demeans transgender people's identity." SG App. 41a–42a.

The government responds that "the Executive Order simply defines 'male' and 'female' in terms of 'sex,' rather than 'gender identity.'" Stay Appl. 22. According to the government, "simply" "adopt[ing] a biology-based definition of sex cannot, in and of itself, be considered evidence of animus." *Id.* But the Passport Policy and the surrounding EOs did much more than simply adopt a particular definition of sex. They imposed a "broad and undifferentiated disability," SG App. 28a (quoting *Romer*, 517 U.S. at 632), on a disfavored group based on the view that any acknowledgement that transgender people have a gender identity that differs from their sex designated at birth—which the government declares a "false claim"—has "a corrosive impact . . . on the validity of the entire American system," and undermines "public safety, morale, and trust in government itself," along with our country's "cherished legal rights and values." EO §§ 1, 2(f).

Other contemporaneous executive orders targeted schools that allow transgender youth to express their gender identity, claiming that such acknowledgement "sow[s] division, confusion, and distrust." Exec. Order 14190, 90 Fed. Reg. 8853, 8853 (Feb. 3, 2025). Another declared that being transgender "conflicts" with a soldier's "commitment to an honorable, truthful, and disciplined lifestyle." Exec. Order 14183, 90 Fed. Reg. 8757, 8575 (Feb. 3, 2025). As the district

court explained, "[a]lthough aimed at different policy goals, each of these related orders, in tone and language, conveys a fundamental moral disapproval of transgender Americans." SG App. 45a; *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("series of official actions" can be evidence of constitutional violations).

The government's response that these policies do not reflect anti-transgender animus and only have a disparate impact on transgender people is hard to square with their text and avowed purpose. The fact that this Court granted a stay of an injunction of another of those executive orders does not neutralize the animus behind this one, particularly given that the stay in *United States v. Shilling*, No. 24A1030, 2025 WL 1300282 (U.S. May 6, 2025), was in the context of military affairs, where this Court has often allowed a "healthy deference" to executive and legislative decisions even in contexts where heightened equal protection scrutiny typically applies. *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981); *see also Goldman v. Weinberger*, 475 U.S. 503, 507–08 (1986). This case does not implicate military operations, and the government admitted below that a "core" purpose of the Passport Policy is "outing" transgender people. Resp. App. 171a (quoting Resp. App. 80a n.8) (internal quotation marks and citations omitted).

In an effort to salvage their plainly discriminatory policy, Defendants point to *Trump v. Hawai'i,* 585 U.S. 667, 702 (2018). But that Establishment Clause decision does not help the government. *First*, *Hawai'i* applied an unusually deferential standard—whether the government offered a "facially legitimate and bona fide

reason"—because the challenged executive order concerned the entry of noncitizens into the United States. *Id.* at 703 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972)). The government does not and cannot invoke that standard here.

Second, this Court rejected the *Hawai'i* challengers' animus argument because the executive order at issue was "facially neutral toward religion" and the plaintiffs' arguments about animus would have required the Court to "probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office." *Id.* at 702. In contrast, the EO and Policy at issue here are facially infused with animus against transgender people, and the Court need not assess the President's extrinsic statements.

Third, *Hawai'i* rested on the fact that the challenged executive order directed "a worldwide review process undertaken by multiple Cabinet officials and their agencies" to identify the countries whose nationals would be barred from entry. *Id.* at 707. *Hawai'i* held that that review, which identified national security risks posed by other countries' identification processes, effectively isolated the Executive's actions from any expressions of animus by the President outside the four corners of the executive order. *See id.* By contrast, the government here implemented the Passport Policy without any such process, undermining the suggestion that it had an independent and legitimate basis for a sudden reversal in a policy in place for decades and providing no isolation from the animus evident in the Executive Order.

Fourth, *Hawai'i* emphasized that the challenged executive order allowed for "significant exceptions" for various categories of immigrants from the banned

countries. 585 U.S. at 709. Here, though, there are no exceptions or processes (except for those imposed by the injunction) for a transgender applicant to receive a passport correctly reflecting their gender identity. In short, "no legitimate purpose overcomes the" Policy's animating "purpose and effect to disparage and to injure" transgender people. *Windsor*, 570 U.S. at 775.

II. THE REMAINING STAY FACTORS FAVOR PLAINTIFFS.

The class-wide injunction has been in place for more than three months, a similar policy was in place universally for years before, and changes to passports to align with gender identity have been permitted since the early 1990s. *See supra* Statement, A.1. Maintaining this status quo not only protects class members' constitutional rights; it protects them against "a variety of immediate and irreparable harms," SG App. 146a, including harassment, violence, psychological distress, and being "outed" every time they use their passport—as the district court found based on unrebutted evidence. There is no contest between these concrete, serious harms and the government's amorphous foreign-affairs arguments—the only injury it asserts. *See supra* I.A.

A. Plaintiffs Face Serious Irreparable Injuries If a Stay Upends the Status Quo.

While the government asserts no concrete and irreparable harm, Plaintiffs will suffer severe harms if a stay is granted. The deprivation of constitutional rights is itself a substantial injury. And the district court found—including based on uncontroverted expert evidence—that the Passport Policy substantially increased the risk that class members would "experience[] harassment or violence when traveling,

particularly to countries that criminalize transgender expression." SG App. 104a. Having an identity document with a sex marker that does not align with the bearer's gender identity also doubles the risk of "suicidal ideation," increases the risk of "serious psychological distress," and interferes with treating gender dysphoria. *Id.* Yet when transgender, nonbinary, and intersex applicants receive identity documents that align with their gender identity, the unrebutted evidence demonstrates that they are "significantly less likely" to experience these harms and face fewer obstacles in their medical treatment. *See id*. Granting a stay would lead to precisely these same harms.

The government cannot point to any clear errors in the district court's findings of fact. Indeed, it only briefly addresses the violence, harassment, and "outing" findings by arguing that those risks stem from the conduct of others and are based on past harms. *See* Stay Appl. 35–37. The government cites no law that exposure to avoidable violence, harassment, and being forcibly outed are not irreparable injuries. *See, e.g.*, SG App. 106a ("This argument fails because it confuses a condition that is sufficient to establish irreparable harm with a condition that is necessary to do so."); *Muth v. Voe*, 691 S.W.3d 93, 137 (Tex. App. 2024) (affirming order recognizing that "outing" someone "as transgender" constitutes irreparable harm).

The district court found, on unrebutted evidence, that these harms are fairly traceable to the government's challenged conduct. *See* SG App. 101a–107a. Indeed, the government has admitted that one of the Policy's core purposes is to out transgender, intersex, and nonbinary people. *See supra* I.C.4. It cannot now claim

the opposite. In any event, the irreparable injury here is not based solely on past harms. The district court found, again based on unrebutted evidence, a risk of *future* harm. *See, e.g.*, SG App. 103a–104a (citing expert evidence and "large-scale studies" showing "elevated" future "risk" of these issues). Unable to meaningfully dispute this, the government pivots to two other arguments.

First, the government argues that "membership in the PI Class is not conditioned on whether an individual has concrete international travel plans," so there is no irreparable injury. Stay Appl. 35. There is no reason to limit irreparable harm in that way—and the government points to nothing in the law or record supporting it. The harms identified by the district court are concrete and based on expert evidence and on representative evidence of class representatives. *See* App. 101a–107a. Further, international travel plans—for which a passport is legally required, *see* 8 U.S.C. § 1185(b)—often arise suddenly and even in emergency situations, such as when a family member in another country has a medical crisis. Class members are concretely injured by *not being able to obtain* usable passports in the first place. If the government's cramped theory of injury were right, no one challenging anything about their passports—for instance, the government improperly withholding a passport or printing incorrect information on it—could ever establish the irreparable injury necessary to get an injunction until they made plans to leave the country. And, separately, the district court found serious psychological injuries (not only those predicated on gender dysphoria) from being forced to use

identity documents that do not align with gender identity, an irreparable injury in itself. *See* SG App. 103a–105a.[12]

Second, the government argues before this Court that passports are government speech and property. *See* Stay Appl. 36–37. To start, the government never made this argument to the district court, so it is forfeited here. In any event, the government is wrong: In issuing passports, the government is acting, and government action is constrained by the Constitution and the APA. The government cannot inflict constitutional injuries merely by declaring that it is "speaking" or doing so through its "property." This Court has also repeatedly held that individuals can sue the government for its conduct with respect to passports, including their specific content. *See supra* I.B.1. Under the government's never-before-advanced theory, all of those cases should have easily been disposed of in its favor. For good reason, they were not. *See, e.g.*, *Kent*, 357 U.S. at 128–29 (finding passport determination unconstitutional when it infringed individual "liberty").

B. The Government Has Not Shown a Reasonable Probability of Certiorari.

The government's arguments about why review is warranted all boil down to a rehash of its foreign policy argument. *See* Stay Appl. 32–33. But that argument is

[12] The district court also correctly found that passports are often needed for many purposes such as opening bank accounts, establishing employment eligibility, or traveling domestically. *See* SG App. 106a–107a. The government argues that these harms are "self-inflicted," but requirements of using passports for those purposes are imposed by actors other than class members, so they are not "self-inflicted." *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 181–83 (2000) (injury exists when a party chose to not fish, camp, swim, and picnic near a river due to fear of pollution they did not create).

wrong, *see supra* I.A, and, as the balance of the government's brief demonstrates, its substantive objections are all ordinary requests for error correction. The district court's decision here is based on well-established legal principles and factual, record-specific application of those principles. Nothing about it warrants certiorari. Indeed, this case is a particularly poor vehicle for considering the issue that the government fronted most prominently in its stay requests to the courts below—application of *Skrmetti*—because *Skrmetti* does not affect the equal protection analysis in this case and does not (even on the government's telling) affect the animus and APA findings. *See supra* I.B–C. The certiorari question points in the same direction as the stay factors: Nothing about this case warrants this Court's intervention, the courts below faithfully adhered to this Court's precedents, and the government's requested relief would inflict immediate, grave harms on many Americans.

CONCLUSION

The Court should deny the government's application for a stay.

(Listing of counsel on next page)

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